

Editor's note: 80 LD. 1

STATE OF WYOMING

IBLA 71-194
IBLA 71-211
IBLA 71-279
IBLA 71-307

Decided January 10, 1973

Appeal from decisions of the Land Office, Cheyenne, Wyoming, No. W-26982; W-27006; W-28537 and W-28559; holding for rejection applications for State school land indemnity selections.

Affirmed.

School Lands: Indemnity Selections

A resurvey of either the base lands or the lands selected by a State will have no effect upon the State's right to further lieu selection.

APPEARANCES: A. E. King, Commissioner of Public Lands, State of Wyoming, and W. M. Sutton, Special Assistant Attorney General, State of Wyoming, for appellant; Assistant Solicitor, Division of Public Lands, for appellee.

OPINION BY MR. STUEBING

This opinion involves a consolidation of several Wyoming school land indemnity lieu selection appeals. Their facts will be set out separately; however, the same law may be applied to the disposition of all the appeals.

In the first case, IBLA 71-211, W-26982, several indemnity selections were clearlisted on various dates from 1899 to 1908 with the State of Wyoming offering sections of school lands as base. In each instance, the area offered as base was one unsurveyed section, presumably 640 acres. Subsequently, from 1944 to 1963, the subject base lands were either surveyed or platted by projection diagram and each was found to contain more than 640 acres per section. On the basis of the discovery of more than the standard number of acres in the base lands previously given up, the State of Wyoming made another application to select more lieu lands. By its decision of February 3, 1971, the Wyoming Land Office held the State's application for rejection.

The second case, IBLA 71-194, W-27006, involved several indemnity selections clearlisted on various dates from July 1901 to June 1918. Each of the sections offered as base had been surveyed

and shown to contain 640 acres. Upon resurvey of these base sections, between 1915 and 1945, all the sections were found to contain more than 640 acres. The State of Wyoming offered this excess as base for a further selection and on February 1, 1971, the Wyoming Land Office held the application for rejection.

In the third case, Wyoming lieu selections W-28537 and W-28559, IBLA 71-307, the situation is reversed from that in the first two cases. Here, the State of Wyoming was invested with title to certain surveyed school sections in place on the date of its statehood, July 10, 1890. The survey at that time showed the sections involved contained 640 acres. Upon subsequent resurvey by the United States the sections were revised and from that revision the State of Wyoming determined the acreage of each section to be something less than 640 acres per section. On the basis of the State's recalculation of the number of acres in the resurveyed school sections, an indemnity selection application was filed for the balance. The application was held for rejection by the Wyoming Land Office on May 7, 1971.

The fourth case, 1/ IBLA 71-279, involves a situation where the State was originally presumed to have one-half of a certain section 16 and all of a certain section 36 in Yellowstone National Park. One-half

1/ Apparently no serial number was assigned to this case by the Wyoming Land Office. The record consists principally of several items of correspondence.

of section 16 was apparently in Montana. On that basis, the State made a selection of one and one-half sections elsewhere. Later, it was determined that all of section 16 was in the State of Montana. Wyoming does not contest the finding that it has an excess selection because of the one-half of section 16 that is in Montana. However, the land which Wyoming selected in 1884 was dependently resurveyed in 1963 and it was determined that the selected section and a half contained 655.78 acres instead of the usual 960 acres. The State asks that the loss of 304.22 acres discovered by the dependent resurvey of the selected lands be offset by the admitted overselection of the half section, 320 acres, determined to be in Montana, thus leaving an overselection of only 15.78 acres. By its letter decision dated December 28, 1970, the Wyoming Land Office denied that request.

From all the above denials, the State of Wyoming appeals.

In the four cases the Bureau of Land Management used as a basis for its decisions the cases of State of New Mexico, 53 I.D. 222 (1930) and State of New Mexico, 51 L.D. 409 (1926). The former case held:

*** When the State of New Mexico in 1915, prior to a survey in the field, offered all of Sec. 2 as base land for an indemnity selection it, by implication,

accepted the protraction diagram as correct for the purposes of the case; having received the indemnity land for which it applied, the State is now estopped to assert anything to the contrary, or to make a further indemnity claim on account of the said Sec. 2.

The latter case states:

A deficiency in acreage caused by alleged gross inaccuracies in the surveys is not a ground for adjustment of a State grant, inasmuch as section 2396, Revised Statutes, declares that in the disposal of public lands the official surveys are to govern, and that each section or subdivision thereof shall be held and considered as containing the exact quantity shown on the plat.

The bulk of appellant's briefs are directed to distinguishing the above quoted cases and to quoting 43 U.S.C. §§ 851, 852 (1970). The pertinent provisions of these sections which relate to deficiencies in the States' grant of school land by reasons of settlement or otherwise and how to fill these deficiencies are set out as follows:

*** And other lands of equal acreage are also appropriated and granted, and may be selected, in accordance with the provisions of section 852 of this title, by said State to compensate deficiencies for school purposes, where sections 16 or 36 are fractional in quantity, or where one or both are wanting by reason of the township being fractional ***.

(b) Where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the

following principles of adjustment, to wit: For each township, or fractional township containing a greater quantity of land than three-quarters of an entire township, one section * * * Provided, That the States which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships.

We believe that the disposition of each of these cases is governed by the decisions cited above. These decisions establish the rule that the extent of a State's right to receive a school indemnity grant is limited to the acreage shown by the official surveys (or protraction diagrams for unsurveyed lands), and where indemnity lands have been granted by the United States in lieu thereof, subsequent discovery of deficiencies in acreage caused by inaccuracies in the surveys will not afford a new basis for adjustment of the grant. The rationale of this long-established rule is fully stated in the 1926 decision in State of New Mexico, supra:

In denying the State's claim for credit on account of the alleged deficiency, the Commissioner held that Section 2396, Revised Statutes, contemplated that in the disposal of public lands the official surveys are to govern, and that each section or sectional subdivision, the contents whereof have been returned by the surveyor general shall be held as containing the exact quantity expressed in the return that the design and purpose of this statute was to establish beyond dispute all lines and lines and monuments of accepted official surveys; to obviate inquiry and contention with respect to survey inaccuracies and place a statutory bar against attempts to alter the same or to set up complaints of deficiency of areas as a basis for resurvey. The Commissioner

observed that aside from this statutory limitation, administrative reasons precluded the granting of the State's claim; that the stability of surveys and the title to lands described by reference thereto should be unassailable by parties finding differences in measurements and areas from those returned, and if transactions involving the disposition of public lands were not made final, and the Government was obliged to open up for readjudication the question as to the area of a particular tract or tracts granted and patented, controversies would be constantly arising and resurveys and readjudications would be interminable. (Ibid. at 411).

* * * * *

The Department has carefully considered the matter and finds no reason to differ with the conclusion reached by the Commissioner. The provisions of section 2396, Revised Statutes, recognize the fact taught by experience that measurements of lands can not be performed with precise accuracy and that the work of no two surveyors would exactly agree. True, the alleged shortage in this case looms to a figure of impressive proportions, but the very purpose of the declaration of law above referred to was to obviate inquiry and contention in regard to survey inaccuracies. Moreover, the recognition of right to an adjustment in this instance would establish a far-reaching precedent and afford a basis for similar claims by other States and a multitude of claims by individuals who had purchased Government lands and found the area short of that expressed on the plat of survey. Also, the rule works both ways, in favor of and against the United States. Manifestly the Government has no basis for claim to readjustment of boundaries or for further payment, or for restitution in those cases of certified or patented lands where there was an excess of acreage over that paid for or taken in harmony with the survey returns at the time of disposal. And if the returns are conclusive against the Government they must also be conclusive in its favor. Take the present case; the Government can not inquire into the contents of the school sections and subdivisions assigned by the State as basis for its indemnity selections, but accepts them as containing the exace quantity expressed

in the return. Examination might disclose a deficiency in the area of these sections; frequently, no doubt, exchanges have been made of unequal areas, the discrepancy being in favor of the State, but the law gives these transactions repose and they can not be disturbed. Otherwise endless confusion would ensue. (Ibid. at 412).

The same principle was applied in the 1930 decision in State of New Mexico, supra, where it was held:

Where a State submits as base for an indemnity school selection an unsurveyed section within a national forest the area of which was estimated by protraction, the adjudication of its claim for indemnity on that basis is final and the State will be estopped from asserting a claim for further indemnity on the ground that the section when surveyed was shown to contain a greater area than that estimated by the protraction. (Syllabus).

By application of this principle we can resolve the issues raised in the present four appeals.

The first two fact situations set out above will be discussed together for the reason that the only difference in the facts is that the base land in the first case was unsurveyed at the time of the transfer and in the second case the land had been surveyed prior to the transfer for lieu. In both cases, the base land was later determined to have more than 640 acres, or a greater number of acres than the land selected. The State of Wyoming, in both the first and

second appeals, distinguishes their fact situations from the New Mexico case (53 I.D. 222, supra). Appellant points out that the New Mexico lieu selections were based on a protraction and in the Wyoming cases the first was not even protracted and the second involved a prior survey. The State next contends that the New Mexico (53 I.D. 222) case stands for the proposition that equity would, in situations such as the present case, allow the State to choose more land, pointing out that in the New Mexico case, the Department allowed the State to keep lieu lands mistakenly selected and approved on the basis of the resurveyed base. The distinction here, also made clear by the New Mexico case, is that the Department did not recognize an equitable right to select additional land once the mistake was discovered. Although the State points to certain factual variations in the situations involved, the law is settled that once a state gives up its base and accepts lieu, the exchange is final.

The State, in cases one and two, next points to 43 U.S.C. § 851 which provides for lieu selections where the base had been in some manner taken from the state in whole or in part. The significant part of that statute, here, reads:

* * * Provided, That the selection of any lands under this section in lieu of sections granted or reserved to a State shall be a waiver by the State of its right to the granted or reserved sections. * * *

The intent of the statute is that once the exchange has been made the matter is settled, and no further adjustments may be made. This is pointed out in the cases discussed above.

The third case involves a situation where the State is asking a lieu selection based upon a resurvey of the base land which it still retains. Again the arguments relating to 43 U.S.C. §§ 851 and 852 were utilized. The basic rule of law, as we see it, is that the area shown on the plat at the time title passes is to control what the State receives, and that a later survey will not affect that grant. This is the general principle set out in State of New Mexico, 51 I.D. 409, 412 (1926), and the cases cited at 43 U.S.C.A. § 752 N3 (1964). To rebut this, the State distinguishes the fact situation of State of New Mexico, case in that in the New Mexico case the State made the resurvey, but in the present case, the federal government made the resurvey. This does not change the fact that the grant was finalized at the time title passed to the State, and so the State is bound by the original plat upon which that grant was based.

One further question remains in the third appeal. The State enclosed a letter, 1364141 "F" WJC, dated January 30, 1930, from the General Land Office, Washington, to the Commissioner of Public Lands

in Wyoming, granting the state a lieu selection for base in a situation closely resembling the present case. In light of our analysis of the precedent relied upon for our holding in this case, we cannot regard this letter as having continuing authority.

The fourth case involves the situation where the State selected lands were, by a dependent resurvey, determined to contain less than they had originally been shown to contain. The question involved in that situation has been decided in the first two cases discussed above. However, here the State also asserts an equitable ground. The state admittedly must reduce its entitlement to select lieu land to the extent of the half section of school land in place which was ultimately determined to be in Montana, not Wyoming. In return the State asks that it be allowed to offset the land lost by that resurvey against the half section of selected land for which it admits it must now offer new base, leaving only an overselection of 15.78 acres. In support of its equity argument, the State cited the State of New Mexico, 53 I.D. 222 (1930), which grants equity by allowing the State to keep the already approved lieu lands selected on the basis of an enlarged resurveyed base section. The equities are not directly similar, in that the base land here was not ever in the State of Wyoming, so that no equitable interest therein can be vested in the State.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Edward W. Stuebing, Member

We concur:

Martin Ritvo, Member

Frederick Fishman, Member

IBLA 71-194
IBLA 71-211
IBLA 71-279
IBLA 71-307

Concurring Opinion of
Frederick Fishman

At first blush, the main opinion's rationale in part suggests that the grant under the Lieu Selection Act [43 U.S.C. §§ 5 1-852 (1970)] is in terms of sections, not acres.

The opinion does not discuss the apparently disparate provisions of 43 U.S.C. § 851 (1970), which reads as follows:

Where settlements with a view of preemption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections or either of them have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected, in accordance with the provisions of section 852 of this title, by said State, in lieu of such as may be thus taken by preemption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted and may be selected, in accordance with the provisions of section 852 of this title, by said State where sections sixteen or thirty-six are, before title could pass to the State, included within any Indian, military, or other reservation, or are, before title could pass to the State, otherwise disposed of by the United States: Provided, That the selection of any lands under this section in lieu of sections granted or reserved to a State shall be a waiver by the State of its right to the granted or reserved sections. And other lands of equal acreage are also appropriated and granted, and may be selected,

in accordance with the provisions of section 852 of this title, by said State to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State shall be entitled to select indemnity lands to the extent of section for section in lieu of sections therein which have been or shall be granted, reserved, or pledged; but such selections may not be made within the boundaries of said reservation: Provided, however, That nothing in this section contained shall prevent any State from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein. [Emphasis supplied]

Concededly the statute speaks of "section for section"; however, it also addresses itself to "other lands of equal acreage," a contradiction in many situations.

As I see it, the crucial point is the fact that the school indemnity statutes, Rev. Stats. §§ 2275 and 2276 were amended by the Acts of February 28, 1891, 26 Stat. 796, the Act of August 27, 1958, 72 Stat. 928, the Act of September 14, 1960, 74 Stat. 1024, and the Act of June 24, 1966, 80 Stat. 220 at which times Congress must be presumed to have known the interpretations put on the lieu selection law by the Department. That Congress did nothing by statute to

change the administrative practice and interpretation is tantamount to Congressional approval thereof.

This view is buttressed by State of Wyoming v. United States, 310 F.2d 566, 580 (10th Cir. 1962), cert. denied, 372 U.S. 953 (1963), as follows:

When Congress passed the Resurvey Act of 1908, it must be presumed to have known the construction which had been placed on the Resurvey Acts of 1903 and 1905 and the effect given to such earlier Acts by the Department of the Interior and the practices and procedures followed and carried out by such Department, with respect to the lands in the original school sections and resurveyed school sections. Therefore, when Congress enacted the Resurvey Act of 1908, without substantial change in any relevant part, it manifested its approval and ratification of the administrative construction of the earlier Resurvey Acts by the Department of the Interior, the effect given thereto by such Department, and such practices and procedures. [Footnote omitted]

The soundness of this approach, in its evenhandedness and practicality, is articulated in State of New Mexico, 51 L.D. 409 (1926), quoted in the main opinion.

In view of the fairly consistent interpretation given by the Department to the lieu selection statutes and the reasonableness of such interpretation, I see no reason to depart therefrom and therefore concur in the main opinion.

