HB 376

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: March 18, 2002 **FURTHER REFERRALS: Finance**

Date of Committee Action: 4.5.02

The JUDICIARY Committee considered: **HB 376**

HOUSE BILL NO. 376 **FISH & GAME IN NAVIGABLE WATERS**

"An Act relating to management of fish and game in and on the navigable waters and submerged lands of Alaska."

Recommends it be replaced with ____ **CS** For HB376 (JUD) [✓] **Same Title** [ ] **New Title**
*For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR*____

[ ] attach amendments
[ ] add new referral to ____ Committee
[ ] Letter of Intent ____ Committee

List of Abbrev. for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LAA
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW **FISCAL NOTES** *For Chief Clerk's Office Use Only				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
HJUD\F&G				✓

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	**Printed Last Name**	**DP**	**DNP**	**NR**	**AM**
Kim Meyer	Meyer	✓			
John Coghill	Coghill	✓			
Jeannette James	James	✓			
Chair: Norman Rokeberg		✓			
Chair:					

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 376 (JUD)
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Fish and Game
Title: Fish & Game in Navigable Waters
BRU: Multiple
Component:
Sponsor: Representative Ogan
Requester: House Judiciary
Component No.:

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill should have no additional fiscal impact on Fish & Game.

Prepared by: Heather Nobrega, Counsel
Phone 907-465-4990
Division: House Judiciary Committee
Date/Time 4/8/02 10:39 AM
Approved by: Representative Norman Rokeberg, Chairman
Date 4/8/2002
Agency: House Judiciary Committee

(Revised 9/2001 OMB)

22-LS1339\C.1
Utermohle
4/4/02

Moved by Rep. Meyer Adopted

AMENDMENT #1

OFFERED IN THE HOUSE

TO: HB 376

Page 3, line 14:

Delete "or"

Page 3, line 20, following "1985)":

Insert "; or

(4) participating in or cooperating with a joint state-federal program relating to the identification of navigable waters in the state"

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 376
(H) Publish Date: 3/18/02

Revision Date/Time (Note if correction):
Dept. Affected: Fish and Game

Title: Management of fish and game in and on navigable waters and submerged lands
BRU: Multiple
Component:

Sponsor: Representative Ogan
Requester: House Resources
Component No.:

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

The fiscal effect of HB 376 is difficult to quantify. Section 3 could very negatively the ability of ADF&G and the board regulatory system to interact in a meaningful way with the federal subsistence program. Under dual federal/state subsistence management, the state works toward the goals of protecting and enhancing our fish and wildlife resources, asserting and protecting the state's management authority and prerogative, and maintaining opportunities for all users of fish and wildlife with subsistence use as a priority. To achieve these objectives, it is critical that the state communicate with federal parties, and that we work with them to protect the state's interests. If ADF&G participation in the development of federal management decisions is limited or curtailed, there will be accelerated erosion of fishing and hunting opportunity for state managed subsistence, sport, personal use, and commercial users, and a far greater likelihood of negative effects on our fish and game resources.

Prepared by: Rob Bosworth
Phone 465-6140
Division: Commissioner's Office
Date/Time 3/1/02 10:05 AM

Approved by: Commissioner Frank Rue
Date 3/1/2002
Agency: Fish and Game

(Revised 9/2001 OMB)

REPRESENTATIVE SCOTT OGAN Alaska State Legislature

House District 27 • Palmer • Greater Palmer • Sutton • Chickaloon • Sheep Mountain

MEMORANDUM

TO: Representative Norman Rokeberg Chair
Judiciary Committee

FROM: Representative Scott Ogan

DATE: March 15, 2002

SUBJECT: Hearing request for HB 376

HB 376 was prompted by Governor Knowles decision not to appeal the Katie John case to the United States Supreme Court. By his actions, Governor Knowles ceded state sovereign authority to the Feds when he chose not to pursue the Ninth Circuit Court of Appeals decision to the U.S. Supreme Court. In his Anchorage Daily News article, dated March 3, 2000, Governor Knowles said regarding his position of the Submerged Lands Act which was imbedded in the Statehood Act and Compact, "As Alaska's governor, I believe it is my clear responsibility, even in the face of a difficult political battle, to vigorously defend this important aspect of state sovereignty." He also said "It is in the best interest of all Alaskans to demand Alaska management of Alaska's fish and game, to recognize the importance of subsistence to the economy and culture of rural Alaska, and to protect state sovereignty of all our navigable waters."

This is a case of the states right to jurisdiction over all fish and game in and on the navigable waters and submerged lands in the state, except where jurisdiction to federal control has been granted. These are state's rights devolved by Congress in the 1953 Submerged Lands Act and later affirmed in the Statehood Act and Compact which acknowledges the equal footing doctrine.

The U.S. Supreme Court has held that Congress may not simply "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." New York v United States, 505 US 144, 120 L Ed 2d 120, 112 S Ct 2408 (1992).

I would appreciate your scheduling a hearing on this bill so that all views can be discussed and considered.

SO/wc

Interim: 600 E. Railroad Ave. #1, Wasilla, AK 99654 • **Session:** State Capitol, Juneau, AK 99801 465-3878
(907) 376-4866 Fax (907) 373-4724 1 (800) 862-3878 Fax (907) 465-3265

REPRESENTATIVE SCOTT OGAN Alaska State Legislature

House District 27 • Palmer • Greater Palmer • Sutton • Chickaloon • Sheep Mountain

Sponsor Statement For House Bill 376

Fish & Game in Navigable Waters

An Act relating to management of fish and game in and on the navigable waters and submerged lands of Alaska

This bill affirms that the State of Alaska has not assented to federal control of fish and game in and on the navigable waters and submerged lands of Alaska. The actions of Governor Knowles by not appealing the John v U.S. case to the United States Supreme Court prompted introduction of this legislation.

In 1953 the U.S. Congress passed the Submerged Lands Act, which affirmed constitutional doctrine giving state sovereignty over all navigable waters within their borders. This sovereign power was devolved to the State of Alaska on equal footing in the Statehood Act and Compact. In an Anchorage Daily News article dated March 3, 2000, Governor Knowles said, "No governor of any state would – or should – ever voluntarily relinquish authority back to the federal government." He went on to say, "As Alaska's governor, I believe it is my clear responsibility, even in the face of a difficult political battle, to vigorously defend this important aspect of state sovereignty." The U.S. Supreme Court has ruled that Congress may not simply "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." New York v United States, 505 US 144, 120 L Ed 2d 120, 112 S Ct 2408 (1992).

Additionally, the governor said, "The Alaska State Supreme Court has ruled exactly the opposite of federal court and unanimously said the State of Alaska controls all navigable waters." Again, the governor also chose to ignore the Alaska Supreme Court. By his actions, Governor Knowles made Alaska a second-class state, ignoring the fact we were admitted to the union on equal footing, when he chose not to appeal the Ninth Circuit Court of Appeals decision to the U.S. Supreme Court.

In the Alaska Digest Email News of September 3-9, 2001 Alaska Sen. Frank Murkowski supported appealing the Ninth Circuit Court of Appeals decision to the U.S. Supreme Court. Murkowski said, "I don't believe such an appeal would endanger justified subsistence protections, but it would protect the rights Alaskans thought they had secured at Statehood. An appeal would actually help to end the discord over subsistence by providing finality to the legal arguments. That would help all Alaskans come together and settle this in Alaska, where it should be settled." Governor Knowles abrogated his "clear responsibility to defend this important aspect of state sovereignty."

HB 376 further strengthens the State's position with language asserting that the State may not expend funds to adopt or enforce the implementation of federal regulatory programs for control of fish and game in or on the navigable waters or submerged lands in the state. It does not, however, prevent authorities from conducting emergency, life saving, or other appropriate activities.

# # #

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LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 1, 2002

SUBJECT: Sectional Summary of HB 376: relating to management of fish and game in and on the navigable waters and submerged lands of Alaska (Work Order No. 22-LS1339\C)

TO: Representative Scott Ogan
Attn: Bill Church

FROM: George Utermohle
Legislative Counsel

You have requested a sectional summary of HB 376; relating to management of fish and game in and on the navigable waters and submerged lands of Alaska.

As a preliminary matter, note that a sectional summary of a bill is not an authoritative interpretation of the bill. The bill itself is the best statement of its contents.

Section 1 of the bill sets out the findings of the legislature in regard to the management of fish and game in and on the navigable waters and submerged lands of Alaska.

Section 2 of the bill amends AS 16.20.010(a) by adding a new subparagraph stating that the State of Alaska has not assented to federal control of fish and game in and on the navigable waters and submerged lands of Alaska.

Section 3 of the bill amends AS 16.20.020 by adding a new subsection (c) setting out the permissible role of state agencies, employees, and agents in implementing a federal regulatory program for control of fish and game in and on the navigable waters and submerged lands of the state.

If I may be of further assistance, please advise.

GU:med
02-090.med

Alaska Statehood Act

Selection of public lands, fish and wildlife,public schools, mineral permits, mineral grants, confirmation of grants, internal improvements, submerged lands

Section 6

(a) For the purposes of furthering the development of and expansion of communities, the State of Alaska is hereby granted and shall be entitled to select, within twenty-five years after the date of the admission of the State of Alaska into the Union, from lands within national forests in Alaska which are vacant and unappropriated at the time of their selection not to exceed four hundred thousand acres of land, and from the other public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection not to exceed another four hundred thousand acres of land, all of which shall be adjacent to established communities or suitable for prospective community centers and recreational areas. Such lands shall be selected by the State of Alaska with the approval of the Secretary of Agriculture as to national forest lands and with the approval of the Secretary of the Interior as to other public lands: Provided, That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, or shall affect the rights of any such owner, claimant, locator, or entryman to the full use and enjoyment of the land so occupied.

(b) The State of Alaska, in addition to any other grants made in this section, is hereby granted and shall be entitled to select, within twenty-five years after the admission of Alaska into the Union, not to exceed one hundred and two million five hundred and fifty thousand acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection: Provided, That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, or shall affect the rights of any such owner, claimant, locator, or entryman to the full use and enjoyment of the lands so occupied: And provided further, That no selection hereunder shall be made in the area north and west of the line described in section 10 without approval of the President or his designated representative.

(c) Block 32, and the structures and improvements thereon, in the city of Juneau are granted to the State of Alaska for any or all of the following purposes or a combination thereof: A residence for the Governor, a State museum, or park and recreational use.

(d) Block 19, and the structures and improvements thereon, and the interests of the United States in blocks C and 7, and the structures and improvements thereon, in the city of Juneau, are hereby granted to the State of Alaska.

(e) 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, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301; 48 U.S.C., sections 192-211), as amended, and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478; 48 U.S.C., sections 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U.S.C., sections 221-228), as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate

Federal agency: Provided, That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest: Provided, That such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife nor facilities utilized in connection therewith, or in connection with general research activities relating to fisheries or wildlife. Sums of money that are available for apportionment or which the Secretary of the Interior shall have apportioned, as of the date the State of Alaska shall be deemed to be admitted into the Union, for wildlife restoration in the Territory of Alaska, pursuant to section 8 (a) of the Act of September 2, 1937, as amended (16 U.S.C., section 669g-1), and for fish restoration and management in the Territory of Alaska, pursuant to section 12 of the Act of August 9, 1950 (16 U.S.C., section 777k), shall continue to be available for the period, and under the terms and conditions in effect at the time, the apportionments are made. Commencing with the year during which Alaska is admitted into the Union, the Secretary of the Treasury, at the close of each fiscal year, shall pay to the State of Alaska 70 per centum of the net proceeds, as determined by the Secretary of the Interior, derived during such fiscal year from all sales of sealskins or sea otter skins made in accordance with the provisions of the Act of February 26, 1944 (58 Stat. 100; 16 U.S.C., sections 631a-631q), as supplemented and amended. In arriving at the net proceeds, there shall be deducted from the receipts from all sales all costs to the United States in carrying out the provisions of the Act of February 26, 1944, as supplemented and amended, including, but not limited to, the costs of handling and dressing the skins, the costs of making the sales, and all expenses incurred in the administration of the Pribilof Islands. Nothing in this Act shall be construed as affecting the rights of the United States under the provisions of the Act of February 26, 1944, as supplemented and amended, and the Act of June 28, 1937 (50 Stat. 325), as amended (16 U.S.C., section 772 et seq.).

(f) Five per centum of the proceeds of sale of public lands lying within said State which shall be sold by the United States subsequent to the admission of said State into the Union, after deducting all the expenses incident to such sales, shall be paid to said State to be used for the support of the public schools within said State.

(g) Except as provided in subsection (a), all lands granted in quantity to and authorized to be selected by the State of Alaska by this Act shall be selected in such manner as the laws of the State may provide, and in conformity with such regulations as the Secretary of the Interior may prescribe. All selections shall be made in reasonably compact tracts, taking into account the situation and potential uses of the lands involved, and each tract selected shall contain at least five thousand seven hundred and sixty acres unless isolated from other tracts open to selection. The authority to make selections shall never be alienated or bargained away, in whole or in part, by the State. Upon the revocation of any order of withdrawal in Alaska, the order of revocation shall provide for a period of not less than ninety days before the date on which it otherwise becomes effective, if subsequent to the admission of Alaska into the Union, during which period the State of Alaska shall have a preferred right of selection, subject to the requirements of this Act, except as against prior existing valid rights or as against equitable claims subject to allowance and confirmation. Such preferred right of selection shall have precedence over the preferred right of application created by section 4 of the Act of September 27, 1944 (58 Stat. 748; 43 U. S. C., section 282), as now or hereafter amended, but not over other preference rights now conferred by law. Where any lands desired by the State are unsurveyed at the time of their selection, the Secretary of the Interior shall survey the exterior boundaries of the area requested without any interior subdivision thereof and shall issue a patent for such selected area in terms of the exterior boundary survey; where any lands desired by the State are surveyed at the time of their selection, the boundaries of the area requested shall conform to the public land subdivisions established by the approval of the survey. All lands duly selected by the State of Alaska pursuant to this Act shall be patented to the State by the Secretary of the Interior. Following the selection of lands by the State and the tentative approval of such selection by the Secretary

of the Interior or his designee, but prior to the issuance of final patent, the State is hereby authorized to execute conditional leases and to make conditional sales of such selected lands. As used in this subsection, the words "equitable claims subject to allowance and confirmation" include, without limitation, claims of holders of permits issued by the Department of Agriculture on lands eliminated from national forests, whose permits have been terminated only because of such elimination and who own valuable improvements on such lands.

(h) Any lease, permit, license, or contract issued under the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U.S.C., section 181 and following), as amended, or under the Alaska Coal Leasing Act of October 20, 1914 (38 Stat. 741; 30 U. S. C., section 432 and following), as amended, shall have the effect of withdrawing the lands subject thereto from selection by the State of Alaska under this Act, unless such lease, permit, license, or contract is in effect on the date of approval of this Act, and unless an application to select such lands is filed with the Secretary of the Interior within a period of five years after the date of the admission of Alaska into the Union. Such selections shall be made only from lands that are otherwise open to selection under this Act, and shall include the entire area that is subject to each lease, permit, license, or contract involved in the selections. Any patent for lands so selected shall vest in the State of Alaska all right, title, and interest of the United States in and to any such lease, permit, license, or contract that remains outstanding on the effective date of the patent, including the right to all rentals, royalties, and other payments accruing after that date under such lease, permit, license, or contract, and including any authority that may have been retained by the United States to modify the terms and conditions of such lease, permit, license, or contract: Provided, That nothing herein contained shall affect the continued validity of any such lease, permit, license, or contract or any rights arising thereunder.

(i) All grants made or confirmed under this Act shall include mineral deposits. The grants of mineral lands to the State of Alaska under subsections (a) and (b) of this section are made upon the express condition that all sales, grants, deeds, or patents for any of the mineral lands so granted shall be subject to and contain reservation to the State of all of the minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same. Mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct: Provided, That any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States District Court for the District of Alaska.

(j) The schools and colleges provided for in this Act shall forever remain under the exclusive control of the State, or its governmental subdivisions, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college, or university.

(k) Grants previously made to the Territory of Alaska are hereby confirmed and transferred to the State of Alaska upon its admission. Effective upon the admission of the State of Alaska into the Union, section 1 of the Act of March 4, 1915 (38 Stat. 1214; 48 U.S.C., section 353), as amended, and the last sentence of section 35 of the Act of February 25, 1920 (41 Stat. 450; 30 U. section C, section 191), as amended, are repealed and all lands therein reserved under the provisions of section 1 as of the date of this Act shall, upon the admission of said State into the Union, be granted to said State for the purposes for which they were reserved; but such repeal shall not affect any outstanding lease, permit, license, or contract issued under said section 1, as amended, or any rights or powers with respect to such lease, permit, license, or contract, and shall not affect the disposition of the proceeds or income derived prior to such repeal from any lands reserved under said section 1, as amended, or derived thereafter from any disposition of the reserved lands or an interest therein made prior to such repeal.

(l) The grants provided for in this Act shall be in lieu of the grant of land for purposes of internal

improvements made to new States by section 8 of the Act of September 4, 1841 (5 Stat. 455), and sections 2378 and 2379 of the Revised Statutes (43 U.S.C., section 857), and in lieu of the swampland grant made by the Act of September 28, 1850 (9 Stat. 520), and section 2479 of the Revised Statutes (43 U.S.C., section 982), and in lieu of the grant of thirty thousand acres for each Senator and Representative in Congress made by the Act of July 2, 1862, as amended (12 Stat. 503; 7 U.S.C., sections 301-308), which grants are hereby declared not to extend to the State of Alaska.

(m) The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

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Content current as of February 7, 1998
Page last revised February 7, 1998

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Created and maintained by Bob Hume

SUBMERGED LANDS ACT

43 U.S.C. §§ 1301-1315, May 22, 1953, as amended 1986.

Overview. The Act grants coastal states title to offshore lands within their historic boundaries, generally up to three miles from the coastline, as well as the rights to the natural resources on or within those lands. The federal government relinquishes its claims to the lands and resources, but maintains the right to regulate offshore activities for national defense, international affairs, navigation, and commerce.

Findings/Policy. Congress declared that it is in the public interest that title to and ownership of the lands beneath navigable waters within the boundaries of the respective states, and the natural resources within these lands and waters, be recognized, confirmed, vested in and assigned to the respective states or the persons who were, on June 5, 1950, entitled to the land and resources under state law. The right and power to manage, lease, develop, and use these lands and resources should also be established in the states. § 1311.

Relevant Definitions. Boundaries: includes the seaward boundaries of a state or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time the state became a member of the Union, or as approved by Congress or extended and confirmed pursuant to § 1312, but in no event shall the term boundaries or the term lands beneath navigable waters be interpreted as extending from the coastline more than three geographical miles into the Atlantic or Pacific Ocean, or more than three marine leagues into the Gulf of Mexico. However, a boundary that has been fixed by final decree of the U.S. Supreme Court remains immobile. Lands beneath navigable waters: (1) all lands within the boundaries of each of the respective states which are covered by nontidal waters that were navigable at the time the state became a member of the Union or acquired sovereignty over the lands and waters, up to the ordinary high water mark, (2) all lands permanently or periodically covered by tidal waters up to the line of mean high tide and seaward to a line three miles from the coast line of such state, and to the boundary line of a state the boundary of which at the time the state became a member of the Union, or as approved by Congress, extended seaward beyond three miles, and (3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters. Natural resources: includes, without limiting the generality thereof, oil, gas, and other minerals and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life, but does not include water power or the use of water for producing power. § 1301.

Resources Seaward of Continental Shelf. The Act does not affect the rights of the U.S. to the natural resources of the subsoil and seabed of the continental shelf lying seaward and outside of the lands beneath navigable waters. The Act states that these natural resources appertain to the U.S., and it confirms the U.S.'s jurisdiction and control. (See also the summary of the Outer Continental Shelf Act of 1953.) § 1302.

Relinquishment of U.S. Title. According to the Act, the U.S. releases and relinquishes to the states all rights, title and interest it may have, unless otherwise reserved, in lands, improvements, and natural resources beneath or within navigable waters within the boundaries of the respective states. The U.S. also releases and relinquishes any claims it may have for money or damages arising out of the operations of states or persons acting under state authority upon or within those lands and navigable waters. The Act addresses the effectiveness of leases covering lands and natural resources affected by the Act, as well as the allocation of lease payments among the U.S., the state and the lessee.

Nothing in the Act is to affect the use, development, improvement, or control of lands and waters, by or under the constitutional authority of the U.S., navigation or flood control or the production of power. Nothing shall be construed as the release or relinquishment of rights of the U.S. arising under constitutional authority to regulate or improve navigation, or to provide for flood control or the production of power. Also, nothing in the Act is to affect the laws of states which lie westward of the 98th meridian

relating to the ownership and control of ground and surface waters. The control, appropriation, use and distribution of these waters shall continue to be in accordance with state law. § 1311.

Seaward Boundaries of States. The seaward boundary of each original coastal state is confirmed as a line three miles from its coast line or, in the case of the Great Lakes, to the international boundary. Subsequently admitted states may extend their boundaries to either three miles from their coast line or to international boundaries in the Great Lakes or any other body of water traversed by such boundaries. States may claim these boundaries without prejudice to any claim that the boundaries extend beyond that point. § 1312.

Exceptions. Exceptions from the confirmation and establishment of states' title, power and rights include: all tracts or parcels of land, together with all accretions, resources or improvements, to which title has been acquired by the U.S. from a state or a person with vested title; all lands which the U.S. holds under state law; lands expressly retained or ceded to the U.S. when the state entered the union; lands acquired by the U.S. by eminent domain proceedings, purchase, cession, gift or otherwise in a proprietary capacity; all lands filled in, built up or otherwise reclaimed by the U.S. for its own use; any rights the U.S. has in lands presently and actually occupied by the U.S. under claim of right; lands beneath navigable waters which are held by the U.S. for the benefit of a tribe, band, or group of Indians or for individual Indians; all structures and improvements constructed by the U.S. in the exercise of its navigational servitude. § 1313.

Rights and Powers Retained. The U.S. retains its navigational servitude and its rights in and powers of regulation and control of lands and navigable waters for the constitutional purposes of commerce, navigation, national defense and international affairs, all of which shall be paramount to the proprietary rights of ownership, management, administration, leasing, use, and development of lands and natural resources recognized and vested in the states and others under the Act. In time of war or when necessary for national defense, the U.S. shall have the right of first refusal to purchase natural resources at the prevailing market rate or to acquire land with due process of law and paying just compensation. § 1314.

Chapter 4 - Statute Summaries
Federal Wildlife & Related Laws Handbook

Distributed By
Representative Scott Ogan
District 27

EQUAL FOOTING

James Madison had included provisions for equality in admittance of the new States in the first draft of the Constitution:

> "If admission be consented to, new states shall be admitted on the same terms with the original states."

In spite of the Oct. 10, 1780, promises of the federal Congress and conditions of several State deeds of cession, a faction lead by Governor Morris of New York and Elbridge Gerry of Massachusetts advocated plans to limit the number of new states so that they would never outnumber the older states or to admit new states on a less than equal basis. Madison insisted that **"the Western States neither would nor ought to submit to a union which degraded them from an equal rank with the other States."** (2 Madison, "Journal of the Debates in the Convention which Framed the Constitution," 274 - Hunt's ed. 1908.)

George Mason stated:

> "If the Western States are to be admitted to the Union, they must be treated as equals and subject to no degrading discrimination. They will have the same pride and other passions which we have, and will either not unite with or will speedily revolt from the Union, if they are not in all respects placed on an equal footing with their bretheren." (Clarence B. Carson, A Basic History of the United States, Volume 2, American Textbook Committee, c1995.)

A compromise resulted in the neutral statement in the Constitution:

> "***New states may be admitted by Congress into this union***; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress."

The principle of "equal footing" was later summarized by Justice Lurton in Coyle v. Smith, 221 U.S. 559 (1911):

> "The power of Congress in respect to the admission of new states is found in the 3d section of the 4th article of the Constitution. That provision is that, 'new states may be admitted by the Congress into this Union.' The only expressed restriction upon this power is that no new state shall be formed within the jurisdiction of any other state, nor by the junction of two or more states, or parts of states, without the consent of such states, as well as of the Congress.
>
> "But what is this power? **It is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union.** It is, as strongly put by counsel, a 'power to admit states.'
>
> "The definition of 'a state' is found in the powers possessed by the original states which

adopted the Constitution,-a definition emphasized by the terms employed in all subsequent acts of Congress admitting new states into the Union. The first two states admitted into the Union were the states of Vermont and Kentucky, one as of March 4, 1791, and the other as of June 1, 1792. No terms or conditions were exacted from either. Each act declares that the state is admitted 'as a new and entire member of the United States of America.' 1 Stat. at L. 191, 189, chaps. 7, 4. Emphatic and significant as is the phrase admitted as 'an entire member,' even stronger was the declaration upon the admission in 1796 of Tennessee [1 Stat. at L. 491, chap. 47] as the third new state, it being declared to be 'one of the United States of America,' **'on an equal footing with the original states in all respects whatsoever,'- phraseology which has ever since been substantially followed in admission acts**, concluding with the Oklahoma act, which declares that Oklahoma shall be admitted 'on an equal footing with the original states.'

"The power is to admit 'new states into this Union.'

'This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself.To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new states, enlarged or restricted by the conditions imposed upon new states by its own legislation admitting them into the Union; and, second, that such new states might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission.

"The argument that Congress derives from the duty of 'guaranteeing to each state in this Union a republican form of government,' power to impose restrictions upon a new state which deprive it of equality with other members of the Union, has no merit. It may imply the duty of such new state to provide itself with such state government, and impose upon Congress the duty of seeing that such form is not changed to one anti-republican,-Minor v. Happersett, 21 Wall. 162, 174, 22 L. ed. 627, 630,-but **it obviously does not confer power to admit a new state which shall be any less a state than those which compose the Union."**

Boyd v. State of Nebraska, 143 U.S. 135 (1892):

"Admission on an equal footing with the original states, in all respects whatever, involves **equality of constitutional right and power, which cannot thereafterwards be controlled,** and **it also involves the adoption as citizens of the United States of those whom congress makes members of the political community**, and who are recognized as such in the formation of the new state with the consent of congress."

As established by Justice Field in Escanaba & L. M. Transp. Co. v. City of Chicago (1882) 107 U.S. 678, 2 Sup. Ct. 185, regardless of prior territorial provisions, such as the Northwest Ordinance of 1787, the new

States:

> '[But the states] have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people.'

Stated Justice Field in Illinois Cent. R. Co. v. State of Illinois, 146 U.S. 387 (1892):

> "The state of Illinois was admitted into the Union in 1818 on an equal footing with the original states, in all respects. Such was one of the conditions of the cession from Virginia of the territory notrhwest of the Ohio river, out of which the state was formed. **But the equality prescribed would have existed if it had not been thus stipulated. There can be no distinction between the several states of the Union in the character of the jurisdiction, sovereignty, and dominion which they may possess and exercise over persons and subjects within their respective limits..."**

Factors that effect "equal footing" can be roughly separated into those pertaining to the "imperium" (political sovereignty, police powers, jurisdiction over citizens and others) of the State and the "dominium" (property, eminent domain or territorial jurisdiction) of the State:

IMPERIUM

- The effects of Enabling Acts, terms and conditions of statehood, Congressional acts applicable to territorial government, etc. upon the subsequent political sovereignty and eminent domain of the State, (including "police" or "municipal" powers such as hunting regulations.)

DOMINIUM

- Devolution of the Crown's title and trust over "Royal Rivers" or the "Sea and it's Arms" from the federal government to the sovereign people of the States, including offshore limits, beds and banks of navigable streams and common or public fishery.

- Federal retention of title as proprietor of the "Public Lands" ceded by the original States lying within the new States east of the Mississippi as trustee for the purposes of disposal for payment of the war debt.

- Federal retention of the "public domain" lands west of the Mississippi.

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KATIE JOHNS APPEAL IS ABOUT STATE SOVEREIGNT .

Article Date: Friday, March 03, 2000
Page: B12
Section: Metro By Tony Knowles

In 1953, America was celebrating a new era of peace, prosperity and change. The Korean War had halted; Dwight Eisenhower was president. Early chords of rock and roll were being strummed. The first vacuum tube computer was processing.And in the territory of Alaska, Anchorage's KENI launched the first-ever television broadcast.Another much less noticed event occurred that year, which heralded a dramatic change in the relationship between the federal government and the states. With passage of the Submerged Lands Act, Congress affirmed a constitutional doctrine giving states control of all navigable waters -- those used for commerce and transportation -- within their borders. This act presented the states a historic and extraordinary opportunity for economic development and local control of resources. Six years later, when Alaska became a state, this meaningful state control was imbedded in the Statehood Act and Compact.No governor of any state would -- or should -- ever voluntarily relinquish this authority back to the federal government.As Alaska's governor, I believe it is my clear responsibility, even in the face of a difficult political battle, to vigorously defend this important aspect of state sovereignty.That was certainly my position as a candidate for this office six years ago, and it was my position in 1995 when I fought in court a federal attempt to take this authority from Alaska. And it remains my firm stand today as I appeal the same case to the 9th Circuit Court of Appeals, and to the Supreme Court if necessary.That case is Katie John v. the United States. Filed in 1990 by a respected Athabaskan elder from Mentasta, the case was an appeal to the federal government to protect her subsistence rights under federal law.The State of Alaska, by its own Supreme Court ruling, could not provide this right until the Legislature allows Alaskans the opportunity to vote on a subsistence constitutional amendment. Once this happens, the case would simply disappear.Unfortunately, a small minority of state senators refuses to allow Alaskans to vote on this important issue. That's why on Oct. 1, 1999, the federal government took over fish and game management on federal lands in our state, which constitute about two-thirds of Alaska. If we lose the Katie John case, we also will lose navigable waters to the feds.I believe that as a rural resident of Mentasta, Katie John deserves the right for a subsistence preference in times of shortage. I think most Alaskans agree.We can make that happen by allowing Alaskans to vote on a subsistence amendment to our constitution. The wrong way to make that happen is to hand over to the federal government even more authority by managing our rivers and streams.The Alaska State Supreme Court has ruled exactly the opposite of federal court and unanimously said the State of Alaska controls all navigable waters.In its special convention two weeks ago, the Alaskan Federation of Natives passed a resolution condemning me for again appealing the Katie John case. They further stated they no longer support the rural subsistence preference constitutional amendment that passed the state House at a special legislative session I called last year. In early

February, I introduced that same amendment in the state Senate.While I understand AFN's frustration and accept the "condemnation" as part of my job as governor (this seems to happen with increasing frequency!), it's vitally important we remain focused on the goal most Alaskans share -- protecting subsistence.I will do all I can to keep together the statewide coalition of business leaders, commercial and sport fishermen, development and civic organizations, a bipartisan majority of the Legislature, the congressional delegation and AFN, who came together behind one goal. That goal is maintaining state -- not federal -- control and management of our fish and game resources and standing behind our commitments under the Alaska Lands Act, which provides for a rural subsistence preference.I have urged AFN privately -- and urge them here publicly -- to continue their long-standing support for a rural subsistence preference constitutional amendment.It is in the best interest of all Alaskans to demand Alaska management of Alaska's fish and game, to recognize the importance of subsistence to the economy and culture of rural Alaska, and to protect state sovereignty of all our navigable waters.Tony Knowles is governor of Alaska.

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District 27

Alaska Digest Email News

September 3-9, 2001

Murkowski Laments State Decision Not To Appeal 9th Circuit Case

FAIRBANKS -- Alaska Sen. Frank Murkowski had the following reaction to a decision by Alaska Gov. Tony Knowles not to appeal to the U.S. Supreme Court a decision by the Ninth Circuit Court of Appeals.

"While I stand in agreement with the Governor that over the last several years the divide between Rural and Urban Alaska has widened, I'm disappointed along with the majority of Alaskans that the Governor has conceded jurisdiction over state waters to the federal government by not appealing the Ninth Circuit's decision. The Governor's failure to file an appeal does not solve the subsistence issue."

"Even if we succeed in passing a constitutional amendment to protect subsistence and solve the subsistence problem, which I have supported and will continue to work for, Alaskans will not be afforded the chance to recover control over state waters, which the Governor has chosen to give away."

"The Ninth Circuit decision goes far beyond subsistence to broadly impact state jurisdiction over state waters. The Knowles/Ulmer concession appears to undermine the state's constitution. That is why other western states have voiced support for Alaska's appeal. It's a sad day for states rights."

"I, as do the vast majority of Alaskans, agree that subsistence is an important and integral part of our culture and must be protected. If this court case were solely about subsistence rights in Alaska I could better understand the Governor's rationale. This case is about how far the often-intrusive arm of the federal government can extend into areas of jurisdiction that are better left to the states. If left unchecked, this reach could extend far beyond what it is today."

"In 1953 the federal government passed the Submerged Lands Act granting ownership of all lands under tidal and navigable waters to the states. The Ninth Circuit ruling, however, effectively overturns that law by granting federal authority over navigable waters to further subsistence on "neighboring" federal lands. That could open the door to federal management of navigable waters covering everything from commercial fishing to tourism. Clearly that was not the intent of Congress when it guaranteed subsistence on "federal" lands in 1971's Alaska Native Claims Settlement Act and is the reason why other western states backed Alaska's appeal."

"I don't believe such an appeal would endanger justified subsistence protections, but it would protect the rights Alaskans thought they had secured at Statehood. An appeal would actually help to end the discord over subsistence by providing finality to the legal arguments. That would help all Alaskans come together and settle this in Alaska, where it should be settled."

MAIN PAGE & INDEX

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Legal History of the Subsistence Issue: A Chronological Overview

To understand the subsistence preference issue, one must examine the legal history behind it. This outline will provide a concise road map to that history and will summarize the development of the legal issues.

I. Alaska Constitution: Adopted and ratified by the people of Alaska in 1956, the Alaska Constitution specifically addressed ownership and use of Alaska's fish, wildlife and other resources.

   A. Article VIII, § 3 states that fish and wildlife in their natural state are reserved for the *common use* of the people.
   B. Article VIII, § 4 requires that all the state's replenishable resources are to be managed on a sustained yield principle, subject to preferences among beneficial uses.
   C. Taken together, these provisions mean that the state cannot grant any group of *people* preferential use of fish and wildlife resources; the only legally acceptable preferences are among beneficial *uses*. *McDowell v. State*, 785 P.2d 1 (Alaska 1989).

II. Alaska Statehood Act: The Alaska Statehood Act was a compact between the people of the state of Alaska and the United States of America providing for Alaska's admission to the Union as a state. It was passed by Congress and ratified by the people of Alaska in 1958, and Alaska was formally admitted as a state by a proclamation of President Eisenhower in 1959.

   A. The Statehood Act is not just a law; it is a *compact* between the people of the state and the United States, just as the U.S. Constitution is a compact between the people and the federal government. This is important because it means that Congress cannot unilaterally pass any law that contradicts or violates the terms of the compact. In other words, the Statehood Act takes precedence over other federal laws if there is a conflict.
   B. The Statehood Act specifically accepted and ratified the Alaska Constitution as the governing document for the new state, including those provisions reserving fish and wildlife for common use of all Alaskans. (Alaska Statehood Act, § 1)
   C. The Act also transferred management of Alaska's fish and wildlife resources to the state, except for special refuges or reservations set apart for wildlife protection.

III. Alaska Native Claims Settlement Act (ANCSA): The Native Claims Settlement Act of 1971 was a full and final settlement of all claims to any rights, title, interest or privilege by people of Native origin in

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the state of Alaska, and extinguished any claims of Alaska Natives to special hunting or fishing rights. This Act is a legal settlement in the nature of a treaty; it therefore takes precedence over any previous or subsequent laws of Congress.

A. Declaration of Congressional Policy in § 1 states that "the settlement should be accomplished . . . ***without establishing any permanent racially defined institutions, rights, [or] privileges . . .***"
B. The settlement provided for payment by the federal government to Alaska Natives of four-hundred sixty-two million, five-hundred thousand dollars ($462,500,000) in cash payments, and another five-hundred million dollars ($500,000,000) in assignments of mineral royalties and lease payments received by the State of Alaska. It also granted title to millions of acres of land to regional and village Native corporations established under the Act.
C. In exchange, the Native peoples of the state specifically waived forever any and all aboriginal claims based on previous use or occupancy (in other words, traditional use), or based on any previous statute or treaty. These forfeited claims include claims to any right, title, use or occupancy in or to land and water areas of the State of Alaska:

    b. All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and ***including any aboriginal hunting and fishing rights that may exist, are hereby extinguished.***

Alaska Native Claims Settlement Act, § 4 (b),(c) (emphasis added).

IV. <u>Implementation of Alaska Native Claims Settlement Act (ANCSA) and Alaska Statehood Act:</u> In 1980, Congress passed this Implementing Act which contains a number of clarifications and refinements of procedural and administrative issues relating to implementation of the Native Claims Settlement Act and the Statehood Act.

A. Also establishes a new "Alaska Land Bank" program which authorizes holders of large tracks of land to place their land in a federal land bank for a ten year period, renewable in five year increments.
B. A participating landowner agrees (among other things) to manage fish and wildlife on the land according to federal or state management plans, if any. In exchange, the federal government provides the owner with technical assistance in fish and wildlife management, as well as other benefits. The Act does not transfer management duties to the federal government, however.

V. <u>Alaska National Interest Lands Conservation Act (ANILCA):</u> This Act, passed by Congress in 1980, is often referred to as "ANILCA," and imposes a preference for uses of Alaskan fish and wildlife by "rural resident."

A. Rural or bush residents are granted preference under ANILCA in the taking of fish and wildlife. (16 USC § 3114). While the Act tries to mask its racial preference agenda by granting the preference to rural subsistence users rather than to Natives, the true intent of congress is revealed in § 3111 where Congress invokes its constitutional authority over "Native affairs" to preserve the "economic, traditional and cultural existence" of "Native and non-Native" rural subsistence users and attempts to "fulfill the policies and purposes

of ANCSA."

B. Defines the preferential "subsistence uses" as "customary and traditional uses" of fish and wildlife (16 USC § 3113). This is exactly the type of claims of aboriginal hunting or fishing rights based on previous use that were "extinguished" by the Native Claims Settlement Act.
C. The Act does not authorize the federal government to manage fish and game according to this subsistence preference; it only authorizes federal judicial intervention if a subsistence user feels that he or she isn't receiving preferential treatment under the state's management plan.

VI. Important Court Cases:

A. In McDowell v. State, 785 P.2d (Alaska 1989), the Alaska Supreme Court ruled that the Alaska Constitution, which was ratified and approved by Congress in the Statehood Compact, prohibits granting a rural subsistence preference.
B. In 1984, the 9th Circuit Court of Appeals issued an important ruling in two consolidated cases: Inupiat Community v. U.S., 746 F.2d 570 (9th Cir. 1984) and People of the Village of Gambell v. Clark, 746 F.2d 572 (9th Cir. 1984). The Court stated that Alaska Natives' claims of subsistence hunting and fishing rights had been forever extinguished with the Alaska Native Claims Settlement Act. The United States Supreme Court refused to hear the one of the two cases when the Native communities appealed, and in the other case bypassed the issue of extinguishment of Native rights by holding that neither the Alaska Native Claims Settlement Act (ANCSA) or Alaska National Interest Lands Conservation Act (ANILCA) applied to the outer continental shelf. Gambell v. Clark, 480 U.S. 531 (1991).
C. These cases clearly hold that any and all claims by Alaska Natives to subsistence hunting and fishing preferences *cannot stand* under the Alaska Constitution, the Alaska Statehood Act, and the ANCSA. Yet the federal government has taken over the management of fish and wildlife on federal lands in Alaska to forcibly implement ANILCA'S unlawful subsistence preference scheme. It was this federal management of Alaska's fish and wildlife resources--which is not authorized in any statute, and which flagrantly violates Alaska statehood compact with the federal government--that was challenged in the Babbitt lawsuit.

and finally,

D. United States v. Alexander, 938 F.2d 942 (CA9 1991). Persons convicted of selling subsistence taken roe-on-kelp challenged their conviction.

The 9th Circuit Court of Appeals found that ANILCA does not limit customary trade to transactions involving personal or family consumption. The sale of herring roe is customary trade [up to fifteen thousand dollars ($15,000) per person]. ANILCA allows rural Alaskans to engage in limited sales of herring roe so long as the sales are part of customary trade. State regulations cannot prohibit the sale of herring roe taken in subsistence fisheries because customary trade in fish and game is a subsistence use of fish.

The court remanded the case for a new trail. If the defendants were found, at the new trail, to have engaged in a sale of herring roe that was more than a limited cash sale then they could be convicted of unlawful selling of subsistence caught herring roe.

Michael TOTEMOFF, Petitioner,

v.

STATE of Alaska, Respondent.

No. S–6151.

Supreme Court of Alaska.

Oct. 20, 1995.

Rehearing Denied Nov. 20, 1995.

Subsistence hunter was convicted in the District Court, Third Judicial District, Whittier, John D. Mason, J., of violating regulation prohibiting hunting with aid of artificial light. The Court of Appeals, 866 P.2d 125, affirmed. Hunter petitioned for hearing. The Supreme Court, Matthews, J., held that: (1) state had power to enforce its hunting and fishing laws against subsistence hunter on federal land, so long as its laws did not conflict with federal laws or regulations; (2) state law prohibiting use of spotlight was not in actual conflict with Alaska National Interest Lands Conservation Act (ANILCA); (3) state had jurisdiction over subsistence hunter because he violated Alaska law in navigable waters above state lands and ANILCA did not give federal government power to regulate subsistence hunting and fishing in such navigable waters; and (4) subsistence hunter was not barred from challenging spotlighting regulation.

Reversed and remanded.

1. Criminal Law ⇐1017

Jurisdiction is threshold issue which must be decided before Supreme Court may address other issues presented by appeal.

2. States ⇐18.3

United States ⇐3

State is free to enforce its civil or criminal laws on federal land within its boundaries unless state consents to exercise of exclusive federal jurisdiction, state voluntarily cedes exclusive jurisdiction to federal government, or state's laws are preempted by federal law.

3. States ⇐18.3

Federal law can preempt state law in three ways: first, Congress may expressly declare that state law is preempted; second, state law is preempted if Congress intends federal government to occupy field exclusively; third, federal law preempts state law if two actually conflict.

4. Game ⇐3.5

Regulation of hunting is area that is part of police power of states.

5. Fish ⇐9

Game ⇐4

States ⇐18.33

Congress did not intend for federal government to exclusively occupy field of subsistence hunting and fishing regulation under Alaska National Interest Lands Conservation Act (ANILCA), so as to preempt state law regulating subsistence hunting and fishing on federal land; language of ANILCA does not demonstrate clear and manifest Congressional intent to preempt state law, and federal agencies have interpreted federal ANILCA as allowing such state regulation. 16 U.S.C.A. §§ 3111–3126, 3112(3), 3202; Alaska Admin. Code title 5, § 92.080(7).

6. Game ⇐4

States ⇐18.33

Alaska National Interest Lands Conservation Act (ANILCA) does not protect use of spotlight as customary and traditional method of subsistence hunting, and thus state law prohibiting use of spotlight is not in actual conflict with ANILCA, so as to preempt enforcement of Alaska's stoplight ban against subsistence hunters on federal land. 16 U.S.C.A. §§ 3113, 3121(b); Alaska Admin. Code title 5, § 92.080(7).

7. Criminal Law ⇐97(.5)

If elements of crime are committed in different jurisdictions, any state in which essential part of crime is committed may assert jurisdiction.

8. Criminal Law ⇐97(.5)

State had jurisdiction over subsistence hunter who shot deer on federal land, even assuming that Alaska National Interest Lands Conservation Act (ANILCA) preempted application of Alaska spotlighting ban on federal land, where hunter's act of shining spotlight and firing fatal shot occurred on navigable waters, and ANILCA did not give federal government power to regulate hunting and fishing on navigable waters. 16 U.S.C.A. §§ 3101–3233; Alaska Admin. Code title 5, § 92.080(7).

9. Public Lands ⇐4

"Public lands" means lands, waters, and interests therein under Alaska National Interest Lands Conservation Act (ANILCA), title to which is in United States; but "public lands" does not include lands, waters, and interests therein which were transferred to Alaska under other federal laws. 16 U.S.C.A. § 3102.

10. Commerce ⇐82.30

Navigable Waters ⇐2

"Navigational servitude" is dominant servitude, sometimes described as superior navigation easement, which allows federal government to exercise its regulatory power over navigable waters in interests of commerce without compensation for interference with private water rights; it is dominant right over navigable waters for purposes of improving and regulating navigation and is derived from commerce clause. U.S.C.A. Const. Art. 1, § 8, cl. 3; Submerged Lands Act, § 6(a), 43 U.S.C.A. § 1314(a).

See publication Words and Phrases for other judicial constructions and definitions.

11. Waters and Water Courses ⇐2

Under "reserved water rights doctrine," when Congress withdraws land from public domain for a federal purpose, it implicitly reserves water necessary to accomplish purposes of reservation.

See publication Words and Phrases for other judicial constructions and definitions.

12. Waters and Water Courses ⇐2

Amount of water reserved under reserved water rights doctrine is limited to what is necessary to fulfill purposes of land reservation.

13. Waters and Water Courses ⇐2

Reservation of water may be implied under federal reserve water rights doctrine only where water is necessary for primary purpose of federal reservation, not where water merely serves secondary purposes of reservation.

14. Waters and Water Courses ⇐2

Under reserved water rights doctrine, in determining scope of implied reserved water rights court may look only to primary purpose of reservation at time land was first reserved by federal government, and may not consider other purposes later given to reservation.

15. Courts ⇐97(1)

Alaska Supreme Court is not bound by decisions of federal courts other than United States Supreme Court on questions of federal law.

16. Judgment ⇐829(3)

State of Alaska was not collaterally estopped by federal court decision, in case in which it was party, as to legal issues regarding applicability of Alaska National Interest Lands Conservation Act (ANILCA) to navigable waters since issue raised pure questions of law which did not involve factual issues. 16 U.S.C.A. §§ 3101–3233.

17. Fish ⇐8

Game ⇐3.5

Federal government has no authority to regulate hunting and fishing in Alaska's navigable waters based on navigable servitude or reserved water rights doctrine, neither of which bring navigable waters within Alaska National Interest Lands Conservation Act (ANILCA) definition of "public lands." 16 U.S.C.A. §§ 3102(1), 3114.

18. Fish ⇐8

Navigable Waters ⇐36(1)

Submerged Lands Act gives Alaska ownership of, title to, and management power over lands beneath navigable waters of Alaska, navigable waters themselves, and fish and other marine life located in Alaska's navigable waters. 16 U.S.C.A. §§ 3102(1), 3114; 43 U.S.C.A. §§ 1301–1356.

19. Fish ⇐8
Game ⇐3½
States ⇐4.16(2)

Submerged Lands Act specifically precludes navigational servitude from being used to give federal government power over fish or animals in state navigable waters. 16 U.S.C.A. §§ 3102(1), 3114; 43 U.S.C.A. §§ 1301–1356, 1314(a).

20. Navigable Waters ⇐16
Waters and Water Courses ⇐2

Neither navigational servitude nor reserved water rights give federal government possessory interest in body of water; United States cannot hold title to navigational servitude or reserved water rights.

21. Navigable Waters ⇐36(1)
Public Lands ⇐4

In including "interest" in "lands" or "waters," "title to which is in the United States" within Alaska National Interest Lands Conservation Act's (ANILCA's) definition of "public lands," Congress intended word "interest" to cover possessory interest lesser than fee interests such as leases, as to which title could be held, rather than navigational servitudes and reserved water rights, to which United States does not hold title. 16 U.S.C.A. § 3102(1, 3).

See publication Words and Phrases for other judicial constructions and definitions.

22. Fish ⇐8
Game ⇐3.5
Navigable Waters ⇐16

Navigational servitude only gives United States power to regulate navigable waters for navigation purposes without owing compensation; it does not permit federal regulation of hunting and fishing in navigable waters.

23. Waters and Water Courses ⇐2

Reserved water rights doctrine only grants to government right to either exclude others from appropriating water which feeds government reservation or to use limited volume of water in order to serve federal land reserved; doctrine does not provide federal government with plenary power over body of water.

24. Fish ⇐8
Game ⇐3.5

Neither navigational servitude power to regulate for navigation purposes nor power to reserve water rights grants federal government jurisdiction to manage hunting and fishing and navigable waters; two powers are over navigation and water, not fish and game.

25. Statutes ⇐219(3)

Positions on interpretations of statutes adopted by agency during litigation which contradict earlier regulations are not owed deference by courts.

26. Statutes ⇐219(6.1)

Definition of "public lands" under Alaska National Interest Lands Conservation Act (ANILCA) is pure question of statutory construction, which involves no technical agency expertise, and on which deference is not owed. 16 U.S.C.A. § 3102(1), (3)(A).

27. Navigable Waters ⇐4

Navigable waters are generally not "public lands" under Alaska National Interest Lands Conservation Act (ANILCA); Submerged Lands Act of 1953 specifically gives state authority over fish and animals in navigable waters and precludes navigation servitudes or reserved rights from being used to erode that authority, navigable servitudes and reserved water rights are not interests to which title can be held, and navigational servitude and reserved water rights are limited interests which do not give federal government power over navigable or reserved waters unrelated to those interests. 16 U.S.C.A. § 3102(1), (3)(A); 43 U.S.C.A. §§ 1301–1356; 36 C.F.R. § 242.3(b).

28. Fish ⇐8
Game ⇐3.5
States ⇐18.33

Alaska National Interest Lands Conservation Act (ANILCA) does not curtail state's authority to regulate hunting and fishing in navigable waters. 16 U.S.C.A. §§ 3103–3233.

29. Statutes ⇐217.4

Legislative history may not be used to legislate detailed rules that cannot be supported by statute's explicit language.

30. Game ⇐4

Subsistence hunter may contest validity of regulation under which hunter is prosecuted. AS 16.05.259; Alaska Admin. Code title 5, § 92.080(7).

31. Game ⇐4

Subsistence hunter was not precluded by statute from contesting validity of spotlighting ban. AS 16.05.259; Alaska Admin. Code title 5, § 92.080(7).

32. Fish ⇐8
Game ⇐3.5

Board of Game is not required to hold substantive hearing in addition to hearings required under Administrative Procedure Act in order to adopt hunting and fishing regulation. AS 44.62.180–44.62.290, 44.62.210(a); Alaska Admin. Code title 5, § 92.080(7).

33. Criminal Law ⇐1181.5(3.1)

Where subsistence hunter's challenge to validity of spotlighting ban regulation was improperly precluded by lower court in finding he had violated regulation, remand was required to allow hunter opportunity to demonstrate that regulation was adopted without compliance with Administrative Procedure Act. AS 44.62.180–44.62.290; Alaska Admin. Code title 5, § 92.080(7).

Paul E. Malin, Assistant Public Defender, John B. Salemi, Public Defender, Anchorage, for Petitioner.

Joanne Grace, Assistant Attorney General, Anchorage, Bruce M. Botelho, Attorney General, Juneau, for Respondent.

Before COMPTON, C.J., and RABINOWITZ, MATTHEWS, MOORE and EASTAUGH, JJ.

ORDER

IT IS ORDERED, SUA SPONTE:

1. Opinion No. 4236 issued in this case on August 7, 1995, is WITHDRAWN.

2. Corrected Opinion No. 4276 is issued today in its place. The corrections are found in the last full paragraph on page 18 and in the first full paragraph on page 26.

Entered by direction of the court at Anchorage, Alaska on October 20, 1995.

Before MOORE, C.J., and RABINOWITZ, MATTHEWS, COMPTON and EASTAUGH, JJ.

OPINION

MATTHEWS, Justice.

Subsistence hunter Mike Totemoff shot a deer with the aid of a spotlight in December 1990. The deer was killed on federal land, Naked Island in Prince William Sound. However, Totemoff was in a skiff in navigable waters surrounding Naked Island when he shined his spotlight at the deer and fired the fatal shot.

Totemoff was charged with violating 5 Alaska Administrative Code (AAC) 92.080(7), which prohibits hunting with the aid of an artificial light. Totemoff moved to have the indictment dismissed, arguing that the State did not have jurisdiction to prosecute him and that the regulation prohibiting spotlighting was invalid. To support some of his arguments, Totemoff presented evidence that spotlighting is a customary and traditional means of hunting deer for subsistence in his native community of Tatitlek. The district court ruled that the State did have jurisdiction to prosecute Totemoff. The district court held that Alaska law prohibits subsistence hunters from challenging, in a criminal proceeding, the regulations under which they are prosecuted.

The case proceeded to trial, and Totemoff was convicted. The court of appeals affirmed. *Totemoff v. State*, 866 P.2d 125 (Alaska App.1993). We granted Totemoff's petition for hearing.

[1] We must first decide whether the State has criminal jurisdiction over Totemoff, as jurisdiction is a threshold issue which must be decided before this court can address other issues presented in an appeal. *See Nattrass v. State*, 554 P.2d 399, 401 (Alaska 1976). Jurisdiction can be established either by finding that the State has

the power to apply the spotlighting ban to subsistence hunters on federal land, or by determining that the State has exclusive jurisdiction over the navigable waters from which Totemoff fired his rifle. If we find that the State does have jurisdiction, we will then consider Totemoff's state law challenge to the anti-spotlighting regulation.

I. *JURISDICTION OVER FEDERAL LAND*

[2] A state is free to enforce its civil or criminal laws on federal land within its boundaries unless the state consents to the exercise of exclusive federal jurisdiction, the state voluntarily cedes exclusive jurisdiction to the federal government, or the state's laws are preempted by federal law. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580–81, 107 S.Ct. 1419, 1424–25, 94 L.Ed.2d 577 (1987); *Kleppe v. New Mexico*, 426 U.S. 529, 542–43, 96 S.Ct. 2285, 2293–94, 49 L.Ed.2d 34 (1976); *see also Arizona v. Manypenny*, 445 F.Supp. 1123, 1125–26 (D.Ariz.1977), *rev'd on other grounds*, 451 U.S. 232, 101 S.Ct. 1657, 68 L.Ed.2d 58 (1981). Alaska has not voluntarily ceded exclusive jurisdiction over hunting on federal land to the federal government or consented to exclusive federal control. Therefore, the State lacks jurisdiction to enforce its spotlighting ban against subsistence hunters on federal land only if enforcement is preempted by federal law.

[3] Federal law can preempt state law in three ways. First, Congress may expressly declare that state law is preempted. Second, state law is preempted if Congress intends the federal government to occupy a field exclusively. Third, federal law preempts state law if the two actually conflict. *See, e.g., Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604–05, 111 S.Ct. 2476, 2481–82, 115 L.Ed.2d 532 (1991); *English v. General Elec. Co.*, 496 U.S. 72, 78–79, 110 S.Ct. 2270, 2274–75, 110 L.Ed.2d 65 (1990). Totemoff argues that application of the spotlighting ban to him is preempted by the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§ 3101–3233 (1988).

No provision in ANILCA expressly preempts state enforcement of state hunting laws against subsistence hunters on federal land. Thus, we must determine whether Congress intended for the federal government to exclusively occupy the field of regulation of subsistence activities when it enacted ANILCA, or whether state law actually conflicts with ANILCA.

A. *Intent to Occupy Field*

Congressional intent to occupy a field can be inferred from a "scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it," or if a federal law "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *English*, 496 U.S. at 79, 110 S.Ct. at 2275 (alteration in original) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)).

However, "'[w]here ... the field which Congress is said to have pre-empted' includes areas that have 'been traditionally occupied by the States,' congressional intent to supersede state laws must be 'clear and manifest.'" *Id.* (alteration in original) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977)). "When considering pre-emption, '[courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Mortier*, 501 U.S. at 605, 111 S.Ct. at 2478 (quoting *Rice*, 331 U.S. at 230, 67 S.Ct. at 1152).

[4] Regulation of hunting is an area that has been traditionally occupied by the states. It is part of the historic police power of states. *See State v. Coffee*, 97 Idaho 905, 914, 556 P.2d 1185, 1194 (1976); *State ex rel. Nepstad v. Danielson*, 149 Mont. 438, 427 P.2d 689, 691 (1967); *see also Montana v. United States*, 450 U.S. 544, 564 n. 13, 101 S.Ct. 1245, 1258 n. 13, 67 L.Ed.2d 493 (1981). Therefore, we may find that Congress intended to occupy the field of regulation of subsistence hunting on federal land only if Congress' purpose was clear and manifest.

[5] ANILCA does not disclose such a clear and manifest purpose. Title VIII of ANILCA governs subsistence hunting and fishing. 16 U.S.C. §§ 3111–26. Section 804 of Title VIII requires the taking of fish and wildlife on public lands for subsistence purposes to be accorded priority over the taking of fish and wildlife for other purposes. 16 U.S.C. § 3114. Section 802 states that it is the purpose of Congress "to provide the opportunity for rural residents engaged in a subsistence way of life to do so." 16 U.S.C. § 3112(1). Section 814 requires the Secretaries of Interior and Agriculture to promulgate regulations necessary to carry out their responsibilities under Title VIII. 16 U.S.C. § 3124. Sections 805(a)-(c) of Title VIII provide for the establishment of a network of regional advisory councils and local advisory committees to advise the Secretaries in the exercise of their authority under ANILCA. 16 U.S.C. §§ 3115(a)–(c).

Under § 805(d), the federal government was not to implement §§ 805(a)–(c) if Alaska enacted laws of general applicability providing "for the definition, preference, and participation specified" in Title VIII. 16 U.S.C. § 3115(d). Alaska did enact such laws,[1] but we struck down the rural preference provision of those laws as contrary to the Alaska Constitution in *McDowell v. State*, 785 P.2d 1 (Alaska 1989). As a result, the State fell out of compliance with ANILCA. The federal government subsequently promulgated temporary and then permanent regulations governing subsistence hunting on public land and implementing §§ 805(a)–(c) of Title VIII. 55 Fed.Reg. 27,114 (1990); 57 Fed.Reg. 22,940 (1992).

Even though Title VIII has been fully implemented, it does not create a scheme of federal regulation so pervasive that there is no room for state regulation to supplement it. Under Title VIII, the Secretaries of Interior and Agriculture implement ANILCA's subsistence priority and opportunity provisions with the participation and assistance of local and regional advisory councils. This does not foreclose the State from promulgating hunting and fishing regulations which may affect subsistence hunters on federal land, so long as those regulations do not conflict with federal laws or regulations. Nothing in Title VIII discloses a clear and manifest purpose to prohibit all state regulation of subsistence hunting. Nothing affirmatively prohibits the State from engaging in such regulation.

Moreover, § 1314 of ANILCA states, "Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in [Title VIII] of this chapter." 16 U.S.C. § 3202. Again, no provision in Title VIII clearly and manifestly prevents the State from enforcing its general hunting laws against subsistence hunters on federal land.

In addition, § 802(3) of Title VIII provides that the policy of Congress is that "[f]ederal land managing agencies, in managing subsistence activities on the public lands ... shall cooperate with ... appropriate State and Federal agencies." 16 U.S.C. § 3112(3). This section suggests that Congress did not intend a federal regulatory scheme so pervasive that there would be no room for state regulation to supplement it.

Finally, when the federal regulations promulgated pursuant to ANILCA were passed, the federal agencies administering ANILCA explained that the regulations would permit the State to continue to participate in the management of subsistence hunting on public land:

> *[T]hese regulations anticipate an interactive process between the State fish and game regulatory procedure.* The State, because of its constitution, cannot provide a preference for rural residents with customary and traditional use of fish and wildlife as required by ANILCA. *The State can facilitate harvest by rural residents through various regulations dealing with means and methods of take and perhaps other mechanisms.*

If State regulations allow rural residents the opportunity to obtain their customary and traditional take and uses of fish and wildlife resources, the Federal regulations may closely parallel State regulations.

1. *See* ch. 151, SLA 1978, ch. 52, SLA 1986.

> *The Federal program anticipates a highly cooperative, interactive relationship with the State system.* To the extent that cooperation exists, the Federal program will be able to minimize change to traditional State regulation and management of fish and wildlife.

55 Fed.Reg. 27,114, 27,119 (1990) (emphasis added). Thus, the federal government clearly contemplated that Alaska means and methods regulations, the kinds of regulations at issue in this case, would be effective on federal land.

Since the language of ANILCA does not demonstrate a clear and manifest Congressional intent to preempt all state regulation affecting subsistence hunting and fishing on federal land, and since the federal agencies administering ANILCA have interpreted ANILCA as allowing such state regulation, we hold that Congress did not intend for the federal government to exclusively occupy the field of subsistence hunting and fishing regulation.

B. *Actual Conflict*

[6] We must next decide whether federal law actually conflicts with the enforcement of the state spotlighting ban against Totemoff on federal land. There is no direct conflict between Alaska's anti-spotlighting regulation, 5 AAC 92.080(7), and any federal statute or regulation. At the time of Totemoff's arrest, a federal subsistence hunting regulation virtually identical to the state regulation prohibited taking game with the aid of a spotlight. *Compare* 36 C.F.R. § 242.23(b)(1)(vii) (1990) *with* 5 AAC 92.080(7) (1990).

Totemoff's principal federal claim, however, is that federal law preempts application of the state spotlighting ban to him because federal law allows him to defend against prosecution on the grounds that spotlighting is a customary and traditional method of taking deer, while state law does not permit such a defense.[2] Totemoff relies on *United States v. Alexander*, 938 F.2d 942 (9th Cir. 1991).

In *Alexander*, the defendants sold herring roe in violation of an Alaska regulation prohibiting sale of herring roe. *Id.* at 944–45. The court held that the defendants were permitted to defend against criminal prosecution on the basis that they were engaged in customary trade for subsistence purposes, a subsistence use protected by ANILCA. *Id.* at 948. In deciding that customary trade was protected by ANILCA, the court cited ANILCA's definition of "subsistence uses"—"the customary and traditional uses by rural Alaska residents of wild renewable resources ... for barter, or sharing for personal or family consumption; *and for customary trade.*" *Id.* at 946 (alteration in original).

The full text of ANILCA's definition of "subsistence uses" is:

> [T]he customary and traditional *uses* by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.

ANILCA § 803, 16 U.S.C. § 3113 (emphasis added). This definition only covers various uses of subsistence resources. It does not cover traditional means and methods of hunting. And no other provision in ANILCA creates a general right to use traditional means and methods of taking game.

Title VIII of ANILCA does specifically protect the use of traditional means of surface transportation for subsistence hunting. Section 811(b) of Title VIII states, "Notwithstanding any other provision of this Act or other law, the Secretary shall permit on the public lands appropriate use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes by local residents, subject to reasonable regulation." 16 U.S.C. § 3121(b). The protection of traditionally employed surface transportation methods implies that other traditional components of subsistence hunting or fishing, such as the use of certain guns, nets, or other equipment, are not exempt from state regulation.

Furthermore, numerous provisions in ANILCA require regulation of subsistence taking in accordance with sound wildlife management principles and the preservation of wildlife resources. *See* 16 U.S.C. §§ 3101(b), 3101(c), 3111(3), 3112(1), 3125(1). Restriction of traditional means and methods may be necessary to accomplish this goal. *See* ANILCA § 801(3), 16 U.S.C. § 3111(3) ("continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened ... by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management").

In addition, no case law directly holds that ANILCA protects customary and traditional methods of hunting. There is a case, however, which could provide support for such a holding, *Native Village of Quinhagak v. United States*, 35 F.3d 388 (9th Cir.1994). In *Quinhagak*, the court ruled that several native villages were entitled to a preliminary injunction against the enforcement of an Alaska regulation barring the taking of rainbow trout for subsistence purposes. *Id.* at 395. The court held that the villages presented a showing of hardship sufficient to justify the preliminary injunction, since they demonstrated that rainbow trout was an important food source for them. *Id.* at 393. The court then added:

> The Villages also presented evidence that the federal and state regulations interfere with their way of life and cultural identity.... They needed to prove nothing more in light of the clear congressional directive to protect the cultural aspects of subsistence living. 16 U.S.C. § 3111(1) [ANILCA § 801(1)] ("[T]he continuation of the opportunity for subsistence uses by rural residents of Alaska ... is *essential to Native* physical, economic, traditional, and *cultural existence*....").

Id. at 394 (alteration in original).

It might be inferred from this language that ANILCA protects traditional subsistence taking means and methods which are part of the cultural identity and way of life of Natives. However, *Quinhagak* only held that the villages were entitled to a preliminary injunction and did not resolve the merits of any controversy concerning the interpretation of ANILCA. Though an argument can be made based on *Quinhagak* that ANILCA does protect customary and traditional means and methods, we conclude that more weight should be accorded to Congress' failure to mention means and methods in ANILCA's definition of "subsistence uses" and to Congress' specific grant of protection to traditional means of surface transportation.

We hold that ANILCA does not protect the use of a spotlight as a customary and traditional method of subsistence hunting, and thus there is no actual conflict between ANILCA and Alaska law. Therefore, federal law does not preempt enforcement of Alaska's spotlighting ban against subsistence hunters on federal land, and the State does have jurisdiction over Totemoff.

II. *JURISDICTION OVER NAVIGABLE WATERS*

[7] Even if ANILCA does protect customary and traditional means and methods, thereby preempting state enforcement of the anti-spotlighting regulation against Totemoff on federal land, the State still has criminal jurisdiction if ANILCA does not apply to the navigable waters from which Totemoff shined his spotlight at the deer. Totemoff's conduct of taking a deer with the aid of an artificial light was committed partly in navigable waters and partly on federal land. If the elements of a crime are committed in different jurisdictions, "any state in which an essential part of the crime is committed" may assert jurisdiction. *State v. Seofield*, 7 Ariz.App. 307, 315, 438 P.2d 776, 784 (1968). "If an offense is committed partly on federal and partly on non-federal property, both sovereigns have jurisdiction." *State v. Kirksey*, 647 S.W.2d 799, 804 (Mo.1983) (en banc).

2. In *State v. Morry*, 836 P.2d 358, 370 (Alaska 1992), we held that the Boards of Fish and Game "have the discretion, *but are not mandated*, to take into consideration the traditional and customary methods of subsistence takings in their formulation of subsistence regulations." (Emphasis added.)

See also Lane v. State, 388 So.2d 1022, 1028 (Fla.1980) (though fatal blow struck in Alabama, Florida has jurisdiction over murder if either premeditation to murder or felony underlying murder occurred in Florida); *Commonwealth v. Lanoue*, 326 Mass. 559, 95 N.E.2d 925, 926 (1950) (if a criminal act is committed in two jurisdictions, a state has jurisdiction over the act if the part of the act committed within that state has been declared to be punishable by its laws); *State v. Kills on Top*, 243 Mont. 56, 793 P.2d 1273, 1285–86 (1990) (Montana has jurisdiction over felony-murder even though victim killed in Wyoming because underlying felony, kidnapping, occurred in Montana), *cert. denied*, 501 U.S. 1259, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991); *People v. Fuller*, 185 A.D.2d 446, 586 N.Y.S.2d 366, 367–68 (App.) (New York has jurisdiction over rape defendant, even though actual sexual assault may have taken place in Pennsylvania, because element of forcible compulsion occurred in New York), *appeal denied*, 80 N.Y.2d 974, 591 N.Y.S.2d 144, 605 N.E.2d 880 (1992); *Brown v. Market Dev., Inc.*, 41 Ohio Misc. 57, 322 N.E.2d 367, 372 (Ohio C.P.1974) (Ohio would have jurisdiction over a person who stood in Ohio and fired a shot across the state border, killing someone in Indiana). *But see State v. Hall*, 114 N.C. 909, 19 S.E. 602, 604–05 (1894) (North Carolina did not have jurisdiction over defendant who while standing in North Carolina shot victim in Tennessee, since no North Carolina statute criminalized the conduct which occurred in North Carolina or otherwise conferred jurisdiction upon the state).

[8] In this case, Totemoff's act of shining a spotlight and firing the fatal shot, an essential part of the crime with which he was charged, unlawful taking of game, occurred on navigable waters. Moreover, Alaska law specifically criminalizes conduct which Totemoff committed solely on navigable waters. Alaska Statute 16.05.940(33) defines "take" as "taking, pursuing, hunting, fishing, trapping, or in any manner disturbing, capturing, or killing or attempting to take, pursue, hunt, fish, trap, or in any manner capture or kill fish or game." Totemoff took actions in navigable waters which constitute "pursuing," "hunting," "disturbing," and "attempting to take, pursue, hunt ... or in any manner capture or kill" deer. Therefore, the State has jurisdiction over Totemoff, even if ANILCA preempts the application of the spotlighting ban on federal land, so long as ANILCA does not give the federal government the power to regulate hunting and fishing in navigable waters.

[9] ANILCA's subsistence priority applies only to "public lands." ANILCA § 804, 16 U.S.C. § 3114. Section 102 of ANILCA defines the term "public lands":

> (1) The term "land" means lands, waters, and interests therein.
>
> (2) The term "Federal land" means lands the title to which is in the United States after December 2, 1980.
>
> (3) The term "public lands" means land situated in Alaska which, after December 2, 1980, are Federal lands, except—
>
> (A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law.

16 U.S.C. § 3102. Thus, "public lands" means lands, waters, and interests therein, the title to which is in the United States. But "public lands" does not include lands, waters, and interests therein which were transferred to Alaska under other federal laws.

Whether "public lands" includes navigable waters was the subject of a recent Ninth Circuit decision, *Alaska v. Babbitt (Katie John)*, 54 F.3d 549 (9th Cir.1995), *cert. denied* — U.S. —, 116 S.Ct. 272, — L.Ed.2d — (1995). The *Katie John* court considered whether ANILCA applies to navigable waters because of the federal government's navigational servitude or federal reserved water rights.

[10] The navigational servitude is a dominant servitude, sometimes described as a "superior navigation easement," which allows the federal government to exercise its regulatory power over navigable waters in the interests of commerce without compensation for interference with private water rights. *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627–28, 81 S.Ct. 784, 787–88, 5 L.Ed.2d 838 (1961); *Boone v. United States*, 944 F.2d 1489, 1493–94 (9th Cir.1991). The servitude "is a concept of power, not of property." *United States v. Certain Parcels of Land Situated in Valdez*, 666 F.2d 1236, 1238 (9th Cir.1982). It is a "dominant right over navigable waters for purposes of improving and regulating navigation." *United States v. 119.67 Acres of Land, More or Less, Situated in Plaquemines Parish, La.*, 663 F.2d 1328, 1330 n. 5 (5th Cir.1981). The navigational servitude is derived from the Commerce Clause. *See United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 704, 107 S.Ct. 1487, 1489–90, 94 L.Ed.2d 704 (1987); *Boone*, 944 F.2d at 1494 n. 9.

[11, 12] Under the reserved water rights doctrine, when Congress withdraws land from the public domain for a federal purpose, it implicitly reserves water necessary to accomplish the purposes of the reservation. *Cappaert v. United States*, 426 U.S. 128, 138, 96 S.Ct. 2062, 2069, 48 L.Ed.2d 523 (1976); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46 (9th Cir.), *cert. denied*, 454 U.S. 1092, 102 S.Ct. 657, 70 L.Ed.2d 630 (1981). "The United States acquires a water right vesting on the date the reservation was created, and superior to the rights of subsequent appropriators." *Colville*, 647 F.2d at 46. The amount of water reserved under the doctrine is limited to what is necessary to fulfill the purpose of the land reservation. *Cappaert*, 426 U.S. at 141, 96 S.Ct. at 2070–71; *United States v. Adair*, 723 F.2d 1394, 1409 (9th Cir.1983), *cert. denied*, 467 U.S. 1252, 104 S.Ct. 3536, 82 L.Ed.2d 841 (1984).

[13, 14] A reservation of water may be implied only where the water is necessary for the primary purpose of the federal reservation, not where the water merely serves secondary purposes of the reservation. *United States v. New Mexico*, 438 U.S. 696, 702, 98 S.Ct. 3012, 3015, 57 L.Ed.2d 1052 (1978); *Adair*, 723 F.2d at 1408–09. In determining the scope of implied reserved water rights, a court may look only to the primary purpose of a reservation at the time the land was first reserved by the federal government, and may not consider other purposes later given to the reservation. *See New Mexico*, 438 U.S. at 713–15. The reserved water rights doctrine has at times been treated as giving the government only a non-consumptive right to prevent others from using a supply of water in a manner that would deprive the federal reservation of the water necessary for its primary purpose; at other times, the doctrine has been interpreted as giving the United States the right to a specific amount of water. *Compare Cappaert*, 426 U.S. at 135, 143, 96 S.Ct. at 2068, 2071–72 *and Adair*, 723 F.2d at 1411 *with Arizona v. California*, 373 U.S. 546, 600–01, 83 S.Ct. 1468, 1497–98, 10 L.Ed.2d 542 (1963) *and Colville*, 647 F.2d at 47.

The Ninth Circuit in *Katie John* decided that the navigational servitude is not an interest to which the United States holds title and ruled that the navigational servitude does not convert all Alaska navigable waters to "public lands" as defined in ANILCA. 54 F.3d at 553. In doing so, the court reversed a federal district court decision which held that the navigational servitude is an interest to which the United States holds title for the purposes of ANILCA. *John v. United States*, Nos. A90-0484-CV, A92-0264-CV, 1994 WL 487830, at *17 (D.Alaska March 30, 1994). The Ninth Circuit also held in *Katie John* that reserved water rights are interests in land to which the federal government has title under ANILCA's definition of "public lands." 54 F.3d at 554.

[15, 16] We are not obliged to follow *Katie John*, since this court is not bound by decisions of federal courts other than the United States Supreme Court on questions of federal law. *In re F.P.*, 843 P.2d 1214, 1215 n. 1 (Alaska 1992), *cert. denied*, — U.S. —, 113 S.Ct. 2441, 124 L.Ed.2d 659 (1993). Though the State was a party to *Katie John*, it is not collaterally estopped here as to the issues decided in that case because the applicability of ANILCA to navigable waters is a pure question of law which does not involve factual issues. *See State v. United Cook Inlet Drift Ass'n*, 895 P.2d 947, 954 (Alaska 1995) ("the State is permitted to relitigate

unmixed questions of law so long as the subject matter of the second case is 'substantially unrelated' to that of the first"). We will follow *Katie John* only to the extent that its reasoning is persuasive.

[17] For a number of reasons, we find that neither the navigational servitude nor reserved water rights bring navigable waters within ANILCA's definition of "public lands," and that the federal government has no authority based on the navigational servitude or the reserved water rights doctrine to regulate hunting and fishing in Alaska's navigable waters.

First, even if the navigational servitude or reserved water rights can be considered interests to which the United States holds title, the State has an interest in fish and wildlife located in navigable waters which precludes federal regulation of such fish and wildlife, under § 102(3)(A) of ANILCA and the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301–56 (1988). Section 102(3)(A) of ANILCA exempts from the definition of "public lands" "lands which have been ... granted to the Territory of Alaska or the State under any other provision of Federal law." 16 U.S.C. § 3102(3)(A). As ANILCA § 102(1) defines "land" as "lands, waters, and interests therein," 16 U.S.C. § 3102(1). "public lands" does not include lands, waters, and interests therein granted to Alaska under another federal law.

A relevant interest in lands or waters is granted to Alaska by the Submerged Lands Act of 1953. Section 3(a) of the Act states:

> It is hereby determined and declared to be in the public interest that (1) *title to and ownership of* the lands beneath navigable waters within the boundaries of the respective States, and *the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said* lands and *natural resources* all in accordance with applicable State law be, and they *are*, subject to the provisions hereof, *recognized, confirmed, established and vested in and assigned to the respective States* or the persons who were on June 5, 1950,[3] entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof.

43 U.S.C. § 1311(a) (emphasis added). Section 2(e) of the Act states, "[t]he term 'natural resources' includes ... fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life." 43 U.S.C. § 1301(e).

[18] The Submerged Lands Act thus gives Alaska ownership of, title to, and management power over the following: lands beneath the navigable waters of Alaska,[4] the navigable waters themselves,[5] and fish and other marine life located in Alaska's navigable waters. Under § 102(3)(A) of ANILCA, the definition of "public lands" in ANILCA therefore excludes navigable waters.

[19] Furthermore, § 6(a) of the Submerged Lands Act specifically precludes the navigational servitude from being used to give the federal government power over fish or animals in state navigable waters. The section states:

> The United States retains all its *navigational servitude and rights in* and powers of regulation and control of said lands and *navigable waters* for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but *shall not be deemed to include, proprietary rights of ownership, or the rights of management administration, leasing, use, and development of* the lands and *natural resources which are specifically* recognized, confirmed, established, and *vested in* and assigned to the respective *States* and others *by section [3]* of this [Act].

43 U.S.C. § 1314(a) (emphasis added). Under this statute, the navigational servitude and other federal rights in navigable waters cannot give the federal government ownership of navigable waters or management rights over fish and animals in navigable waters, as those rights are reserved to the states by § 3 of the Submerged Lands Act.

The second reason supporting our decision that ANILCA does not give the federal government power to regulate hunting and fishing in navigable waters is that the navigational servitude and reserved water rights are not the type of property interests to which title can be held. Authorities disagree on whether the term "title" applies only to fee ownership of property or also covers lesser possessory interests such as lease interests. *Dover Veterans Council, Inc. v. City of Dover*, 119 N.H. 738, 407 A.2d 1195, 1196 (1979); *see also United States v. Hunter*, 21 F. 615, 617 (C.C.E.D.Mo.1884); *compare United States v. City of New Brunswick*, 11 F.2d 476, 477 (3d Cir.1926) ("the ownership of title means ownership of property"), *rev'd on other grounds*, 276 U.S. 547, 48 S.Ct. 371, 72 L.Ed. 693 (1928) *and Schaible v. Fairbanks Medical & Surgical Clinic, Inc.*, 531 P.2d 1252, 1260 (Alaska 1975) (conventional definition of "title" is ownership of the premises) *with Shingleton v. State*, 260 N.C. 451, 133 S.E.2d 183, 189 (1963) ("title" signifies actual or constructive possession of property or the right to possession) *and East Norriton Medical Assocs., Ltd. v. Commonwealth*, 168 Pa.Cmwlth. 421, 650 A.2d 1169, 1171 (1994) (cites statute which defines "title" as a possessory or leasehold interest). However, it is generally accepted that "title" signifies at least some sort of possessory interest in property and does not include lesser interests such as easements. *See Kohl Industries, Park Co. v. County of Rockland*, 710 F.2d 895, 903 (2d Cir.1983).

[20] Neither the navigational servitude nor reserved water rights are possessory interests in a body of water. The navigational servitude has been described as a "dominant servitude" and as a "superior navigation easement." *Virginia Elec. & Power*, 365 U.S. at 627, 81 S.Ct. at 787. Reserved water rights give the federal government the right to prevent others from appropriating water or to use a certain volume of water, not to possess a body of water. *See Cappaert*, 426 U.S. at 135, 143, 96 S.Ct. at 2068, 2071–72; *Arizona*, 373 U.S. at 600–01, 83 S.Ct. at 1497–98. Therefore, the United States cannot hold title to the navigational servitude or reserved water rights.

A similar conclusion was reached by a New York court when New York State claimed that it had title to submerged lands by virtue of state interests analogous to the federal navigational servitude and federal reserved water rights. In *Niagara Falls Power Co. v. Water Power & Control Commission*, 237 A.D. 216, 262 N.Y.S. 217, 219–221 (N.Y.App. 1932), *rev'd on other grounds*, 267 N.Y. 265, 196 N.E. 51 (N.Y.), *cert. denied*, 296 U.S. 609, 56 S.Ct. 128, 80 L.Ed. 432 (1935), an issue relevant to determining the amount of rent the state could charge for a water power site located on submerged lands which had been previously granted to a private company was whether "title" to the "water power sites or lands" was "vested in the state." The state argued that it had "title" through "[i]ts sovereignty and incidental control over navigable waters," a power similar to the federal navigational servitude, or through interference the power site could cause with state riparian rights appurtenant to a state park, an interest similar to federal reserved water rights. *Id.* at 221. The court rejected these arguments, explaining that these "inchoate and incorporeal" rights did not constitute "title." *Id.* at 224–25.

[21] Our conclusion that the navigational servitude and reserved water rights are not interests to which the United States holds title may raise the question of what Congress intended when it included "interests" in "lands" or "waters," "the title to which is in

3. Under the Alaska Statehood Act, "[t]he Submerged Lands Act of 1953 [is] applicable to the State of Alaska and the said State [has] the same rights as do [other] States thereunder." Pub.L. No. 85–508, § 6(m) (1958), *reprinted in* 48 U.S.C. following § 5 (1988).

4. The term "lands beneath navigable waters" covers

> all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles.

43 U.S.C. § 1301(a)(2).

5. The U.S. Supreme Court has referred to the Submerged Lands Act as a grant of "submerged lands and waters." *United States v. California*, 436 U.S. 32, 37, 98 S.Ct. 1662, 1665, 56 L.Ed.2d 94 (1978).

the United States," within ANILCA's definition of "public lands." *See* ANILCA §§ 102(1)–(3), 16 U.S.C. §§ 3102(1)–(3). A logical answer is that the word "interests" was intended to cover possessory interests lesser than fee interests such as leases, as there is considerable authority that title can be held to such interests. *See, e.g., Shingleton*, 133 S.E.2d at 189; *East Norriton*, 650 A.2d at 1171.

A broader reading would conflict with the clear statement doctrine, which is the third ground underlying our ruling on the navigable waters issue. The clear statement doctrine "counsels that a ... court should not apply a federal statute to an area of traditional state concern unless Congress has articulated its desire in clear and definite language to alter the delicate balance between state and federal power by application of the statute to that area." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485, 495 n. 6 (8th Cir.) (quoting *Taffet v. Southern Co.*, 930 F.2d 847, 851 (11th Cir.1991), *vacated on other grounds and reh'g granted*, 958 F.2d 1514 (11th Cir.), *on reh'g en banc*, 967 F.2d 1483 (11th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 657, 121 L.Ed.2d 583 (1992)), *cert. denied*, 504 U.S. 957, 112 S.Ct. 2306, 119 L.Ed.2d 228 (1992). The doctrine means that "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *California State Bd. of Optometry v. Federal Trade Comm'n*, 910 F.2d 976, 981 (D.C.Cir.1990) (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65, 109 S.Ct. 2304, 2309, 105 L.Ed.2d 45 (1989)); *see also BFP v. Resolution Trust Corp.*, —— U.S. ——, ————, 114 S.Ct. 1757, 1764-66, 128 L.Ed.2d 556 (1994). The doctrine applies "in circumstances in which the language of a statute or its legislative history provide some indication of ambiguity." *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1306 (2d Cir.1990).

In this case, ANILCA's definition of "public lands" would have to be viewed as ambiguous before it could be interpreted as covering the navigational servitude or reserved water rights. Defining "public lands" as waters subject to the navigational servitude or reserved water rights would allow the federal government to regulate hunting and fishing in navigable waters. States have traditionally had the power to govern hunting and fishing in their navigable waters. Regulation of hunting and fishing is a traditional concern of the states. *See Coffee*, 556 P.2d at 1194; *Danielson*, 427 P.2d at 691. Congress has not expressed in unmistakably clear language a desire to alter this traditional allocation of state and federal power.

The fourth basis for our decision on this matter is that, even assuming the navigational servitude or reserved water rights are interests to which the United States holds title, the land management authority which the federal government obtains through these interests is limited by the purposes of the interests. The power any easement, servitude, or similar property interest gives to its holder is limited by the interest's purpose. *See, e.g., Southern Pac. Co. v. City of San Francisco*, 62 Cal.2d 50, 41 Cal.Rptr. 79, 396 P.2d 383, 386 (1964); *Benno v. Central Lake County Joint Action Water Agency*, 242 Ill. App.3d 306, 182 Ill.Dec. 522, 526, 609 N.E.2d 1056, 1060 (Ill.App.), *appeal denied*, 151 Ill.2d 561, 186 Ill.Dec. 378, 616 N.E.2d 331 (1993). For example, an easement giving a person the right to cross over another's property for access to his own land does not create a right to use the property subject to the easement for any other purpose.

[22, 23] Likewise, the navigational servitude only gives the United States the power to regulate navigable waters for navigation purposes without owing compensation, *Boone*, 944 F.2d at 1493–94; it does not permit federal regulation of hunting and fishing in navigable waters. Similarly, the reserved water rights doctrine only grants to the government the right to either exclude others from appropriating water which feeds a government reservation or to use a limited volume of water in order to serve the federal land reserved. *See Cappaert*, 426 U.S. at 135, 143, 96 S.Ct. at 2068, 2071–72; *Arizona*, 373 U.S. at 600–01, 83 S.Ct. at 1497–98. The doctrine does not provide the federal government with plenary power over a body of water.

[24] Fifth, neither the navigational servitude power to regulate for navigation purposes nor the power to reserve water rights can grant the federal government jurisdiction to manage hunting and fishing in navigable waters. The two powers are over navigation and water, not fish and game.

The final reason for our ruling on the navigable waters issue concerns reserved water rights only. Employing the reserved water rights doctrine to define the geographic scope of navigable waters covered by ANILCA would be highly impractical, perhaps even impossible. It would first require the federal agencies administering ANILCA to determine the primary purpose of each federal land reservation in Alaska at the time the reservation was created. *See New Mexico*, 438 U.S. at 702, 713–15, 98 S.Ct. at 3015, 3020–22. Then, the federal agencies would have to ascertain the amount of water necessary to fulfill the primary purpose of the reservation. *See Cappaert*, 426 U.S. at 141, 96 S.Ct. at 2070. Afterwards, the agencies would have to somehow convert that amount of water into a surface area of water constituting "public lands" under ANILCA. This last step could be especially difficult, because reserved water rights represent the right to use a set volume of water or to prevent others from appropriating water, and not specific geographic areas around which property lines may be drawn. Congress could not have intended to create such a complicated and uncertain regulatory scheme.

Despite acknowledging that it was "impos[ing] an extraordinary administrative burden on federal agencies," the Ninth Circuit held in *Katie John* that reserved water rights are interests in land to which the federal government has title for ANILCA purposes. 54 F.3d at 554. The court's holding was based on two grounds. First, the court believed that the position taken by the federal agencies that reserved water rights do define the scope of ANILCA was a reasonable agency interpretation owed deference. *See id.* at 552–54. Second, the court feared undermining Congress' intent to protect subsistence fishing. *See id.* at 552, 554. In our view, neither of these considerations justifies the court's holding.

We apply federal law on deference in determining whether deference is owed to a federal agency's legal position. Under federal deference law, the *Katie John* court should not have deferred to the federal agencies' position on the meaning of ANILCA's definition of "public lands." *See id.* at 554. This position was first adopted by the federal government at oral argument before the district court. *Id.* at 552. Prior to that, the federal regulations promulgated pursuant to ANILCA and the explanations of those regulations had repeatedly generally excluded navigable waters from the definition of "public lands." *See* 36 C.F.R. § 242.3(b) (1994); 57 Fed.Reg. 22,940, 22,941 (1992); 56 Fed. Reg. 29,310, 29,311 (1991); 55 Fed.Reg. 27,-114, 27,115 (1990).[6]

[25] The federal government's new position that ANILCA covers navigable waters in which the United States has reserved water rights is a position taken during litigation, not a regulation or agency interpretation that is owed deference. The federal government's new position has not been formalized in any regulation. *See* 60 Fed.Reg. 31,542, 31,542–43 (1995). Positions on interpretations of statutes adopted by agencies during litigation which contradict earlier regulations are not owed deference by courts. *See Wolpaw v. Commissioner*, 47 F.3d 787, 790 (6th Cir.1995) (position announced by federal agency in the course of litigation owed no deference). If any interpretation is owed deference, it is the interpretation in the federal regulations that ANILCA generally does not apply to navigable waters, not the position adopted in a litigation context. *See id.* (while litigation position not owed deference, agency's earlier regulations may be entitled to some deference); *see also General Elec. Co. v. Gilbert*, 429 U.S. 125, 142–46, 97 S.Ct. 401, 411–13, 50 L.Ed.2d 343 (1976) (Court

6. Certain navigable waters over submerged lands to which the United States holds title were included in the definition of "public lands." *See* 36 C.F.R. 242.3(b); 57 Fed Reg. 22,940, 22,941 (1992).

refuses to defer to agency interpretation contradicting previous, long-standing interpretation and follows earlier interpretation).

[26] Deference is not due to the new federal position for several other reasons. The definition of "public lands" under ANILCA is a pure question of statutory construction. *See Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 445–46, 107 S.Ct. 1207, 1220–21, 94 L.Ed.2d 434 (1987) (suggesting that no deference or lesser degree of deference is due to agency interpretation if issue before court is pure question of statutory construction). The issue involves no technical agency expertise. *See Thomas Jefferson Univ. v. Shalala*, — U.S. —, —, 114 S.Ct. 2381, 2387, 129 L.Ed.2d 405 (1994) (deference more warranted when interpretation involves technical agency expertise). The federal agencies' position is not a long-standing one. *See Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 646 n. 34, 106 S.Ct. 2101, 2122 n. 34, 90 L.Ed.2d 584 (1986) (if agency interpretation is neither consistent nor longstanding, the degree of deference it deserves is substantially diminished). Most importantly, the recent federal interpretation is not a reasonable, permissible construction of ANILCA, for the numerous reasons given earlier. *See National R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 418, 112 S.Ct. 1394, 1402, 118 L.Ed.2d 52 (1992) ("a reviewing court need not accept an interpretation which is unreasonable"); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781–82, 81 L.Ed.2d 694 (1984) (deference may be given to agency interpretation only if it is based on permissible construction of statute).

We also respectfully disagree with the conclusion of the court in *Katie John* that utilizing reserved water rights to define the scope of ANILCA is necessary to fulfill Congress' intent to protect subsistence fishing. The court noted that Congress intended ANILCA to protect subsistence uses, that subsistence uses include subsistence fishing, and that subsistence fishing has traditionally taken place in navigable waters. 54 F.3d at 552. The court then stated, "Thus, we have no doubt that Congress intended that public lands include at least some navigable waters." *Id.* The court later stated that ruling that neither the navigational servitude nor reserved water rights constitute interests to which the United States holds title for ANILCA purposes "would undermine congressional intent to protect and provide the opportunity for subsistence fishing." *Id.* at 554.

However, the definition of "public lands" in the federal regulations issued pursuant to ANILCA does include navigable waters over submerged lands owned by the United States. *See* 36 C.F.R. § 242.3(b); 57 Fed. Reg. 22,940, 22,941 (1992).[7] Moreover, some subsistence fishing takes place in non-navigable waters which are "public lands." *See, e.g., Quinhagak*, 35 F.3d at 391. Therefore, fulfilling Congress' intent to provide an opportunity for subsistence fishing does not require ruling that reserved water rights define "public lands" under ANILCA.

[27, 28] Because the Submerged Lands Act of 1953 specifically gives states authority over fish and animals in navigable waters and precludes the navigational servitude or reserved water rights from being used to erode that authority, because the navigational servitude and reserved water rights are not interests to which title can be held, because of the clear statement doctrine, because the navigational servitude and reserved water rights are limited interests which do not give the federal government power over navigable or reserved waters unrelated to those interests, and for the other reasons discussed above, we hold that navigable waters are generally not "public lands" under ANILCA. Therefore, ANILCA does not curtail the State's authority to regulate hunting and fishing in navigable waters, and the State has criminal jurisdiction over Totemoff.

7. The area encompassed in the regulation defining ANILCA's scope is substantial. It includes, to name only the largest areas, the Arctic Ocean watershed from the Canadian border to Cape Lisbourne on the Chukchi Sea, and virtually all of the Aleutian Islands. *See* 36 C.F.R. § 242.3(b)(1), (4).

III. *VALIDITY OF REGULATION*

As the State has the right to prosecute Totemoff, we proceed to consider his state law defense. Totemoff argues that the regulation prohibiting spotlighting is invalid because the Board of Game failed to consider the impact of the regulation on subsistence hunting at its adoption. Both the district court and the court of appeals held that *State v. Eluska*, 724 P.2d 514 (Alaska 1986), prohibited Totemoff from challenging the regulation in a criminal proceeding. *See Totemoff*, 866 P.2d at 129. In addition, the State argues that AS 16.05.259, a statute entitled "No Subsistence Defense," prevents Totemoff from challenging the regulation.

A. *Eluska*

Both lower courts misinterpreted *Eluska*. In that case, Eluska, the defendant, killed a deer out of season. There were no subsistence regulations separate from the general hunting regulations. Eluska defended against prosecution on the grounds that he was hunting for subsistence purposes, that the Board had violated its statutory duty to adopt subsistence regulations, and that therefore his actions were lawful. 724 P.2d at 514. The court of appeals accepted his defense. The court held that Alaska law gave subsistence users a right to hunt for subsistence purposes. The court ruled that in areas where the Board of Game failed to adopt regulations permitting subsistence hunting, a person charged with violating hunting laws could defend on the basis that he was hunting for subsistence. *Id.* at 515.

We reversed, citing AS 16.05.920(a), which prohibits taking any game unless permitted by statute or regulation. We observed that no Alaska statute or constitutional provision gave persons the right to hunt for subsistence in the absence of regulations authorizing such hunting, and noted that the decision of the court of appeals would have permitted unregulated hunting in areas where the Board failed to adopt regulations authorizing subsistence hunting. *Id.* We cited one of our earlier decisions, *United States Smelting, Refining & Mining Co. v. Local Boundary Commission*, 489 P.2d 140 (Alaska 1971), explaining that the case held that "agency action taken without first complying with a statutory requirement may be invalid," not that "an agency's failure to act in accordance with a statutory requirement means that those who are regulated by the agency may act as though they were not regulated." *Eluska*, 724 P.2d at 516.

Eluska only held that a person may not hunt for subsistence purposes without regulations authorizing the person to do so. It did not rule that a subsistence hunter may not defend against criminal prosecution on the grounds that the regulation the hunter is charged with violating is procedurally invalid. Unlike the defendant in *Eluska*, Totemoff disputes the validity of a specific regulation. Therefore, we hold that *Eluska* does not bar Totemoff's defense.

B. *Alaska Statute 16.05.259*

After the court of appeals' decision in *Eluska* was announced, but before we published our decision in the case, the legislature adopted AS 16.05.259. *See Bobby v. Alaska*, 718 F.Supp. 764, 785 (D.Alaska 1989). Alaska Statute 16.05.259 states, "In a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense that the taking was done for subsistence uses."

Arguing that AS 16.05.259 prohibits Totemoff from challenging the spotlighting ban, the State relies on a passage from a Senate Committee on Resources report on the legislation which contained AS 16.05.259. In its entirety, that passage reads:

> [Alaska Statute 16.05.259] states that in a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense to the charge that the taking was done for subsistence use. *This section requires a person who disagrees with a board action or statute to seek to correct that action or statute through appeal, petitions for reconsideration, court action, etc. rather than permitting the person to violate the statute or regulation and claim subsistence as a defense. This elim-*

inates the "subsistence defense" as arose in the Eluska and Skuse[8] *cases.*

This section does not effect [sic] AS 16.05.930(b) which allows people to take fish and game in case of emergency. *This section is also not intended to limit a persons [sic] ability to challenge a regulation that is unreasonable in its terms or fails to provide a reasonable opportunity to satisfy subsistence uses as required in proposed AS 16.05.2[illegible].* An example might be a hunting season on caribou that was open in a particular area before or after the caribou migrated through the area, but was closed while the caribou were in the area. Such a regulation would be unreasonable on its face and would fail to provide a reasonable opportunity for subsistence uses as required by AS 16.05.258(c).

Senate Committee on Resources, *RE: SCS for CS for HB 288 (Resources) "An Act relating to the taking of fish and game for subsistence and personal use; and providing for an effective date"* 8–9 (March 12, 1986) (emphasis added). The report shows that AS 16.05.259 was designed to undo the court of appeals' decision in *Eluska*.

However, the report is also somewhat contradictory. It first states that the law requires a person who disagrees with a Board action to seek to correct that action through administrative means, not a challenge in a criminal prosecution. It then states that it does not prohibit a person from contesting a regulation in a criminal proceeding on the basis that the regulation is unreasonable or fails to provide a reasonable opportunity to satisfy subsistence uses.

[29] These contradictory passages suggest that under AS 16.05.259 a subsistence hunter may challenge a regulation in a criminal case only on the grounds that the regulation is unreasonable or fails to provide an opportunity to satisfy subsistence needs, but not on other grounds. But such a reading cannot be justified by the plain language of the statute. Legislative history may not be used to legislate detailed rules that cannot be supported by a statute's explicit language. *Cf. Madison Galleries, Ltd. v. United States*, 870 F.2d 627, 629–30 (Fed.Cir.1989).

As the committee's report is not particularly helpful, we look to AS 16.05.259's language and to the fact that it was passed to undo the court of appeals' decision in *Eluska* in order to divine the statute's meaning. The plain language of AS 16.05.259 does not bar challenges to the validity of a regulation such as 5 AAC 92.080(7), which governs means or methods of subsistence hunting. The law simply states, "In a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense that the taking was done for subsistence uses." This only means, as we held in *Eluska*, that unauthorized hunting does not become lawful because it is subsistence hunting. The statute does not state that a subsistence hunter may not challenge the validity of a means or methods regulation under which the hunter is prosecuted.

[30] Furthermore, deciding that a subsistence hunter may contest the validity of a regulation under which the hunter is prosecuted is consistent with a recent decision of ours, *State v. Palmer*, 882 P.2d 386 (Alaska 1994). The defendant in *Palmer* was charged with violating the bag limit in a regulation governing subsistence hunting of caribou. *Id.* at 386. We held that while part of the regulation may have been invalid, the defendant could be prosecuted because the potentially invalid portion of the regulation was severable from the portion of the regulation containing the bag limit. *Id.* at 389. No suggestion was made in *Palmer* that *Eluska* or AS 16.05.259 prohibited the defendant, a subsistence hunter, from challenging the regulation under which he was charged.

[31] Since *Eluska* and AS 16.05.259 were intended only to prevent hunters who took game in the absence of any regulation authorizing them to do so from claiming a subsistence defense, we hold that neither *Eluska*

8. *State v. Skuse*, No. 3KNS–85–1111 Cr. (Alaska Dist.Ct., January 17, 1986), was a district court decision similar to the court of appeals' decision in *Eluska*. In *Skuse*, the defendant was fishing for subsistence in an area where no regulation permitted subsistence fishing. Slip op. at 6. The court accepted the defendant's subsistence defense and granted his motion for prejudgment acquittal. *Id.* at 7.

nor AS 16.05.259 prohibit Totemoff from contesting the validity of the spotlighting ban.

C. *Board's Failure to Consider Impact on Subsistence*

We now reach the merits of Totemoff's challenge to the regulation. Totemoff argues that the regulation banning taking of game with the aid of an artificial light is not valid because the Board did not consider whether the regulation was appropriate for subsistence hunting when it was adopted. Totemoff's argument is based on former AS 16.05.258(c), which stated in relevant part: "The boards shall adopt ... subsistence hunting regulations for each ... population for which a harvestable portion is determined to exist [consistent with sustained yield]." Under former AS 16.05.258(f), subsistence takings were "subject to reasonable regulation of seasons, catch or bag limits, and methods and means." In addition, AS 16.05.255 provides in relevant part:

> (a) The Board of Game may adopt regulations it considers advisable in accordance with AS 44.62 (Administrative Procedure Act) for
>
> ....
>
> (3) establishing the means and methods employed in the pursuit, capture, and transport of game ...;
>
> ....
>
> (10) regulating sport hunting and subsistence hunting as needed for the conservation, development, and utilization of game.

As noted, the challenged regulation, 5 AAC 92.080(7), prohibits the taking of game with the use of an artificial light.[9] This prohibition applies statewide to both subsistence and general hunting. 5 AAC 92.001 states: "Except as specifically provided otherwise, the regulations in this chapter apply statewide to subsistence hunting, general hunting, and trapping, as applicable."

Totemoff argues that the artificial light regulation is invalid because the Board of Game did not hold a hearing to determine whether the regulation was suitable for application to subsistence hunting. He argues that our decision in *State v. Morry*, 836 P.2d 358 (Alaska 1992), holds that the Board of Game must conduct "consistency hearings" to determine the suitability of means and methods prohibitions to subsistence hunting. The State, by contrast, argues that the regulation is presumed to have been validly enacted and nothing in the record rebuts this presumption. For the reasons that follow,

9. 5 AAC 92.080 provides:

> The following methods of taking game are prohibited:
>
> (1) by shooting from, on, or across a highway;
>
> (2) with the use of any poison, except with the written consent of the board;
>
> (3) knowingly, or with reason to know, with the use of a helicopter in any manner, including transportation to, or from, the field of any unprocessed game or parts of game, any hunter or hunting gear, or any equipment used in the pursuit or retrieval of game; this paragraph does not apply to transportation of a hunter, hunting gear, or game during an emergency rescue operation in a life-threatening situation;
>
> (4) unless otherwise provided in this chapter, from a mechanical vehicle, or from a motor-driven boat or snowmachine unless the motor has been completely shut off and the progress from the motor's power has ceased, except that a motor-driven boat may be used to take caribou in Units 23 and 26, a snowmachine may be used to take caribou in Unit 23, and a motorized vehicle may be used to take game as described in (10) of this section;
>
> (5) with the use of an aircraft, snowmachine, motor-driven boat, or other motorized vehicle for the purpose of driving, herding, or molesting game;
>
> (6) with the use or aid of a machine gun, set gun, or a shotgun larger than 10 gauge;
>
> (7) with the aid of a pit, fire, artificial light, radio communication, artificial salt lick, explosive, barbed arrow, bomb, smoke, chemical, or a conventional steel trap with a jaw spread over nine inches; however, the "conibear" style trap with a jaw spread of less than 11 inches may be used;
>
> (8) with a snare, except for taking an unclassified game animal, a furbearer, grouse, hare, or ptarmigan;
>
> (10) from a motorized land vehicle; except that in those portions of Units 7 and 15 within the Kenai National Wildlife Refuge, a motorized land vehicle may be used to take game by a person with physical disabilities, as defined in AS 16.05.940, who requires a wheelchair for mobility, under authority of a permit issued by the department and in compliance with Kenai National Wildlife Refuge regulations.

we accept the State's argument and reject Totemoff's.

The procedures for adopting regulations are set forth in the Administrative Procedure Act (APA) at AS 44.62.180–.290. The APA requires that notice of the proposed adoption of a regulation be published and disseminated thirty days before adoption. AS 44.62.190. The notice must contain an informative summary. AS 44.62.200(3). On the date designated in the notice the agency must give each interested person "the opportunity to present statements, arguments, or contentions in writing, with or without opportunity to present them orally." AS 44.62.210(a).

Alaska Statute 44.62.100 provides that upon the filing of a certified copy of a regulation, rebuttable presumptions are created that "(1) it was duly adopted; (2) it was duly filed and made available for public inspection at the day and hour endorsed on it; [and] (3) all requirements of this chapter and the regulations relative to the regulation have been complied with."

[32] Totemoff implies that our decision in *Morry* requires a hearing in addition to that called for in AS 44.62.210(a). We do not read that case so broadly. At issue in *Morry* were regulations applicable to brown bear hunting which required hunters, among other things, to purchase a numbered, nontransferable tag before hunting and to affix and keep the tag on the animal after it was killed, and sealing requirements mandating that the successful hunter keep the skin and skull of a bear and have a state official seal these parts. 836 P.2d at 360. By contrast, the regulations did not prohibit letting the bear meat rot in the field. *See id.* at 363.

The superior court in *Morry* invalidated these regulations. *Id.* at 361. On appeal we affirmed on two grounds. First, we accepted the appellees' argument that the regulations in question were trophy-hunting regulations not appropriate as subsistence hunting regulations and that the regulations thus violated former AS 16.05.258(c), which required the Board to adopt subsistence hunting regulations. *Id.* at 363–64. We stated concerning this point:

> In particular, we find compelling the following arguments which were advanced by Morry and Kwethluk:
>
> [w]hatever the 'noncommercial, customary and traditional uses' standard of the definition of 'subsistence uses' in AS 16.05.940(30) may mean, it is plainly related to non-trophy uses that are 'for direct personal or family consumption as food, shelter, fuel, clothing, tools or transportation,' for the 'making and selling' of handicrafts, and for 'customary trade, barter or sharing.' There is no hint that hunting for trophies is a subsistence use....
>
> Many people, both residents of the state and non-residents, hunt grizzly bears for trophies and leave the meat at the kill site ... But it is not a subsistence use, and plaintiffs have contended throughout that it is manifestly unreasonable to apply the regulatory regime designed to govern such trophy-hunting practices to the uses in those places, such as Kwethluk and Anaktuvuk Pass, where brown bears are hunted for the meat and raw materials.

Id. (alteration in original).

As an alternative reason for affirmance, we held that the regulations were adopted by the Board in violation of the Administrative Procedure Act. *Id.* at 364. The appellees had argued that there never was an "APA rulemaking hearing, which would have provided a record demonstrating careful consideration of the applicable subsistence laws." *Id.* at 363. The State did not directly address this contention and thus made no effort to refute it. *Id.* We accepted it as a fact that "no hearing was ever held." *Id.* at 364.

Our conclusion in *Morry* that the regulations were invalid "on the ground that [they] were adopted by the board in violation of the [APA]," *id.* at 364, contradicts Totemoff's implied assertion that *Morry* imposes special hearing requirements beyond those called for by the APA. We do not so read *Morry*.

"[O]ne challenging an administrative regulation 'must show ... a substantial failure [to comply with the APA] in order to rebut the presumption of procedural validity.'" *Gilbert v. State, Dep't of Fish & Game, Bd. of Fisheries*, 803 P.2d 391, 394 (Alaska 1990) (alteration in original) (citing *Chevron U.S.A. Inc. v. LeResche*, 663 P.2d 923, 929 (Alaska 1983)). Totemoff has not offered any evidence that 5 AAC 92.080(7), the anti-spotlighting regulation, or 5 AAC 92.001, which applied the anti-spotlighting regulation to subsistence hunting, were invalidly adopted.[10]

[33] However, because the district court ruled that Totemoff's challenge was barred by *Eluska*, the district court was unable to inform Totemoff that he had not presented the kind of evidence necessary for an informed ruling on the validity of the regulation, and to give Totemoff an opportunity to remedy the deficiency in his pre-trial motion challenging the regulation. As a result, it would be unfair to rule on Totemoff's attack on the regulation without giving Totemoff an opportunity to introduce evidence that the procedures mandated by AS 44.62.180–.290 were not followed when 5 AAC 92.001 or 5 AAC 92.080(7) were adopted. *See Union Oil Co. of California v. State, Dep't of Natural Resources*, 574 P.2d 1266, 1272 (Alaska 1978) (challenger to regulations given opportunity to present additional evidence on remand, where challenger had not had sufficient reason to introduce evidence relevant to attack on regulations in original proceedings below because of procedural history of case).

The appropriate remedy is thus a remand to the district court. If Totemoff demonstrates on remand that 5 AAC 92.001 or 5 AAC 92.080(7) were adopted without Board compliance with AS 44.62.180–.290, the district court should vacate Totemoff's conviction and dismiss the charges against him. If Totemoff fails to make the requisite showing, the district court should allow his conviction to stand.

IV. *CONCLUSION*

We hold that the State has jurisdiction over Totemoff because it has the power to enforce its hunting and fishing laws against subsistence users on federal land, so long as those laws do not conflict with federal laws or regulations. There is no such conflict in this case, since there is no federal right to employ customary means and methods of taking. We further hold that the State has jurisdiction over Totemoff because he violated Alaska law in navigable waters above state lands and ANILCA does not give the federal government the power to regulate subsistence hunting and fishing in such navigable waters.

We REVERSE the decision of the court of appeals that *Eluska* bars Totemoff from challenging the spotlighting regulation. Alaska Statute 16.05.259 also does not stop Totemoff from contesting the regulation. We hold that the regulation is invalid under *Morry* only if the Board failed to comply with the requirements of AS 44.62.180–.290. *Morry* does not impose a substantive hearing requirement on the Board not contained in the APA.

We REMAND this case to the district court for development of the record relevant to Totemoff's procedural challenge to the spotlighting ban. If Totemoff demonstrates that the Board did not comply with the requirements of AS 44.62.180–.290 when it passed 5 AAC 92.001 or 5 AAC 92.080(7), the district court should vacate Totemoff's conviction and dismiss the charges against him. Otherwise, the conviction is to stand.

10. As noted, the regulations challenged in *Morry* dealt not with the means of pursuit or capture of game, but with the handling of animal parts considered trophies. The artificial light regulation does not suffer from the substantive defect of the *Morry* regulations in that it is not a trophy-hunting regulation which is "manifestly unreasonable" in its application to subsistence hunting. *See id.* at 363. Reasonable grounds for applying the spotlighting ban to subsistence hunting include safety concerns associated with shots fired at night, preventing the wrong species from being taken, and making enforcement of bag limits easier.

lands. Since its seaward boundary is the low water line along Alaska's coast, the Range necessarily encompasses the tidelands. The justification statement accompanying the application, which describes the habitat of various species along the coast and beneath inland waters, further reflects a clear intent to withhold submerged lands. A Department of Interior regulation in effect when the application was filed and when Congress passed the Alaska Statehood Act operated to "segregate" the lands for which the application was pending. Section 6(e) of that Act expressly prevented lands that had been "set apart as [a] refuge[" from passing to Alaska. It follows that, because all of the lands covered by the 1957 application had been so "set apart," the United States retained title to submerged lands within the Range.

Exceptions of Alaska overruled; exception of United States sustained; Special Master's recommendations adopted to the extent consistent with the Court's opinion.

O'Connor, J., delivered the opinion of the Court, in which Stevens, Kennedy, Souter, Ginsburg, and Breyer, JJ., joined, and in Parts I, II, and III of which Rehnquist, C. J., and Scalia and Thomas, JJ., joined. Thomas, J., filed an opinion concurring in part and dissenting in part, in which Rehnquist, C. J., and Scalia, J., joined.

OPINION OF THE COURT

Justice O'Connor delivered the opinion of the Court.

[1a] This original action presents a dispute between the United States and the State of Alaska over the ownership of submerged lands along Alaska's Arctic Coast. In 1979, with leave of the Court, 442 US 937, 61 L Ed 2d 307, 99 S Ct 2876, the United States filed a bill of complaint setting out a dispute over the right to offer lands in the Beaufort Sea for mineral leasing. Alaska counterclaimed, seeking a decree quieting its title to coastal submerged lands within two federal reservations, the National Petroleum Reserve-Alaska and the Arctic National Wildlife Range (now the Arctic National Wildlife Refuge). The Court appointed a Special Master. 444 US 1065, 62 L Ed 2d 747, 100 S Ct 1005 (1980). Between 1980 and 1986, the Special Master oversaw extensive hearings and briefing. Before us now are the report of the Special Master and the exceptions of the parties. We overrule Alaska's exceptions and sustain that of the United States.

I

Alaska and the United States dispute ownership of lands underlying tidal waters off Alaska's North Slope. The region is rich in oil, and each sovereign seeks the right to grant leases for offshore exploration and to share in oil and gas revenues from the contested lands.

[2, 3, 4a] Several general principles govern our analysis of the parties' claims. Ownership of submerged lands—which carries with it the power to control navigation, fishing, and other public uses of water—is an essential attribute of sovereignty. *Utah Div. of State Lands* v *United States*, 482 US 193, 195, 96 L Ed 2d 162, 107 S Ct 2318 (1987). Under the doctrine of *Lessee of Pollard* v *Hagan*, 3 How 212, 228-229, 11 L Ed 565 (1845), new States are admitted to the Union on an "equal footing" with the original 13 colonies and succeed

to the United States' title to the beds of navigable waters within their boundaries. Although the United States has the power to divest a future State of its equal footing title to submerged lands, we do not "lightly infer" such action. *Utah Div. of State Lands, supra*, at 197, 96 L Ed 2d 162, 107 S Ct 2318.

[5, 6] In *United States* v *California*, 332 US 19, 91 L Ed 1889, 67 S Ct 1658 (1947) *(California I)*, we distinguished between submerged lands located shoreward of the low-water line along the State's coast and submerged lands located seaward of that line. Only lands shoreward of the low-water line—that is, the periodically submerged tidelands and inland navigable waters—pass to a State under the equal footing doctrine. The original 13 colonies had no right to lands seaward of the coastline, and newly created States therefore cannot claim them on an equal footing rationale. *Id.*, at 30-33, 91 L Ed 1889, 67 S Ct 1658. Accordingly, the United States has paramount sovereign rights in submerged lands seaward of the low-water line. *Id.*, at 33-36, 91 L Ed 1889, 67 S Ct 1658. In 1953, following the *California I* decision, Congress enacted the Submerged Lands Act, 67 Stat. 29, 43 USC § 1301 *et seq.* [43 USCS §§ 1301 *et seq.*]. That Act "confirmed" and "established" States' title to and interest in "lands beneath navigable waters within the boundaries of the respective States." § 1311(a). The Act defines "lands beneath navigable waters" to include both lands that would ordinarily pass to a State under the equal footing doctrine and lands over which the United States has paramount sovereign rights, beneath a 3-mile belt of the territorial sea. § 1301(a). The Act essentially confirms States' equal footing rights to tidelands and submerged lands beneath inland navigable waters; it also establishes States' title to submerged lands beneath a 3-mile belt of the territorial sea, which would otherwise be held by the United States. *California ex rel. State Lands Comm'n* v *United States*, 457 US 273, 283, 73 L Ed 2d 1, 102 S Ct 2432 (1982). The Alaska Statehood Act expressly provides that the Submerged Lands Act applies to Alaska. Pub. L. 85-508, § 6(m), 72 Stat. 343 (1958). As a general matter, then, Alaska is entitled under both the equal footing doctrine and the Submerged Lands Act to submerged lands beneath tidal and inland navigable waters, and under the Submerged Lands Act alone to submerged lands extending three miles seaward of its coastline.

In hearings before the Special Master, the parties identified 15 specific issues for resolution, which we treat in three groups. First, the parties disputed the legal principles governing Alaska's ownership of submerged lands near certain barrier islands along the Arctic Coast. Second, the parties contested the proper legal characterization of particular coastal features, including a gravel and ice formation in the Flaxman Island chain known as Dinkum Sands. Third, the parties disputed whether, when Alaska became a State, the United States retained ownership of certain submerged lands located within two federal reservations, the National Petroleum Reserve-Alaska in the northwest and the Arctic National Wildlife Refuge in the northeast. For each reservation, the Master considered both whether the seaward boundary encompassed certain disputed waters and whether particular executive and congressional actions prevented the lands beneath tidally influenced waters from passing to Alaska at statehood.

[505 US 144]

NEW YORK, Petitioner

v

UNITED STATES et al. (No. 91-543)

COUNTY OF ALLEGANY, NEW YORK, Petitioner

v

UNITED STATES et al. (No. 91-558)

COUNTY OF CORTLAND, NEW YORK, Petitioner

v

UNITED STATES et al. (No. 91-563)

505 US 144, 120 L Ed 2d 120, 112 S Ct 2408

[Nos. 91-543, 91-558, and 91-563]

Argued March 30, 1992. Decided June 19, 1992.

Decision: State "take title" provision of Low-Level Radioactive Waste Policy Amendments Act of 1985 (42 USCS § 2021e(d)(2)(C)) held to violate Tenth Amendment, but to be severable from remainder of Act.

SUMMARY

The Low-Level Radioactive Waste Policy Amendments Act of 1985 (42 USCS §§ 2021b et seq.) embodied a compromise whereby "sited" states—that is, states having low-level radioactive waste disposal sites—agreed to extend by 7 years the period in which they would accept waste from "unsited" states, while the unsited states agreed to end their reliance on the sited states by 1992. The Act required each state to be responsible for providing, either individually or in cooperation with other states, for the disposal of wastes generated within its borders, and three types of incentives were provided to encourage state compliance: (1) under the "monetary incentives" provisions of 42 USCS §§ 2021e(d)(1), 2021e(d)(2)(A), 2021e(d)(2)(B), sited states were authorized to collect a surcharge for accepting waste during the 7 year extension, and a portion of those surcharges would go into an escrow account held by the United States Secretary of Energy and would be paid out to states which met a series of deadlines in complying with their obligations under the Act; (2) under the "access incentives" provisions of 42 USCS § 2021e(e)(2), states failing to comply with the statutory deadlines could be charged multiple surcharges by sited states for a certain period and then denied access altogether; and (3) under the "take title" provision of 42 USCS § 2021e(d)(2)(C), each state that fails to provide for the disposal of internally generated waste by a specific date must, upon request of the waste's generator or owner, take title to the waste, be obligated to take possession of the waste, and become liable for all damages incurred by the generator or owner as a consequence of the state's failure to take possession promptly. The state of New York and two of its counties, seeking a declaratory judgment that the Act violated the Federal Constitution's Tenth Amendment and the Constitution's guarantee clause (Art IV, § 4, guaranteeing to the states a republican form of government), filed suit against the United States in the United States District Court for the Northern District of New York. The District Court dismissed the complaint (757 F Supp 10), and the United States Court of Appeals for the Second Circuit affirmed (942 F2d 114).

On certiorari, the United States Supreme Court affirmed in part and reversed in part. In an opinion by O'CONNOR, J., expressing the unanimous view of the court in part (as to points 1 and 2 below) and joined in part (as to points 3-5 below) by REHNQUIST, Ch. J., and SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., it was held that (1) the "monetary incentive" provisions were not inconsistent with the Tenth Amendment, because (a) the surcharge authorization was a proper exercise of Congress' authority under the Constitution's commerce clause (Art I, § 8, cl 3) to authorize states to burden interstate commerce, (b) the Secretary's collection of a portion of the surcharges was no more than a federal tax on interstate commerce, and (c) the distribution of the escrow fund was a proper conditional exercise of Congress' authority under the Constitution's spending clause (Art I, § 8, cl 1); (2) the "access incentive" provisions of the Act did not violate the Tenth Amendment, but rather represented a conditional exercise of Congress' commerce power along the lines of those previously held by the Supreme Court to be within Congress' authority; (3) the "take title" provision was unconstitutional, either as lying outside Congress' enumerated powers or as violating the Tenth Amendment, because (a) an instruction to state governments to take title to waste, standing alone, would be beyond the authority

SUBJECT OF ANNOTATION

Beginning on page 957, infra

Supreme Court's construction and application of guarantee clause of Article IV, § 4 of Federal Constitution, providing that United States will guarantee states republican form of government

Summaries of Briefs; Names of Participating Attorneys, p 1064, infra.

waste. Space in radioactive waste disposal sites is frequently sold

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by residents of one State to residents of another. Regulation of the resulting interstate market in waste disposal is therefore well within Congress' authority under the Commerce Clause. Cf. Philadelphia v New Jersey, 437 US 617, 621-623, 57 L Ed 2d 475, 98 S Ct 2531 (1978); Fort Gratiot Sanitary Landfill, Inc. v Michigan Dept. of Natural Resources, 504 US 353, 359, 119 L Ed 2d 139, 112 S Ct 2019 (1992). Petitioners likewise do not dispute that under the Supremacy Clause Congress could, if it wished, pre-empt state radioactive waste regulation. Petitioners contend only that the Tenth Amendment limits the power of Congress to regulate in the way it has chosen. Rather than addressing the problem of waste disposal by directly regulating the generators and disposers of waste, petitioners argue, Congress has impermissibly directed the States to regulate in this field.

Most of our recent cases interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws. The Court's jurisprudence in this area has traveled an unsteady path. See Maryland v Wirtz, 392 US 183, 20 L Ed 2d 1020, 88 S Ct 2017 (1968) (state schools and hospitals are subject to Fair Labor Standards Act); National League of Cities v Usery, 426 US 833, 49 L Ed 2d 245, 96 S Ct 2465 (1976) (overruling Wirtz) (state employers are *not* subject to Fair Labor Standards Act); Garcia v San Antonio Metropolitan Transit Authority, 469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005 (1985) (overruling National League of Cities) (state employers are once again subject to Fair Labor Standards Act). See also New York v United States, 326 US 572, 90 L Ed 326, 66 S Ct 310 (1946); Fry v United States, 421 US 542, 44 L Ed 2d 363, 95 S Ct 1792 (1975); Transportation Union v Long Island R. Co., 455 US 678, 71 L Ed 2d 547, 102 S Ct 1349 (1982); EEOC v Wyoming, 460 US 226, 75 L Ed 2d 18, 103 S Ct 1054 (1983); South Carolina v Baker, 485 US 505, 99 L Ed 2d 592, 108 S Ct 1355 (1988); Gregory v Ashcroft, supra, 115 L Ed 2d 410, 111 S Ct 2395 (1991). This case presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties. Cf. FERC v Mississippi, 456 US 742, 758-759, 72 L Ed 2d 532, 102 S Ct 2126 (1982).

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This litigation instead concerns the circumstances under which Congress may use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way. Our cases have established a few principles that guide our resolution of the issue.

I

[8a] As an initial matter, Congress may not simply "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." Hodel v Virginia Surface Mining & Reclamation Assn., Inc., 452 US 264, 288, 69 L Ed 2d 1, 101 S Ct 2352 (1981). In Hodel, the Court upheld the Surface Mining Control and Reclamation Act of 1977 precisely because it did *not* "commandeer" the States into regulating mining. The Court found that "the

States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government." Ibid.

The Court reached the same conclusion the following year in FERC v Mississippi, supra. At issue in FERC was the Public Utility Regulatory Policies Act of 1978, a federal statute encouraging the States in various ways to develop programs to combat the Nation's energy crisis. We observed that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." Id., at 761-762, 72 L Ed 2d 532, 102 S Ct 2126. As in Hodel, the Court upheld the statute at issue because it did not view the statute as such a command. The Court emphasized: "Titles I and III of [the Public Utility Regulatory Policies Act of 1978 (PURPA)] require *only consideration* of federal [illegible]. And if a State has no utili[illegible]n, or simply stops regu[illegible]field, it need not even federal

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proposals." 456 [illegible] L Ed 2d 532, 102 S Ct [illegible] is in original). Because [illegible] nothing in PURPA 'di[illegible]ling' the States to enact [illegible] program," the statute [illegible]sistent with the Consti[illegible]on of authority between [illegible] Government and the 765, 72 L Ed 2d 532, 102 [illegible]uoting Hodel v Virginia [illegible]urface Mining & Reclamation Assn., Inc., supra, at 288, 69 L Ed 2d 1, 101 S Ct 2352). See also South Carolina v Baker, supra, at 513, 99 L Ed 2d 592, 108 S Ct 1355 (noting "the possibility that the Tenth Amendment might set some limits on Congress' power to compel States to regulate on behalf of federal interests"); Garcia v San Antonio Metropolitan Transit Authority, supra, at 556, 83 L Ed 2d 1016, 105 S Ct 1005 (same).

These statements in FERC and Hodel were not innovations. While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions. See Coyle v Smith, 221 US 559, 565, 55 L Ed 853, 31 S Ct 688 (1911). The Court has been explicit about this distinction. "Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, *directly upon the citizens*, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States." Lane County v Oregon, 7 Wall. at 76, 19 L Ed 101 (emphasis added). The Court has made the same point with more rhetorical flourish, although perhaps with less precision, on a number of occasions. In Chief Justice Chase's much-quoted words, "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks

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March 21, 2002

Representative Norman Rokeberg
Chair, House Resources Committee
State Capitol Room 124
Juneau, Alaska 999801-1182

VIA FACSIMILE

Re: *HB 376: An Act relating to management of fish and game in and on the navigable waters and submerged lands of Alaska.*

Dear Representative Rokeberg:

HB 376 - *An Act relating to management of fish and game in and on the navigable waters and submerged lands of Alaska* is scheduled for a hearing in the House Judiciary Committee on March 25. The Department of Law offers the following comments on the bill for the committee's consideration.

Section 2 of the bill, which amends AS 16.20.010(a), will have no practical effect. As a result of this amendment, the statute would declare that the state has jurisdiction over all fish and game in the state except in those areas where it has assented to federal control, and that those areas do not include the navigable waters and submerged lands in Alaska. We assume that the drafters know that the federal law can preempt state law without state agreement, since Section 3 of the bill implicitly recognizes this. *See* U.S. Constitution, Art. VI, cl. 2. State law is naturally preempted to the extent of any conflict with a federal statute. *Crosby v. National Foreign Trade Council*, 147 L.Ed.2d 352, 372 (2000)(citing *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941)). The Supreme Court will find a state law preempted where it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Id.* (citing *Hines*, 312 U.S. at 67). Because Title VIII of the Alaska National Interest Lands Conservation Act grants a subsistence priority that state law cannot presently permit, federal law clearly conflicts with and thus preempts state law. A state law declaration to the contrary can do nothing to change this.

Section 3, also amending AS 16.20.010(a), does make a substantive change in the law. It prohibits a state agency, employee, or agent from expending funds to adopt or enforce the implementation of a federal regulatory program for control of fish

and game in navigable waters that conflicts with a state law. The Tenth Amendment prohibits Congress from requiring state officers to execute federal laws; however, a state can choose to implement federal laws voluntarily. *See Printz v. United States*, 521 U.S. 898 (1997). This amendment to AS 16.20.010(a) would prohibit state officials from voluntarily implementing this type of federal law.

The intent of the bill appears to be to withhold any state assistance from the federal agencies in their takeover of state fisheries management for subsistence uses. We do not think that the bill is meant to hinder the state's ability to manage its resources for sustained yield. State managers must be able to keep track of the federal program's effect on Alaska's fish and wildlife, because dual management systems require the state to be responsive to federal regulations. The state boards and agency staff must be able both to estimate the likely subsistence harvests that federal regulations will permit and to determine the actual harvests, so that the boards can adjust state regulations to compensate for any increased harvest that might threaten a given fish or wildlife population. Further, state biologists sometimes negotiate with federal staff about how much of the harvestable surplus federal regulations will allow to be taken. The state's responsibility to manage fish and wildlife depends on its ability to scrutinize the federal program and react appropriately.

The proposed language of Section 3 may be sufficient to permit the state to monitor a federal program. However, the necessary monitoring may require some level of cooperation with the federal agencies to ensure that the state can continue its successful management of fish and wildlife in Alaska. The bill should explicitly permit state employees or agencies to expend state money to get any information from the Federal Subsistence Board or other federal agencies necessary to continue effective state management.

Thank you for the opportunity to comment.

Sincerely,

BRUCE BOTELHO
ATTORNEY GENERAL

By:
Joanne Grace
Assistant Attorney General

cc: Representative Scott Ogan
Members, House Judiciary Committee
Representative Jeannette James
Representative John Coghill, Jr.
Representative Kevin Meyer
Representative Ethan Berkowitz
Representative Albert Kookesh

JG/bmp