

STATE SCHOOL LANDS: WHAT'S AN IN-LIEU SELECTION AND WHO OWNS THE MINERALS?

Brian R. Bjella
Crowley Fleck PLLP
Bozeman, Montana

I. Introduction: What are In-Lieu Lands?

When most states in the western United States were admitted into the Union, they were granted sections of land for the support of common schools. In many states, such as North Dakota and Montana, they received Sections 16 and 36 in every township. Enabling Act, 25 Stat. 676 (1889). However, on occasion certain of these sections were not available to grant to the states by virtue of prior federal land reservations. When this occurred, the states then had the right to select what has become known as “in-lieu” or “indemnity” lands elsewhere within the state. However, a rather unique anomaly also developed by which states could select in-lieu lands if rivers or lakes were located within a particular Section 16 or 36. As a result, the state received title to the entire section, but then released its rights to the bed of the water body.

II. Navigable and Non-Navigable Water Bodies in School Lands

If the water body was navigable, the state received title to all lands, including those lands under the water body, not by virtue of the enabling act, but by virtue of the equal footing doctrine upon the state’s admission to the Union. *Pollard v. Hagan*, 44 U.S. 212 (1845). This is the case even if, after statehood, the state had applied for and received an in-lieu grant for the bed of a navigable water body. *Leonard R. McSweyn*, 28 IBLA 100, 83 Interior Dec. 556 (1976).

However, if the water body is non-navigable, the result is different. For example, in Section 36, Township 142 North, Range 102 West, Billings County, North Dakota, the State of North Dakota received title to all of Section 36 by virtue of the Enabling Act. However, the Little Missouri River courses through Section 36 to the extent of 41.8 acres. When a state received in-lieu or indemnity lands this was documented by what has come to be known as a clear list or indemnity list. In Clear List No. 31, dated March 13, 1918, the State of North Dakota received indemnity lands elsewhere within the state for the 41.8 acres contained within the riverbed of the Little Missouri River. In 1992, the river was determined to be non-navigable. *State of North Dakota v. United States*, 972 F.2d 235 (8th Cir. 1992). In *United States v. State of Oregon*, 295 U.S. 1 (1935), the Supreme Court held that by virtue of Oregon accepting an in-lieu selection for a non-navigable lake located within a school grant land section, the United States retained title to the bed of the lake. Thus, when the State of North Dakota agreed to accept in-lieu lands elsewhere within the state for the 41.8 acres located in the bed of the Little Missouri River in Section 36, the United States retained title to the riverbed, including the minerals. This is despite the fact that in a typical land ownership scenario, the owner of the upland bordering a non-navigable body of water owns the land underneath the water body.

III. Role of the Title Examiners When Non-Navigable Water Body Is Identified

For title examiners, it is important to keep this concept in mind when examining title to state school grant lands. The issue of whether the state received in-lieu lands is not evident from examination of title or even by review of the master title (MT) plat. Title examiners need to obtain copies of the MT plat and the original government survey to attempt to determine if a water body is located within the particular state grant lands they are examining. If a river or lake is identified, then the title examiner must consult with either the Bureau of Land Management or the State Department of Trust Lands to determine if an in-lieu or indemnity selection was made, and if one was made, to obtain a copy of the appropriate

clear list. Failure to do so could result in misidentification of ownership. An examiner cannot assume that the state owns the bed of the non-navigable water body by virtue of its riparian uplands ownership. An example of this is a decision of the Interior Board of Land Appeals in *David A. Provinse*, 15 IBLA 387, 81 Interior Dec. 300 (1974) where it was determined that as the State of Montana received an in-lieu selection for a non-navigable lake located within a school section, pursuant to the Supreme Court decision in *United States v. State of Oregon*, the state selection of other lands results in relinquishment of any interest in the lands underlying the lake. The title examiner cannot assume that the state owns the bed of the non-navigable water body in school grant lands; further inquiry is needed.

This concept was further supported in the Memorandum of the Office of the Solicitor of the Department of the Interior dated March 29, 1995, regarding ownership of the bed of the Little Missouri River in Section 36. As the State of North Dakota had requested and received an in-lieu selection for the acreage in the riverbed, the Solicitor found that the state waived its riparian rights that would have normally accrued to it as the upland owner, and that the riverbed title, including minerals, were retained by the United States.

IV. USA Mineral Reservation in In-Lieu Lands

For the title examiner, a related anomaly can occur when examining title to the in-lieu or indemnity lands received by the state. Typically, when a state received title to school grant lands, the state received full and complete title, including 100% percent of all minerals. However, this is not always the case when a state received its in-lieu lands. The time frame for a state to request indemnity lands and complete the process through what was then known as the General Land Office could be many years. In a case before the U.S. Supreme Court, the State of Wyoming made an in-lieu selection in 1912. In 1914 there was an executive withdrawal as possible oil lands under the Act of June 25, 1910, 36 Stat. 847. In 1915, when it came time to finalize the indemnity selection, the State of Wyoming was requested to accept the lands with the oil reservation. However, the State declined, and brought suit claiming that its legal rights vested on the date of its selection of the lands, and that it should receive the lands free of any reservation of oil. The Supreme Court in *State of Wyoming v. United States*, 255 U.S. 489 (1921) held that the state's legal rights in the land vested on the date of selection; the subsequent executive withdrawal of the land for oil was not effective and the state received the lands free of any such mineral reservation. However, not all states were apparently as assertive as Wyoming. For example, Lots 1 and 2 of Section 2, Township 142 North, Range 89 West, Mercer County, North Dakota, were granted to the State of North Dakota as in-lieu school lands. As is typical, there is no patent from the United States to the State of North Dakota. However, the MT plat indicates that the United States reserved coal and includes the phrase "IL 34." This is in reference to Indemnity List No. 34 between the United States and the State of North Dakota. A review of Clear List No. 34 does, in fact, indicate that after the State had made its selection of the in-lieu lands, a portion was withdrawn by virtue of the Act of March 3, 1909, 35 Stat. 844, whereby the United States reserved coal. The Clear List indicates that the State elected to take title to the lands subject to a coal reservation in the United States. Thus, in a similar situation the State of Wyoming was successful in having the mineral reservation removed, but apparently the State of North Dakota elected not to file any such challenge and indicated to the General Land Office that it would accept the lands with the coal reservation. Thus, it is important for title examiners in examining title to in-lieu lands received by a state to first review the MT plat to determine if there is any indication of a federal mineral reservation, and then to subsequently examine the applicable Clear List to verify whether there was a mineral reservation in the United States.

V. CONCLUSION

When examining title to school grant lands, it is important to determine if a water body is located in the lands, and then verify whether the water body has been determined to be navigable or non-navigable. If navigable, title should remain with the state, even if it had happened to receive an in-lieu

selection for lands elsewhere due to the presence of the water body. However, if the water body is non-navigable, then further investigation is necessary to determine if an in-lieu selection was made for the bed of the water body, and if it was, to verify that title would remain with the United States. As to in-lieu lands, a title examiner cannot assume that the state acquired all mineral rights by virtue of the lands being a substitute for original grant lands, but must determine by review of the MT plat and the clear list as to whether there was any mineral reservation in the United States.