

Editors' note: 94 I.D. 422

COOK INLET REGION, INC., ET AL.
(ON RECONSIDERATION)

IBLA 84-149 Decided November 24, 1987
90 IBLA 135
92 I.D. 620

Petition for reconsideration in part of Cook Inlet Region, Inc., 90 IBLA 135, 92 I.D. 620
(1985).

Petition granted; prior decision overruled in part.

1. Constitutional Law: Generally--Conveyances: Generally--Patents of Public Lands: Effect--Public Lands: Jurisdiction Over--Statutes--Statutory Construction: Generally

Legislation concerning disposition of the public lands cannot generally be construed as authorizing the transfer of title to lands previously conveyed out of Federal ownership and which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment. A well-established principle of statutory construction suggests avoidance of an interpretation of a statute that would raise a serious doubt of its constitutionality.

2. Alaska: Land Grants and Selections--Alaska: Navigable Waters: Generally--Alaska: Statehood Act--Navigable Waters--State Grants--State Lands--Submerged Lands

Lands under navigable waters were held for the benefit of future states, and a state's title to such land

cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the state.

3. Act of January 2, 1976--Alaska: Alaska Native Claims Settlement Act--Alaska: Land Grants and Selections--Alaska: Navigable Waters: Generally--Alaska: Statehood Act--Alaska Native Claims Settlement Act: Conveyances: Regional Conveyances--Alaska Native Claims Settlement Act: Native Land Selections: Regional Selections: Generally--Alaska Native Claims Settlement Act: Navigable Waters--Indians: Alaska Natives: Generally--Navigable Waters--State Grants--State Lands--Submerged Lands

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

APPEARANCES: Elizabeth J. Barry, Esq., Michael W. Sewright, Esq., and M. Francis Neville, Esq., Office of the Attorney General, Anchorage, Alaska, for the State of Alaska; Russell L. Winner, Esq., Anchorage, Alaska, for Cook Inlet Region, Inc.; F. Christopher Bockmon, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

On September 30, 1983, the Alaska State Office, Bureau of Land Management (BLM), issued a decision approving for conveyance in part, rejecting in part, and reserving certain basements in land for which Cook Inlet Region, Inc. (CIRI), had applied pursuant to the Alaska Native Claims Settlement Act

(ANCSA), as amended, 43 U.S.C. § 1601 (1982). CIRI, the State of Alaska, and Silver Dome Mining Company filed appeals from that decision, in response to which this Board granted BLM authority to amend its decision to exclude lands encompassed by the Silver Dome Mining Company claims and referred the case to the Hearings Division for determination as to major waterways. The Board affirmed BLM's decision in all other respects. Cook Inlet Region, Inc., 90 IBLA 135, 92 I.D. 620 (1985).

Our decision also held that the conveyance included land beneath navigable portions 1/ of the Susitna River inside the boundaries of Power Site Classification 443. 2/ The State of Alaska has filed a petition for reconsideration of this particular holding by challenging the following determinations

1/ As we noted in our decision, CIRI objects to BLM's determination that the upper portion of the Susitna River is navigable but, in accordance with Bristol Bay Native Corp., 71 IBLA 318 (1983), and section 901(b) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1631(b) (1982), reserves its right to appeal BLM's navigability determination in Federal court after issuance of an interim conveyance of the lands.

2/ The classification was issued by the Director of Geological Survey on Feb. 13, 1958, and stated:

"Pursuant to authority vested in me by the act of March 3, 1879 (20 Stat. 394; 43 U.S.C. 31) and by Department Order No. 2333 of June 10, 1947 (43 C.F.R. 4.623; 12 F.R. 4025), the following described lands are hereby classified as power sites insofar as title thereto remains in the United States and subject to valid existing rights; and this classification shall have full force and effect under the provisions of section 24 of the Act of June 10, 1920, as amended by section 211 of the Act of August 26, 1935 (16 U.S.C. § 818)."

23 FR 1124 (Feb. 21, 1958).

16 U.S.C. § 818 (1982) provides, in pertinent part:

"Any lands of the United States included in any proposed projection [sic] under the provisions of this subchapter shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the commission or by Congress."

of our decision: (1) that the September 30, 1983, decision of BLM did not exclude the bed of navigable portions of the Susitna River; (2) that such submerged lands were properly conveyed to CIRI pursuant to section 12(e) of P.L. 94-204; and (3) our statement that the September 30, 1983, decision constituted a conveyance of the submerged lands.

The State contends that reconsideration is necessary because of the Board's reliance upon the consideration of issues which appellant did not raise and which the State did not have a meaningful opportunity to address before issuance of the Board's decision. CIRI opposes reconsideration, contending that CIRI had raised these issues several times in its pleadings before the Board. BLM's response to the petition for reconsideration referred to BLM's use of the term "excluding" in decisions to issue a conveyance to indicate it does not intend to convey specific lands, including the bed of navigable water bodies. BLM's response went on to state that BLM "does wish to clarify that it intended to withhold from conveyance the submerged lands underlying the Susitna River." ^{3/}

We reject the State's contention that the issues were not raised in the appeal before the Board. Our prior decision quotes statements filed by CIRI and the State in the appeal which make it clear that the State could not have

^{3/} BLM's response to the petition for reconsideration states: "The submerged lands were not conveyed because the land was the subject of a classification instead of a withdrawal." The Sept. 30, 1983, BLM decision contained no language excluding the bed of the Susitna River within the boundaries of Power Site Classification 443. See Cook Inlet Region, Inc., *supra*, at 138, 92 I.D. at 622, text at note 5.

been surprised by this issue. 90 IBLA at 138, 92 I.D. at 622. Nevertheless, we grant reconsideration because we did not decide an issue presented by the parties, namely, whether the power site classification prior to the enactment of the Alaska Statehood Act prevented the passage of title to the beds beneath navigable portions of the Susitna River to the State pursuant to section 6(m) of the Alaska Statehood Act and the Submerged Lands Act. ^{4/} Instead, we held that CIRI was entitled to select land including the beds beneath navigable portions of the Susitna River pursuant to section 12(e) of P.L. 94-204, 89 Stat. 1153, 43 U.S.C. § 1611 note (1982), enacted on January 2, 1976. That subsection provides:

The Secretary may, notwithstanding any other provision of law to the contrary, convey title to lands and interests in lands selected by Native corporations within the exterior boundaries of Power Site Classification 443, February 13, 1958, to such corporations, subject to the reservations required by section 24 of the Federal Power Act. This conveyance shall be considered and treated as a conveyance under the Settlement Act.

In holding that this provision authorized conveyance to CIRI of land beneath navigable portions of the Susitna River within the power site withdrawal, we focused on the fact that the authority was granted "notwithstanding any other provision of law" and that the statute made no express exception for lands beneath navigable waters. 90 IBLA at 141, 92

I.D. at 623. Thus, we

^{4/} Section 6(m) of the Alaska Statehood Act, P.L. 85-508, 72 Stat. 343, 48 U.S.C. note preceding section 21 (1982), provides: "The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder." The provisions of the Submerged Lands Act are codified at 43 U.S.C. §§ 1301, 1311-1315 (1982).

construed section 12(e) as authorizing the conveyance to CIRI of land that may have passed to the State of Alaska.

[1] This Board has recently observed that legislation passed by Congress concerning disposition of the public lands cannot generally be construed as authorizing the transfer of title to lands previously conveyed out of Federal ownership and which are no longer part of the public domain. Heirs of Doreen Itta, 97 IBLA 261 (1987); Matilda Titus, 92 IBLA 340, 351 (1986) (Grant, A. J., concurring). "To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment." *Id.* A well-established principle of statutory construction counsels avoidance of an interpretation of a statute that would raise a serious doubt of its constitutionality. See Califano v. Yamasaki, 442 U.S. 682, 692-93 (1979); see also United States v. Clark, 445 U.S. 23, 27 (1980); 2A Sutherland Stat. Const. § 45.11 (4th ed. 1984). By interpreting section 12(e) to authorize the conveyance to CIRI of land beneath navigable portions of the Susitna River that may have passed to the State, we did not focus upon this principle.

Under the circumstances it is proper to grant reconsideration of this matter in order to decide whether land beneath the navigable portions of the Susitna River within the exterior boundaries of the power site classification passed to the State of Alaska upon statehood or whether the classification had the effect of reserving those lands so as to make them available to CIRI under section 12(e). In our prior decision, we noted BLM's view that a

withdrawal of the land would have precluded such a conveyance to the State, but a classification would not. 90 IBLA at 138-39 n.8, 92 I.D. at 625-26 n.8. BLM's response to the State's petition acknowledged the distinction between a classification and a withdrawal, see note 3, *supra*, but noted that one court had held that a classification precluded State ownership. See State of Utah v. United States, 780 F.2d 1515 (10th Cir. 1985).

[3] Any doubt arising from that Court of Appeals opinion was erased when the Court of Appeals was reversed by the Supreme Court. Utah Division of State Lands v. United States, ___U.S. ___, 107 S. Ct. 2318 (1987). The Court held that title to the bed of Utah Lake passed to Utah upon that State's admission to the Union in 1896, notwithstanding the reservation of the lake as a reservoir site prior to statehood. In reaching this holding, the Court stated certain principles that must be followed when determining whether a state has title to land beneath navigable waters:

[W]e do not lightly infer a congressional intent to defeat a State's title to land under navigable waters:

"[T]he United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future States, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." United States v. Holt State Bank, 270 U.S. 49, 55, 46 S.Ct. 197, 199, 70 L.Ed. 465 (1926).

We have stated that "[a] court deciding a question of title to the bed of a navigable water must . . . begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance unless the intention was definitely declared or otherwise made very plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the waters of the stream." Montana v. United States, 450 U.S. 544, 552, 101 S.Ct. 1245, 1251, 67 L.Ed.2d 493 (1981) (internal quotations and citations omitted). Indeed, in only a single case--Choctaw Nation v. Oklahoma, 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970)--have we concluded that Congress intended to grant sovereign lands to a private party. The holding in Choctaw Nation, moreover, rested on the unusual history behind the Indian treaties at issue in that case, and indispensable to the holding was a promise to the Indian Tribe that no part of the reservation would become part of a state. Montana v. United States, *supra*, 450 U.S., at 555, n. 5, 101 S.Ct., at 1253, n. 5. Choctaw Nation was thus literally a "singular exception," in which the result depended "on very peculiar circumstances." Ibid.

107 S. Ct. at 2321.

After setting forth the foregoing principles which apply to conveyances made prior to statehood, the Court extended them to reservations:

Given the longstanding policy of holding land under navigable waters for the ultimate benefit of the States, therefore, we would not infer an intent to defeat a State's equal footing entitlement from the mere act of reservation itself. Assuming arguendo that a reservation of land could be effective to overcome the strong presumption against the defeat of state title, the United States would not merely be required to establish that Congress clearly intended to include land under navigable waters within the federal reservation; the United States would additionally have to establish that Congress affirmatively intended to defeat the future State's title to such land.

107 S. Ct. at 2323-24. Although the Court acknowledged references to the lakebed in material submitted to Congress, it found "no unambiguous evidence

that members of Congress actually understood these references as pointing to a reservation of the bed of Utah Lake." Id. at 2326.

The instant case involves the effect of a power site classification, not a treaty entered prior to statehood as in Choctaw Nation, supra. Neither the statute authorizing the power site classification nor section 12(e) of Public Law 94-204 authorizing selection of the land by CIRI makes it "very plain" or states in "clear and especial words" that the Congress intended that the State of Alaska was not to obtain title to land beneath navigable portions of the Susitna River.

[3] Applying the principles set forth in the Supreme Court's decision, we conclude that our holding that section 12(e) authorized conveyance of land beneath navigable portions of the Susitna River to CIRI was in error. We now hold that section 12(e) authorized conveyance of all land within Power Site Classification 443, but did not authorize conveyance of the land beneath navigable portions of the Susitna River (because such land had previously passed to the State pursuant to the Alaska Statehood Act), and that BLM's September 30, 1983, decision is properly interpreted as excluding the lands beneath the navigable portions of the Susitna River from conveyance. Our resolution of this matter on the basis of the principles announced in the Supreme Court's decision makes it unnecessary for us to discuss other points raised in the petition for reconsideration, the responses, or the other documents filed in this matter.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, our decision in Cook Inlet Region, Inc., supra, is overruled in part and the matter is remanded to BLM to clarify its decision to issue conveyance, dated September 30, 1983, by expressly excluding land beneath navigable portions of the Susitna River.

Will A. Irwin
Administrative Judge

We concur:

R. W. Mullen
Administrative Judge

Gail M. Frazier
Administrative Judge.

