HB

376

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REPRESENTATIVE SCOTT OGAN Alaska State Legislature

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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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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 GU
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

SECTIONAL

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

AK Statehood Act

Federal agency: Provided, That the admin stration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Gc ernment 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 appor'oned, 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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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

SUB LANDS

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

= Footing

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.

Distributed By
Representative Scott Ogan
District 27

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

K. JOHN

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.

REPRESENTATIVE SCOTT OGAN — Alaska State Legislature

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

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 revecled 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.

Distributed By
Representative Scott Ogan
District 27

Alaska Digest Email News

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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

F. Murkowski