No. 84, Original

In The Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA,
Plaintiff,
v.
STATE OF ALASKA

PETITION FOR REHEARING

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INTRODUCTION

Pursuant to Supreme Court Rule 44.1, the State of Alaska petitions for rehearing of parts IV and V of the Court's June 19, 1997 decision in which the Court holds that Congress, when it admitted Alaska to the Union on an equal footing with the other States, nonetheless defeated Alaska's title to submerged lands in the National Petroleum Reserve—Alaska (the "Reserve") and the Arctic National Wildlife Refuge (the "Refuge") and retained those lands for itself.

The Court rests these holdings on three arguments that were neither raised by the United States during the eighteen years this case has been pending nor addressed by the Master in his 505 page report. These arguments depart fundamentally from the Court's prior equal footing doctrine decisions, and attribute to Congress a change in its basic policy with respect to the admission of new States.

Considerations of judicial restraint when dealing with an issue as monumental as the admission of a new State, recognition of the dramatic change these holdings mark in the Court's equal footing

doctrine jurisprudence, and respect for the effect of these holdings on the sovereign interests of all States suggest, at the very least, that Alaska be given the opportunity to address fully the arguments that the Court has raised *sua sponte*.

1. In parts IV and V, the Court holds that the United States need only show that a pre-statehood withdrawal and reservation serve an "appropriate public purpose," the minimum required under the Constitution, to establish that Congress intended to defeat State title to submerged lands. *United States v. Alaska*, No. 84, Orig. (United States Supreme Court June 19, 1997) (referred to herein as "Slip Op.") at 39 and 53. Without discussion, the Court thus attributes to Congress an intent to abandon its longstanding policy of defeating State title to submerged lands only in the "most unusual circumstances" and "exceptional instances" or of "international duty or public exigency"—*i.e.*, for the most compelling of reasons. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197 and 201 (1987) (citation and quotations omitted). This in effect reverses the strong presumption against defeat of State title, *see id.* at 197-198, and establishes a new rule that State title will be presumed defeated, for it would be a rare case indeed in which a pre-statehood withdrawal and reservation had no "appropriate public purpose." Nor can this new rule be limited to Alaska, for Congress in section 1 of the Alaska Statehood Act provided explicitly that Alaska was admitted to the Union "on an equal footing with the other States in all respects whatever." Alaska Statehood Act, Pub. L. No. 85-508, § 1, 72 Stat. 339 (1958) (reprinted as amended in 48 U.S.C. note preceding § 21 (1987)). Whatever rule applies to Alaska thus would seem to apply equally to other States.

2. The Court applies different legal rules to tidelands and lands beneath navigable bodies of water. Slip Op. at 35, 37-38 n.1, 50. The Court's equal footing doctrine cases and the Submerged Lands Act, however, make no such distinction. *See, e.g., Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 15 (1935), and equal footing doctrine cases cited therein; *see also* 43 U.S.C. § 1301(a)(2).

3. In part V, the Court misapprehends the legal effect of section 6(e) of the Alaska Statehood Act in concluding that, unless it defeated Alaska's title to submerged lands in the Refuge, it

would have transferred the uplands to Alaska as well. Slip Op. at 60-61. By its terms, section 6(e) transferred to Alaska only property "specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska." Alaska Statehood Act, *supra*, § 6(e). Because the Refuge was not established until after Alaska statehood, lands now included in the Refuge were not "specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska" at the time of Alaska's admission, and thus were not subject to transfer under section 6(e). *Id.*

I. In holding that the United States need identify only an "appropriate public purpose" for reserving submerged lands to defeat State title, the Court has established a new rule at odds with both its prior decisions and Congress's longstanding policy of defeating State title only in the most unusual and exceptional cases.

Citing *Shively v. Bowlby*, 152 U.S. 1, 48 (1894), the Court holds that the United States need only show that a pre-statehood conveyance or reservation serves an "appropriate public purpose" —the bare minimum required under the Constitution—to establish that Congress intended to defeat State title to submerged lands. Slip Op. at 38 and 53. In every such prior case, however, the Court recognized that Congress has unwaveringly held to a policy of defeating State title to submerged lands "*only* in case of some international duty or public exigency," "only in the most unusual circumstances," and "only in exceptional instances." *Utah*, 482 U.S. at 197 and 201 (citations and quotations omitted; emphasis in original). From this, the Court established a strong presumption against defeat of State title. *Id.* at 197.

In holding that the United States need only show that pre-statehood withdrawals and reservations serve an "appropriate public purpose" to establish that Congress intended to defeat a State's title, the Court necessarily attributes to Congress an intent to abandon its longstanding policy of defeating State title only in the most unusual and exceptional cases of responding to an international duty or a public exigency. Instead, the Court, silently but necessarily, imputes to Congress an intent to follow a

fundamentally different policy of defeating State title whenever that serves an "appropriate public purpose."

This, in turn, seems necessarily to reverse the "strong presumption" against defeat of State title and to establish instead a presumption that State title was defeated except where the United States or its grantee can advance no "appropriate public purpose." For it would be the rare case indeed in which the United States cannot advance some "appropriate public purpose."

Alaska submits that the Court, in so holding, has established an unintended new rule for deciding such cases that is fundamentally at odds with its prior decisions. In *Montana v. United States*, 450 U.S. 544, 556 (1981), while recognizing that establishment of an Indian reservation is an "appropriate public purpose" within the meaning of *Shively*, the Court held that State title was not defeated because no "public exigency" required Congress to depart from its policy of defeating State title only in the most compelling reasons. In *Utah*, 482 U.S. at 218-219 (White, J., dissenting), the court held that State title was not defeated even though that would have avoided any possibility of having to pay compensation for the use of nonfederal lands, clearly an "appropriate public purpose." Under the "appropriate public purpose" test announced in this case, State title would have been defeated in both *Montana* and *Utah*.

Alaska submits that the Court did not intend to establish such a new rule, one that is so at odds with the Court's prior decisions and Congress's longstanding policy of not defeating State title except in the most unusual and exceptional cases of international duty or public exigency. Certainly nothing in the Alaska Statehood Act or its legislative history supports either a finding that Congress changed its longstanding policy on or the establishment of such a rule. Congress stated explicitly in section 1 of the Alaska Statehood Act that Alaska "is admitted into the Union on an equal footing with the other States *in all respects whatever*." Alaska Statehood Act, *supra*, § 1 (emphasis added). Congress recognized that the United States held title to submerged lands in the Territory of Alaska in trust for the future State, and that title to submerged lands would pass to the new State upon

admission.[1] Nothing in either the Act or its history even hints that Congress intended to change its general policy of defeating State title only in the exceptional instances of international duty or public exigency and adopt an entirely new policy of defeating State title if that serves any "appropriate public purpose." It is inconceivable that Congress would have changed something as fundamental as its general policy of defeating a State's title to submerged lands only for the most compelling reasons without a word of comment,[2] yet that is the essence of the Court's holdings in parts IV and V.[3]

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[1] *See, e.g., Alaska Statehood: Hearings on S. 50 before the Senate Committee on Interior and Insular Affairs,* 83d Cong., 2d Sess. 215-216, 223-225, and 280-282 (1954); S. Rep. No. 1720, 85th Cong., 2nd Sess. (1958), *reprinted in* 1958 U.S. Code Cong. & Admin. News 2893, 2898-99; S. Rep. No. 1045, 85th Cong., 1st Sess. (1957), *reprinted in* 1957 U.S. Code Cong. & Admin. News 1933; *Hearings before the Subcommittee on Territories of the Senate Committee on Interior and Insular Affairs,* 85th Cong., 1st Sess. (1957), *reprinted in Alaska Submerged Lands: Hearings on H.R. 8054 before the Senate Committee on Interior and Insular Affairs,* 85th Cong., 2d Sess. 117 and 124 (1957).

[2] *Cf. Watt v. Alaska,* 451 U.S. 259, 271 n.13 (1981) ("almost inconceivable" that Congress would have changed a longstanding statutory formula for distribution of mineral revenues "without a word of comment").

[3] It is even more inconceivable that Congress intended to implement such a policy change through the many federal withdrawals in Alaska. Congress found that the benefits of the public land laws had largely been vitiated in Alaska by the withdrawal of more than one-fourth of Alaska's total land area, and that many of the withdrawals were "either excessive in size or totally unnecessary." H.R. Rep. No. 624, 85th Cong., 1st Sess. 6-8 (1957). One such "totally unnecessary" withdrawal, for example, was Public Land Order ("PLO") 82, 8 Fed. Reg. 1599 (1943), which withdrew, *inter alia,* the entire 48 million acres of Alaska's North Slope and reserved the minerals therein for use in the prosecution of World War II. World War II ended in 1945 and PLO 82 was revoked, but not until 1960, shortly after Alaska statehood. PLO 2215, 25 Fed. Reg. 12,599 (1960). Moreover, applications for the withdrawal and reservation of submerged lands for three wildlife refuges in addition to the Arctic National Wildlife Refuge (*see* 19 Fed. Reg. 8076-8077 (1954), 20 Fed. Reg. 4227-4228 (1955), and 23 Fed. Reg. 8163 and 9039 (1958)), were pending at the time of Alaska statehood but the submerged lands ultimately were not included in those refuges. *See* Report of the Special Master, *United States v. Alaska,* (No. 84, Original) (Oct. Term, 1995) ("Master's Report") at 492-493 and n. 38. Under the Court's analysis in parts IV and V, PLO 82 and the three applications arguably defeated Alaska's

Further, the fact that Congress explicitly provided that Alaska was admitted "on an equal footing with the other States in all respects whatever" suggests that any such change in congressional policy is not limited solely to Alaska but applies equally to other States. If so, the new rule established in this case would apply equally to other States in future title disputes between the States and the United States. [4]

Alaska submits that this is not what the Court intended, and that the Court should at least permit the parties to brief the matter fully before taking such a step.

II. The Court's decision treats tidelands differently from lands underlying a body of navigable water even though there is no legally significant difference between the two.

Merely because navigable waters are within the exterior boundaries of a conveyance or reservation "does not in itself mean that submerged lands beneath those waters were . . . reserved" and State title thereby defeated. Slip Op. at 37. The Court nonetheless concludes that tidelands necessarily were reserved, and Alaska's title defeated, solely because they are within the boundaries of the Reserve and the Refuge. Slip Op. at 35, 37-38 n.1, 50. The Court distinguishes between a boundary enclosing "*a body of navigable water*" which does not in itself mean the submerged lands were conveyed or reserved, and a boundary enclosing "certain *submerged lands*—specifically, tidelands"—that in the Court's view apparently does mean that the submerged lands were conveyed or reserved. Slip Op. at 37-38 (emphasis in original).

There is no basis in law or logic for this distinction. Tidelands

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title to submerged land even though post-statehood events showed that no substantive public purpose ultimately was served thereby. Congress manifestly did not intend such a result.

[4] Indeed, even the reopening of past decisions could be sought under this new rule. *Cf. Agostini v. Board of Educ.*, Docket No. 96-552 and 96-553 (United States Supreme Court June 23, 1997) at 22.0 (where prior case would be decided differently under current case law, the law of the case doctrine does not apply because that would work "manifest injustice").

are equally subject to the strong presumption of State ownership under both the equal footing doctrine and the Submerged Lands Act as lands underlying a body of navigable water.[5] *See, e.g., Borax*, 296 U.S. at 15, and equal footing doctrine cases cited therein; *see also* 43 U.S.C. § 1301(a)(2) (defining "lands beneath navigable waters" as including "all lands permanently or periodically covered by tidal waters").

III. The Court misapprehended the legal effect of section 6(e) when it concluded that the *uplands* in the Refuge would have passed to Alaska unless the application for its creation prevented that transfer.

In part V, the Court holds that Congress intended a proviso to section 6(e) of the Alaska Statehood to defeat Alaska's title to submerged lands in the Refuge. Slip Op. at 59-60. Were this not so, the Court reasons, title to the uplands included in the application also would have passed to Alaska under the main clause of section 6(e). Slip Op. at 61.

The Court misapprehends the legal effect of both section 6(e)'s main clause and the proviso.[6] Section 6(e)'s main clause

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[5] *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476-481 and 484-485 (1988), affirmed State ownership of all tidelands. The dissent would have held that States hold title only to lands underlying navigable waters but not to lands underlying non-navigable tidewaters. *Id.* at 490-491 (O'Connor, J., dissenting). Even if that distinction were legally significant, it has no application here, for the evidence in the record shows that all of the water areas enclosed by islands in the Reserve and the Refuge are in fact navigable. *See United States Coast Pilot, Pacific and Arctic Coasts Alaska: Cape Spencer to Beaufort Sea*, 341-344 and 347-349 (9th Ed. 1979) (Ak. Ex. 136).

[6] In relevant part, section 6(e) provides:

> All real and personal property of the United States situated in the Territory of Alaska which is *specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, shall be transferred and conveyed to the State of Alaska* by the appropriate Federal agency. . . . *Provided*, That *such transfer* shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife nor facilities used in connection therewith, or in connection with general research activities relating to fisheries or wildlife . . . .

transferred to Alaska only those uplands "specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska." At statehood, neither the uplands nor any submerged lands included in the application were "specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska," for the governing Interior Department regulation provided that the filing of an application did not affect the administrative jurisdiction over the applied for lands.[7] The lands would not be "specifically used for [that] sole purpose" unless and until the Secretary granted the application. By its terms, accordingly, section 6(e)'s main clause did not apply to the lands included in the application. Indeed, if the lands included in the application had been subject to section 6(e)'s main clause—*i.e.*, if they were "specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska"—the Bureau of Sport Fisheries and Wildlife would have had no need or reason to apply for creation of the Refuge for the lands already would have been administered as a refuge.

Thus, as the Alaska Attorney General explained to the Court, *see* Slip Op. at 60, Alaska has no claim to the uplands within the Refuge. It was not the "setting apart" of the applied for lands that prevented the transfer of those lands to Alaska. Instead, transfer of those lands was prevented by the fact that the applied for lands were not specifically used solely for fish and wildlife conservation and protection.

The proviso to section 6(e), moreover, is not an *independent* retention provision. Instead, it is a mere exception to the limited grant made by the main clause of section 6(e). By its terms, it provides only that the transfer of property under the main clause does not include lands withdrawn or otherwise set apart as wildlife refuges by excepting them from "such transfer"—*i.e.*, the transfer that would occur only in the absence of the proviso.

The Court disagrees with the Master's conclusion that section 6(e) applied only to completed reservations because, in the Court's

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(Emphasis added).

[7] *See* 43 C.F.R. § 295.11(a) (1958), *quoted in relevant part* in Slip Op. dissent at 9 (Thomas, J., dissenting).

view, the Master's interpretation rendered the words "or otherwise set apart" superfluous. Slip Op. at 59. That is not so. The Pribilof Islands had been "otherwise set apart" as a "special reservation" for the protection of fur seals *by statute*,[8] not withdrawal. The Master thus correctly concluded, as the legislative history shows, that Congress intended the proviso excepting certain lands from section 6(e)'s main clause to apply only to completed wildlife refuges and reservations.[9] Defeating State title to land merely subject to an application would have been totally contrary to Congress's historical policy of defeating State title only in the most compelling of reasons. *See* Master's Report at 461.

CONCLUSION

Until this case, the Court had found State title to submerged lands defeated in only one case, a "singular exception" to the established line of cases upholding State title that resulted from "very peculiar circumstances." *Montana*, 450 U.S. at 555 n.5. In this case, the Court has found the second and third exceptions to that otherwise unbroken line of cases upholding State title. The Court's analysis, moreover, necessarily will result in many more exceptions if the United States need show only an "appropriate public purpose" for reserving submerged lands in order to defeat State title. This result is at odds with the Court's prior decisions and contrary to both Congress's historical policy with respect to all other States and Congress's specific intent that Alaska be admitted to the Union on an equal footing with the other States "in all respects whatever."

Because the Court based its decisions in part IV and V on arguments not raised by the parties or the Master, and because those arguments run so counter to both the Court's prior decisions

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[8] *See* Act of February 26, 1944, ch. 65, § 6, 58 Stat. 100, 102, (formerly codified at 16 U.S.C. § 631(f) (1945), repealed by 16 U.S.C. § 408(a) (1966)).

[9] *See* S. Rep. No. 1163, 85th Cong., 1st Sess. 17 and 33 (1957); H.R. Rep. No. 624, 85th Cong., 1st Sess. 19 and 24 (1957); S. Rep. No. 1028, 83d Cong., 2d Sess. 31 (1954); and H.R. Rep. No. 675, 83d Cong., 1st Sess. 17 (1953).

and Congress's intent, the Court should grant Alaska's petition for rehearing to permit the parties to brief these arguments fully. Only by doing so will the Court ensure that it is fully informed as to the possible consequences of its decision for all States, including those yet to be admitted.

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Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the defendant, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

/s/ _____
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