ORIGINAL

In the

Supreme Court of the United States

CECIL A. ANDRUS, SECRETARY OF INTERIOR,

PETITIONER

V.

IDAHO ET AL.,

No. 79-260

Washington, D. C.
February 25, 1980

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v. No. 79-260

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Monday, February 25, 1980

The above-entitled matter came on for oral argument at 10:03 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

STUART A. SMITH, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Petitioner

DAVID H. LEROY, ESQ., Attorney General of Idaho, Boise, Idaho; on behalf of Idaho et al.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Cecil A. Andrus, Secretary of Interior, v. Idaho.

Mr. Smith, you may proceed whenever you are ready.

ORAL ARGUMENT OF STUART A. SMITH, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SMITH: Mr. Chief Justice, and may it please the Court:

This case comes here on a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. It presents the question whether the Carey Act of 1894 requires the Secretary of Interior indefinitely to reserve from appropriation for other public or private uses some 2.4 million acres of desert land within Idaho to the eventuality that the State may be able and willing to select all or any part of such acreage to irrigation and reclamation under this statute.

The statute is set forth at pages 2 through 5 of the petition. Its language in our view is clear and direct. It authorizes the Secretary of Interior with the approval of the President is as the statute says authorized and empowered upon proper application of the State to contract and agree from time to time with each of the States to enter into contracts with the States which will then be binding upon the United States to donate, grant and patent to the State certain

desert lands not exceeding a particular amount of acreage in each State on the condition that the State cause them to be irrigated, reclaimed and occupied.

The statute provides that after the Secretary approves the State application for a grant the land is then segregated from the public domain for a period of 3 to 15 years to permit the State to undertake the required required reclamation and irrigation.

QUESTION: Mr. Smith, you say that the question presented is whether the Secretary of Interior must reserve indefinitely the 3 million acres reserved or mentioned in the Carey Act. Actually, all we have before us in this case is an application for 27,000.

MR. SMITH: Well, that is the way, Mr. Justice Rehnquist, the case originally arose on the State's application for a 27,400-acre tract, to reserve that under the temporary withdrawal statute of 1910 which permits the State to ask for a temporary segregation in advance of a plan. That application was rejected by the Bureau of Land Management for the reason that some of that land was being used for stock driveway purposes. The State then appealed that determination to the Interior Board of Land Appeals and that body, that administrative body within Interior affirmed and rejected the State's argument which in part was focused on that particular tract. But the State then began to make a broader argument that it was entitled

to have a reservation of its maximum quota under the Act. While the case was pending in the Interior Board of Land Appeals the State brought this action in the District Court of Idaho for broad declaratory relief and specifically it asked for a declaratory judgment that the State have an absolute right to demand up to 3 million acres of desert land and that the Board of Land Management -- the Bureau of Land Management that is, has no discretion to deny a request for segregation of desert land.

So the case originally arose out of this narrow application but it became broader as the State requested broader relief, a relief which the District Court granted and which the Court of Appeals affirmed.

QUESTION: The State is bound by the controversy and all the other related requirements of Article 3 the same way any other litigant is.

MR. SMITH: I couldn't agree with you more. I think there is a case of controversy here because the judgment of the District Court as affirmed by the Court of Appeals is before this Court requiring the Secretary of the Interior to withdraw and -- you know, to withdraw, to manage the public land in a way to insure that Idaho will ultimately get its 3 million-acre quota. In fact the judgment says that Idaho is entitled to have withdrawn and patented 3 million acres provided that there are lands of such character and kind and

that the State fulfills the conditions. So there is -- I think the controversy between the parties is now altered, you know, the propriety of this judgment, although I agree with you that originally the case started with this application for a withdrawal of a particular tract.

QUESTION: Well, what if we were to say that the Secretary's action in declining the 27,000-acre request was perfectly proper if it is reviewable at all. Would we then have to go on and expatiate the way the District Court and the Court of Appeals --

MR. SMITH: I think that you would have to go on to the extent that, you know, we have this judgment binding the Secretary of Interior to reserve, you know, on the eventuality -- the 3 million acres on the eventuality --

QUESTION: If we just vacated the judgment that would get rid of it, wouldn't it?

MR. SMITH: It would get rid of it, although I think, you know, I think that there is a, you know, a case where controversy between the parties as to the -- as to the union of the Act and -- because I think the State has brought a lawsuit, I -- you know, I think the chronology of it is such that the case arose under the particular application for the 27,400-acre tract.

QUESTION: Do you think the District Court held that if -- and the Court of Appeals -- that if the Secretary has

withdrawn and put to other Federal uses all of the public land so there is none of the 3 million is left, it has all been withdrawn, all put to some other uses, for stock driveways or something. The District Court did say that the Secretary must entertain a petition for reclassification. Right?

MR. SMITH: Yes.

QUESTION: And that he could not arbitrarily deny it. But the District Court did not hold that he had to grant a request for reclassification.

MR. SMITH: I think that the -- I think that the fact that the District Court, you know, granted the State's, you know, request for declaratory relief, ordering the Secretary to have it withdrawn and Idaho was entitled to have it withdrawn and patented 3 million acres of land, I think from the Secretary's point of view if he were to allocate public lands for other purposes under the host of other Federal statutes that he administers for other public domain --

QUESTION: Your answer to my question is that, yes, the District Court did hold that he would have to reclassify or --

MR. SMITH: Yes, I think that's --

QUESTION: -- or withdraw all these lands.

MR. SMITH: I think that's right. I think that's right. And I think that the Court -- that is before the

Court.

QUESTION: Do you think that the day after the Carey Act was passed Idaho could have gone into Federal District Court in Idaho and asked for this sort of declaratory judgment, not that it was ready with any plan but just requiring the Secretary to make sure it did not let the original one million acres go?

MR. SMITH: Well, if the Idaho -- you know, I think we would take the position that Idaho would not be entitled to, you know, that kind of relief. But I don't see any, any, any, you know, anything that would, you know, prevent Idaho from doing it. And if a court like this District Court was to so hold I think that the Secretary would be before a reviewing court the way we have petitioned here.

QUESTION: Yes, but to put it another way, as I understand it the Government's claim is that if the day after the Carey Act was passed Idaho came in and asked for anything, whether 3 million acres or none, or even if it said it was ready and satisfied all the conditions, that the Secretary has discretion to say "no" to Idaho.

MR. SMITH: Exactly.

QUESTION: And it doesn't need to reserve anything, no matter how much land is available. That is your position.

MR. SMITH: That's our position.

QUESTION: And if that is your position it seems to

that Idaho certainly has a case of controversy with you.

MR. SMITH: Yes.

QUESTION: Is this the view the Government expressed to Idaho in the administrative proceedings?

MR. SMITH: Is is the view that the Government expressed to Idaho in the administrative proceedings?

QUESTION: Yes. So Idaho said that we should really get this settled. At least as long as some land is unwithdrawn, at least as long as there is some available we are entitled to it. And you say absolutely not.

MR. SMITH: Exactly.

QUESTION: You have complete discretion.

MR. SMITH: Exactly. The argument was made below where the State was arguing the Carey Act gave it, you know, the day it was enacted gave it an absolute right to 3 million acres. The District Court rejected the argument that the --

QUESTION: Is there a word in the District Court's opinion about the issue you are arguing here?

MR. SMITH: Yes.

QUESTION: I know there is in the judgment. But, in its opinion?

MR. SMITH: I think so.

QUESTION: You think so.

MR. SMITH: If you will look on -- may I refer the Court to page 18-A of the appendix to the petition where the

Court says that an in praesenti grant of title did not occur under the Carey Act seems quite clear from the language of the Act, the legislative history, administrative interpretations and court interpretations albeit dicta. It is likewise clear however that the Carey Act and subsequent enactments conferred upon the State of Idaho a right of entitlement to 3 million acres of desert land, etc.

And I think that is in the opinion.

QUESTION: But they didn't argue that in their complaint.

Their theory as I understood it was that they had a present grant of 3 million acres and the court rejected that argument.

MR. SMITH: That they have a present grant of 3 million acres. Well, I mean the District Court interpreted, you know, their claim to an in praesenti grant the right to a, you know, a particular 3 million acres. And it said that the State didn't have a right to any particular 3 million acres but it does have a right to 3 million acres of suitable desert land and that the Secretary has to manage the --

QUESTION: This argument was made, as I understood it, to say that the 27,000 acres that had been preempted for highway rights-of-way or something or other -- I forget what it was -- but that preemption by the Secretary was invalid -- or reservation by the Secretary was invalid because the land

had previously been made available to the State. Wasn't that their position?

MR. SMITH: No. No. Their position was on that -- the position on the -- they did appeal -- their in praesenti argument went to the 27,400 acre thing. They said basically they had a right to that. I think perhaps we are saying the same thing, that they did have a right to that particular land and they appealed to the Court of Appeals, you know, on their in praesenti grant. But the Secretary also appealed to the Court of Appeals saying that the District Court was wrong in saying that they had any right to any particular --

QUESTION: How much acreage is there that is available still; some 11 million acres, isn't there?

MR. SMITH: There are some 11 million acres, I think, total overall, the States that the Carey Act --

QUESTION: How can this controversy be ripe until some unreserved acreage is requested by the State and the Secretary refuses to --

MR. SMITH: I think Mr. Justice Stevens that the controversy is ripe to the extent that the State has asked the District Court and the District Court has granted this declaratory relief essentially --

QUESTION: Suppose he had vacated it and started all over, how would anybody be hurt? Shouldn't we presume the Secretary will in due course if there is acreage available give

it to the State when they request it in a proper way?

MR. SMITH: And then they will not be because as I think we point out and argue at great length there are a host of Federal statutes. The Secretary has to manage, you know, public domain under a variety of statutes. I think that this -- I think that to the extent that parties and the Western States need clarification as to the meaning of the Carey Act.

QUESTION: Well, why do they need it until they have asked for some land that they haven't been allowed to get?

MR. SMITH: Well, in this particular case --

QUESTION: The complaint didn't raise this issue, as I read it.

MR. SMITH: Well, I think the complaint did raise the issue in the sense that it talked about --

QUESTION: Which count of the complaint raised this issue?

MR. SMITH: I think the first count of the complaint because I think the second count of the complaint went to the --

QUESTION: It is in the appendix.

MR. SMITH: It is in the record of the appendix, I think.

QUESTION: The first count raises the present grant theory. There was a present grant of 3 million acres. And

the District Court rejected that.

MR. SMITH: Yes. Look at page 5. It says, "The defendant's agent has notified plaintiff he will now allow the requests for segregation or withdrawal under the Carey Act as a matter of right. The defendant specifically alleges that he has the authority to determine what lands are suitable for disposal under the Carey Act, even though the lands refused to be granted are in fact desert and suitable for agricultural use and settlement ... the plaintiff believes that these lands are subject to temporary withdrawal."

I think that, you know, I think that the issue is joined --

QUESTION: And ... plaintiff believes that the defendant intends to and has violated the contract established by the Carey Act to convey these lands." And the violation of the contract was by reserving 27,000 acres for cattle --

MR. SMITH: Well, that was, you know, the controversy -- the controvery --

QUESTION: I don't see how you could just bring in a lawsuit. Say you have got 11 million acres available and we want to know for sure that you are going to save 3 million acres for us.

Why don't they just ask for the 3 million acres?

MR. SMITH: Well, they could have identified --

QUESTION: They did. Those that were identified

held they are not entitled to.

MR. SMITH: Exactly. But I think -- I think the difference between the administrative proceeding and this lawsuit can be best highlighted by the fact that while the State -- while the State was -- while the administrative action was pending in the Interior Board of Land Appeals, the State brought this action for broader declaratory relief. And that relief I think the District Court grappled with and determined it was appropriate. It did reject the in praesenti argument but it did nevertheless hold. And I think that the opinion couldn't really be any clearer, that the Carey Act confers upon a State a right of entitlement to 3 million acres. It's the serious of that judgment that caused --

QUESTION: You are correct, you corred me in the opinion. But why wouldn't it be a proper disposition of the case to do what Mr. Justice Rehnquist, I believe, suggested, to simply vacate the judgment and if the problem ever becomes ripe there will be plenty of time to litigate it?

MR. SMITH: I could not state to you with complete certainty that that would not be an appropriate thing to do. But I can say to you, number one, that we think that the broader relief that the State has requested and the broader relief that the District Court has granted has put this question before the Court. Since this case has come the Bureau of Land Management has rejected two State applications

from Idaho for future District Court decision under the Carey Act. Our petition makes reference to the fact that --

QUESTION: Totally vacant and unreserved --

MR. SMITH: Right. And there is also brewing in Nevada, as we point out in the footnote in our petition, a host of applications that are getting ready to be filed. And I think that the --

QUESTION: Did the Secretary give reasons for rejecting those applications or did he take the position we have an arbitrary right to reject anything we want to?

MR. SMITH: Well, I think the Secretary -- I don't think the Secretary has to give reasons. I don't think the Secretary did give reasons.

QUESTION: Even if you shave this lawsuit down to the 27,000 acres that Idaho identified, as I understand you the District Court held that the net effect is that Idaho is entitled to the 27,000 acres.

MR. SMITH: I think the net effect of the District Court's judgment has to be read that way because --

QUESTION: And you say that Idaho is not entitled to it at all.

MR. SMITH: Idaho is not entitled --

QUESTION: Not to 27,000 --

MR. SMITH: Or anything.

QUESTION: Do you think the District Court held

that they are entitled at least to the 27,000 acres?

MR. SMITH: I do, that is --

QUESTION: And you say they are not, not because you had already set aside for some stock purposes but because you just have complete discretion.

MR. SMITH: Exactly. Exactly. You know, I think that --

QUESTION: So the 27,000-acre issue involves the very issues you want decided and that Idaho wants decided.

MR. SMITH: I think that's right. I think that's right. And I think that --

QUESTION: I am totally baffled because I read the District Court opinion to reject Idaho's claim to the 27,000 acres and its judgment to reject that.

MR. SMITH: Well, I think the District Court -- I think the District Court ordered the, you know, I think Idaho has to go back and petition for reclassification of the 27,000 under the Carey Act. That was the impression -- that was the impression I got from the --

QUESTION: Certainly that is the intimation at the bottom of page 18-A of the petition where the District Court says, "However, the State may not perfunctorily select acreage previously withdrawn for other purposes such as in this case withdrawal for stock driveways."

The District Court wasn't saying that Idaho's

application in this case should have been granted.

QUESTION: It just said it should not be arbitrarily denied.

MR. SMITH: Should not be arbitrarily denied --

QUESTION: And your issue with the District Court is that you shouldn't --

MR. SMITH: We shouldn't have to be --

QUESTION: -- you shouldn't be subject to any petition for reclassification.

MR. SMITH: Exactly. Because our view of the matter is that the Secretary has complete discretion as to whether to grant applications under the Carey Act.

QUESTION: Well, is that really a case of Article 3 lawsuit where the Government says we ought to win on this ground and the District Court says you ought to win on a narrower ground?

MR. SMITH: Well, I think -- I think it is full of controversy between the parties.

QUESTION: The District Court would subject you to further procedures which you say you shouldn't be subjected to.

MR. SMITH: Absolutely. And I think under this particular judgment the Secretary is now bound to administer all the statutes with an eye to making sure that it doesn't invade the so-called quotas under the Carey Act. And in our

that is, you know, that is an impossible narrowing of his discretion under, for example, the latest Federal Management Land Policy Act of 1976 which is supposed to charge the Secretary with putting all the public domain to the best possible uses, it would be impossible for him to do that knowing that he had this Damoclean Carey Act sword over his head which would require him to reserve this desert land for the eventuality --

QUESTION: It isn't a sword as long as he has still got 11 million acres that are available.

MR. SMITH: That is 11 million acres I think across the board throughout all the States.

QUESTION: How much is there in Idaho?

MR. SMITH: I think it -- I am not really sure how much there is in Idaho.

QUESTION: Well, it is a lot more than 3 million acres.

MR. SMITH: Yes. But I mean presumably even if there is a lot more than 3 million acres I think that the Secretary would --

QUESTION: As I understand it, the Government is to save at least 3 million acres.

MR. SMITH: Yes. But, Mr. Justice Stevens, assuming, you know, if the Secretary was to allocate lands, desert lands for a lot of other purposes under a variety of other statutes,

he would still have to make sure that he kept at least 3 million acres and, you know, the --

QUESTION: The present indication is he intends to do that.

MR. SMITH: Yes, but, you know --

QUESTION: I thought it was 11 million acres. Maybe I am wrong, I don't know. But as long as there is four or five times as much land as might be needed to fulfill the commitment made in 1894 -- assuming there was a commitment or the tender or whatever you might describe it -- I just don't see any Damoclean sword over anybody. If they came in and asked for some land and the Secretary turns it down, sure, you have got a lawsuit.

MR. SMITH: I can't belabor the point but I think that is exactly what happened here, they came in and asked for some land, the Secretary turned them down and --

QUESTION: And the court said he turned them down properly.

MR. SMITH: And we say they turned them down properly and they say their point is that in 1894 when Congress passed this statute that they had -- they have a right to the quota. And the Secretary says "no." Because in fact while there are a host of statutes now, even in 1894 there was the Desert Land Act of 1877 and the Secretary presumably --

QUESTION: It shows how ripe this case is. The

same issue has been available for 40 or 50 years and no problem arose --

MR. SMITH: Well, the problem --

QUESTION: -- for 80 years, really.

MR. SMITH: Well, the problem is before the Court really because of --

QUESTION: Because the 27,000-acre application was denied.

MR. SMITH: No. I was going to say that the problem -- the problem has become more current than needs resolution because the deep well technology has made irrigation much more feasible. I mean there haven't been any Carey Act grants since the 1930's and the reason was because most of the desert land that existed existed, you know, it was there and it was unirrigatable.

Well, I don't think, you know, there is anything more to say on the case. I simply want to say that our argument rests on three prongs which we think convincingly refute that the District Court's, that the Court of Appeals decision is incorrect, that the plain language of the statute gives the Secretary discretion. I need only point to pages 2 to 5 of the petition which talks about authorizing and empowering the Secretary upon proper application. It talks about entering into a contract which then becomes binding upon the United States. The statute itself doesn't talk about

a binding right. There are a host of Land Grant statutes that give absolute grants. This is not one of those statutes. The Swamp Land Act of the 1850's was such an absolute grant and the legislative history specifically distinguished that kind of statute from this kind of statute.

I might also point out to the Court that the second paragraph on page 3 of the petition talks about before the application of any State is allowed. The clear implication of that language is that an application of a State may not be allowed. And in fact 1908 the reports of the Secretary of Interior were replete with statistics indicating that many applications were denied. I don't think there was any question that people realized, the people in the Western States realized that applications under the Carey Act could be and were being denied routinely.

QUESTION: Do you think the Secretary has the power to deny without any judicial review under the Overton Park theory that there is simply no standard set forth by which he may determine whether to grant or deny?

MR. SMITH: I think that is the proper standard. I think it is a question, you know, whether the Secretary is being arbitrary and capricious. I don't think the Secretary could announce that he is not taking any applications from Idaho.

QUESTION: Do you think his action in denial could

could be reviewed under the APA?

MR. SMITH: I think it can be but under a kind of arbitrary and capricious standing.

And then finally let me --

QUESTION: I get from you that the Secretary need not give any reason at all; it is denied.

MR. SMITH: I think that's right. The Secretary needn't give any reason but I think that a reviewing court would have to --

QUESTION: He need not even claim that the land has presently been withdrawn for some other use or that the United States has any plans for its use.

MR. SMITH: Well, yes. I think the implication is that the Secretary, you know, has to administer --

QUESTION: That certainly doesn't --

MR. SMITH: Well, I --

QUESTION: That certainly liquidates the Carey Act without much trouble. You take a petition and you just shrug your shoulders and say, "Sorry," --

MR. SMITH: Well, I don't --

QUESTION: "Sorry, you know but" --

MR. SMITH: I don't think it liquidates the Carey Act. I think the Secretary is required by -- the Act is still on the books.

QUESTION: He is required to read the petition, that

is all.

MR. SMITH: He is required to give a good faith consideration of the petition.

QUESTION: But he needn't give any reason for denying.

MR. SMITH: I think that's right. I think that's right but I think that --

QUESTION: How would anyone know whether it was arbitrary and capricious if he didn't use any explanation?

MR. SMITH: --

QUESTION: How do prove?

MR. SMITH: Well, I think what you have to do is examine the panoply of other statutes with the Secretary and if there is a reasonable basis for inferring that the Secretary had or could have other plans for the development of -- of this land.

QUESTION: Why should we have to do that; why shouldn't the Secretary have to do it?

MR. SMITH: Well, there is an administrative, you know --

QUESTION: I know. But all you say he has to give is the bottom line: "Denied."

MR. SMITH: Well, I think the statute pretty much requires that because the statute talks about the concurrence of the President. I think. I think we are really talking

about, you know, it seems to me that it is comparable to the --

QUESTION: He needn't even say well, we think maybe perhaps in a hundred years we would like to lease this land out for mineral development, or something.

MR. SMITH: Well, I think the implication is that the Secretary may have that in reserve; but I don't think he has to say that.

QUESTION: Why shouldn't he say so?

MR. SMITH: Well, I don't think he has to say so. It is possible that he could say so but I don't think the Act requires that he say so.

QUESTION: Does he have to have an administrative record?

MR. SMITH: Does he have to have an administrative record?

QUESTION: Is that required?

MR. SMITH: Under the Act?

QUESTION: Can he just say "no" without an administrative record?

MR. SMITH: I think he can say "no," but there is an administrative record and I think that, you know, during the administrative proceedings the Secretary, I think, you know, may well volunteer reasons as to why -- as to why --

QUESTION: He could do it without it?

MR. SMITH: Well, I think he could do it without it.

QUESTION: What if the Secretary simply said the Carey Act is an authorization and nothing more and I just don't choose to allot under the Carey Act. I realize I could but I just don't feel like doing it.

Would that be an adequate response?

MR. SMITH: Well, it would depend. I don't think he could say I don't feel like allotting anything under the Carey Act, period. But I think he could say, I don't want to grant this application under the Carey Act.

I think all that the Act requires him to do is to give a good faith, you know, consideration of any Carey Act application.

Congress, you know, in 1976 addressed the question of --

QUESTION: We don't know.

MR. SMITH: What?

QUESTION: We don't know.

MR. SMITH: I think that the words of the statute, I think that's what they connote.

I just want to close by saying that I think that the consistent administrative interpretation also confirms our argument that the Secretary has discretion.

If the Court has no further questions I would like

to save a few moments for rebuttal.

QUESTION: Congress can give to one person the untrammeled, uncontrolled discretion to give away my land without giving any reason.

MR. SMITH: Well, I would put it the other way, that Congress can give the untrammeled discretion of a particular individual to preserve the public domain for the best purposes.

QUESTION: Or he can give it away.

MR. SMITH: Or he can give it away and use it according to its best life, according to its best use.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Attorney General.

ORAL ARGUMENT OF DAVID H. LEROY, ESQ.,

ON BEHALF OF IDAHO ET AL.

MR. LEROY: Mr. Chief Justice, and may it please the Court:

This is a case both novel and surprisingly novel in that the Carey Act was a noble experiment, a one-of-a-kind statute unique in concept in 1894 and never again duplicated; novel in that unlike most Federal statutes it has only been before this Court once in its 84 years of existence and surprising in that the Act is before the Court again at all, in that in the 1970's the Department of the Interior felt that the Act was so obsolete and useless that it repealed all

of the Carey Act regulations, assuming that they would never be used again.

But as the Solicitor made a brief reference, technology and advances in deep well and the sprinkler systems have now restored some possibility of achieving the original congressional purpose and offer an opportunity to offset some of the up to 2 million acres per year lost in farmland every year.

QUESTION: They have discovered -- apparently they have some deeper aquifers in Idaho that they want to tap?

MR. LEROY: Mr. Justice White, there is continuing investigation and review of those aquifers in a number of contexts and more is being learned about them every day. But the technology and the efficiency and the economy of drawing water in a well more cheaply and sprinkling it more effectively is the chief reason that breathes life back into this Act. We would urge that this is a case of statutory interpretation and that the Carey Act granted no such absolute discretion as the Solicitor describes to the Secretary.

We would urge that there is an actual case or controversy ripe for consideration in that the denials of this particular application, even though it be on reserve land where in fact as the IBLA ruled based upon an absolute Secretarial discretion which the Secretary suggested flowed from the language, the history and the intent of the Carey

Act itself. Perspective on the Carey Act is simple. The Congress in 1894 had both the --

QUESTION: On the particular land that was the subject of the application in dispute in this case, does Idaho still contend that it is entitled to have those 27,000 acres conveyed pursuant to the Carey Act?

MR. LEROY: Your Honor, the basis for denial of those acres --

QUESTION: You say they gave the wrong reason. I understand that.

MR. LEROY: -- was the Secretary's discretion.

QUESTION: You contend you are entitled to those 2,700 acres.

MR. LEROY: What the District Courg suggested is that we have an opportunity to go back in and should have if the Carey Act is properly interpreted to petition for re-classification,which Idaho would do. But the Secretary says that he has the absolute discretion and will not permit us even to go back under the reclassification procedure, thus an actual case or controversy is framed.

QUESTION: Well, I am still not quite clear on your answer to my question.

Is Idaho still contending that it has a right to these 27,000 acres?

MR. LEROY: Idaho would contend, Your Honor, yes,

that we have the right to do what the District Court instructed us to do, to petition for reclassification. And the Secretary would contend that we have no such right because he has exercised his unfettered discretion.

QUESTION: You haven't answered his question yet. Do you claim that reclassification must be granted?

MR. LEROY: We claim as the District Court suggested --

QUESTION: On these 27,000 acres?

MR. LEROY: We would so claim; yes. But it would be upon -- based upon evidence and material presented at a reclassification hearing.

The proper perspective of the Carey Act --

QUESTION: Well, you deny then that a withdrawal by the Secretary for another use by the United States is enough to defeat a Carey Act claim?

MR. LEROY: Yes, we would per se when the Secretary --

QUESTION: You would or you do?

MR. LEROY: We do when the Secretary -- especially when the Secretary per se contends that he has no authority.

QUESTION: What if his claim was: Well, you don't get this land because we have already withdrawn it for some other purpose and that is enough of a reason.

MR. LEROY: Then we would not so contend that we would be automatically entitled to the land because we have rejected the in praesenti theory which we presented to the

District Court. We suggest now that the Carey Act is a conditional grant conditioned upon the performance of certain conditions which the Congress specifically outlined in 1894.

QUESTION: Because I want to be sure I understand your position.

It would be your view that you could get the 27,000 acres by filing a petition for reclassification. The issue in that proceeding would be whether or not the 27,000 acres had been properly withdrawn for stock driveway purposes.

MR. LEROY: Yes. And the Secretary --

QUESTION: And if the withdrawal for those purposes was authorized by statute and was not an abuse of discretion, then you would concede, as I understand it, that you would have no Carey Act right to those 27,000 acres?

MR. LEROY: That is correct.

QUESTION: Well, then, suppose the Secretary had withdrawn for stock purposes or for all sorts of things all but 2 million acres of the public land in Idaho. And then Idaho came in and made a present claim for 3 million acres. And suppose that all those -- all the withdrawals had been authorized by statute and were as fair as this withdrawal was, supposedly.

I take it you would concede that Idaho would not be entitled to its full 3 million acres.

MR. LEROY: We would suggest at that point, yes,

Your Honor, that we would have been disadvantaged, though we would suggest unfairly in that the Carey Act and this entitlement flowing from the Act of 1894 should have been originally considered when the Secretary went through the machinations and considerations in all those other reservations. And in addition it is important to note that it is not likely or possible or feasible for a block of 3 million acres to be sought under the Carey Act. And it is also important to note that there is no such sword hanging over the Secretary to make him discomfort his discretion in this regard, there being 33 million acres as we note in the brief of Federal lands in Idaho, 12 million under the control and discretion of the Secretary of the Interior and approximately 8.5 million susceptible of possible irrigation that is still in Federal hands.

QUESTION: What you are saying is that the Carey Act is a factor that the Secretary has to take into consideration in passing on any application for withdrawal of public lands?

MR. LEROY: Mr. Justice Rehnquist, it is in this sense: The Carey Act obviously by its terms identifies no specific lands and we claim no entitlement as to any specific parcel. But as to a general right of entitlement which ought to be considered by the Secretary in his classification and planning process and should have been since 1894, we urge that position on the Court.

What the District Court's position actually says is that it draws a very careful distinction, it suggests a very careful balance between the rights of the State and the rights of the Secretary, rejecting the Idaho in praesenti argument, rejecting the U.S. argument of outright discretion and instead holding that there is a right of entitlement under the Carey Act created by the Congress, that that right is not so abolute that the State can perfunctorily select any particular parcel of land it wishes for the Secretary has other withdrawal authority, the authority if the State meets the Carey Act conditions the Secretary has no unfettered discretion to deny applications. Fourth, if the land sought has been withdrawn for other purposes the State may apply for reclassification, which petition should be handled in the ordinary course and subject to judicial review. And fifth, since Congress prescribed acreage entitlements to the State in 1894 the Secretary should preserve suitable amounts on our applications as they come in over time.

That is exactly what the judge's decision did and we suggest that that is a proper interpretation of the legislative history, the language of the statute and it properly addresses the administrative and contemporaneous construction given to it by the agency. The language of the statute --

QUESTION: May I ask you another question.

Under your understanding of the District Court ruling, as long as at least 3 million acres remain unclassified for any purpose, that are desert land and could thereafter be selected by Idaho, would there be any violation of the judgment?

MR. LEROY: Not automatically, Your Honor, where the acreage and entitlement and reservation and potential for Carey Act application was there.

QUESTION: If that is true, is it not also true that if the Secretary purported to withdraw so much that there was less than 3 million available you would then have a right under the judgment to enjoin him or prevent him from making that additional withdrawal?

MR. LEROY: Yes, Your Honor.

QUESTION: Anything that invaded the 3 million would be subject to reclassification and made available. But if that is all true, how can there be a present controversy until you approach the area of withdrawal that would invade the 3 million figure?

MR. LEROY: There is a present case or controversy because in this particular identification of acreage a part of that 3 million acres, the IBLA and the Secretary assert that they can reject outright in their absolute discretion our opportunity to petition them for a contract on that acreage.

QUESTION: It seems to me the easiest way to challenge that is by making a request for some of that land and having them do it. In other words, they say they have the power. But suppose they never exercised such arbitrary power, that they always granted your application; so why do we have to decide this question?

MR. LEROY: It is our suggestion to the Court that the IBLA exercised exactly such an absolute discretion because they intended to and said they did in this particular parcel and acreage.

QUESTION: The 27,000, that is withdrawn land.

MR. LEROY: Well, the parcel is withdrawn.

QUESTION: You are complaining that they gave the wrong reason for something they had a perfectly lawful right to do, as I understand you.

MR. LEROY: And they are suggesting that they will not entertain, as the District Court suggest they must, our petition for reclassification because they have the absolute discretion under the Carey Act not to do so. But nothing about the language of the Carey Act, nothing about the legislative history of the Carey Act, nothing about the contemporaneous construction of the Carey Act suggests any such absolute discretion to the Secretary.

QUESTION: Mr. Attorney General, I take it from what -- if I didn't misunderstand Mr. Smith, he said part of

this 27,000 acres had been withdrawn for stock driving purposes.

MR. LEROY: Yes, Mr. Justice White, in fact that is accurate. There were four separate --

QUESTION: Not all of it?

MR. LEROY: No. As to a Federal reclamation project, as to a wildlife preserve, as to some State land grant exchanges, Idaho did not press its claim forward, showing again that it is eminently possible for the State and the Secretary to work in this fashion and acknowledge the Secretary's other duties if the Secretary does not have any such absolute discretion as he asserts falls from the Act of 1894; and that discretion is simply not there. A study of the statutory language, a reference to the contract authority of the Secretary, the special duties detailed to the Secretary, the legislative debates and discussions, none of those factors and features make any mention of any general and unfettered discretion to the Secretary. The contract contemplated by the Carey Act is nothing more or nothing less than an agreement of feasibility as to certain lands and a protection to the States and the settlers on those lands which are identified and a guarantee that as to dollars expended and efforts expended the States and the settlers will be protected.

Congress had already in a sense by the terms of the Act made an offer to the States and the States accepted

that offer and it was that kind of arrangement, that kind of conditional grant that the Carey Act contemplated.

Even the language of the Act the specific duties of the Secretary are detailed to accept applications, review maps and plans, to review for their sufficiency to accomplish the irrigation needed and desired; as fast as adequate proof is received, to issue the patents and to produce such rules and regulations but only as to the mode of proof and the mode ofprocedure.

There is no general discretion encouraged or authorized in the statutory language. And if any such discretion was intended or contemplated by the Congress, it would have been a discretion that would have had the potential, as in this case, to frustrate the noble purpose which Congress sought, namely of permitting the States to go forward in the absence of Federal --

QUESTION: Do you think that a State would have the right to have set aside for Carey Act purposes land that had been withdrawn for oil shale development, for leasing?

MR. LEROY: Mr. Justice White, again the Secretary in the new --

QUESTION: "The Secretary." How about Idaho's claim, would a Carey Act claim override such a withdrawal?

MR. LEROY: It would not automatically override such a withdrawl. The State would have the right to make the

petition and the Secretary would have the right to balance the equity --

QUESTION: And you would at least have the right to have it shown that the withdrawal was regular and authorized by statute.

MR. LEROY: Exactly. And we would have the right to require the Secretary to review the matter.

QUESTION: General Leroy, supposing the oil shale withdrawal covered 7 million acres, so there is less than 3 million would be available.

Would that be permitted, under your view? It clearly would not under the District judges' analysis.

MR. LEROY: Your Honor, again we would be entitled to request of the Secretary and petition to him for Carey Act application and withdrawal and --

QUESTION: As I understand his theory you wouldn't even have to do that, they could not invade the 3 million -- they must reserve at all times at least 3 million acres for Carey Act development.

MR. LEROY: Justice White presented a harder case, suggesting that lawful grants had already been issued dropping us below the 3 million. But --

QUESTION: But that is not true. But now we are talking about there now are more than 3 million acres available and the question is: Under your interpretation of the District

Court's holding could the Secretary withdraw enough acreage to invade the 3 million and have the withdrawal for the purposes of shale oil?

MR. LEROY: Not unless either Congress modified the Carey Act or Idaho modified its terms and conditions of acceptance of the Carey Act.

QUESTION: What if the Secretary in response to the type of situation posed by Justice Stevens said, "I recognize the Carey Act, I recognize the Oil Shale Act, it necessarily requires me to balance the needs for uses of public land and in the exercise of my informed discretion I grant the Oil Shale Act withdrawals."

Would you feel that you had anything more than an appeal to the Court of Appeals for abuse of discretion under the Administrative Procedure Act?

MR. LEROY: It would be our position, Mr. Justice Rehnquist, that there is a conditional entitlement in an already conceived congressional purpose flowing from 1894. We would acknowledge that the Acts and the management duties of the Secretary need to be read together. We would not necessarily presume that a court would find that the Carey Act either was subservient to a later Act nor would we presume that it would override it.

I can't answer the question directly in that I would not guess what the Court might do. But I would say that the

congressional entitlement from 1894 would be of equal dignity before a court in its --

QUESTION: But not a flat prohibition against the Secretary reserving into the 3 million allocated to Idaho if he could sustain a classification to the satisfaction of a judge reviewing it under the Administrative Procedure Act.

MR. LEROY: We would suggest that that would likely be a result in the court.

QUESTION: Well, that would require -- that is inconsistent with the judgment of the District Court here.

MR. LEROY: Not so in the sense that the judge also acknowledges that reclassification procedure and judicial review are available. But in the sense he says very directly that 3 million acres ought to be reserved so that from time to time applications can be made, yes, it would be slightly inconsistent.

QUESTION; "Ought to be reserved." The words that Mr. Smith called to my attention are "It is likewise clear that the Carey Act conferred upon the State of Idaho a right of entitlement to 3 million acres of land suitable for irrigation."

And I think you are saying that if we have this oil shale conflict problem way down in the future somewhere we ought to decide that when it arises, which is exactly what I have been suggesting for some time here.

MR. LEROY: Well, Your Honor, there is an entitlement The entitlement flows from a congressional Act in 1894 and as to other Acts including oil shale activities there would necessarily be a reading together before a court of those. But we contend before the Court that the District judge was correct in urging an entitlement in the nature of a grant upon conditions that flowed from the Carey Act. We would also urge that the Department of the Interior has not properly presented to the Court their contemporaneous construction of the Act.

Immediately after the Act in 1894 a key to the case would be a review of the regulations of the Department of the Interior. In those regulations,the first promulgated under authority of the Act, there was absolutely no mention of Secretarial discretion.

And in 1895, the report to Congress annually made every year as House Document No. 5, the General Land Office Commissioner to the Secretary said in characterizing the Carey Act that this is a form of agreement to donate a million acres of desert land upon the condition -- and continued onward -- The Secretary to the Congress described the Carey Act as a grant conditioned upon the reclamation and settlement.

Now, it is our contention that it was Interior and not Idaho that first characterized the Carey Act as a grant upon condition. And in that same year 1895, Idaho accepted

a grant for the Cary Act by legislative activity that specifically referred to the Carey Act as a grant.

The annual reports of the Department of the Interior reviewed from 1895 to 1905 contain grant language including the 1895 reference to a grant condition and there is no discretion mentioned in the --

QUESTION: What did Idaho do in 1895?

MR. LEROY: In 1895 Idaho became the second State to through its State legislature pass a statute that accepted the donation, the grant of Congress with regard to the Carey Act. There were 12 such States in the West that accepted that and each of those 12 States in one way or another discussed the Carey Act. By that language 10 of the 12 States accepted the grant of Congress, the grant that Congress intended in the Carey Act.

QUESTION: But did they set up a mechanism whereby private settlers could make claims analagous to way you make mineral claims or homestead claims by locating on the property and residing on it for a year?

MR. LEROY: Yes. The purpose of those several Carey Acts were also to set up a structure whereby contracts could be entered in with construction companies to construct the works necessary to transport the waters long distances and apply water to the land and as well contemplated boards and land commissioners to receive applications and administer

the actual settlers who applied under the Act.

One of the greatest dignities in terms of the departmental position of what the Carey Act actually meant was its rules and regulations. There have been five such sets of rules and regulations promulgated between 1894 and the time of this particular lawsuit. In 1894 the regulations immediately after the promulgation of the Act made no mention of Secretarial discretion. In 1898 the word "grant" was mentioned four times in those regulations, "discretion" not mentioned at all. In 1902 the word "grant" was mentioned four times, "discretion" was not mentioned at all except in the context of a limited 1901 amendment.

And the 1902 regulations which provision became identical and the 1909 regulations are very careful, a two-step process whereby the General Land Office would review the applications and then upon their approval for that technical sufficiency submit them to the Secretary, the regulation said," "Upon approval a contract is executed by the Secretary as directed by the Act."

That regulation continued in effect in 1909 and those 1909 regulations were in effect until repealed in 1970.

We would urge that the Secretary by his administrative construction neither contemplated discretion and characterized to the contrary that the Act was in fact a grant to the States.

The doctrine of contemporaneous consistent administra-

tive construction suggests that if a statute is suceptible of two reasonable interpretations and the Department adopts Interpretation A, then great deference ought to be accorded to A. But it never said that if the Department adopts A in 1895 and then somehow in 1977 and 1975 switches to B, contending that no discretion and no mention of discretion has become absolute discretion, that the Court ought to attach any deference to the later construction.

Had Congress intended the Secretary to have any absolute discretion of this type so significant as to frustrate the statutory purpose and the great noble objective of the Carey Act, it certainly would have authorized it in clear and specific language.

And we thus contend that both legislative history and administrative construction suggests no such discretion existed.

The subsequent Acts by Congress, indeed, also characterized the Carey Act as a grant. The 1896 Amendment characterizes it as a grant. In the 1901 Amendment the Congress illustrated that it knew how to use the words "in his discretion" with the Secretary in giving him a five-year extension privilege; it used those very words "in his discretion." The Secretary of the Interior in that same year, as we indicated at page 8 of our brief, issued a letter in assistance of Congress in attempting to establish what the

legislative purpose and intent might be for the amendment. And Secretary Hitchcock in that letter four times mentioned that he characterized the Carey Act as a grant to the States, first mentioning "a grant made" to certain States; next, "grant was a departure"; third, "lands intended to be granted" and fourth, "under this grant."

In the 1921 Amendment to the Carey Act a restoration privilege to the Secretary to return lands to the public domain if construction not begun within three years, provided the Secretary may in his discretion commit that Act.

QUESTION: General Leroy, is it your view that the grant is so firm that Congress could not change its mind?

MR. LEROY: No, Mr. Justice, we would not suggest that Congress cannot change its mind. The features of the conditional grant are that no title would pass until the conditions are fulfilled. Thus we would urge that no equitable title attaches until the same.

QUESTION: Throughout your argment is a conditional grant, is there not?

MR. LEROY: Yes, Your Honor.

The Solicitor did not have an opportunity to mention but a good deal of authority is placed in the brief of Interior on the Wyoming land decision reported in 1908. We would urge this Court that that land decision which found some discretion in the Secretary's opportunity to contract is not

a proper administrative construction. It is not consistent with the Secretary's own rules and regulations. It is not strictly contemporaneous. It is based on a faulty reasoning, that it is no authority, that it is not persuasive and it never was embraced by Congress nor even called to Congress' attention and that it remained obscure in the Department in that it was not even contemplated and grafted into the 1909 rules and regulations as the Secretary promulgated some six months later.

QUESTION: Well, what is the real argument here, not between you and the District Court or between the Government and the District Court but between you and the Government, because the Government concedes that the Secretary's arguments are subject to review and that the Carey Act has to be taken into consideration. You concede that the Carey Act isn't an outright grant and that the Secretary could invade the maximum amount granted if he could show sufficient justification for it.

I don't see much different in your positions.

MR. LEROY: The difference as I understand the Government's position is that they say they have the absolute discretion to contemplate receiving no applications at all, to receiving no petitions for reclassification at all, to not giving us the time of day on the Carey Act. And they also urge that there is no entitlement of any kind whatsoever.

We to the contrary contend that the Carey Act created neither an absolute grant nor an absolute discretion but the intent of Congress was to challenge the States to pick up a great and noble public purpose, that the Department of Interior acknowledged in 1895 that it was in fact a conditional grant, that by legislative action the States accepted that grant and began to operate under the rules and regulations of the Department which for 74 years characterized both the Act as a grant and suggested that the Department of the Interior and the Secretary of the Interior had no authority to do anything after that technical approval but sign the contract as directed by law.

QUESTION: Exactly what did the Government deprive Idaho of as of now; not 1895, as of right now?

MR. LEROY: The Government has deprived us by the stance that they have taken in the IBLA and by the Secretary of the Interior of an opportunity to seek any lands under the Carey Act, as saying that they have in their absolute discretion --

QUESTION: Do they deny you a right to file a piece of paper?

MR. LEROY: They did not deny us an access to the outer office but they deny us the access to any decision-making process and they have not so granted any Carey Acts in Idaho in the last 30 years.

QUESTION: That doesn't mean they won't do it tomorrow, does it?

MR. LEROY: They have taken the position before the IBLA that they will not in this instance --

QUESTION: They denied you access to the inner circle, you mean they won't let you talk to the Secretary?

MR. LEROY: No, sir, but they will not exercise any discretion in either the State BLM office or --

QUESTION: That resulted in what?

MR. LEROY: That resulted in this actual case us not being allowed to petition for reclassification with any likelihood of success.

QUESTION: But you could have applied?

MR. LEROY: We did apply for both a temporary --

QUESTION: But they denied you the right to apply.

MR. LEROY: Yes.

QUESTION: But you did apply?

MR. LEROY: We applied for both a temporary withdrawal-

QUESTION: Do you agree with me that if there is a completely unconstitutional statute on the books and it applies to you and the statute says that the Secretary of the Interior give you a million dollars or no, nothing. And you have no redress from his action.

Do you have a cause of action?

MR. LEROY: Mr. Justice Marshall --

QUESTION: Because he might give it to you. He might give it to me.

MR. LEROY: Well, in construing the statute --

QUESTION: Isn't it possible that the Secretary of te Interior could rule with you in this case?

MR. LEROY: It is not possible now. It was final when the agency action closed the door and rests its position on an assertion of absolute discretion flowing from the 1894 Act. But we suggest there is no such discretion there.

QUESTION: And that prevents you from doing what?

MR. LEROY: It prevents us as to these particular lands from the possibility of moving them and to carry out development, a frame of natural case or controversy.

QUESTION: So you have been denied the right to land which you otherwise are entitled to.

MR. LEROY: Yes, and the vehicle of that denial is an assertion of absolute discretion and a refusal to follow the dictate of the District Court in allowing us to petition for reclassification.

QUESTION: I am not interested in all the explanations. I am interested in what actually injured you; that you don't have this particular land to use as you please.

MR. LEROY: Yes, Your Honor

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

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