

ORIGINAL

Docket 3

No. 13722

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF ARIZONA, A PUBLIC BODY; MAJOR GEN. A. M.
TUDHILL, THE ADJUTANT GENERAL, CONSTITUTING THE
ARIZONA NATIONAL GUARD; AND THOMAS L. KIMBALL,
DIRECTOR, AND DR. W. J. RICHARDS, FRED RAYBURN AND
JACK MANGLE, MEMBERS OF AND CONSTITUTING THE
ARIZONA GAME AND FISH COMMISSION, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF ARIZONA

REPLY BRIEF FOR THE UNITED STATES

FILED

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PAUL P. O'BRIEN
CLERK

WARREN E. BURGER
Assistant Attorney General

JACK D. HAYS
United States Attorney

PAUL A. SWEENEY,
MORTON HOLLANDER
Attorneys, Department of Justice

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In the district court, Arizona and the other third-party defendants advanced the defense that the district court had no jurisdiction over the third-party proceedings filed by the United States against the State because (1) Article III, Section 2, of the Federal Constitution confers *exclusive* jurisdiction on the United States Supreme Court over suits by the United States against a State and (2) the United States had not complied with the conditions prescribed by Arizona in waiving that State's immunity from suit. This jurisdictional defense was, as Arizona itself has earlier stated in this litigation,

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tion, "the defense which was presented to the district court" in urging dismissal of the third-party complaint filed by the United States, and it was the defense "on which dismissal was based" in the district court.¹ It was because of the district court's reliance on these jurisdictional contentions and its consequent refusal to pass on the merits of our third-party claim against Arizona that we took the instant appeal to this Court. See our Statement of Points (R. 12).

It is apparent from the brief now filed by Arizona in this Court that the State has completely abandoned its first contention that the United States Supreme Court has *exclusive* jurisdiction over the instant controversy because it is one between the United States and a State.² Likewise, with respect to the second ground which it urged and which was adopted by the district court, Ari-

¹The language is quoted from Arizona's Brief in Opposition filed by the Arizona Attorney General in the United States Supreme Court in this litigation. *United States v. America v. State of Arizona*, No. 375, Oct. Term, 1953. In this Brief in Opposition, Arizona advised the Supreme Court as follows (page 2, note 1):

Merely to fully inform the Court as to the respondent's Position herein, we summarize the defense which was presented to the District Court on which dismissal was based. It was contended and the District Court held that it had no jurisdiction over the parties and subject matter.

In view of Arizona's unequivocal statement to the Supreme Court as to the jurisdictional grounds upon which it obtained district court dismissal of the third-party complaint, it is impossible to understand Arizona's denial in this Court "that the District Court granted the third-party defendants' motion to dismiss for lack of jurisdiction on the two grounds set forth" above. Brief for Appellees, p. 3.

²Cf. Arizona's earlier reliance in the instant appeal on Article III, Sec. 2, of the Federal Constitution (which confers original jurisdiction on the Supreme Court in cases in which a State is a party) and *United States v. West Virginia*, 205 U. S. 483 (interpreting Article III, Sec. 2). Page 3 of "Authorities" attached to Arizona's "Motion to Dismiss Appeal" filed in this Court on May 21, 1953.

zona admits "after further research" that "the Federal Government as a sovereign has the power and authority to sue any State without the State's consent" (Appellee's Brief, pp. 4, 6). Despite this confession of error, Arizona's brief advances two new arguments. To those arguments we now turn.

I

While recognizing that the United States may sue a State without the State's consent, Arizona argues that perhaps the instant case is different because here the United States "is suing not as a sovereign but as a private person against whom a judgment for personal injuries has been secured" (Appellee's Brief, p. 6). But this misconceives the nature of the Federal Government with respect to every function which it performs and every activity in which it engages.

Repeated decisions of the Supreme Court establish that every authorized function or activity of the United States constitutes an exercise of its sovereign or governmental power. *Fed. Land Bank v. Bismarck Co.*, 314 U. S. 95, 102; *Pittman v. Home Owners' Corp.*, 308 U. S. 21; *Groves v. N. Y. ex rel. O'Keefe*, 306 U. S. 466, 477. Since the Federal Government's assertion of a right to indemnity, essential for the sovereign's protection of the public purse, is certainly an authorized function, it follows that the United States is suing here as a sovereign. See *Colton v. United States*, 11 How. 229, 231 (recognizing the right of the sovereign as a "body politic" to bring suits to enforce their contracts and protect their property). Accord: *Wisconsin Central R.R. v. United States*, 164 U. S. 190; *Clearfield Trust Co. v. United States*, 318 U. S. 363.

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II

Arizona also argues that the district court dismissal of the third-party complaint may have been based not on jurisdictional grounds but on the ground that the third-party complaint stated facts insufficient to entitle the United States to relief by way of indemnity or contribution. Arizona further contends that the dismissal should be affirmed here on the latter ground.

The conclusive answer to this argument is that the district court dismissed the third-party proceedings *without prejudice*. Certainly, if as Arizona now contends, the district court had intended to rule on the merits of the third-party complaint and hold that it failed to state sufficient facts to constitute a cause of action in indemnity, it would undoubtedly, as provided in the Federal Rules of Civil Procedure, have ordered the complaint dismissed with prejudice. Rule 41(b). It was only because the district court did not pass on the merits but accepted Arizona's jurisdictional arguments that it dismissed without prejudice. This dismissal without prejudice conformed not only to the Rules but the "general practice" that when a complaint "is dismissed without consideration of the merits" the order of dismissal must state that it is "without prejudice." *Sacram Land & Cattle Co. v. Bryant*, 148 U. S. 603, 612; *Belgor v. Leasing Drop Forge Co.*, 124 F. 2d 440, 444 (C. A. 6), certiorari denied, 316 U. S. 671. Indeed, the district court's acceptance of the argument that it lacked jurisdiction precluded it from consideration of the sufficiency of the third-party complaint or any other matter concerning the merits of the case. See *Topping v. Fry*, 147 F. 2d 715, 717 (C. A. 7); *Central Mexico Light & Power Co. v. March*, 116 F. 2d 85, 87 (C. A. 2)

Since the district court has not passed on the merits of the third-party complaint and since there has never been a trial of the issues raised in the third-party proceedings,³ we submit that the proper procedure for this Court to follow would be to reverse the order of dismissal with instructions to the district court to try the case on the merits. This procedure is particularly appropriate here, where the district court, because of its dismissal on jurisdictional grounds, has not yet given consideration to either (a) the well-settled principles of common-law indemnity under which the United States is entitled to be indemnified or (b) the express indemnity contract under which Arizona agreed to "indemnify and hold harmless" the United States for the very type of claim and judgment which forms the basis of the instant third-party proceeding.⁴

³ The suggestion in Arizona's brief that the issues in the third-party proceedings may have been tried on the merits and decided by the district court against the United States is not supported by the record. After the trial of the main suit, at which counsel for Arizona and the other third-party defendants did not even appear, judgment was entered in favor of Krause against the United States on December 3, 1951. (Supp. R. 30, 45.) Recognizing that this judgment in no way affected the merits or issues in the third-party proceedings filed by the United States against Arizona, the district court thereafter notified the parties that the case would be called on January 21, 1952 for trial setting as to the issues between the United States and Arizona. "The district court's docket entry for January 21, 1952 shows that on that date the case came "on for trial setting as to third parties" but that it was "ordered continued" because of Arizona's request for "time to familiarize self with case". The docket entries further show that no trial of the issues involved in the third-party proceedings was ever held. Instead, on October 6, 1952, the district court granted Arizona's motion to dismiss the third-party complaint without prejudice because of the jurisdictional grounds described above. (R. 11.)

⁴ A Concession Deed for the land transferred to Arizona provides: "By the acceptance of this instrument and as a further consideration for this conveyance, the party of the second part [i.e., Arizona] herein covenants and agrees for itself, its successors and assigns, to assume all risk for all personal injuries

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CONCLUSION

For the reasons stated above and in our main brief, it is respectfully submitted that the order of the district court dismissing the third-party proceedings should be reversed and the case remanded for trial on the merits.

WARREN J. BURGER,
Assistant Attorney General.

JACK D. H. HAYS,
United States Attorney.

PAUL A. SWEENEY,
MORRIS HOLLANDER,
Attorneys, Department of Justice.

and property damages arising out of ownership, maintenance, use and occupation of all of the property hereinabove described whether the same is owned in fee by the party of the first part or the party of the second part; and further covenants and agrees to indemnify and save harmless the Department of the Army and the United States of America, their servants, agents, officers and employees, against any and all liability, claims, causes of action or suits due to, arising out of, or resulting from, immediately or remotely, the possible contaminated condition, ownership, use, occupation or presence of the party of the second part or any other person upon the property, lawfully or otherwise.

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