

COPY

IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO, COUNTY OF SANTA FE

FIRST JUDICIAL DISTRICT COURT

JOHN ETCHEVERRY,

Plaintiff,

vs.

SAGE OIL COMPANY, a Texas
corporation; STATE LAND
OFFICE; and OIL CONSERVATION
DIVISION,

Defendants.

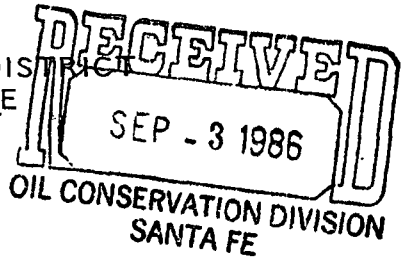
MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

Plaintiff, John Etcheverry ("Etcheverry"), submits the following Memorandum in Opposition to Defendant State Land Office's ("SLO"), Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted.

The SLO asserts that Etcheverry's "claim of trespass" is barred by the doctrine of sovereign immunity and that the "claim against the state for compensation for a taking of his property for public use" is barred by § 42A-1-31(B), N.M.S.A. (1978), a Statute of Limitations applicable to such actions (SLO Mem., 2-4).

The SLO has mischaracterized Etcheverry's claims. The Complaint in this case seeks no damages from the SLO, whether on account of trespass or on the basis of inverse condemnation.¹ The Complaint requests only

1. The SLO relies on various provisions of the Tort Claims Act (§ 41-4-1 *et seq.*, N.M.S.A. (1978)) as grounds for dismissal (SLO Mem., 2-3). However, by its terms, the provisions of that Act are only applicable to a "person who claims damages from the state" Section 41-4-16, N.M.S.A. (1978). Since the Complaint makes no such claims, the Act is inapplicable here.



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No. SF-86-1509(C)

declaratory relief, and the SLO makes no argument that declaratory relief is barred. Accordingly, the Motion to Dismiss should be denied.

The primary thrust of the Complaint in this action is a claim for damages against Sage Oil Company ("Sage"), for the injection of salt water that has traveled from the place of injection and migrated under Etcheverry's lands. This injection and subsequent migration creates an actionable trespass. "[A] trespass may be committed . . . beneath . . . the surface of the earth." *Restatement (Second) Torts*, § 159 (1965).

The SLO is named as a defendant in this action for the sole purpose of determining whether the SLO's grant of Salt Water Disposal Easement No. SWD-0104 immunizes Sage from liability by somehow authorizing a lawful trespass upon or permitting a taking of Mr. Etcheverry's property for a private use without compensation. The Complaint merely seeks a declaration that the SLO may not lawfully authorize these actions. The Complaint does not challenge the SLO's right to grant an easement for the disposal of salt water on its own land; rather, the Complaint challenges the SLO's right to authorize the disposal of salt water under the lands of Mr. Etcheverry.

Mr. Etcheverry is entitled to seek such a declaration under the New Mexico Declaratory Judgment Act, §§ 44-6-1 *et seq.*, N.M.S.A. (1978). Section 44-6-4 provides:

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Since the salt water disposal easement would impair plaintiff's property rights if it authorizes Sage to trespass upon Mr. Etcheverry's lands, he is entitled

to a declaration of whether the SLO may lawfully provide such authorization. Moreover, § 44-6-13, N.M.S.A. (1978) specifically authorizes suits against state agencies such as the SLO. That statute provides:

For the purpose of the Declaratory Judgment Act [44-6-1 to 44-6-15 NMSA 1978], the state of New Mexico, or any official thereof, may be sued and declaratory judgment entered when the rights, status or other legal relations of the parties call for a construction of the constitution of the state of New Mexico, the constitution of the United States or any of the laws of the state of New Mexico or the United States, or any statute thereof.

The doctrine of sovereign immunity asserted by the SLO has no application to a suit seeking a declaration that a state agency may not exceed the scope of its lawful authority. See *City of Albuquerque v. Burrell*, 64 N.M. 204, 326 P.2d 1088 (1958); *Gast v. State By And Through Stevenson*, 36 Or. App. 441, 585 P.2d 12 (1978). "The acts of officials which are not lawfully authorized are not acts of the State, and an action against the officials by one whose rights have been invaded or violated by such acts, for the determination and protection of his rights, is not a suit against the State within the rule of immunity of the State from suit." *Cobb v. Harrington*, 144 Tex. 360, 190 S.W.2d 709, 712 (1945).

Section 42A-1-31(B), N.M.S.A. (1978), prescribes a three year statute of limitations for actions for damages resulting from the taking of property for public use without compensation. This statute is inapplicable to the instant case because Etcheverry does not seek damages from the SLO for a taking of his property for public use. Etcheverry seeks a declaration that the SLO may not authorize Sage to take Etcheverry's property for Sage's private use.

For the foregoing reasons, plaintiff respectfully requests the Court to deny defendant State Land Office's Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he did on the 2nd day of September, 1986, cause to be mailed a true copy of the foregoing Response to opposing counsel of record.

Nicholas F. Persampieri