

STATE OF ALASKA

10/17/11

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October 14, 2011

Honorable Ralph R. Beistline
Judge of the U.S. District Court
222 W. 7th Ave. #49
Anchorage, AK 99513-7546

HAND DELIVERED

Re: Mills v. U.S., Case No. 4:10-cv-0033-RRB

Dear Judge Beistline:

On October 11, 2011, I received a copy of the court's Tentative Order Regarding Pending Motions in the above-referenced case from the clerk of court. The state earlier had received copies from various parties to the action. The unusual posture of this case, and the ruling within the Tentative Order that the court intends to order the State of Alaska to become an involuntary plaintiff in this case are the reasons for this letter. This letter is intended for informational purposes only, however, and is not intended to submit the state to this court's jurisdiction or as a waiver of its sovereign immunity, as discussed below.

Because the order remains tentative, the state is not yet a party to this case, and it is unclear what its role is at this point. However, the state felt that it was important to inform you and the parties that the state does not want to be a party to this case at this time, and will resist being joined as an involuntary plaintiff. In that regard, the state asserts that it is improper for this court to order it to become an involuntary plaintiff in the case because, among other reasons, the state has Eleventh Amendment immunity from suit in federal court, which immunity it does not intend to waive at this time.

The Eleventh Amendment does not apply only to actions where the state is a defendant; rather, it also prevents the state from being joined as an involuntary plaintiff. *See Federal Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. 743, 754 (2002) (“[S]overeign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment.”). In a similar case where the parties sought to join the Missouri Department of Natural Resources in a contamination case, ostensibly as a defendant, but actually as a plaintiff,¹ the eighth circuit held that the Eleventh

¹ In *Thomas*, the court recognized that the state entity did not “meet the stringent requirements for initial joinder as an involuntary plaintiff,” but that its role was nevertheless as a plaintiff. *Thomas* at 504 n.5 (citing *Independent*

Amendment protects the state from being compelled to prosecute a case at a time and place dictated by the federal court. *Thomas v. FAG Bearings Corp.*, 50 F.3d 502, 505-506 (8th Cir. 1995). “A suit is against the state if ‘the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,’ or if the effect of the judgment would be ‘to restrain the Government from acting, or compel it to act.’” *Thomas* at 505 (quoting *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 101 n.11(1984)).

The *Thomas* court held that forcing a state to prosecute a legal action against its will showed the “disrespect for state autonomy in decision-making [that] is precisely what the Eleventh Amendment was intended to avoid. Indeed, ‘[t]he very object and purpose of the Eleventh Amendment [is] to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.’” *Thomas* at 505-506 (quoting *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 146 (1993)).

Although a state may waive its Eleventh Amendment immunity, such a waiver must be clear and unequivocal. *Pennhurst State School & Hosp.*, 465 U.S. at 99; *see also In Re Bliemeister*, 296 F.3d 858, 861 (9th Cir. 2002) (the test to determine whether a state has waived immunity is stringent). The Tentative Order suggests that the court may view the state’s notice to the Department of Interior of its intent to bring a quiet title action involving several RS 2477 rights-of-way as a waiver of its immunity. However, the notice provided by the state to the Department of Interior is simply a requirement under 28 U.S.C. §2409a(m) before it is possible for the state to institute an action under the Quiet Title Act. As the United States, Doyon, and Hungwitchin have all recognized in their recent oppositions (Dockets 127-129), such notice does not, in itself, waive the state’s Eleventh Amendment immunity. The state’s immunity is not waived until such time as the state actually files a quiet title action against the United States (or some other party) in federal court. Nothing in the notice binds the state to file an action against any entity, much less to file it at a particular time or place, and it cannot be construed as an explicit waiver of immunity.

The state’s notice to the Department of Interior expresses the state’s belief that the RS 2477s included within that notice, including the trail that is the subject of this case, are in fact valid existing rights-of-way that were accepted and used under the terms of the federal grant. The state is going forward with researching the historical establishment and use of those and other trails within the entire Fortymile District. The Alaska

Wireless Tel. Co v. Radio Corp., 269 U.S. 459, 472-474, 46 S.Ct. 166, 170-171, 70 L.Ed. 357 (1926)). The State of Alaska also asserts that, under the test in *Independent Wireless*, this is not a “proper case” for joinder as an involuntary plaintiff under Fed. R. Civ. Pro. 19 because the plaintiffs do not have a right to assert the state’s title interests in the trail. Because the state’s immunity supersedes any issue of Rule 19 joinder, however, the state will not address this point unless the court ultimately orders the state to be joined.

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Department of Natural Resources has been aggressively gathering information and documentation that is necessary to firmly establish the state's title to those rights-of-way, and has spent many weeks and man-hours on the ground in the Fortymile area this past summer. However, it is up to the state, after an evaluation of all the factors, including cost and benefits to the state and its citizens, to determine when it is ready to file a quiet title action and on which trail or trails.

More importantly, when the state files an action to quiet title to an RS 2477 right-of-way, such an action must be against the United States in order to fully establish the state's rights to such trail. The Tentative Order reflects that the quiet title action against the United States will be dismissed because the United States has not yet disputed title to the trail and, therefore, there is no actual case or controversy of which the court can take jurisdiction. Simply joining the state will not change this ruling. The current status of this case would prevent a full adjudication of the state's interests in the trail because the United States is dismissed and the only remaining claims are against the non-federal defendants for access. Forcing the state to join as an involuntary plaintiff at this point will not prevent the United States from subsequently denying access on the trail, thus forcing additional, duplicative, and wasteful litigation in the future. The state cannot and should not be an involuntary plaintiff in this case.

I hope that the above information is helpful to the court in determining its final ruling on the parties' pending motions. Please let me know if I can provide any additional information.

Sincerely,

JOHN J. BURNS
ATTORNEY GENERAL



for By: Elizabeth J. Barry
Chief Assistant Attorney General
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