Case No. 10-35175

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM CARLOS JACHETTA,

Plaintiffs – Appellant,

v.

UNITED STATES OF AMERICA; BUREAU OF LAND MANAGEMENT; and STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

APPELLEE STATE OF ALASKA'S BRIEF

STATE OF ALASKA
DANIEL S. SULLIVAN
ATTORNEY GENERAL

Sean P. Lynch, Esq.
Assistant Attorney General
State of Alaska, Department of Law
P.O. Box 110300
Juneau, AK 99811-0300
Telephone: (907) 465-3600
Fax: (907) 465-6735
sean.lynch@alaska.gov

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ISSUE PRESENTED

Did the district court correctly find that the Plaintiff's causes of action against the State of Alaska are barred from federal court jurisdiction by the Eleventh Amendment of the United States Constitution?

STATEMENT OF THE CASE

This is an appeal from the district court's dismissal, pursuant to Eleventh Amendment of the United States Constitution, of all causes of action against the State of Alaska, Department of Transportation and Public Facilities ("State of Alaska" or "State"). Mr. Jachetta's complaint against the State alleged inverse condemnation, nuisance, and civil rights violations. ER 27-33. The district court found that the Eleventh Amendment barred its jurisdiction over these causes of action and dismissed them with prejudice.

Mr. Jachetta's appeal raises seven distinct issues, five of which are directed toward the State. Appellant's Brief 1-3. The Appellant's issues numbered one and two, and the accompanying arguments[1], are directed solely at the federal Appellee and are not addressed by the State.

[1] Appellant's Brief 15-35.

STATEMENT OF FACTS

In 1960, Mr. Jachetta began using certain property north of Fairbanks, Alaska for subsistence purposes. ER 106. Mr. Jachetta's use and occupancy of these lands created an inchoate interest in the property. ER 108.

In 1968, the Bureau of Land Management ("the BLM") authorized the State of Alaska to enter upon and use a parcel of federal land as a materials site for the construction and maintenance of the Trans-Alaska Pipeline haul road. ER 108.

In 1971, Mr. Jachetta submitted an application to the Bureau of Indian Affairs ("the BIA") for a 110-acre Native allotment of land. ER 102. As the result of clerical errors, the BIA did not process Mr. Jachetta's application for the allotment. ER 126-27

In 1973, the State began operations at the materials site. At that time, the BLM was unaware of the Native allotment application filed with the BIA. ER 108.

In 1983, Mr. Jachetta requested that BIA certify his 1971 application for the Native allotment. ER 123. The Interior Board of Land Appeals certified Mr. Jachetta's application for the Native allotment in 1990. ER 130 (Decision and Order, IBLA 86-1169, May 17, 1990). After further hearings and appeals, Mr. Jachetta's application for the allotment was approved in 2003. ER 101-109

(Decision and Order, Docket No. F-14769, March 10, 2003). The BLM conveyed the allotment to Mr. Jachetta in 2004. ER 99-100.

Concurrent with this 2004 conveyance to Mr. Jachetta, the BLM limited the State's authority to enter and use its materials source site by excluding the portion of the site located in the Native allotment. ER 75-79; ER 89. In the spring of 2005, the State of Alaska surveyed the two overlapping parcels to ensure that its continued operations in the permitted portion of its material source site would not interfere with Mr. Jachetta's property rights. *See* ER 74 (surveyed parcels). The State of Alaska continues to have BLM authorization to use the portion of its material source site located outside Mr. Jachetta's allotment.[2]

SUMMARY OF ARGUMENT

Mr. Jachetta's claims against the State of Alaska are barred by the Eleventh Amendment. The Eleventh Amendment bars inverse condemnation and nuisance actions brought against the state in federal courts. Moreover, Congress did not abrogate Eleventh Amendment immunity either in the Trans-Alaska Pipeline Authorization Act or the Civil Rights Act of 1871. The district court therefore properly dismissed Mr. Jachetta's claims against the State.

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[2] In his Appellant's brief, Mr. Jachetta incorrectly describes his Native allotment as "encompassed" and "obliterated" by the State's material source site. Appellant's Brief 9 and 10. As the 2005 survey depicts, the two BLM-issued parcels share a portion of land but do not completely overlap. ER 74.

STANDARD OF REVIEW

When a party asserts an Eleventh Amendment defense, the Court must examine each cause of action to determine whether its jurisdiction over each claim is barred.[3] An entity invoking Eleventh Amendment immunity bears the burden of asserting and proving those matters necessary to establish its defense.[4] Whether a party is immune from suit under the Eleventh Amendment is a question of law that is reviewed de novo.[5]

ARGUMENT

The Eleventh Amendment presupposes that each state is a sovereign entity in the federal system and that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [a state's] consent."[6] State agencies are equally immune from suit, whether the relief sought is legal or equitable in nature.[7]

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3 *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 121 (1984).

4 *Del Campo v. Kennedy,* 517 F.3d 1070, 1075 (9th Cir. 2008).

5 *Id.*

6 *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) (quoting *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)).

7 *Brooks v. Sulpher Springs Valley Electric Coop*, 951 F.2d 1050, 1053 (9th Cir. 1991).

I. First Cause of Action – Inverse Condemnation

Mr. Jachetta argues that the State's use of the subject material site constitutes inverse condemnation. ER 27 ¶ 16. "Inverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency."[8] The Tucker Act, 28 U.S.C. §§ 1346(a)(2) and 1491, provides the federal remedy for a property owner to recover just compensation for an inverse taking.[9] Mr. Jachetta does not seek redress in this case under the Tucker Act.

As the district court recognized, the Ninth Circuit recently ruled that the Eleventh Amendment bars inverse condemnation actions brought against state defendants in federal courts. ER 21.[10] In *Seven Up Pete Venture v. Schweitzer*, this Court rejected the argument that the self-executing nature of the Fifth Amendment Takings Clause—applied to the states through the Fourteenth Amendment—alters

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[8] *United States v. Clarke*, 445 U.S. 253, 257, (1980)(quoting D. Hagman, Urban Planning and Land Development Control Law 328 (1st ed. 1971) (internal quotes and emphasis omitted)).

[9] *United States v. Clarke,* 445 U.S. at 256 (citing *United States v. Dow,* 357 U.S. 17, 21 (1958)).

[10] The district court relied on *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948 (9th Cir. 2008).

the conventional application of the Eleventh Amendment.[11] Thus, the district court followed settled Ninth Circuit precedent when it dismissed Mr. Jachetta's inverse condemnation action against the State of Alaska.

A. 25 U.S.C. § 357 and the Fourteenth Amendment do not abrogate State's immunity

Mr. Jachetta argues that the State's Eleventh Amendment immunity from an inverse condemnation action has been abrogated by the Fourteenth Amendment's due process guarantees. Appellant's Brief 41-43. According to this argument, the State was required to institute formal condemnation proceedings in federal court, pursuant to 25 U.S.C. § 357, before using the material site in 1973.[12] *Id.* Since 25 U.S.C. § 357 sets forth procedural rights, Mr. Jachetta argues, these statutory rights are enforceable against the State in federal court through the Fourteenth Amendment's protections. *Id.* at 42. The factual and legal premises for the Plaintiff's argument are unsound, however, and must be rejected.

First, the facts do not support Mr. Jachetta's argument. He admits that he possessed merely an inchoate interest[13] in the subject property from 1960 until

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[11] 523 F.3d at 954.

[12] Under 25 U.S.C. § 357, "[l]ands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

[13] Black's Law Dictionary defines an inchoate interest as "[a]n interest in real

his property rights vested in 2004. ER 26 ¶¶ 8 and 10. He did not apply for a Native allotment of property until 1971, and his application for was not certified for processing until 1990. The State of Alaska was authorized by a federal permit, as early as 1968, to enter and use a portion of the subject property to develop and operate a material site. ER 26 ¶ 11. From the time the State entered the property until the allotment was certified in 2004, the federal government held superior title to the property.[14] Thus, the State's entry onto the property to develop a material site—authorized by the title holder— did not require judicial authorization through eminent domain proceedings.

Legally, Mr. Jachetta's argument is equally faulty. Section five of the Fourteenth Amendment[15] empowers Congress to limit a state's Eleventh Amendment sovereign immunity. Congress must state its intent with unmistakable clarity in order to abrogate a state's constitutionally secured immunity, however.[16]

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estate which is not a present interest, but which may ripen into a vested estate, if not barred, extinguished, or divested." *Black's Law Dictionary* 762 (6th ed. 1990).

[14] The Appellant states "in accepting legal title for the resource, [the State is] holding [Mr. Jachetta's] beneficial interest in trust." Appellant's Brief 43; *see also* Appellant's Brief 3 (Issue 6). Mr. Jachetta's complaint does not allege a trust obligation of the State, the issue was not argued in or decided by the district court, and underlying facts and legal authorities for this proposition are not provided in the Appellant's brief.

[15] "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

In this instance, 25 U.S.C. § 357 provides only general authorization for government entities to exercise eminent domain powers in federal court. The provision does not grant a reciprocal right to property owners to sue government entities. As the Supreme Court stated in *Atascadero State Hospital v. Scanlon*, "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."[17]

The plain language of 25 U.S.C. § 357 does not support an action alleging inverse or reverse condemnation.[18] Therefore, the district court was correct in finding that this provision did not abrogate the State's Eleventh Amendment immunity.

B. The State's involvement in the Trans-Alaska Pipeline project did not abrogate its immunity.

Mr. Jachetta also argues that the State's Eleventh Amendment immunity from an inverse condemnation action has been abrogated by its participation in activities authorized under the Trans-Alaska Pipeline Authorization

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16 *Seminole Tribe*, 517 U.S. at 56.

17 473 U.S. 234, 246 (1985).

18 *United States v. Clarke,* 445 U.S. at 259 (stating that "25 U.S.C. § 357, although prescribing that allotted lands 'may be condemned for any public purpose under the laws of the State or Territory where located,' requires that they nonetheless be 'condemned.'").

Act ("TAPAA").[19] Appellant's Brief 43-45. As discussed above, Congress can waive the Eleventh Amendment's protections only by communicating this intent with unmistakable clarity.[20] Mr. Jachetta argues that Congress's unequivocal abrogation of state immunity is found in 43 U.S.C § 1652(e),[21] which states:

> "The Secretary of the Interior and other Federal officers and agencies are authorized at any time when necessary to protect the public interest, pursuant to the authority of this section [§ 1652 – Authorization for construction] and in accordance with its provisions, to amend or modify any right-of-way, permit, lease, or other authorization issued under this title [TAPAA]."

This provision in fact conveys no information about Congress's intent as to state liability. A different TAPAA provision squarely addresses it, however, and disclaims any intent to abrogate immunity:

> "Where the State of Alaska is the holder of a right-of-way or permit under this title [TAPAA], the State shall not be subject to the provisions of subsection 204(a) [§ 1653(a) – Liability for damages] ..."
>
> 43 U.S.C. § 1653(a)(5).

As the holder of a permit issued by the BLM to enter and develop the property, the State of Alaska is exempted from civil actions seeking damages "in connection with or resulting from activities along or in the vicinity of the proposed trans-

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19 87 Stat. 584, 43 U.S.C. § 1651 *et seq.*

20 *Seminole Tribe*, 517 U.S. at 56.

21 Appellant's Brief 44.

Alaskan pipeline right-of-way."[22] Rather than restricting the State's Eleventh Amendment protections, TAPAA codified the State's immunity from all actions for damages related to federally authorized rights-of-way and permits issued under TAPAA.[23]

Mr. Jachetta argues that the State's suit for damages subsequent to the Exxon Valdez oil spill is evidence of "previously acknowledged federal abrogation" of its Eleventh Amendment immunity. Appellant's Brief 45, fn 173. The State's suit for damages against the Trans-Alaska Pipeline Liability Fund ("the Fund") was statutorily authorized by TAPAA:

> For any claims against the Fund, the term 'damages' shall include ... the net cost of providing increased or additional public services during or after removal activities due to discharge of oil, including protection from fire, safety, or health hazards, incurred by a State or political subdivision of a State.
>
> 43 U.S.C. § 1653(c)(13)(B) (repealed August 18, 1990 by the Oil Pollution Act of 1990, 104 Stat. 484, 33 U.S.C. § 2701 *et seq.*)

This congressional authorization for the State to seek redress for damages against a TAPAA-created fund cannot be viewed as an unequivocal abrogation of the State's Eleventh Amendment immunity from suits filed by citizens. [24]

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22 43 U.S.C. §§ 1653(a)(1) and (a)(5).

23 *Id.*

24 *See Atascadero State Hospital*, 473 U.S. at 246.

Neither the plain language of TAPAA nor the State's participation in activities authorized under TAPAA provide bases for the limitation of the State's constitutional rights found in the Eleventh Amendment. Thus, the Plaintiff's second basis for claiming that Congress abrogated the State's Eleventh Amendment protections from an inverse condemnation claim also must be rejected.

II. Second Cause of Action – Injunctive Relief

Mr. Jachetta's second cause of action against the State requests an injunction prohibiting it "from engaging in acts constituting inverse condemnation." ER 28-29. In the same manner that a federal court has no jurisdiction to hear an inverse condemnation action for money damages against the State, a federal court is barred from hearing an inverse condemnation action that seeks injunctive relief. The Supreme Court has held that "the relief sought by a plaintiff suing a State is irrelevant to the question of whether the suit is barred by the Eleventh Amendment."[25] The Eleventh Amendment does not exist "solely in order 'to preven[t] federal court judgments that must be paid out of a State's

[25] *Seminole Tribe*, 517 U.S. at 58 (citing *Cory v. White,* 457 U.S. 85, 90 (1982) ("It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought")).

treasury.'"[26] It "also serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'"[27] Thus, the district court was correct in ruling that the Eleventh Amendment prohibits Mr. Jachetta from maintaining his action against the State for injunctive relief. ER 21-22.

A. The Eleventh Amendment remains applicable in suits seeking the return of property.

Mr. Jachetta asserts that the Eleventh Amendment is inapplicable to suits in which a plaintiff seeks the return of property. Appellant's Brief 39-41. In support of this argument, Mr. Jachetta cites several decisions interpreting the *Ex parte Young* exception to the Eleventh Amendment protections. Appellant's Brief 40[28] The *Ex parte Young* exception allows a plaintiff to maintain an action for injunctive relief against a state officer as a means to force compliance with federal

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26 *Id.* (citing *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 38 (1994)).

27 *Id.* (citing *Puerto Rico Aqueduct and Sewer Authority v. Metcalf and Eddy, Inc.,* 506 U.S. 139, 146 (1993)).

28 Mr. Jachetta relies on *Florida Dept. of State v. Treasure Salvores, Inc.*, 458 U.S. 670 (1982) and *Taylor v. Westly*, 402 F.3d 924 (9th Cir. 2005). He also cites two cases concerning federal, as opposed to state, sovereign immunity. Appellant's Brief 39 (citing *United States v. Lee*, 106 U.S. 196 (1882) and *Malone v. Bowdoin*, 369 U.S. 643 (1962)). One of those cases noted that the Court of Claims is the proper tribunal for seeking compensation for the taking of land by the United States. *Malone*, 369 U.S. at 648, fn 8.

law.[29] The theory behind the *Ex parte Young* exception is that actions of state officials in violation of federal law are "void" and therefore do not "impart to [the officer] any immunity from responsibility to the supreme authority of the United States."[30] As the district court correctly noted, however, Mr. Jachetta did not identify any State official whose actions may be enjoined under the *Ex parte Young* exception. ER 22. Therefore, the district court was correct in dismissing Mr. Jachetta's claim against the State of Alaska seeking injunctive relief.

III. Third Cause of Action – Nuisance

Mr. Jachetta's complaint also alleges that the State's removal of resources from the property, even with authorization of the BLM, constitutes nuisance. ER 29. In his Appellant's brief, Mr. Jachetta does not directly address the district court's dismissal of this cause of action. He does argue, however, that the federal court is the only forum in which he can adjudicate claims arising from his property rights. Appellant's Brief 35-37.

Mr. Jachetta cites *Harrison v. Hickel* for the proposition that no other forum is available to him, as Alaska courts lack jurisdiction over allotment claims.[31] Appellate Brief 37. *Harrison v. Hickel* is a decision by this Court that

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[29] *Pennhurst*, 465 U.S. at 102 (citing *Edelman v. Jordan,* 415 U.S. 651, 666-667 (1974))

[30] *Id.* (quoting *Ex parte Young*, 209 U.S. 123, 160 (1908)).

involved a Native allottee's claim against the State of Alaska based partially in nuisance. *Id*.

Harrison v. Hickel is similar to this case in that the United States conveyed a Native allotment to Mr. Harrison after transferring a portion of the same parcel to the state for a road.[32] Since Mr. Harrison's rights to the Native allotment dated back to the commencement of his use and occupancy, he held the preferential right to the property.[33] Mr. Harrison sued the state in part for trespass and nuisance.[34] The district court dismissed the action against the State on Eleventh Amendment grounds.[35] On appeal, the Ninth Circuit affirmed, finding that "[w]ithout consent, or express abrogation of Eleventh Amendment immunity by Congress, a private citizen cannot maintain an action against a state."[36] The Court noted, however, that Mr. Harrison could bring an action against the federal government, since the United States had the responsibility to make him whole.[37]

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31 6 F.3d 1347 (9th Cir. 1993).

32 *Id.* at 1348-49.

33 *Id.* at 1349

34 *Id.*

35 *Id.* at 1350.

36 *Id.* at 1354-55.

37 *Id.* at 1353 (citing *Aguilar v. United States*, 474 F.Supp. 840

The Tucker Act provides a remedy for Native allottees seeking redress though an inverse or reverse condemnation action.[38]

In fact, Mr. Jachetta is pursuing a related case in the Court of Federal Claims against the United States under the Tucker Act.[39] The district court's dismissal of the State of Alaska on Eleventh Amendment grounds has not hindered Mr. Jachetta's claim against the United States, which retains the right to implead the State of Alaska if it fears incomplete or inconsistent relief.[40] Thus, the district court's dismissal of the causes of action against the State of Alaska did not deprive Mr. Jachetta of a forum in which to obtain relief.

IV. Fifth Cause of Action – Civil Rights Violations

The Plaintiff lastly pleads a civil rights cause of action, under 42 U.S.C. §§ 1983 and 1985, alleging that the State took his property without just compensation in violation of the Fifth and Fourteenth Amendments. ER 30-33. Congress did not abrogate Eleventh Amendment immunity with the passage of the

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(D.Alaska, 1979)).

[38] *See United States v. Clarke*, 445 U.S. at 256 (citing 28 U.S.C §§ 1346(a)(2) and 1491).

[39] *See Jachetta v. United States*, Case No. 10-1051 (Fed Cl., filed February 18, 2010).

[40] *See Lord v. Babbitt*, 943 F.Supp. 1203, 1210 (D. Alaska 1996).

Civil Rights Act of 1871, however,[41] so suit cannot be brought under the Act against government units.[42] Therefore, the district court was correct in its decision that it cannot hear the civil rights cause of action plead against the State without the State's consent. ER 22.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the district court.

Respectfully submitted October 15, 2010.

STATE OF ALASKA
DANIEL S. SULLIVAN
ATTORNEY GENERAL

/s/ Sean P. Lynch
Assistant Attorney General
P.O. Box 110300
Juneau, AK 99811-0300
Tel: (907) 465-3600
Fax: (907) 465-6735

41 *Quern v. Jordan*, 440 U.S. 332, 345 (1979).

42 *Sykes v. California,* 497 F.2d 197, 201 (9th Cir. 1974).

STATEMENT OF RELATED CASES

The cases listed below involve the same transactions and events:

1. *William Carlo Jachetta v. United States*, Case No. 10-1051 (Fed Cl.) filed February 18, 2010.

2. *William Carlo Jachetta v. Alyeska Pipeline Service Co.*, Case No. 3:08-cv-00262-RBB (D.Alaska) filed November 26, 2008.

STATEMENT OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(a)(7)(c) and Ninth Circuit Rule 32-1, the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 4060 words.

DATED: October 15, 2010

/s/ Sean P. Lynch
Counsel for State of Alaska

CERTIFICATE OF SERVICE

I certify that on October 15, 2010, true and accurate copies of the foregoing Appellee's brief were served on the parties listed below via the Court's electronic service methods.

Samuel J. Fortier Rachel B. Lauesen Fortier & Mikko, P.C. 101 W. Benson Blvd., Suite 304 Anchorage, AK 99503 sfortier@fortmikk.alaska.com	Aaron P. Avila U.S. Dept. of Justice P.O. Box 23795 (L'Enfant Plaza) Washington, DC 20026-3795 aaron.avila@usdoj.gov

/s/ Stephanie Hyde
Law Office Assistant
stephanie.hyde@alaska.gov