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Oil and Wildlife Along the Frozen Arctic Coast: The Saga of a Federal-State Struggle Over the Arctic National Wildlife Refuge

by William L. Andreen

Case at a Glance

Not just private individuals have disputes over land ownership. In this case which is nearing its eighteenth anniversary, the United States and Alaska are in a tug of war over ownership of off-shore, submerged lands which may contain oil and gas reserves. Alaska asserts ownership so it can develop any reserves that may exist; the United States asserts ownership to preserve abundant fish and other wildlife in a large adjacent wildlife refuge.

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EDITORS NOTE

In original jurisdiction cases, the Supreme Court is both the trial court and the appellate court. However, the Court itself does not hear an original jurisdiction case in the first instance; instead, it assigns the case to a Special Master who, on behalf of the Court, actually tries the issues presented. After trial, the Special Master presents a report and recommended decision to the Supreme Court. In reviewing the report and recommendation, the Court functions in its familiar role as an appellate court. The parties to the case are entitled to contest the Special Master's report and recommendation by filing exceptions with the Court. The Court then reviews the report and recommendation of the Special Master and any exceptions of the parties and makes a decision. On occasion, as in this case, the Court will hold oral arguments on the exceptions before reaching a decision.

The United States invoked the original jurisdiction of the Supreme Court, U.S. CONST. art. III, § 2, ¶ 2, in a dispute with Alaska over the ownership of certain submerged lands lying off the Arctic Coast of Alaska. The lands at issue include ecologically sensitive areas located in or adjacent to the Arctic National Wildlife Refuge (the "Wildlife Refuge" or the "Refuge").

The United States claims that certain submerged lands located within three miles of the coast — lands that ordinarily would have been conveyed to Alaska at the time of statehood — were retained by the United States. Alaska, on the other hand, claims that the Executive Branch either lacked the legal authority to retain ownership of these lands or failed to exercise its authority properly.

Although the dispute between the United States and Alaska involves a fairly obscure area of law, it is of great practical importance because oil and gas deposits may be present offshore. Should Alaska prevail on its claims to the submerged areas in or along the edge of the Refuge, the State appears likely to grant leases permitting oil and gas exploration and development in an area of rich biological diversity.

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UNITED STATES V. ALASKA

NO. 84, ORIGINAL JURISDICTION
ARGUMENT DATE:
FEBRUARY 24, 1997

FACTS

The Arctic Coast of Alaska is a harsh and haunting place. The sun never shines in winter and never sets during the short Arctic summer. The coastal plain is tundra. Trees do not grow here for none can endure the darkness and winter temperatures that sometimes sink below minus-70 degrees Fahrenheit. Only a few inches below the tundra lies permafrost.

While forbidding to humans, the coastal plain and its offshore waters are rich in wildlife; this is true especially of the Wildlife Refuge which is one of the more primitive and isolated areas on earth. Encompassing over 18 million acres in northeastern Alaska, the Refuge was set aside to protect a uniquely productive fish and wildlife habitat.

In the short Alaska summer, thousands of caribou roam the tundra within the Refuge and, with millions of mosquitoes in hot pursuit, the caribou often take cover in the salty coastal water. Joining the caribou on the coastal plain are large numbers of grizzly bears, musk oxen, wolves, and Arctic foxes. The coastal lagoons and marshes, meanwhile, teem with fish which attract migratory birds in abundance and encourage polar bears to den in the vicinity.

Valuable oil and gas deposits, however, are thought to be present along the northern coastline. Indeed, it is the presence of these deposits that makes the ownership dispute over the Refuge's offshore, submerged lands all the more salient, especially because oil and gas production was prohibited by Congress in 1980 when it enlarged the Refuge. 16 U.S.C. § 3143 (1994) (no oil or gas development or production in the Wildlife Refuge "until authorized by an act of Congress").

The United States commenced this action against the State of Alaska in an effort to exert ownership over a relatively small portion of the coastal seabed lying near the existing oil-producing area of Prudhoe Bay. Alaska, in turn, counterclaimed against the United States, seeking an order declaring its title to a broader range of submerged lands, including submerged lands lying inside the barrier islands located along the northern edge of the Refuge.

It has long been recognized that states, upon admission to the Union, succeed the United States in the ownership of lands underlying navigable waters located inside state boundaries. *Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212 (1845). This rule is sometimes referred to as the Equal Footing Doctrine in recognition of the fact that when the 13 colonies became states they took ownership of the lands beneath their navigable waters, and the view that new states should have the same ownership rights as the original states.

The Equal Footing Doctrine was clarified, or perhaps qualified, in 1947 when the Supreme Court declared that national rights were supreme in the water and lands lying seaward of the coastline. *United States v. California,* 332 U.S. 19 (1947). Therefore, while states receive title to lands underlying inland waters such as rivers and lakes, the United States retained title to the lands beneath the three-mile territorial sea.

Congress acted in 1953 to undo the holding of *United States v. California* by passing the Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1994), which grants coastal states title to offshore, submerged lands extending three miles to sea. But the Submerged Lands Act also provides that coastal states do not take title to "lands expressly retained by . . . the United States when the state entered the Union . . . ." 43 U.S.C. § 1313(a).

The Supreme Court in *United States v. Louisiana,* 446 U.S. 253 (1980), held that the Submerged Lands Act was a proper exercise of Congress' constitutional authority to transfer and dispose of federal property. U.S. CONST. art. IV, § 3, ¶ 2.

When Alaska became a state in 1959, it joined the Union pursuant to the terms of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), which explicitly applied the provisions of the Submerged Lands Act. Alaska, therefore, received title to the offshore, submerged lands within three miles of the coastline except, in the words of the Submerged Lands Act, for those lands "expressly retained by . . . the United States" at the time of statehood. While the Alaska Statehood Act provided, in general, that the United States would retain title to all public lands in Alaska, a number of exceptions were made including public lands used for the conservation and protection of Alaskan fisheries and wildlife. Such conservation land would be transferred to Alaska unless it had been "withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." 72 Stat. at 340-41.

In 1957, while Alaska was still a territory, the Bureau of Sport Fisheries and Wildlife of the United States Department of the Interior (the "Wildlife Bureau") submitted an application for withdrawal to the Secretary of the Department of the Interior (the "Interior Secretary" or the "Secretary"), seeking to set aside a large area of public lands in the northeastern part of the Territory of Alaska, an area that is now the Wildlife Refuge. The

Interior Secretary, however, did not formally withdraw the area and create the Refuge until December 1960, almost two years after Alaska had attained statehood in January 1959.

Although the United States and Alaska agree that the upland areas in the Wildlife Refuge were properly withdrawn and remained in federal ownership after Alaska's statehood, they disagree about which governmental entity owns the offshore, submerged lands lying along the northern rim of the Refuge. The northern boundary of the Refuge is defined as the "line of extreme low water, including all offshore bars, reefs, and islands." The question, consequently, is whether lands under the tidally influenced waters along the northern rim of the Refuge — lagoons, tidelands, and so on — lying between the mainland and the offshore bars, reefs, and islands were withdrawn as part of the Refuge or form a portion of Alaska's three-mile coastal belt under the Submerged Lands Act. If they were withdrawn, they belong to the United States; if they were not, they belong to Alaska.

Case Analysis

Alaska contends that only Congress could reserve United States ownership of the offshore, submerged lands. In other words, Alaska argues that the attempt to withdraw the land composing the Refuge by the Wildlife Bureau and Interior Secretary's post-statehood action approving the withdrawal application were insufficient to establish the United States' ownership over the submerged lands adjacent to the Refuge.

The United States, by contrast, argues that the reservation of the onshore lands for the Refuge also encompassed a reservation of offshore, submerged lands. According to the United States, not only could the Executive Branch, acting through the Interior Secretary, effectively withdraw the lands, it did so by virtue of a substantive administrative rule under which a withdrawal application "shall temporarily segregate such lands from settlement . . . lease, and other forms of disposal under the public lands laws . . . ."

This and related questions were briefed and argued before Special Master J. Keith Mann who then recommended that the Court hold that the application for withdrawal and its subsequent approval by the Interior Secretary which created the Refuge had not withdrawn any tidally influenced submerged lands from Alaska's ownership. While the Special Master found that the withdrawal application together with the administrative rule temporarily segregated the submerged lands of the Wildlife Refuge for wildlife protection purposes, he further found that they did not have the effect of permanently setting the area apart as a refuge under the language of the Alaska Statehood Act. In other words, the Special Master ruled that the offshore, submerged lands at issue were not "withdrawn or otherwise set apart as refuges or reservations" because the Interior Secretary did not approve the Wildlife Bureau's application until after the date of statehood. In fact, the Special Master was quite troubled by the prospect that had the Secretary rejected the application, the lands, if deemed withdrawn or set apart by the application, might remain in federal hands, even though the Secretary later found no real need for the withdrawal.

Recognizing the possibility that the Supreme Court might reject his recommendation, the Special Master addressed the issue that would arise in the event the Wildlife Bureau's withdrawal application were deemed effective by the Court: What offshore, submerged lands were covered by the application? After discussing the boundary description and various other indications of intent, the Special Master concluded that the offshore, submerged lands in question were within the intended borders of the Wildlife Refuge.

The United States contests the Special Master's recommendation concerning the ineffectiveness of the Wildlife Bureau's withdrawal request. It argues that the Special Master's distinction between setting land aside as a refuge as opposed to a temporary segregation to protect wildlife is formalistic and inconsistent with the normal use of these words. According to the United States, if Congress had meant to retain title only to lands that had been conclusively dedicated to a public purpose, it would have used only the word "reservation" in the Alaska Statehood Act, rather than the broader terminology of "lands withdrawn *or otherwise set apart* as refuges." (Emphasis supplied.) In fact, the statutory phrase "otherwise set apart as refuges" well describes lands that have been set aside for that purpose by administrative request, pending further administrative or legislative action.

The United States also addresses the Special Master's concern over ownership of the Refuge's offshore, submerged lands in the event the Interior Secretary eventually denied the Wildlife Bureau's withdrawal request. In that event, says the United States, it would continue to own the offshore, submerged lands until such time as Alaska could convince Congress to convey them to the State — a not unlikely prospect, says the United States, given the fact that the Wildlife Refuge might never have come into existence because of the Interior Secretary's

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failure to act of the withdrawal application prior to Alaska's statehood.

Alaska, on the other hand, maintains that the Special Master was correct in concluding that the Wildlife Bureau's withdrawal application failed to set these lands aside. For example, the withdrawal application did not effectuate a transfer of administrative jurisdiction over the segregated lands from the Bureau of Land Management to the specific office within the Department of the Interior responsible for managing formally designated refuges.

Alaska argues further that the legislative history fails to demonstrate that Congress considered the Wildlife Bureau's application alone as sufficient to set lands apart. In fact, the Deputy Solicitor of the Department of the Interior opined in 1959 that another prestatehood application for withdrawal of submerged lands did not prevent their passing to Alaska.

On a more fundamental level, however, Alaska relies on the Equal Footing Doctrine to claim that the land at issue would have passed to it even if a formal order creating the Refuge had been issued prior to statehood. Alaska argues that the strong presumption against divesting a state's entitlement to lands underlying inland navigable waters extends to offshore, submerged lands. Indeed, Alaska maintains that the Submerged Lands Act was intended to reverse the Supreme Court's decision in *United States v. California* and to apply the Equal Footing Doctrine to offshore, submerged lands. Thus, in Alaska's view, only Congress can defeat a future state's title in offshore, submerged lands prior to statehood and, then, only in the most extreme of circumstances and using the clearest of terms.

The United States responds that, although the Department of the Interior agency administering the Refuge did not change at the time the withdrawal application was made, the area thenceforth was administered in accordance with the rules governing wildlife refuges. The United States also points out that the opinion of the Deputy Solicitor relied upon by Alaska was repudiated in a published decision rendered by the Solicitor of the Department of the Interior.

Finally, the United States calls attention once again to *United States v. California* as well as to a subsequent line of Supreme Court cases that refused to extend the Equal Footing Doctrine to coastal, submerged lands. Although the United States concedes that the Submerged Lands Act made a substantial grant of federal lands to coastal states, it insists that the grant was limited. In other words, the Court's decision in *United States v. California* was not annulled by the Submerged Lands Act because the statute withheld from a state "all lands expressly retained by or ceded to the United States when the state entered the Union . . . ." 43 U.S.C. § 1313(a).

SIGNIFICANCE

This case presents yet another contest between development and preservation. If Alaska prevails, it will have the sole authority to decide if the offshore, submerged lands of the Wildlife Refuge will be opened to oil and gas exploration and production. Indeed, Alaska officials have indicated that they expect to grant exploration and production rights as soon as 1999. If the United States prevails, such development would require an act of Congress.

ATTORNEYS OF THE PARTIES

For the United States (Walter Dellinger, Acting Solicitor General; (202) 514-2217).

For the State of Alaska (Counsel of Record: Bruce M. Botelho, Attorney General of the State of Alaska; (907) 465-3600).

AMICUS BRIEFS

In support of the United States
Joint brief of the Wilderness Society, Sierra Club, Alaska Wilderness League, National Audubon Society, Porcupine Caribou Management Board, Alaska Center for the Environment, Northern Alaska Environmental Center, and Trustees for Alaska (Counsel of Record: Peter Van Tuyn; Trustees for Alaska; (907) 276-4244).

In support of the State of Alaska
Joint brief of the State of Alabama, 14 other states, and the Virgin Islands (Counsel of Record: Daniel E. Lungren, Attorney General of the State of California; (916) 327-7853).