

LEGAL SERVICES

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MEMORANDUM

December 6, 2012

SUBJECT: Establishing a bounty on sea otters
(Work Order No. 28-LS0160A)

TO: Senator Bert Stedman
Attn: Darwin Peterson

FROM: Alpheus Bullard *AB*
Legislative Counsel

This memorandum accompanies the bill described above. Please be aware that providing a state bounty for sea otters taken by Alaska Natives is likely to be interpreted as conflicting with federal law. Sea otters are protected under 16 U.S.C. 1361 - 1421h (Marine Mammal Protection Act (MMPA)).¹ The Act prohibits the harvest of sea otters, permitting only certain Alaska Natives to take sea otters for subsistence or "for purposes of creating and selling authentic native articles of handicraft and clothing" under 16 U.S.C. 1388.²

Providing a state bounty for harvested sea otters, even if the sea otters are only taken by those persons permitted to do so under the MMPA, is likely to be interpreted as conflicting with the intention and purposes of the MMPA.

Under the Supremacy Clause of the federal constitution, state laws that interfere with federal laws are invalid.³ To avoid preemption, state law must be consistent with (or

¹ In addition to protections offered by the MMPA, note that in 2005, the U.S. Fish and Wildlife Service listed the southwestern Alaska sea otter population, which ranges from Kodiak Island through the western Aleutian Islands, as threatened under section 4 of the Endangered Species Act. See 70 FR 46366. In 2009, the U.S. Fish and Wildlife Service designated nearly 5,900 square miles as critical habitat for sea otters in the Aleutian Islands, Bering Sea, and Alaska Peninsula. See 74 FR 51988.

² This section (enacted as section 119, MMPA amendments of 1994 (Public Law 103-238)) permits the National Marine Fisheries Service and the U.S. Fish and Wildlife Service to enter into cooperative agreements with Alaska Native organizations. For the regulation adopted under this section that permits certain Native Alaskans to take marine mammals without a permit, see 50 C.F.R. sec. 216.23 ("Native exceptions").

Senator Bert Stedman

December 6, 2012

Page 2

more protective than) the federal law. Providing a bounty, and thus incentivizing the taking of sea otters for reasons other than subsistence and artisanal purposes, is likely to be interpreted as contrary to both the purposes and objectives of Congress in enacting the MMPA and in establishing a narrow exception for certain Native Alaskans to take sea otters for subsistence and artisanal purposes.

If you have questions, please do not hesitate to contact me.

TLAB:ljw

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Enclosure

³ "Federal laws can preempt state laws in the following three ways: (1) if Congress expressly declares that state law is preempted; (2) if Congress demonstrates an intent to occupy a field exclusively; and (3) if there is an actual conflict between federal and state law.' When considering preemption, courts 'start with the assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress.'" State v. Progressive Casualty Ins. Co., 165 P.3d 624, 631 (Alaska 2007) (footnotes and citations omitted).