

ORIGINAL

In the

Supreme Court of the United States

STATE OF CALIFORNIA,

Plaintiff,

--vs--

STATE OF NEVADA,

Defendant,

Number:

73 Original

Washington, D. C.
April 14, 1980

Pages 1 thru 49

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IN THE SUPREME COURT OF THE UNITED STATES

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STATE OF CALIFORNIA, :
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Plaintiff :
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v. :
STATE OF NEVADA, :
:
Defendant :
:
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No. 73 Orig.

Washington, D. C.

Monday, April 14, 1980

The above-entitled matter came on for oral argument
at 1:00 o'clock p.m.

BEFORE:

- WARREN E. BURGER, Chief Justice of the United States
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice
- HARRY A. BLACKMUN, Associate Justice
- LEWIS F. POWELL, JR., Associate Justice
- WILLIAM H. REHNQUIST, Associate Justice
- JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

- JAMES H. THOMPSON, ESQ., Special Deputy Attorney
General, Capitol Complex, Carson City, Nevada
89710; on behalf of the Defendant

- JAN S. STEVENS, ESQ., Assistant Attorneys General,
555 Capitol Mall, Suite 350, Sacramento,
California 95814; on behalf of the Plaintiff

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

JAMES H. THOMPSON, ESQ.,
on behalf of defendant

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JAN S. STEVENS, ESQ.,
on behalf of plaintiff

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REBUTTAL ARGUMENT OF

JAMES H. THOMPSON, ESQ.,
on behalf of defendant

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P R O C E E D I N G S

1
2 CHIEF JUSTICE BURGER: We will hear arguments next
3 this afternoon in the State of California v. the State of
4 Nevada.

5 Mr. Thompson, you may proceed whenever you are
6 ready.

7 ORAL ARGUMENT OF JAMES H. THOMPSON, ESQ.,

8 ON BEHALF OF THE DEFENDANT

9 MR. THOMPSON: Mr. Chief Justice, and may it please
10 the Court:

11 The State of Nevada submits that the real issue in
12 this case is whether California and Nevada in 1863 constitution-
13 ally set their joint State boundary. Nevada submits that they
14 did.

15 The second question is assuming that boundary was
16 constitutionally set, that the United States, whether they had
17 the power to move it onto a new land. Nevada submits that the
18 United States did not have this power under the Constitution.

19 Nevada does concede that if this were a proper case
20 for application of the doctrine of acquiescence that Nevada
21 has acquiesced in the present marked lines, the lines recommend-
22 ed by the Master.

23 We submit that this is not a case for the application
24 of the doctrine of acquiescence, because to apply the doctrine
25 in this case would confer upon the Executive branch of the

1 Government the power to act upon State boundaries. And
2 this Court in Rhode Island v. Massachusetts many years ago
3 said:

4 "There can be but two tribunals under the
5 Constitution who can act on the boundaries of
6 States, the legislative or the judicial power, the
7 former is limited, in express terms, to assent or
8 dissent, where a compact or agreement is referred
9 to them" -- meaning Congress.

10 QUESTION: You say acquiescence is inapplicable here
11 and your reason for it is that it is the United States that
12 made the mistake?

13 MR. THOMPSON: Yes, sir, it is our contention that
14 the United States had no power to move the boundary under the
15 Constitution. Therefore --

16 QUESTION: Why is acquiescence any less persuasive
17 in a situation like that than where it simply drafts a wrong
18 decision of this Court or a mistaken decision of this Court
19 or a mistake in a surveyor's note?

20 MR. THOMPSON: We contend that the failure of the
21 power of the United States to move the boundary goes to
22 California's claim of right in which acquiescence has always
23 been applied on the claim of right in the State. In all
24 the boundary decisions of this Court there has always been
25 an enabling Act or something of that nature, a concession

1 from Virginia to the United States, a monument of title, a
2 color of title. And California, we contend, does not have
3 that because they claim the United States has wrongfully
4 moved, taken part of Nevada and given it to California.

5 QUESTION: I take it that if we adopt the Special
6 Master's report and if you take the Special Master's -- it
7 includes, what, 5,000 acres of land or so, that the United
8 States purported to give to Nevada?

9 MR. THOMPSON: It is approximately 218 square miles.

10 QUESTION: The land that the United States purported
11 to give to Nevada and Nevada purported to convey to settlers.

12 MR. THOMPSON: Forty-six hundred acres, Your Honor.

13 QUESTION: And then those titles resting in
14 the change from U.S. to Nevada to owners, that land will now
15 be in California.

16 MR. THOMPSON: That land would be in California by
17 the Master's decree. But concurrently with that, California --

18 QUESTION: Let me ask you: What is your interest?

19 MR. THOMPSON: Interest in those patents?

20 QUESTION: What is your interest, is it just a
21 matter of jurisdiction and whether the land is in Nevada or
22 not?

23 MR. THOMPSON: Yes, territorial sovereignty, Your
24 Honor.

25 QUESTION: That is it?

1 MR. THOMPSON: There is some question by California
2 as to the legality of those private titles.

3 QUESTION: But there isn't anything like oil or
4 minerals or --

5 MR. THOMPSON: No, sir. Nevada still --

6 QUESTION: -- taxes, or anything. It is just
7 sovereignty.

8 MR. THOMPSON: Yes, sir, territorial sovereignty,
9 the political integrity of the State.

10 QUESTION: The Special Master's report wouldn't have
11 any impact on private titles, would it?

12 MR. THOMPSON: I don't think it does, particularly --

13 QUESTION: Even if we accept the Special Master it
14 wouldn't have any impact on the private titles?

15 MR. THOMPSON: Not according to Nevada. California
16 and the United States have some question about it but I could
17 find no parcel of land patented by both States, such as you
18 had in Coffee v. Groover or Poole v. Fleeger. I haven't found
19 any parcel.

20 QUESTION: Would present landowners have to get their
21 title quieted in California?

22 MR. THOMPSON: Well, if the Special Master's line
23 is decreed, this Court I remember in Maryland v. West Virginia
24 that it was the duty of the law-making bodies of those two
25 States to enact legislation validating the new found --

1 QUESTION: Well, what if we accept the Special
2 Master's report, are there some more proceedings before the
3 Special Master that have to go on?

4 MR. THOMPSON: Yes, sir, he has made a recommendation
5 that California be permitted to file an amended complaint in
6 which the matter of titles and certain claims will be asserted
7 against the United States by California. I think Mr. Stevens
8 will go into that.

9 QUESTION: But you are not concerned with that, is
10 that correct?

11 MR. THOMPSON: No, sir. We are strictly concerned
12 with the movement of part of our territory to the State of
13 California.

14 Congress can act, they can prescribe a boundary, they
15 can establish it, they can set it. But once it is done, they
16 can't move an established boundary. So you are back to the
17 question did the joint survey establish the boundary between
18 California and Nevada. And, if it did, it is our contention
19 that the United States has no power whatsoever to go out there
20 and physically move it, to give part of Nevada, a significant
21 portion of territory to California.

22 So the despositive question really to be answered
23 and indeed to be faced, because California won't face it, the
24 Special Master did not face it, is did the Federal Government
25 act under a power under the Constitution when it moved the

1 posted boundary. And that question has not been addressed and
2 we submit that it has to be looked at and answered, you
3 just can't go on acquiescence, because there is no --

4 QUESTION: I must confess I really don't understand
5 the argument. If the claim of right of California is it owns
6 up -- it has sovereignty up to the 120th Meridian and if they
7 thought they were claiming land up to the 120th Meridian,
8 does it matter whether the survey was done by a private person
9 who was misinformed or the United States Government or is
10 California or Nevada --

11 MR. THOMPSON: If it is first set on the ground and
12 marked, that is the boundary. Under the Constitution you
13 would then have to go to the compact clause to move it or by
14 suit in this Court.

15 QUESTION: The acquiescence cannot move it even
16 though the parties believe that is where it is?

17 MR. THOMPSON: No, sir, because the actual moving was
18 without constitutional authority and California's title is
19 only so good as the title of the United States to that
20 territory.

21 QUESTION: Where does the acquiescence principle come
22 in?

23 MR. THOMPSON: The Special Master in California
24 urged it was a simple case of acquiescence, like any other
25 boundary.

1 QUESTION: At least you can't acquiesce if the
2 boundary is marked on the ground.

3 MR. THOMPSON: We cannot acquiesce and avoid a
4 constitutional act.

5 QUESTION: In Arkansas v. Tennessee, I think it was
6 Chief Justice Hughes' opinion and in the Indiana v. Kentucky
7 opinion, certainly the acquiescence principle was applied.

8 MR. THOMPSON: In every case before this it was
9 correctly applied, there was a claim with color of title in
10 every case. It stated in there that Kentucky succeeded to the
11 ancient right and possession of Virginia. There was a color of
12 title.

13 California is trying to take advantage of an
14 unconstitutional void Act and say we have got a valid claim
15 to it. And, as I say, the question has not been addressed.
16 We tried to address it and we have raised it and for the first
17 time I have someone who is listening to it.

18 If the United States did act under the Constitution,
19 it did have this power to set the boundary, then the decision
20 of this Court should rest upon the holding to that effect,
21 that it was pursuant to a constitutional power and not upon
22 acquiescence. Because we can't acquiesce and avoid an Act.

23 And this Court on several occasions has held that
24 the State cannot confer on the United States a absent power.
25 Chief Justice Marshall in McCulloch v. Maryland said:

1 "These powers (of the United States) are not
2 given by the people of a single State. They are
3 given by the people of the United States ...
4 Consequently, the people of a single State cannot
5 confer a sovereignty which will extend over (the
6 people of the United States) ... because it is the
7 usurpation of a power which the people of a single
8 State cannot give."

9 And Nevada cannot by acquiescence, silent submission,
10 constitutionalize the usurpation of a power.

11 Another case, Pennsylvania v. Wheeling Bridge, there
12 was question whether a compact between two States and which
13 Congress had consented to could offer a restriction upon the
14 power of Congress under the Commerce Clause. The Court said,
15 clearly not. Otherwise Congress and two States would possess
16 the power to modify and alter the Constitution itself.

17 There are three other decisions of this Court,
18 Morley v. First Municipality, Coyle v. Smith and Pollard v.
19 Hagan that all said the same thing.

20 The Special Master said this was a novel argument.
21 It isn't. It goes back to Chief Justice Marshall. He calls
22 it a novel argument. We submit he could not have been more
23 wrong.

24 Clearly then, since a State cannot directly -- as
25 these decisions say -- cannot directly alter the Constitution,

1 How could Nevada ever do it by -- indirectly by acquiescence?
2 It can't; it can't be done. Not under the past decisions of
3 this Court.

4 QUESTION: Well, supposing in Pollard, this Court
5 ultimately held that Congress had no right to admit the State
6 of Mississippi or Alabama, whichever it was, the way it did
7 because it had a right to be admitted on an equal footing with
8 the other State, supposing that for 90 years each of the
9 States had acquiesced in the boundaries set by the United
10 States at the time it admitted the State of Mississippi, do you
11 think acquiescence would have been out of place there?

12 MR. THOMPSON: I think it would have been applied
13 there if there was a survey on the ground at the time of the
14 admission. They were bound to observe that boundary.

15 QUESTION: But the statute admitting the State to the
16 Union prescribed --

17 MR. THOMPSON: Prescribed the boundary. It had not
18 been set on the ground.

19 QUESTION: So that is the critical thing.

20 MR. THOMPSON: The United States would have been free
21 to go out there and set it.

22 QUESTION: You think the critical aspect of the
23 acquiescence doctrine is the fact the boundary has been marked
24 on the ground?

25 MR. THOMPSON: Yes, sir.

1 QUESTION: At the time of admission?

2 MR. THOMPSON: Yes, sir. And if the power was
3 exhausted, then to change it except by the Compact Clause of
4 original jurisdiction of this Court.

5 QUESTION: The question is where a certain meridian
6 is, wasn't it?

7 MR. THOMPSON: Yes, sir, except --

8 QUESTION: You admitted it was marked out on the
9 ground at a certain place?

10 MR. THOMPSON: Yes, sir.

11 QUESTION: And under later surveys it was put in
12 another place.

13 MR. THOMPSON: Yes, sir, every time they would go
14 out and survey it, they would move it. No one has ever agreed
15 on where it is.

16 This Court has always preferred stability of location
17 over stability of --

18 QUESTION: Is there any question about where it was
19 marked on the ground at the time of admission?

20 MR. THOMPSON: No, it was marked on the ground at
21 time of admission.

22 QUESTION: Well, is there any question now where that
23 mark was?

24 MR. THOMPSON: No, sir, there isn't.

25 QUESTION: Can you find it?

1 MR. THOMPSON: Can you find where the Houghton-Ives
2 Line was?

3 MR. THOMPSON: Yes, sir, there is testimony in
4 another case that it can be reestablished.

5 QUESTION: Is that true of the diagonal line as well
6 as the north-south line?

7 MR. THOMPSON: Yes, sir, patents were issued by the
8 United States with relation to both the diagonal and the
9 meridional boundary and you can go to the United States' own
10 records in the BLM Land Office and they are by metes and bounds
11 description.

12 QUESTION: They are metes and bounds?

13 MR. THOMPSON: Yes, sir.

14 QUESTION: Can you still identify the calls?

15 MR. THOMPSON: Yes, sir, in the evidence there is
16 township plats for six townships, running from Lake Tahoe north
17 about 25 miles and there are some chains and links, the Nevada-
18 California boundary line. And the patents were issued in
19 relation to that line on either side.

20 QUESTION: Are the surveyor's notes extant?

21 MR. THOMPSON: Yes, sir. I will put everything in
22 evidence for those six townships where it is heavily populated
23 by Western standards. Those are in evidence.

24 What California is actually asking this Court when
25 she requests the Court to hold that acquiescence is controlling,

1 is for the Court to apply the equitable doctrine of acquiescence
2 so as to alter the Constitution, the organic law of the land.

3 And Chief Justice Marshall again put to rest any
4 notion that the Constitution would be changed by ordinary
5 means in Marbury v. Madison. There he said:

6 "The Constitution is either a superior
7 paramount law unchangeable by ordinary means or
8 is on the level with ordinary legislative Acts.
9 And if the latter part be true, then written
10 Constitutions are absurd attempts on the part of
11 the people to limit a power of its own nature
12 illimitable."

13 I would submit that the Constitution is not an
14 equitable document. It is a legal document setting forth
15 relations of the States between each other, or among each
16 other, among the States vis-a-vis the Federal Government.
17 And those legal constitutional relationships cannot be changed
18 by the application of equitable doctrine normally applied
19 between two private citizens.

20 I would like now to talk about the joint State
21 survey, the Houghton-Ives Line. California by statute
22 prescribed that they would use in this joint survey two
23 terminal points set by Lt. J. C. Ives, not to be confused with
24 Butler Ives. These points were established at the Colorado
25 River and the 35th Parallel and at Lake Tahoe. And they

1 prescribed that these would be used and they were set by the
2 United States Boundary Commission in 1861. So two years later
3 the survey is run. It is a complete survey of the 120th
4 Meridian and it was surveyed along the lake boundary for about
5 102 miles and the following year California appropriated
6 money to put a permanent marker at terminal point so as "to
7 enable the survey to be continued from that point at some
8 future time."

9 That monument was put up. The following year, in
10 1875, Lawson, who also participated in the other survey, Lawson
11 extended the survey another 73 miles, acting as a joint
12 commissioner for both States. So you have to remember at that
13 time the Nevada boundary with California only went as far as
14 the 37th Parallel, it did not go to the Colorado River. So
15 that joint boundary was surveyed within a few miles of the
16 37th Parallel by Lawson's terminal monument.

17 So the States when they accepted it, they said, we
18 accept that survey, it is the official boundary so far as it
19 has been run. So they knew it was incomplete. It hadn't
20 been run all the way to the Colorado River. They accepted it
21 the way it was. And incomplete surveys are not unusual at all.
22 The United States Government has surveyed many a State boundary
23 by piecemeal surveys. Probably the longest one is the Majors
24 Darling-Preston Line by three different surveyors on the 37th
25 Parallel between New Mexico Territory and Colorado. So it is

1 not unusual to do it in piecemeal fashion. And General
2 Houghton, who was California's commissioner of the joint
3 survey, reported to the legislature that, we have marked on
4 the Oblique boundary the important part to be marked at this
5 time.

6 I don't think there were any settlements along there.
7 At this time it was within the power of the United States to
8 have gone out there at that terminal monument, close the public
9 land surveys, and extend Lawson's terminal monument on to the
10 Colorado River, fill in that gap. They would have plenty of
11 power to do that.

12 QUESTION: Well, why was it within the power of the
13 United States to do that at that time; since both California
14 and Nevada had been admitted to the Union?

15 MR. THOMPSON: The United States Government surveyed
16 many State boundaries which turned out to be State boundaries;
17 our northern boundary with Idaho was surveyed by the United
18 States.

19 QUESTION: Are you saying that after two States
20 have been admitted to the Union by an Act of Congress that
21 the United States Geological Survey can come along and run a
22 survey line that doesn't comport to the Act of Congress and
23 that then becomes the boundary?

24 MR. THOMPSON: No, sir, I am not, Mr. Justice
25 Rehnquist. I am saying that the States can set it the first

1 time or the United States can set it the first time. Since
2 the States actually ran the survey, that fixed it. But there
3 was still a gap in it and the United States certainly had an
4 interest in continuing that line so they could close the public
5 land surveys; but, they didn't do that.

6 California has never argued that the Houghton-Ives
7 Line did not set the boundary. They said but it was only
8 observed for ten years. Of course it was ten years, because --

9 QUESTION: When was that?

10 MR. THOMPSON: 1864, Your Honor. Of course it was
11 only there for ten years because the United States had picked
12 up the monuments, they were gone. They sent them over to
13 Von Schmidt's line. California would have you believe that
14 for some period of time, unspecified, at which a State's
15 right to rely on its boundary becomes vested and prior thereto
16 it is subject to being divested. That is sheer nonsense.
17 Nevada submits that the two States acquired a vested boundary
18 the very day they adopted the joint State Houghton-Ives Line,
19 posted it.

20 California complains, but the Federal Government
21 never formally approved the Houghton Line, as though there
22 were some requirement, perhaps by Congress, I don't know, to
23 officially proclaim a survey as the boundary. There is no such
24 requirement. Outside of Congress' approval of a line between
25 Texas and the United States Territory and also the Carpenter

1 survey between New Mexico and Colorado, I don't know if they
2 have ever formally approved any survey.

3 What happens is that if they like a survey, if it
4 is run, the General Land Office closes the public land surveys
5 on that land.

6 QUESTION: What happens in a case of land that is
7 still territory. Say in 1864 when the Territory of New Mexico
8 included both New Mexico and Arizona and President Lincoln
9 severed Arizona and made it a territory in its own right.
10 Was that done by a survey or by an Act of Congress?

11 MR. THOMPSON: They were all done by surveys
12 through appropriation Acts by Congress. And the General Land
13 Office would hire surveyors.

14 QUESTION: But when Nevada was carved out of Utah
15 its western boundary was specifically made the eastern boundary
16 of California.

17 MR. THOMPSON: That is right, yes, sir. But the
18 United States surveys the boundaries and usually they were
19 always between two territories of the United States. Or, if
20 it were between a State and a Territory there was usually a
21 commissioner representing that State. In fact the only
22 boundaries that the United States has ever surveyed between
23 two existing States are both involved in this proceeding.
24 The boundary between California and Oregon, they were both
25 States; and the boundary between Nevada -- on its north boundary

1 with Oregon.

2 QUESTION: Well, did the record indicate why the
3 Von Schmidt survey was ever run?

4 MR. THOMPSON: Yes, sir, it was run not because of
5 any dispute between States. The United States surveyor in
6 California wrote the General Land Office in Washington and
7 said the Majors monument, the survey between California and
8 Oregon, was some 2 miles and 30 chains further west than the
9 Houghton-Ives monument, the joint State line. And they said
10 such a discrepancy should not go unnoticed. We are concerned,
11 let us go up there and do something.

12 Well, it is our contention they had no power to do
13 that, that the line had been fixed. That is how it all got
14 started.

15 QUESTION: There were two known lines on the ground
16 that didn't jibe.

17 MR. THOMPSON: Yes, there were two monuments, both
18 purporting to be the 47th Parallel and the 120th Meridian.
19 But there was only one line marked on the ground, the Houghton-
20 Ives line meridional line down to Lake Tahoe. Majors never
21 run a line that way. He went straight to the Pacific Ocean.

22 QUESTION: Let me go back for a moment to the
23 Diagonal line

24 Masters said that the Houghton-Ives survey extended
25 from the Oregon border to approximately 103 miles southeast of

1 the intersection in Lake Tahoe. It was not continued to the
2 Colorado River and therefore approximately 302 miles of the
3 Oblique boundary were left unmarked and unsurveyed.

4 MR. THOMPSON: At that time there was approximately
5 98 miles left unsurveyed, because Nevada's boundary with
6 California did not extend to the Colorado River. That was
7 another 200 miles further down.

8 QUESTION: Is it correct that part of the boundary
9 had not been marked?

10 MR. THOMPSON: Yes, sir, and Lawson in the 1865 --

11 QUESTION: Well, then, how can you say it was all on
12 the ground? It wasn't.

13 MR. THOMPSON: So much of it as had been run. This
14 is frequently done. Once it is run it is posted and it serves
15 to delineate the political sovereignty of each State.

16 QUESTION: Then your argument does not apply to the
17 southeasterly part of the southeasterly line?

18 MR. THOMPSON: No, sir.

19 QUESTION: So at least as to that you would have to
20 perhaps assume that the doctrine of acquiescence would apply.

21 MR. THOMPSON: Well, we submit it was surveyed within
22 about 20 miles of the 37th Parallel. That is where Lawson
23 terminated his survey. At that point there was a gap. We
24 contend though that the United States, if they wanted to fill
25 that gap they should have started at the terminal monument on

1 the State survey and surveyed on to the Colorado River.

2 QUESTION: It is a question of filling a gap rather
3 than moving a line?

4 MR. THOMPSON: Yes, sir, filling the gap from the
5 already posted terminal monument.

6 Indeed, all that is necessary for Federal recognition
7 of approval of a boundary is the closure of a General Land
8 Office upon that line. And this Court has held in Louisiana v.
9 Mississippi that the closure there and the deeding to the
10 State of Louisiana lands under the swamplands grant approved
11 Louisiana's title up to that boundary line, the very thing
12 the General Land Office has done here. And they called that
13 approval and recognition by the Federal Government.

14 At the time of admission of Nevada to the Union
15 Congress is presumed to know the boundaries of a State. That
16 is West Virginia v. Maryland. And at the time of Nevada's
17 admission to the Union there was a defined boundary on the
18 ground. California had already adopted it by statute ten
19 months before Nevada was admitted to the Union. And Nevada
20 submits that the Houghton-Ives boundary was constitutionally
21 established.

22 And this Court has repeatedly held that you cannot
23 move the territorial limits of a State. Washington v. Oregon,
24 Louisiana v. Mississippi and New Mexico v. Colorado, which is
25 the most analagous case to this one, there this Court clearly

1 held after Colorado had been admitted to the Union in 1876 its
2 right to rely upon the line previously established could not
3 be impaired by any subsequent on the action on the part of the
4 United States. And Congress in that case by resolution had
5 approved the Carpenter survey and President Roosevelt --
6 Theodore Roosevelt vetoed it and Congress never overrode that
7 veto, he put the line back where it was.

8 The Special Master said Nevada's territory was not
9 alienated when Von Schmidt picked up these granite markers
10 and set them over to his line.

11 I suggest the mere fact of all those patents and,
12 the Nevada patents today, the plan to the west, the Von Schmidt
13 line is ample proof there was an alienation of territory.
14 It was the Special Master's conclusion that there was no
15 alienation of territory. He ignores all the evidence on the
16 matter, that Houghton-Ives was the first practical location
17 on the ground. And being marked for the first time, neither
18 California nor Nevada gained or lost any territory. They
19 eliminated their political sovereignty for the first time.
20 And that is Virginia v. Tennessee. Therefore there was no
21 need for a compact since it was the first time they had either
22 gained or lost territory.

23 It falls that any movement of this jointly surveyed
24 State boundary would alienate the territorial estate. And it
25 did.

1 QUESTION: Why can you say that neither one of them
2 gained or lost territory if the line is not in fact on the
3 120th Meridian? Wherever you put it, somebody had to lose if
4 it was erroneous.

5 MR. THOMPSON: No, sir, the 120th Meridian is
6 subject to being moved. It may be moved four years from now
7 in 1983 when the Geodetic Survey tightens up the geodetic
8 grid. These are astronomic lines and they are set by a
9 shooting on the stars. The 120th that is marked on the maps
10 that you have in front of you is a geodetic line. But
11 everyone who goes out to set an stronomic line is going to
12 put it in a different place, it is just human nature, nature
13 of the surveying technique and equipment.

14 QUESTION: I thought that there were more perfect
15 methods of measuring those -- ascertaining those lines now
16 than existed a hundred years ago.

17 MR. THOMPSON: There are; yes, sir, you are right.

18 QUESTION: With the best available modern technology
19 that we would find the very first time they drew the line on
20 the ground they made some mistakes and they therefore took
21 territory from one State or the other.

22 MR. THOMPSON: That is true, there is evidence in
23 this case that we can receive signals from the stars and fix
24 the 120th Meridian within three feet of its true location.

25 But I submit --

1 QUESTION: You don't contend that is what should be
2 done?

3 MR. THOMPSON: No, sir, because you would have to
4 go out and survey every Western State boundary all over again.
5 It would be an endless -- really upset titles.

6 MR. CHIEF JUSTICE STEWART: Mr. Stevens.

7 ORAL ARGUMENT OF JAN S. STEVENS, ESQ.,

8 ON BEHALF OF THE DEFENDANT

9 MR. STEVENS: Mr. Chief Justice, and may it please
10 the Court:

11 California's characterization of the Federal action
12 in surveying the Von Schmidt line as it is described and
13 delineated in the exhibits that we have lodged with the Court
14 for oral argument would be somewhat different from Nevada's.
15 Our position is that the Federal Government did not in 1872
16 move the boundary between California and Nevada. Rather,
17 what the Federal Government did was to mark that boundary
18 at a different location and the boundary which the Federal
19 Government marked was immediately accepted by both States
20 and respected by them in all of their political actions and
21 jurisdiction ever since 1872 to the present.

22 QUESTION: There wasn't any confusion about the line
23 was before 1872, at least that it was marked on the ground,
24 almost all of it.

25 MR. STEVENS: It was from Lake Tahoe north, certainly,

1 Mr. Justice.

2 QUESTION: And so there was that mark. And what was
3 the occasion for putting it in the different location, as you
4 say?

5 MR. STEVENS: It is our understanding that there
6 were substantial doubts raised, primarily by the General Land
7 Office, as to the accuracy of the original Houghton-Ives line.
8 And for that reason --

9 QUESTION: Which was supposed to be what, to reflect
10 what?

11 MR. STEVENS: To reflect the 120th Meridian on --

12 QUESTION: On the ground.

13 MR. STEVENS: -- on the ground, exactly. And also
14 to extend southeasterly for approximately 103 miles south of
15 Lake Tahoe the so-called Oblique boundary to which Justice
16 Stevens made reference.

17 The extension of that boundary by Mr. Lawson, to
18 which counsel has referred, was authorized unilaterally by
19 Nevada and California had no role in either authorizing or
20 approving it subsequently.

21 So the Houghton-Ives line insofar as it existed was
22 marked on the ground from Lake Tahoe to Oregon and it was
23 marked on the ground for approximately 103 miles southeasterly
24 from Lake Tahoe.

25 QUESTION: Well, suppose the two States in 18 -- when

1 was it -- Von Schmidt -- '72?

2 MR. STEVENS: '72.

3 QUESTION: Suppose the two States had got together
4 and said, gee, I think it is probably a mistake, they used
5 this mark on the ground and that is where it was when Nevada
6 was admitted and that is the line that both the legislatures
7 accepted at the time of Nevada's admission, anyway. Didn't
8 they accept the line as it was marked on the ground?

9 MR. STEVENS: Yes, they did, Your Honor.

10 QUESTION: Well, suppose they had said then, well,
11 we want to change it, we want to change our boundary. And
12 so they signed up an agreement.

13 Would that have been a valid agreement?

14 MR. STEVENS: I believe that it would have been,
15 Your Honor. And what happened in fact is very close to that.

16 QUESTION: I know you must have to argue that, don't
17 you?

18 MR. STEVENS: Well, whether it is characterized as
19 agreement or by acquiescence -- or as acquiescence.

20 QUESTION: Wouldn't that have required the consent of
21 Congress?

22 MR. STEVENS: I believe there is a question as to
23 that, Mr. Justice. Justice Field discussed this at some
24 length in the course of Virginia v. Tennessee and it was his
25 feeling that there were several answers to that case, which

1 of course was an acquiescence case and the same point was
2 raised.

3 QUESTION: Well, what about my example, what is the
4 argument they wouldn't have had the consent of Congress if the
5 two States wanted to change their boundary?

6 MR. STEVENS: Well, I believe Justice Field's first
7 point, at least, was that in effect this was not an agreement
8 that altered the political balance of the States or affected
9 sovereignty to such an extent as to require express
10 congressional ratification or a compact within the meaning
11 of that clause.

12 His second point was that congressional approval
13 can be inferred as well as expressly given in cases in which
14 the States have reach an implied agreement or in which they
15 have acquiesced upon a boundary for a long period of years,
16 and that this was a separate and independent ground equally
17 supportive of the position that there was an acquiesced
18 boundary. We believe that the same is true here. The lines
19 which are in question have been observed by both States
20 in the North for 108 years in every respect, in political
21 jurisdiction school districts and county lines have been
22 drawn up and they were immediately accepted.

23 QUESTION: Well, the United States, though, based
24 on the old line conveyed in Nevada some land that was -- you
25 claim was in California.

1 MR. STEVENS: That is right, Mr. Justice.

2 QUESTION: Well, so you infer United States
3 acquiescence or approval of that agreement of moving the line?

4 MR. STEVENS: I believe so, because immediately
5 after the new line was drawn the General Land Office directed
6 that its public surveys be redrawn to close upon the new
7 line. And subsequently if land title stability is to be a
8 factor California received many lands based in reliance upon
9 the new Von Schmidt line.

10 QUESTION: Upon the subsequent line, yes.

11 MR. STEVENS: So as a matter of equity --

12 QUESTION: You say California received new lands.
13 You mean in the sense of political jurisdiction or in the
14 sense of ownership of school lands and that type of thing?
15 The United States patented lands in California based on the
16 Von Schmidt line.

17 MR. STEVENS: That is correct, it did. It patented --

18 QUESTION: Otherwise it would have been in Nevada,
19 under the old line. .

20 MR. STEVENS: That is right, Your Honor.

21 QUESTION: That is where you say the United States
22 acquiesced?

23 MR. STEVENS: Yes, Your Honor. That is our position.
24 The United States not only expressly approved this new boundary
25 line but it subsequently immediately took all steps that were

1 necessary, including the recognition for public land purposes
2 to recognize this as public land within California. Of course
3 it did a lot of other things, too. The post office maps
4 showed the new Von Schmidt line, the Federal judicial districts
5 reflected that line and in every respect it was recognized by
6 the United States as well as both the States ever since 1872.

7 QUESTION: Is it fair to say that California in this
8 case depends upon treating acquiescence in the same way and
9 having the same consequences as an affirmative agreement, an
10 affirmative express agreement on the boundary?

11 MR. STEVENS: I believe that is basically one of
12 the two points that we would believe militates for this line,
13 Your Honor. Acquiescence, whether it is characterized as
14 acquiescence or as agreement I am not sure is important, be-
15 cause we believe that both are shown under the facts here
16 and under the reasoning of Justice Field in Virginia v.
17 Tennessee.

18 We assumed, Mr. Chief Justice, for the purposes of
19 this argument since Nevada has not referred to the alternative
20 lines which it has urged before the Special Master that unless
21 the Court desires us to discuss them we will address ourselves
22 primarily to the principal lines in issue, the Houghton-Ives
23 Line and the Von Schmidt Line in the north and the Coast &
24 Geodetic Survey Line on the Oblique boundary.

25 Nevada had also --

1 QUESTION: Neither of you is very enthusiastic about
2 a brand new survey.

3 MR. STEVENS: If the 120th Meridian is to be the
4 boundary between Nevada and California and if the Court rejects
5 the concept of acquiescence or acceptance of the lines which
6 have been respected by both the States we believe that the
7 only proper thing to do would be to order a new survey, as
8 the Court did of course in the New Mexico case. And such a
9 new survey could in fact depict the 120th Meridian with a
10 great deal more certainty than the old instruments and the
11 poor conditions of 100 years ago could.

12 QUESTION: I don't know about Nevada, but at least
13 I take it that Judge Van Pelt was not particularly enthusiastic
14 about this, he offered it as an alternative.

15 MR. STEVENS: That is right, Your Honor, he pointed
16 out, and I think legitimately, that there is no boundary that
17 could be not more precisely defined today than it could have
18 been a hundred years ago. And this of course is very true.
19 And this is why our principal prayer is for an acquiesced
20 boundary rather than through a new survey by which California
21 would actually stand to gain some rather significant land
22 around Lake Tahoe.

23 QUESTION: Do you think when this description was
24 originally agreed upon that people knew it would end up in the
25 middle of Lake Tahoe, the meeting of the two lines?

1 MR. STEVENS: Well, Your Honor, I don't believe that
2 land was very important to people and very little attention was
3 paid to it.

4 Some question has been laid of course to the acceptance
5 of both States, their readiness to accept a new boundary as
6 laid by the United States in 1872. And perhaps the principal
7 reason would be their eagerness to select from the public
8 domain and to have these lands go into private hands, because
9 as a practical matter of course unless the General Land Office
10 had a boundary that it was happy with, it was going to be
11 impossible for either California or Nevada to make selections
12 of school lands and other lands that could in fact be put into
13 private hands. And there was a great deal of pressure to do
14 so in those days.

15 QUESTION: If they had just as accurate instruments
16 in 1872 or 1860 as they have got today, and the same people
17 were doing the two surveys, would the 120th be in the same
18 place?

19 MR. STEVENS: Your Honor, it is our belief that if --

20 QUESTION: Is it denied or admitted or what is the
21 position? Is the Meridian always where it is supposed to be,
22 or is it moving?

23 MR. STEVENS: The evidence before the Special Master
24 indicates that if an accurate survey were made today, California's
25 line would extend anywhere from 1,200 to 1,700 feet into what

1 is now Nevada if the North Lake Tahoe --

2 QUESTION: Suppose an accurate survey were made 100
3 years from now, then the 120th might be in a different place?

4 MR. STEVENS: I am not sure there would be a
5 significant difference. There have been different data set
6 from time to time. It is my understanding we are on the verge
7 of getting another one.

8 QUESTION: That is based on corrections on the
9 ground conforming to an abstract description. It remains
10 constant, though, doesn't it?

11 MR. STEVENS: That is right, Mr. Justice Rehnquist.
12 I don't believe in a direct answer to your question that there
13 would be a significant difference.

14 QUESTION: Well, there is not supposed to be.

15 MR. STEVENS: No.

16 QUESTION: It isn't an accepted notion that meridians
17 are traveling?

18 MR. STEVENS: That is right.

19 We believe that the record amply supports the Special
20 Master's recommendations with respect to the location and the
21 acceptance of this line. The California-Nevada boundary was
22 established of course by California's 1849 Constitution and
23 California has never consented to a different location. So the
24 120th Meridian must be the description of the California-Nevada
25 boundary. No other description can take its place.

1 QUESTION: Unless there has been acquiescence.

2 MR. STEVENS: That is right, Mr. Justice Rehnquist.

3 And actually I think that the acquiescence perhaps itself
4 could only go to the location of that 120th Meridian on the
5 ground. I am not sure California could acquiesce for instance
6 in a different line at the 43rd Meridian west of Washington,
7 which was one of Nevada's alternative suggestions, because
8 that is an entirely different line from that set forth in the
9 California Constitution.

10 QUESTION: Well, what about Justice Field's comment
11 in the old Indiana case that it wouldn't significantly alter
12 the balance of power between the States as a ground for allowing
13 acquiescence?

14 MR. STEVENS: That might be used to argue and
15 support such a different location.

16 QUESTION: Justice Field didn't know how valuable
17 land around Lake Tahoe was going to be in the 20th Century,
18 did he?

19 MR. STEVENS: He did not, Mr. Chief Justice, although
20 he did come from California. It was not very valuable in those
21 days.

22 The proof with respect to acceptance of this boundary
23 by Nevada is rather incontrovertible. The Nevada Surveyor
24 General pointed out in his 1873 report that the Federal
25 Government was in the process of surveying a new line,

1 depicting the 120th Meridian and he praised them for it. He
2 said thus it will be seen that by the munificence of the
3 general government within a year the State will be enclosed
4 by an actual surveyed line and that troubles heretofore exist-
5 ing will be entirely and forever obviated. This was his
6 opinion in 1873. We hope that his opinion will be borne out
7 by the decision of this Court.

8 The Nevada State Controller promptly directed the
9 county assessors to close their lines upon the new boundary.
10 The legislature in Nevada used the new boundary to define
11 county boundaries of Nevada. And of course the General Land
12 Office directed that the public land surveys be closed upon
13 it.

14 And ever since 1872 in the north and 1903 in the
15 south with respect to the Oblique boundaries this has been
16 the case. There is no dispute with respect to mutual observance
17 by the two States of the boundary that is marked on the ground
18 and respected by them today. And if stability is to be a
19 factor, we would suggest that this boundary should be put to
20 rest and ratified, in effect, by the Court as the accurate
21 placement of this line.

22 QUESTION: Am I right in thinking that Nevada has
23 no western boundary except the eastern boundary of California?

24 MR. STEVENS: Yes, Your Honor, I believe that that
25 is the accurate description.

1 Now, the Nevada Constitution uses a dual description
2 of its western boundary. Their Constitution refers to the 43rd
3 Meridian west of Washington and the eastern boundary of
4 California. But it has been our position that the facts before
5 the Special Master pretty well showed that it was believed in
6 those days the 43rd Meridian west of Washington was synonymous
7 with the 120th Meridian west of Greenwich.

8 QUESTION: There is no other State involved?

9 MR. STEVENS: No, there is not, this is solely between
10 California and Nevada.

11 QUESTION: What precipitated this dispute; I mean
12 why are you all jere if you have been so happy all these years?

13 MR. STEVENS: There were two principal factors, Your
14 Honor.

15 The first is that it has been discovered from time
16 to time and more lately, very recently that the location of the
17 boundary was not an accurate depiction of the 120th Meridian.

18 QUESTION: You mean the Von Schmidt --

19 MR. STEVENS: Von Schmidt was about --

20 QUESTION: Houghton-Ives wasn't and neither was Von
21 Schmidt.

22 MR. STEVENS: That is right, Your Honor.

23 QUESTION: So that is inaccurate.

24 MR. STEVENS: So it is not an accurate depiction of
25 the 120th Meridian and there was some fear that taxes and

1 criminal prosecutions and acts of the like could be challenged
2 on the basis that in fact the California-Nevada boundary as
3 set forth in law was not being followed by the States.

4 QUESTION: So it is a quiet title action?

5 MR. STEVENS: In the nature of one, Your Honor.

6 QUESTION: Yes.

7 MR. STEVENS: Of course the --

8 QUESTION: What is the other thing that precipitated
9 it?

10 MR. STEVENS: The second concern that came to our
11 attention was a ruling of the Department of the Interior which
12 seemed to cast doubt upon the validity of titles which were
13 granted in reliance upon the old replaced boundary, the Von
14 Schmidt boundary. In effect, the Department of the Interior
15 has held that a school land selection initially made in
16 California and approved by the Department of the Interior at
17 that time clear listed, in effect, but subsequently found to
18 be located actually in Nevada remained public lands, notwith-
19 standing the usual line of authority that once a survey is
20 approved by the Federal Government of a selection made by a
21 State, then the title has passed to the State or the persons
22 who take under the State.

23 QUESTION: To homestead.

24 MR. STEVENS: To homestead, to internal improvement
25 lands and to school lands.

1 QUESTION: I suppose your position is that the United
2 States has acquiesced, too?

3 MR. STEVENS: We would hope that that would be the
4 position.

5 QUESTION: Well, I thought you just argued here a
6 while ago that the United States has recognized the Von Schmidt
7 line.

8 MR. STEVENS: It has.

9 QUESTION: And yet I thought you argued a moment
10 ago that the Interior Department has made some nonacquiescent
11 acts recently.

12 MR. STEVENS: Very recently, in the 1960's. And
13 our concern is that the stability of titles be treated as the
14 Solicitor General suggests in further proceedings before the
15 Special Master, because in the absence of this affirmative
16 Interior decision we think that there would be very little
17 difficulty in confirming the present boundary in its present
18 place.

19 QUESTION: Is that dispute just between California
20 and the United States; it doesn't involve Nevada, does it?

21 MR. STEVENS: Yes, it would involve Nevada, Your
22 Honor, because Nevada has made a substantial number of
23 selections, the validity of which could be cast into doubt
24 by the decision --

25 QUESTION: Well, do you think -- how would that

1 dispute be resolved in this case? How could you get the United
2 states into this suit; could they intervene?

3 MR. STEVENS: They could, Your Honor. The Solicitor
4 General --

5 QUESTION: Do you think the Solicitor General has
6 got power to waive sovereign immunity?

7 MR. STEVENS: We believe that they would be properly
8 before this Court. They could intervene because there is a
9 question of possible U.S. title involved here.

10 QUESTION: Well certainly in the recent case that we
11 wrote in Idaho v. Washington and Oregon, we held that even
12 though perhaps only political sovereignty was involved, the
13 United States was not an indispensable party and its inter-
14 vention was not required, didn't we.

15 MR. STEVENS: And I would agree in this case, Your
16 Honor, that the United States --

17 QUESTION: It is not a necessary party indispensable
18 to settle your dispute?

19 MR. STEVENS: Right.

20 QUESTION: The question is whether you could go ahead
21 and impede the United States in this case. Certainly you
22 couldn't against its will.

23 MR. STEVENS: That is right.

24 To pursue this question, however, they have volunteered
25 to participate in further proceedings. And we believe that

1 this is a feasible way of coping with the problems that have
2 come to earth respecting these titles.

3 Perhaps the United States can disclaim any interest
4 in the patents that have been made pursuant to this old
5 boundary. This has been suggested by the Solicitor General.
6 Perhaps legislation passed by the two States and by Congress
7 can solve it and perhaps this Court can offer some further
8 relief, thereby settling all problems which have arisen from
9 the California-Nevada boundary.

10 QUESTION: I have one more question.

11 California was the plaintiff in the case. In your
12 original complaint did you ask the Master to declare the
13 Von Schmidt line the correct line, or the 120th Meridian the
14 correct line?

15 MR. STEVENS: We asked that the Von Schmidt line be
16 declared to be the accurate one, Your Honor, it was basically
17 in the nature of a quiet title as has been suggested. When
18 alternative lines were suggested by Nevada, we felt it
19 necessary to request an alternative survey of our own because
20 if the entire location of the line was to be questioned to
21 such extent, we felt that an accurate survey should be thrown
22 in as an alternative to quieting, in effect, the present
23 line.

24 The Oblique boundary of course we have referred to
25 was surveyed somewhat later than the north-south boundary. It

1 was surveyed from 1893 to 1899 by the Coast & Geodetic Survey.
2 And it replaced the Von Schmidt Line which is the only line
3 that entirely surveyed the Oblique boundary from Lake Tahoe
4 to the Colorado River.

5 Once again, we feel that this is clearly an accepted
6 and an acquiesced boundary and the evidence is exactly the
7 same with respect to its acceptance by the States, with two
8 exceptions.

9 One, the period of acquiescence is somewhat shorter,
10 it is 80 years rather than 108 years as it is in the north.

11 And the second thing is that this line was recognized
12 not only in fact but in statute by both the States. Both
13 States passed in 1901 and 1903 statutes expressly recognizing
14 the fact the Coast & Geodetic line delineated their boundaries.

15 QUESTION: Do both Nevada and California recognize
16 the Act of Congress in the 'Sixties as making the canalized
17 Colorado River the boundary where California and Nevada have
18 joint boundaries?

19 MR. STEVENS: Yes, Your Honor, we do. We have no
20 problem as to the point.

21 Now, in the Oblique boundary, just by way of passing,
22 Nevada gained 256 square miles but California nevertheless
23 recognized that boundary initially and we feel it deserves
24 equal recognition in this case.

25 We have indicated that we feel there is clearly

1 authority for a new survey if it is necessary. And Okiahoma
2 v. Texas represents good authority to that effect. In that
3 case the line proposed by Texas had been rejected on the
4 grounds that it wasn't properly authorized; the line proposed
5 by Oklahoma was rejected on the grounds evidence of
6 acquiescence was insufficient. And the Court felt that the
7 proper remedy in that case was to direct a new survey to be
8 made.

9 We have touched on the question of titles but I
10 don't think it is necessary to touch on it at length. in this
11 proceeding, because what is before the Court directly of
12 course is the location of the boundary between California and
13 Nevada.

14 We do suggest that the Special Master and the
15 United States have both properly recommended that this question
16 be referred to further proceedings, because we believe that
17 solutions are possible.

18 QUESTION: Well, that is not involved before us
19 right now, is it?

20 MR. STEVENS: No, only to the extent that the Special
21 Master --

22 QUESTION: If we just happen to agree with you on
23 this acquiescence issue, we don't need to do anything else, do
24 we?

25 MR. STEVENS: Certainly not at this time, Your

1 Honor.

2 QUESTION: Well, if we did nothing else that would
3 mean we acquiesced in the Master's recommendation that you
4 continue this process, would it not?

5 MR. STEVENS: I assume it would.

6 QUESTION: You have never referred to him any issue
7 about titles. You have just referred to him the dispute
8 between the two States.

9 MR. STEVENS: That is right.

10 QUESTION: So we would have to expand his reference,
11 wouldn't we, if he was going to go on and do something besides
12 what he has done now?

13 MR. STEVENS: We have filed a motion, Your Honor, for
14 the Commission to file an amended complaint which expressly
15 raises this question.

16 QUESTION: So that we haven't acted on that?

17 MR. STEVENS: And you have not acted on that.

18 QUESTION: So in the absence of that, we would have
19 to simply resolve the issue of the boundary line and if this
20 Special Master went beyond the reference to suggest private
21 title litigation, a decree reflecting that recommendation
22 would probably be beyond the reference, wouldn't it?

23 MR. STEVENS: I am not sure, Your Honor. The
24 Special Master initially recommended in its preliminary
25 report that it would be advantageous to the parties and the

1 Court to resolve all known disputes with respect to the
2 determination of the joint common boundaries and that piecemeal
3 litigation should be avoided.

4 QUESTION: There are other forums for settling these
5 title questions, they don't have to be settled here.

6 MR. STEVENS: Your Honor, they may have to be.

7 QUESTION: Why is that? It is just a fight between
8 the United States and the State.

9 MR. STEVENS: The controversy may involve both States
10 and the United States.

11 QUESTION: Well, but not against each other.

12 MR. STEVENS: We know of no direct instance in which
13 both States --

14 QUESTION: Well, then it can be settled somewhere
15 else.

16 MR. STEVENS: To select the same parcel. It is
17 possible that it could but since all three parties have
18 interests in the lands affected, I think the Solicitor General
19 has properly suggested that it may be that we will have to seek
20 resolution in this Court.

21 It is the recommendation of the Special Master only
22 that further proceedings be had with respect to this question
23 and the Solicitor General has recommended only that such
24 proceedings take place without the actual joinder of the United
25 States and possibly without the necessity of further action

1 here.

2 QUESTION: If we were to grant your motion for
3 the amended complaint, do we know now whether Nevada will be
4 in agreement with that, assuming we go with you on the main
5 issues?

6 MR. STEVENS: By agreement, Mr. Chief Justice, you
7 are referring to resolution of the question of titles?

8 QUESTION: Right.

9 MR. STEVENS: We would have every hope that we --

10 QUESTION: We don't know that now. Perhaps Nevada
11 is not prepared to respond, but we will see.

12 MR. STEVENS: We can't speak for them, really.

13 There is precedent of course for such a proceeding.
14 In the last case, Oklahoma v. Louisiana, which this Special
15 Master presided over the question to possible United States
16 title to an island, an island named Sam, the State line river
17 as I recall, came up in the course of the proceedings and it
18 was determined that a further determination was necessary
19 to resolve the entire border controversy to ascertain what
20 U.S. interests may be in that island.

21 Florida v. Georgia of course is the best and most
22 apropos precedent for such a thing. In that case the United
23 States Attorney General actively applied for leave to inter-
24 vene in a boundary dispute between two States on the basis
25 that millions of acres had been alienated by the United

1 States in what it then believed to be Florida but Georgia
2 was contending to be Georgia and that therefore the United
3 States had a real interest to its grantees in participating in
4 the proceeding and helping to assist the Court in ascertaining
5 the propriety both of the boundary and the consequences of
6 that boundary determination, the status of lands within the
7 affected States. It was the duty to see the case was fully
8 and well briefed, he argued, and the United States had a
9 general interest in State boundaries because of political
10 considerations.

11 Well, in that case Justice Tawney granted leave for
12 the United States to intervene informally, as it was character-
13 ized at that time, and to present evidence and to participate
14 but not to be granted leave as a formal party. And perhaps
15 this resembles what the Special Master has recommended in this
16 case, that the United States offer to participate with
17 Nevada and California to help clear up this last remaining
18 question which has been caused by these old boundaries.

19 QUESTION: These proceedings would determine the title
20 to the United States and that is not a very informal participation
21 if you are going to present the United States with a decree,
22 is it?

23 MR. STEVENS: That is true, Mr. Justice White, and
24 it may be necessary that they join formally at a later time.
25 They have deferred presentation of their views and simply asked

1 to be given an opportunity to participate informally until
2 resolution can be had.

3 Basically, then, our position has been that the
4 boundary question is one which is capable of easy resolution.
5 It does not represent a case of the unconstitutional transfer
6 of a boundary from one jurisdiction to another. Rather, it
7 involves the location of a boundary in the ground which was
8 accepted immediately by both States and has been relied upon
9 by the residents of those States for over 100 years in one
10 case and for 80 years in the other. The cases we think
11 clearly support the Special Master's recommendation in that
12 case that the boundary be settled where it has been and where
13 we relied upon it.

14 QUESTION: Well, you think it is just as though there
15 was a dispute at the time about where the boundary was, that
16 it had never been marked on the ground definitely and people
17 were in a big argument about where it was and so the two
18 States agreed to have a survey. So it is marked on the ground
19 and they both then accept it.

20 You think the situation is just like that?

21 MR. STEVENS: It is very close to that, Your Honor,
22 if not precisely that.

23 QUESTION: The only thing is that there was a line
24 on the ground.

25 MR. STEVENS: The difference is that there was a line

1 and the States have accepted it. And the Federal Government
2 came along and marked a new line and the States promptly
3 accepted that line and they have done so ever since.

4 QUESTION: All the time thinking that they were
5 locating the 120th Meridian?

6 MR. STEVENS: That is right, that is correct.
7 The 120th Meridian is we think beyond doubt the proper
8 constitutional boundary between the States. And for that
9 reason we haven't gone into the alternative line suggested
10 by Nevada. We believe that the location which we have
11 respected for all this time should be affirmed at this time.

12 QUESTION: The alternative line being the 43rd
13 west of D.C.?

14 MR. STEVENS: Nevada's alternative being the 43rd
15 west of D.C. And Nevada's second alternative being another
16 line altogether drawn from a different location at the Oregon
17 border, which was represented as being the 120th.

18 QUESTION: Where in D.C. did the measurement start,
19 Mr. Stevens?

20 MR. STEVENS: Your Honor, we believe it originally
21 was in the White House and it was subsequently moved to the
22 old Naval Observatory and then to the new Naval Observatory.
23 And the one to which the Act of Congress of September 29,
24 1850 referred to is not entirely clear to us but in any event
25 it would be approximately 2-1/2 miles farther west into

1 California.

2 QUESTION: Leaving Washington at the bottom of all
3 the confusion.

4 MR. STEVENS: It is involved, Your Honor.

5 Thank you.

6 MR. CHIEF JUSTICE BURGER: Do you have anything
7 further, Mr. Thompson?

8 REBUTTAL ARGUMENT OF JAMES H. THOMPSON, ESQ.,
9 ON BEHALF OF THE PLAINTIFF

10 MR. THOMPSON: Yes, sir.

11 I might add that the 43rd Meridian did not spring
12 out of Nevada's Constitution, it was in Nevada's enabling Act
13 by Congress. At the time Nevada's Attorney General said, we
14 welcome this new "State boundary," that same year the United
15 States was surveying Nevada's northern boundary. So we had
16 to get up there, we had to get up on the Oblique. So when
17 they said fully enclosed, we had hoped we were getting an
18 enclosed boundary that year, which we did.

19 QUESTION: Wasn't the understanding that the 43rd
20 was the same as the 120th?

21 MR. THOMPSON: No, sir. We have argued that Congress
22 has recognized that they were different, because there was
23 actually a survey.

24 QUESTION: At the time was it recognized they were
25 different?

1 MR. THOMPSON: Yes, sir, in 1850 Congress recognized
2 there was a difference. There was a House report published
3 and ordered printed by Congress when they established the
4 American primary meridian. That has been argued --

5 QUESTION: Yes, but what was the eastern boundary --
6 the eastern boundary of California wasn't the 43rd, it was --

7 MR. THOMPSON: But California argues that the Congress
8 can change it and take part of Nevada and give it to California.

9 QUESTION: And the Territory of Nevada was created
10 right up against it.

11 MR. THOMPSON: The eastern boundary of California
12 but the State was specified at the 43rd Meridian west of
13 Washington.

14 QUESTION: At least you don't say that the real
15 boundary was contained in the conference report.

16 MR. THOMPSON: No.

17 Thank you.

18 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen,
19 the case is submitted.

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