

STATE OF ALASKA

IBLA 86-1500; 87-116

Decided October 13, 1993

Consolidated appeals from decisions of the Alaska State Office, Bureau of Land Management, approving the conveyance to Native Corporations of certain land including tidelands reserved for lighthouse purposes.

Affirmed.

1. Navigable Waters--State Grants--State Lands--Submerged Lands--Submerged Lands Act: Generally--Submerged Lands Act: State Laws--Submerged Lands Act: State Sovereignty--Tidelands--Withdrawals and Reservations: Effects of

In sec. 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a) (1988), Congress codified its power to reserve tideland from a state's equal footing entitlement when a state enters the Union by specifically excluding from operation of that Act "all lands expressly retained by or ceded to the United States when the State entered the Union * * * and any rights the United States has in lands presently and actually occupied by the United States under claim of right."

2. Navigable Waters--State Grants--State Lands--Submerged Lands--Tidelands--Withdrawals and Reservations: Effects of

The Supreme Court has articulated a two-pronged test to determine whether a Federal reservation of public land defeats a state's equal footing entitlement: (1) that Congress clearly intended to include land beneath navigable waters (or tideland) within the reservation and (2) affirmatively intended to defeat future state title to such land.

3. Alaska: Navigable Waters: Generally--Alaska: Statehood Act--Navigable Waters--State Grants--State Lands--Submerged Lands--Tidelands--Withdrawals and Reservations: Effects of

The reservation of the power of exclusive legislation in sec. 11(b) of the Alaska Statehood Act is expressly predicated on the fact of continued Federal ownership of parcels held for Coast Guard purposes, and Congress intended to retain ownership over tidelands reserved

for lighthouse purposes by defeating the State's equal footing entitlement.

APPEARANCES: Joanne M. Grace, Esq., Assistant Attorney General, Anchorage, Alaska, for appellant; J. P. Tangen, Esq., Regional Solicitor, for the Bureau of Land Management; Cynthia Pickering Christianson, Esq., Anchorage, Alaska, for Haida Corporation.

OPINION BY ADMINISTRATIVE JUDGE KELLY

These are consolidated appeals by the State of Alaska from decisions of the Alaska State Office, Bureau of Land Management (BLM), approving the conveyance to Native Corporations of certain land including tidelands reserved for lighthouse purposes under Exec. Order No. 3406 (Feb. 3, 1921). 1/ The

1/ The State's appeal docketed as IBLA 86-1500 is from a June 25, 1986, decision of BLM's Alaska State Office rejecting State Selection Application A-057388 to the extent that included land within U.S. Survey No. 1619, the Seldovia Bay Entrance Light #1 (formerly Gray Cliff Light). BLM determined that because the lands remain withdrawn and reserved by Exec. Order No. 3406, they are not available for selection because they are not "vacant, unappropriated, and unreserved" so as to be eligible for selection by the State under the Alaska Statehood Act of July 7, 1958.

The Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. §§ 1601-29a (1988) withdrew and made available for selection by Native Villages and Regional Corporations certain public lands except certain land in the National Park System or withdrawn for defense purposes. The statute defined "public lands" as "all Federal lands and interests therein located in Alaska" with two exceptions, one of which was "the smallest practicable tract * * * enclosing land actually used in connection with the administration of any Federal installation." 43 U.S.C. § 1602(e) (1988). BLM calls its determination of the "smallest practicable tract" a "3(e) determination" which in this case was assigned serial number AA-12825. BLM determined that the land was not withdrawn for defense purposes and was available for selection under this statute, subject to whatever reservations or easements were needed to satisfy the Coast Guard's concerns for access to and maintenance of the light. Accordingly, BLM approved conveyance of the parcel to the Seldovia Native Association, Inc., for the village of Seldovia pursuant to Native Village Selection Application AA-6701-A. The decision disapproved conveyance to Cook Inlet Region, Inc., (CIRI) pursuant to regional selection AA-11153-10, but recognized that CIRI would get title to the subsurface estate.

The State did not object to conveyance of the upland portion of the parcel to Seldovia, and by order dated Apr. 1, 1987, the upland parcel was segregated from the tideland parcels over which we retained jurisdiction.

The State's appeal docketed as IBLA 87-116 is from a Sept. 22, 1986, decision of BLM's Alaska State Office approving conveyance of the Hydaburg Light, also called the Sukkwon Narrows Light, to Haida Corporation pursuant to Village Selection AA-6981-A, after making the 3(e) determination serialized as AA-29015. The parcel is described in U.S. Survey No. 1647 and was also reserved by Exec. Order No. 3406.

State contends that it acquired title to the tidelands upon its admission to the Union. BLM contends that the United States retained title to these reserved tidelands under the Alaska Statehood Act, P.L. 85-508, 72 Stat. 339 (1958), 48 U.S.C. Note Preceding § 21 (1988), and the Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1988).

Tidelands are land over which "the tide ebbs and flows . . . land as is affected by the tide." Phillips Petroleum Co. v. Mississippi, 484 U.S. 477 n.6 (1988), quoting Black's Law Dictionary 1329 (5th ed. 1979). It is well established that states acquire title to tideland and land beneath navigable water as an incident of sovereignty upon attaining statehood. Id.; Shively v. Bowlby, 152 U.S. 1 (1894); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). This entitlement arises from the requirement that new states be admitted on an "equal footing" with existing states. Id.

Prior to statehood, the Federal Government is said to hold title to tidelands and land beneath navigable waters in trust for future states. Shively v. Bowlby, supra; Pollard's Lessee v. Hagan, supra. Notwithstanding the fact that such lands are said to be held in trust, a state's "equal footing" entitlement can be defeated by the conveyance of the tideland prior to statehood. Prosser v. No. Pac. R.R. Co., 152 U.S. 59, 64 (1894); Shively v. Bowlby, supra.

[1] Forty years ago, Congress enacted the Submerged Lands Act, supra, granting and confirming to the states title to land beneath navigable waters, tidelands, and the marginal sea. Section 5(a) of that statute expressly codifies the power of the Federal Government to reserve tideland from a state's equal footing entitlement when a state enters the Union by specifically excluding from operation of the Submerged Lands Act "all lands expressly retained by or ceded to the United States when the State entered the Union * * * and any rights the United States has in lands presently and actually occupied by the United States under claim of right." 43 U.S.C. § 1313(a) (1988). Because this statute operates only upon land beneath the marginal sea and upon land to which a state's equal footing entitlement would ordinarily attach, the intention of Congress that title to such land can be retained at statehood "was definitely declared or otherwise made very plain." United States v. Holt State Bank, 270 U.S. 49, 55 (1926). In Alabama v. Texas, 347 U.S. 272 (1954), the Court sustained the constitutionality of other provisions of the Submerged Lands Act, characterizing the power of the Federal Government to regulate and dispose of its property under art. IV, § 3, cl. 2 of the Constitution as "without limitation." This constitutional power extends to lands such as those at issue here. Hynes v. Grimes Packing Co., 337 U.S. 86, 116 (1949); Alaska Pacific Fisheries Co. v. United States, 248 U.S. 78, 87 (1918). Section 6(m) of the Alaska Statehood Act makes the Submerged Lands Act applicable to Alaska, and BLM contends that these lighthouse tidelands were reserved along with land beneath navigable waters in other military withdrawals by provisions of the Statehood Act, particularly section 11(b).

[2] While these appeals were pending, the Supreme Court of the United States issued its decision in Utah Division of State Lands v. United States, 482 U.S. 193 (1987) (Utah Lake), holding 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. The Court observed that it has "never decided whether Congress may defeat a state's claim to title by a federal reservation or withdrawal of land under navigable waters," Utah Lake, supra at 200, and avoided this issue by finding that the land underlying Utah Lake had not been reserved. Nevertheless, the Court, "[a]ssuming, arguendo, that a reservation of land could be effective to overcome the strong presumption against the defeat of state title," id. at 202, articulated a two-pronged test to determine whether a reservation defeats a state's equal footing entitlement: (1) that Congress clearly intended to include land beneath navigable waters (or tideland) within the reservation and (2) affirmatively intended to defeat future state title to such land.

Consideration of these appeals was suspended at BLM's request pending further guidance from the Secretary concerning the effect of the Utah Lake decision on withdrawn lands in Alaska. ^{2/} We lifted this stay by order dated July 29, 1992, after the Solicitor issued an opinion approved by the Secretary that concluded that the withdrawal effected by Public Land Order (PLO) 82 (Jan. 22, 1943) satisfied the requirements stated in the Utah Lake decision so that it included land beneath inland navigable water which did not pass to the State. Solicitor's Opinion M-36911 (Supp. 1), "Ownership of Submerged Lands in Northern Alaska in Light of Utah Division of State Lands v. United States," 100 I.D. 103 (1992). Briefing in these appeals was completed on June 14, 1993.

The Solicitor's Opinion acknowledged the two-pronged test articulated in the Utah Lake decision but found no indication that the Court intended to create a new principle of law or to place an impossible burden on the Federal government's ability to show that it has exercised its constitutional power to reserve its own property for its own use. Solicitor's Opinion, supra at 119, 124. The Solicitor's Opinion expressly limited the controlling effect of its analysis to cases involving lands withdrawn by PLO 82, and stated that it does not determine the effect of the Utah Lake decision in another appeal involving land beneath the Katella River. Id. at 106 n.17. This limitation follows from the fact that the Court required analysis of the intent of a withdrawal, and the only withdrawals considered by the Solicitor were those involving lands affected

^{2/} When we consolidated these appeals in our Oct. 24, 1988, order, we referred to the Utah Lake decision and directed BLM to show cause why its decisions should not be reversed. By memorandum dated Dec. 20, 1988, the Secretary invoked his authority under 43 CFR 4.5 and directed that we stay consideration of State of Alaska, Morgan Coal Co., IBLA 86-1234 (order dated June 24, 1988) which involved land withdrawn under PLO 82 and reopen and stay, State of Alaska, 102 IBLA 357 (1988), involving land beneath the Katella River in the Chugach National Forest pending further guidance from him. Upon BLM's request, we likewise stayed consideration of these appeals by order dated Jan. 10, 1989, pending further guidance by the Secretary.

by PLO 82. ^{3/} Nevertheless, the Solicitor's analysis also construes authorities such as the Submerged Lands Act and the Alaska Statehood Act which also pertain to the disposition of this appeal, and we will follow the guidance provided by the Solicitor's Opinion on issues common to these appeals. Accordingly, we now focus on the following issues that must be decided in light of the Utah Lake decision: (1) whether Exec. Order No. 3406 intended to reserve tidelands, and (2) whether there was the requisite intent to defeat Alaska's equal footing entitlement.

[3] Exec. Order No. 3406 withdrew 168 parcels, and there can be no doubt that it satisfies the first prong of the Utah Lake case because it expressly reserves tidelands, making further examination of intent unnecessary. The second prong of the Utah Lake test requires evidence of intent to defeat Alaska's equal footing entitlement. The State contends that there was no intent to defeat the State's title, and that the purposes of the reservation could nevertheless continue, much as the Supreme Court found that transfer of the bed of Utah Lake to the State would not necessarily prevent the United States from subsequently developing a water project on the site. Utah Lake, *supra* at 208. The State also points to the survey plats for these parcels which note that the tidelands are surveyed for the purpose of the reservation and not for purposes of disposal. We view this notation merely as a reflection of the rule that laws authorizing disposition of public lands generally do not authorize disposition of tideland. See Shively v. Bowlby, *supra* at 58. The notation does not negate any intention to retain such land.

As we noted above, the Submerged Lands Act expressly acknowledges the Federal Government's authority to retain title to tideland at the time of statehood. Although the Court in Utah Lake did not refer to the Submerged Lands Act, this statute satisfies some of the Court's concerns. As noted above, the intention of Congress that title to tideland can be retained at statehood "was definitely declared or otherwise made very plain," United States v. Holt State Bank, *supra* at 55, quoted in Utah Lake, *supra* at 202. The Act "affirmatively" establishes how "to defeat the future State's title to such land," as required in Utah Lake, *supra* at 202. Thus, the only issue to be decided is whether Congress did so at the time of Alaska's admission.

Two Federal cases directly pertain to the issues raised by the State in these appeals: United States v. State of Alaska, 423 F.2d 764 (9th Cir.), *cert. denied*, 400 U.S. 967 (1970); and United States v. City of Anchorage, State of Alaska, 437 F.2d 1081, (9th Cir. 1971). In the first case, the court held that land beneath a navigable lake was reserved by an Executive

^{3/} PLO 82 described a vast area of Alaska with no specific mention that land beneath navigable waters was reserved with the upland. As evidence of intent to reserve such land in order to satisfy the first prong of the Utah Lake test, the Solicitor relied upon the well established rule that such an intent may be established by necessary implication from the purposes of a withdrawal. Solicitor's Opinion, *supra* at 126-27, *citing* Alaska Pacific Fisheries Co. v. United States, *supra*, and Hynes v. Grimes Packing Co., *supra*.

order creating a moose range and did not pass to Alaska at the time of statehood. In rejecting the State's argument that the Submerged Lands Act confirmed Alaska's title to that land at the time of statehood, the court stated:

Specifically excluded from the operation of the Act are "* * * all lands expressly retained by or ceded to the United States when the State entered the Union * * * and any rights the United States has in lands presently and actually occupied by the United States under claim of right." 43 U.S.C. § 1313. The provisions of § 6(e) of the Statehood Act, 72 Stat. 339, 341, specifically exclude all land and water previously withdrawn. * * *

Admittedly, Alaska was admitted to the Union on an equal footing with other states. However, this does not mean that the President had no power to previously promulgate the Executive Order here under scrutiny. If, as we now hold, the language of the Order is sufficiently clear to withdraw the water of the lake and the submerged land, the state's rights, if any, are subsequent in time and inferior in right to those of the [United States]. Alaska, like other states, except possibly the original thirteen, had no indefeasible right to statehood. While holding the country as a Territory, the United States had all the powers of a Sovereign and, if it saw fit, might even grant rights in and titles to lands which would normally go to a state on its admission.

United States v. State of Alaska, supra at 768; accord, United States v. City of Anchorage, State of Alaska, supra (reservation of tidelands for Alaska Railroad). The Solicitor's Opinion, supra at 138-39, concluded that title to submerged land within the Arctic National Wildlife Refuge was likewise retained under section 6(e) of the Statehood Act which precluded transfer to the state of land withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife.

A different provision of the Statehood Act, however, must operate to retain title to the tidelands reserved for lighthouse purposes in this appeal. In determining whether the second prong of the Utah Lake test was satisfied for land within the PLO 82 withdrawal, the Solicitor reviewed the extensive legislative history concerning land held for military purposes. He concluded that Congress intended to retain title to submerged land held for such purposes and that Congress expressed that intent by enacting section 11(b) of the Statehood Act, which provides in pertinent part as follows:

Notwithstanding the admission of the State of Alaska into the Union, authority is reserved in the United States, subject to the proviso hereinafter set forth, for the exercise by the Congress of the United States of the power of exclusive legislation, as provided by article I, section 8, clause 17, of the Constitution of the United States, in all cases whatsoever over such tracts and parcels of land as, immediately prior to the admission of said State, are owned by the United States and

held for military, naval, Air Force, or Coast Guard purposes, including naval petroleum reserve numbered 4, whether such lands were acquired by cession and transfer to the United States by Russia and set aside by Act of Congress or by Executive Order or proclamation of the President or the Governor of Alaska for the use of the United States, or were acquired by the United States by purchase, condemnation, donation, exchange, or otherwise. [Emphasis added.]

In the case at hand, the tidelands in the lighthouse sites likewise fall within the scope of this provision. They were owned by the United States and held for Coast Guard purposes immediately prior to the admission of Alaska and were set aside by Executive order for the use of the United States.

The State points out that section 11(b) concerns legislative jurisdiction, not title, and argues that retention of title is not necessary for the exercise of legislative jurisdiction (as distinguished from ownership "immediately prior to" statehood) (State's Reply at 13). In making this contention, the State misses the point of BLM's argument as well as the Utah Lake decision. The issue to be determined is whether the reservation of the tideland was intended to defeat Alaska's equal footing entitlement. The reservation of the power of exclusive legislation in section 11(b) is expressly predicated on the fact of continued Federal ownership of the parcels held for Coast Guard purposes. If Federal ownership did not continue past the date of admission, the legislative jurisdiction that Congress intended to maintain would actually cease under the proviso of section 11(b)(iii). See Solicitor's Opinion, supra at 156. As the descriptions of the parcels in Exec. Order No. 3406 make clear, some of those parcels are entirely tideland. Thus, Congress intended to retain ownership over the property at issue by defeating the State's equal footing entitlement. See Solicitor's Opinion, supra at 152-57.

Although the State asserts that the Federal Government cannot defeat state title to tideland as a condition of statehood, none of the cases cited by the State decides the issue of whether the Federal Government can exercise its express authority under the Property Clause of the Constitution, art. IV, § 3, cl. 2, with such effect. See State's Reply, 3-9. The cases cited by appellant simply reflect that once title has passed to a state upon statehood, the state controls disposition of the land. As the Court in Utah Lake acknowledged, its prior decisions do not directly rule on the issue of whether the Federal Government can retain title to the land.

One of the cases principally relied on by Alaska is Coyle v. Oklahoma, 221 U.S. 559 (1911), in which the Court applied the equal footing doctrine derived from Pollard's Lessee v. Hagan, supra, and concluded that Congress could not impose in a statehood act a condition limiting the power of a state to choose the location of its capital. Significantly, however, the Court recognized that statehood legislation could embrace "regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress * * * because the power of Congress extended to the

subject." Coyle v. Oklahoma, *supra* at 574. As we noted above, the Court recognized that this power extended to submerged lands. Hynes v. Grimes Packing Co., *supra* at 116; Alaska Pacific Fisheries Co. v. United States, *supra* at 87.

The fact that BLM now proposes to convey these lands does not revive the State's claim. Under section 4 of the Statehood Act, Alaska disclaimed right and title to property not confirmed to the State under the Act, title to which is held by the United States. See Solicitor's Opinion, M-36911, 86 I.D. 151, 174 n.34 (1978) and accompanying text. Because title to the tidelands at issue here was retained under section 11(b) of the Statehood Act as provided by section 5(a) of the Submerged Lands Act (made applicable to Alaska by section 6(m) of the Statehood Act), the disclaimer in section 4 of the Statehood Act pertains to these tidelands. Under section 3(e) of the ANCSA, 43 U.S.C. § 1602(e) (1988), such land is "public land" available for conveyance under a proper Native Village selection. See State of Alaska, 3 ANCAB 297, 86 I.D. 381 (1979).

To the extent the State has raised arguments which we have not specifically addressed herein, they have been considered and rejected.

Therefore, 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.

John H. Kelly
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge