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The United States argues that because the Alaska Native Claims Appeal Board made the final decision for the Department of the Interior,12 once it decided the case against the BLM, the BLM's claim was no longer the position of the Department. That argument does not go far enough, because until the Board ruled, the BLM's position was the position of the Department. There can be no question that from the time the BLM asserted its position until the time Doyon defeated it before the Board, the Department actively and positively asserted claims on behalf of the United States to the Kandik and Nation riverbeds. And a past assertion of a claim by the Bureau of Land Management has been held to be sufficient to amount to an assertion of a claim for statute of limitations purposes.13

[6] Once the government has formally asserted a claim to an interest in land, a state government is entitled to treat the land as "real property in which the United States claims an interest"14 regardless of whether the United States has ceased actively to assert its claim. Because the United States has asserted a claim, and retains authority to assert it again, the past assertion operates as a present cloud on the state's title. If the United States does elect to drop its claim, it can unilaterally destroy jurisdiction over the Quiet Title Act suit simply by filing a disclaimer.15 Once it files a section (e) disclaimer pursuant to the statute, then it becomes plain that it no longer "claims an interest" for purposes of section (a). The coherent scheme of the Quiet Title Act requires the filing of a section (e) disclaimer to eliminate the title dispute arising out of the government's claim.

[7] By contrast, in the case at bar, the United States once actively claimed in litigation that it owned the riverbeds, and in this litigation when put to the test by the district court refused to file a disclaimer, because it wanted to retain the power to assert a claim in the future. Since the statute provides that the United States can destroy jurisdiction by filing a disclaimer, it would be illogical to construe it to mean that the United States can also destroy jurisdiction by filing a refusal to make a disclaimer.

Our recent decision in Leisnoi, Inc. v. United States16 facilitates decision. In Leisnoi, the federal government had never at any time asserted a claim. A Native corporation sued to quiet title because a private individual had filed a lawsuit in state court asserting that the Native corporation did not properly obtain its conveyance from the United States, and that the

United States should decertify the Native corporation and revoke its conveyance. In contrast to the case at bar, the United States expressly and consistently denied that it had any claim, and filed a disclaimer of interest in the Quiet Title Act lawsuit. We held that the case was properly dismissed for lack of jurisdiction, and that the district court properly refused to confirm the disclaimer because it had no jurisdiction to do so, because the government had never disputed the Native corporation's title. Although the private claimant purported to dispute the title on behalf of the United States, at the time the Quiet Title Act lawsuit was dismissed the state court had rendered judgment against his claim and expressly removed any claim the private claimant had placed on the Native corporation's title.

By contrast with Leisnoi, in the case at bar the United States rather than a private party has disputed the State of Alaska's title. Nor has it clarified and dissipated any ambiguity in its previous assertion of title to the Nation and Kandik Rivers. In Leisnoi the United States attempted to file a formal disclaimer of all interest under the Quiet Title Act.17 As is often true in cases filed by private citizens nominally on behalf of the United States, the private citizen's claim did not at all represent any position that the United States had ever taken, and there was and had been no dispute at all between the United States and the defendant in the "on behalf of" lawsuit.

[8] By contrast, in the case at bar, the United States itself has formally claimed that the Kandik and Nation were nonnavigable at statehood so that it retained title and the State of Alaska did not obtain title. The United States formally admitted the State of Alaska's averment that the United States "does not consider itself bound for purposes of title by the BLM's past navigability determinations."18 That is, the United States pleaded that it did not consider itself bound to maintain its sometime position that the rivers were navigable. In response to the State of Alaska's averments that the Kandik, Nation and Black were navigable at statehood, the United States pleaded that these allegations of navigability "consist of conclusions of law not requiring an answer." 19 This was not merely an early pleading before the United States settled on its position; it was the considered position of the United States maintained to preserve what it saw as a right to elect at any time in the future to assert nonnavigability. The Supreme Court has held that navigability "involve[s] questions of law

inseparable from the particular facts to which they are applied," and navigability of a particular river "is, of course, a factual question."20 Thus the district court was correct under Rule 821 in treating the government's "failure to deny" the factual averments of navigability as admissions of the fact, and the express reservation of its right to change its position and assert nonnavigability as maintaining the dispute. The United States can no more refuse to answer the mixed question averment of navigability than a personal injury defendant could refuse to answer the mixed question averment that it had acted negligently. There remains a live dispute between the United States and the State of Alaska regarding whether the Nation and Kandik Rivers were navigable at statehood. That suffices for jurisdiction under subsection (a) of the statute.22

The United States, in its brief before us, argues that "even if the question of navigability requires an answer, the district court should have permitted the United States to amend its answer to provide one." That would be a strong argument, had the United States asked the district court for leave to amend. But it did not. Even after it lost in district court on navigability, and filed a motion for reconsideration, the United States did not seek leave to amend. The United States stuck so firmly to its contention that it did not have to answer the navigability averment, that it never asked for permission to answer the averment even after the district court decided it had to answer. Where a party never asked for permission, its argument that the "district court should have permitted" is without force.

"We have permitted only narrow and discretionary exceptions to the general rule against considering issues for the first time on appeal. They are (1) when review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process . . . ."23 In two other cases, Black and Jackson, we held that where a party did not seek leave to amend a pleading in the lower court, we would not remand with instructions to grant leave to amend.24 Where a party does not ask the district court for leave to amend, "the request [on appeal] to remand with instructions to permit amendment comes too late."25 This case does not fall within the exception for miscarriages of justice and preserving the integrity of the judicial process. The United States has at various times taken positions on both sides of the proposition that the Kandik and Nation Rivers were navigable at statehood. There is no injustice in holding the United States to a determination of naviga-

bility based upon its obdurate refusal to answer the averment of navigability; the United States reached the same conclusion in the determination of the Alaska Native Claims Review Board, an adjudicative organ of the Department of the Interior.

The Black River

[9] The Black River is a harder case for the State of Alaska, because the federal government held off on asserting its position until after Doyon's administrative litigation was resolved as to the Nation and Kandik, and then threw in the towel without forcing Doyon through another administrative proceeding. It is plain from the record that the United States applied the administrative decision for the Kandik and Nation Rivers in deciding what its position would be on the Black River, and would probably have followed it had it come out the other way. That cuts in favor of jurisdiction, because the state officials know that the federal government considers the Black to be like the Kandik and Nation, and if it asserts a claim on those rivers, it will most probably assert a claim on the Black. But the United States has never, so far as the record shows, expressly asserted a claim on the Black, which cuts against jurisdiction.

Arguably under our decision in Shultz v. Department of Army,26 the United States has not done enough to make a cause of action regarding the Black River to accrue, for purposes of the statute of limitation. But it is possible that a claim is substantial enough for jurisdiction even if limitations against a private litigant has not yet begun to run. We distinguished between easement cases like Schultz and disputes over title that would give rise to possessory rights in Michel v. United States.27 Also, because Congress in 1986 eliminated the Quiet Title Act statute of limitations where state governments bring the suits, the "claims an interest" language in the jurisdiction-granting subsection28 has been cut loose from the jurisdiction-terminating provision barring private actions unless brought within twelve years of "the date upon which it accrued."29

We have held that the statute of limitations portion of the Quiet Title Act "does not require that the United States communicate its claim in clear and unambiguous terms," which argues in favor of jurisdiction, but that a cause of action does not accrue for limitations purposes "when the United States'

claim is ambiguous or vague."30

[10] Our recent decision in Leisnoi31 seems to us to be an insuperable barrier to jurisdiction regarding the Black River. Leisnoi holds that because subsection (a) of the Quiet Title Act requires that title be "disputed,"32 there must be a dispute between the United States and the plaintiff in the Quiet Title Act suit.33 There has never been a dispute between the United States and the State of Alaska over the Black River. The United States reserves the right to start a dispute, and has not disclaimed any interest. There may well be a dispute at some time, considering that the federal position on the Black simply followed the administrative determination on the Kandik and Nation, and it has taken conflicting positions on those rivers. But whatever dispute there may be, it has not yet occurred. The express federal reservation of rights is not to revert to a position previously held, as with the Kandik and Nation, but to adopt a position never previously taken.

[11] This is not to say that the State of Alaska ought not to be able to sue to quiet title in the Black River. Arguably it should. Forty years after statehood, it ought to be able to manage its property knowing what is its property. And the litigation, if there is to be litigation, ought to take place while witnesses with personal knowledge are still alive to testify. The district court's concerns about the federal "dog in the manger" posture are well taken. But the statutory language as construed in Leisnoi nevertheless leaves the district court without jurisdiction to quiet title in the Black River. A title cannot be said to be "disputed" by the United States if it has never disputed it. The statute as it stands does not enable us to repair this practical problem. We are compelled to reverse the district court's judgment insofar as it spoke to the Black River, and remand the case so that the claim can be dismissed for lack of jurisdiction as to the Black River.

II. Indian lands.

The United States argues that, to the extent we affirm, the district court should be required to reword its judgment to exclude Indian lands from its scope. The Native corporations have not appealed.

The United States argues that because the Quiet Title Act does not permit suit against it to quiet title with respect to "trust or restricted Indian lands,"34 the district court erred in

not entering a judgment excluding such lands.35 The United States did not plead or otherwise allege that there are any trust or restricted Indian lands affected by the judgment, but its answer did say that "preliminary research indicates the possible presence of individual landowners or Native allotment claimants on the specified rivers."

A "colorable" claim that land is Indian trust or restricted land defeats Quiet Title Act jurisdiction, but a claim that is not even "colorable" does not.36 There can be no Indian lands in the bed of a navigable river, because such underwater lands as a matter of law were held in trust for the state by the United States prior to statehood, and passed to the State of Alaska on statehood.37 The Alaska Native Allotment Act did not reserve title to submerged lands for future allotment awards.38 Lands granted as Native allotments exclude lands under navigable waters.39

There being no colorable claim to any Indian lands in the beds of the Kandik and Nation Rivers, the district judge did not err in rejecting the United States' proposed language in the judgment.

CONCLUSION

The judgment is AFFIRMED with respect to the Kandik and Nation Rivers and REVERSED with respect to the Black River. As to the Black River, the matter is remanded to the District Court with instructions to dismiss for lack of jurisdiction.

FOOTNOTES

1 The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the 5th Circuit, visiting judge.
2 43 U.S.C. SS 1301-1315; State of Alaska v. Ahtna, Inc., 891 F.2d 1401 (9th Cir. 1989).
3 28 U.S.C. S 2409a.
4 43 U.S.C. S 1601 et seq.
5 86 Interior Dec. 692 (1979).
6 The United States filed an interlocutory appeal, before judgment was entered. It was dismissed because there was no final judgment. Alaska v. United States, 64 F.3d 1352 (9th Cir. 1995).
7 McGann v. Ernst & Young, 102 F.3d 390, 392 (9th Cir. 1996).
8 28 U.S.C. S 2409a(a).

9 Block v. North Dakota,
461 U.S. 273, 287
(1983).
10 Longview Fibre Co., v. Rasmussen, 80 F.3d 1307, 1311 (9th Cir. 1996).
11 P.L. 99-595, 100 Stat. 3351 (1986).
12 43 C.F.R. S 4 1(b)(5) (1980).
13 See, e.g., Knapp v. United States, 636 F.2d 279, 283 (10th Cir. 1980).
14 28 U.S.C. S 2409(a).
15 28 U.S.C. S 2409a(e).
16 Leisnoi, Inc. v. United States, 170 F.3d 1188 (9th Cir. 1999).
17 28 U.S.C. S 2409a(e).
18 Amended complaint P 30; Answer P 30.
19 Id. PP 21, 22, 23.
20 United States v. Appalachian Electric Power Co.,
311 U.S. 377
, 404-
05 (1940); see also New York State Dept. of Environmental Conservation, 954 F.2d 56, 60 (2d Cir. 1992).
21 Fed. R. Civ. P. 8(d).
22 28 U.S.C. S 2409a(a).
23 Jovanovich v. U.S., 813 F.2d 1035, 1037 (9th Cir. 1987).
24 Black v. Payne, 591 F.2d 83, 89 (9th Cir. 1979); Jackson v. American Bar Association, 538 F.2d 829, 833 (9th Cir. 1976).
25 Jackson, 538 F.2d at 833.
26 Shultz v. Department of Army, 886 F.2d 1157 (9th Cir. 1989) (even building a fence, gate, and guardhouse were not enough to put a person on notice that the army claimed the right to control a right of way).
27 Michel v. United States, 65 F.3d 130 (9th Cir. 1995).
28 28 U.S.C. S 2409a(a).
29 28 U.S.C. S 2409(g).
30 State of California v. Yuba Goldfields, Inc., 752 F.2d 393, 397(9th Cir. 1985).
31 Leisnoi, Inc. v. United States, 170 F.3d 1188 (9th Cir. 1999).
32 28 U.S.C. S 2409a(a).
33 Leisnoi, 170 F.3d at 1191-92.
34 28 U.S.C. S 2409a(a).
35 Appellant's Brief, 40-41.
36 State of Alaska v. Babbitt, 182 F.3d 672 (9th Cir. 1999).
37 Montana v. United States,
450 U.S. 544, 551
-52 (1981); Shively v.
Bowlby,
152 U.S. 1
, 49 (1894); Pollard's Lessess v. Hagan, 44 U.S. (3 How.) 212 (1845).

38 43 U.S.C. SS 270-1, 270-3 (1970) (repealed in 1971).
39 In re Frank Rulland, 41 IBLA 207 (1979); In re Hermann Kroener, 124 IBLA 57, 62 (1992); State of Alaska, 119 IBLA 260, 271 (1991).

ALASKA STATE LEGISLATURE

CONFLICTS CONCERNING TITLE TO SUBMERGED LANDS IN ALASKA

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and
Ted Popely, Legal Counsel

Updated: 02/11/04

Statehood Entitlement – Submerged Lands

Alaska became a state in 1959 and under the Equal Footing Doctrine and the Submerged Lands Act inherited title to almost 60+ million acres of submerged lands. Unfortunately, since statehood, less than 20 rivers have been determined to be navigable by the federal courts. Although BLM has made numerous navigability determinations and the Department of the Interior is presently working positively with the state to identify and issue a "Recordable Disclaimer of Interest" for navigable waterways, the process is still painfully slow. Considering the fact that Alaska contains 20,000+ potentially navigable rivers and well over 1,000,000 lakes that could qualify as navigable, it could take several life-times and billions of litigation dollars before Alaska realizes its entitlement, if at all. In addition, the passage of time weakens the state's ability to provide the factual determinations necessary to prove in a federal court that a waterbody was navigable at the time of statehood.

Issues of State Ownership of Submerged Lands

Alaska faces two types of legal hurdles in establishing its entitlement to submerged lands. Its most critical problem is to establish, in an efficient and timely manner, which of the state's rivers and lakes are navigable. Alaska's second hurdle is to determine which submerged lands the United States legally withdrew prior to statehood. The state's attempts to resolve these issues are thwarted by the extremely narrow interpretation the United States gives to the federal Quiet Title Act and by the lack of a non-judicial process to determine title.

The Basis of the State's Claim of Title to Submerged Lands

Alaska owns the submerged lands underlying navigable waters and marine waters seaward three miles by virtue of the Equal Footing Doctrine and the Submerged Lands Act of 1953. The Equal Footing Doctrine dictates that new states enter the Union with all of the powers of sovereignty and jurisdiction that pertain to the original states. When a state enters the Union, it takes title to the lands underlying navigable waters and between mean high and mean low tide as a matter of constitutional right, subject only to the paramount federal power to control the waters for navigation in interstate and foreign commerce. The Submerged Lands Act conveys lands under marine waters and also includes lands underlying inland navigable waters to confirm their automatic passage under the equal footing doctrine.

For purposes of title to submerged lands, waters are navigable when they are used or susceptible of being used in their natural and ordinary condition as highways for commerce over which trade and travel may be conducted. Unfortunately, only a handful of waterways have been adjudged navigable since Alaska's statehood, because of the unwillingness of the United States to settle navigability issues outside litigation, and because of the jurisdictional difficulties of litigating navigability against the United States.

Despite the Equal Footing Doctrine and the Submerged Lands Act, the United States claims title to most or all of the state's submerged lands within the 25% of Alaska that the federal government had reserved before statehood. This issue is governed by *Utah Division of Lands v. United States*, 482 U.S. 193 (1987). Commonly referred to as the "Utah Lake" case. In Utah Lake, the court held that in order to establish that it retained title to submerged land within a reservation, the United States must establish (1) that Congress clearly intended to include submerged lands in the withdrawal, and (2) that Congress affirmatively intended to defeat the future state's title to submerged lands. In Utah Lake, the court found that the United States did not establish congress' intent to include the lake-bed in the reservation, despite the fact that the purpose of the reservation was to preserve the lake for a reservoir.

Navigable Waters Jurisdictional Issues

Some federal agencies have issued regulations governing activities on navigable waters flowing through federal lands. The extent of their authority to do so is unclear. In some instances the agency may have Commerce Clause authority (e.g. promulgating regulations to implement environmental laws) but the more difficult question is the scope of an agency's authority whose mandates are not directly related to water, but are tied to land management, such as the National Forest Service, National Park Service, National Fish and Wildlife Service and Bureau of Land Management. The Court of Appeals for the Eighth Circuit has held that some agencies may regulate non-public lands under the Property Clause if the activities could negatively affect the purpose of the federal reservation. In Alaska, the more common scenario is an agency restricting public access on navigable waters within a reservation, such as requiring restrictive permits to conduct commercial activities on a waterway.

Navigability Criteria Conflicts

Where title to submerged lands is at stake, the dispositive issue is usually the navigability of the waters that overlie them. The United States Bureau of Land Management (BLM) makes navigability determinations infrequently, only for lakes less than 50 acres and rivers less than three chains (198 feet) wide, and only when it is conveying the adjacent uplands. When waterways are larger than these measurements BLM conveys the adjacent and non-submerged land without navigability determinations. Even when BLM finds a smaller waterway non-navigable, however, it maintains that the determination is relevant only to the amount of acreage it is conveying and does not reflect a federal position on title.

The greatest hurdle to overcome in the State's efforts to identify and manage navigable waters has been the long-standing differences of opinion between the State of Alaska and the United States regarding the application of the test for determining title navigability. Navigability is a question of fact, not a simple legal formula. Variations in waterbody use that result from different physical

characteristics and transportation methods and needs must be taken into account. There are many legal precedents for determining navigability in other states based upon the particular facts presented in those cases.

The physical characteristics and uses of a waterbody used by the State for asserting navigability "criteria," are based upon legal principles that have been established by the federal courts. These criteria are applied to rivers, lakes, and streams throughout the State and take into account Alaska's geography, economy, customary modes of water-based transportation, and the particular physical characteristics of the waterbody under consideration.

To resolve these navigability criteria disputes, the State has actively pursued a limited number of court cases challenging particular findings of non-navigability by the federal government. Some of the important cases are:

Gulkana River. In this case, both in the U.S. District Court and on appeal to the U.S. Court of Appeals, the federal courts rejected the federal government's restrictive interpretation of the phrase "highway of commerce" in the title navigability test. The federal district court stated that to demonstrate navigability, it is only necessary to show that the waterbody is physically capable of "the most basic form of commercial use: the transportation of people or goods." Because the Gulkana River can be used for the transportation of people or goods, the Gulkana River was found navigable. The court of appeals found that the modern use of the Gulkana River for guided hunting, fishing, and sightseeing trips is a commercial use and, since the physical characteristics of the river have not significantly changed since 1959, provides conclusive evidence that the river was susceptible of commercial use at statehood. The court also found that modern inflatable rafts can be used to establish navigability. In 1990, the U.S. Supreme Court denied the request to review and overturn the decision and, thus, the Gulkana River precedent is now binding on all future navigability determinations in Alaska.

Kandik, Nation and Black Rivers. In this case, the State and Doyon Limited successfully established that the use or susceptibility of use of a river or stream by an 18-24 foot wooden riverboat capable of carrying at least 1,000 pounds of gear or supplies is sufficient to establish navigability. Based upon the use of these types of boats for the transportation of goods and supplies by trappers, as well as extensive historic and contemporary canoe use, the federal courts found the Kandik and Nation rivers navigable and, due to a technical interpretation of the federal Quiet Title Act, failed to rule on the Black River. The Department of the Interior issued a "Recordable Disclaimer of Interest" for the Black River, however, in 2003.

Alagnak River, Nonvianuk River, Kukaklek Lake and Nonvianuk Lake. In this federal district court case, the Alagnak River, Nonvianuk River, Kukaklek Lake and Nonvianuk Lake were all found navigable. Their primary transportation use is for commercially guided hunting, fishing, and sightseeing and for government research and management. They also serve as a means of access for local residents to their homes and to the surrounding areas for subsistence hunting and fishing.

From the standpoint of the public, the state and the federal governments both contribute to the confusion over navigability determinations. The State Policy on Navigability adopted by the Alaska Department of Natural Resources includes the following explanations:

> "When information is lacking, and it must make a navigability determination, the state is forced to rely solely upon the physical characteristics shown on maps and aerial photographs. In these cases, the state identifies as navigable all streams depicted on the U.S.G.S. maps with double lines (generally at least 70 feet wide) and having an average gradient over the length of the stream of no more than 50 feet per mile."
>
> "Streams depicted with single lines, although narrower in width, may also be listed as potentially navigable if they have gradients of substantially less than 50 feet per mile and are at least 10 miles."
>
> "If a lake is totally isolated, it will be included on the state's navigability maps if it is at least 1 ½ miles long. That length insures that the lake can be used as a highway."
>
> "An isolated lake might need to be 2-3 miles long to be included on the state's navigability maps."
>
> "...those lakes which are shown on maps and aerial photographs as having a navigable water connection with other navigable waters, or which are accessible by short overland portages, are considered navigable regardless of the size of the lake."

Clouded Titles Due to Erroneous Navigability Determinations

The standard procedures for surveying and conveying federal land are found in the Manual of Instructions for the Survey of the Public Lands of the United States. Under those procedures, consistently used in every public land state except Alaska, only uplands are surveyed and conveyed in fulfillment of acreage entitlements, not submerged lands. The survey rules require that all lakes 50 acres or larger, and rivers and streams three chains (198 feet) in width or wider, regardless of navigability, be meandered rivers, lakes, and streams is not included in computing the amount of land involved in the conveyance.

In Alaska, however, the federal government had not consistently followed these survey rules. Until 1983, the federal government treated submerged lands the same as uplands. All bodies of water that were considered non-navigable by the federal government, regardless of size, were surveyed as though they were uplands and the acreage of submerged lands were charged against the total acreage entitlement.

Because of these conveyance procedures, the navigability of waterbodies in Alaska has been an issue of contention since the enactment of the Alaska Statehood Act and ANCSA. In addition to the problems caused by a lack of information about many waterbodies, the situation was exacerbated by the narrow definition of navigability used by the federal government. Hundreds of rivers, lakes and streams considered navigable by the state were determined non-navigable by the federal government.

In 1983, the Department of the Interior agreed that the standard rules of survey should be followed for land conveyances in Alaska. The recipients of conveyances from the federal government are charged only for the amount of public land is calculated by the survey, which does not include the areas of meandered rivers, lakes and streams. This decision by the Department of the Interior was legislatively approved in 1988.

Despite the fact that the use of these survey procedures has eliminated many of the land conveyance problems after 1983, a major problem concerning navigability decisions made by the federal government under the old system remains unresolved. At issue are the hundreds of erroneous non-navigability decisions and the resulting submerged land conveyances made to ANCSA corporations in previous years. This issue becomes more critical as efforts are made by the federal government to establish a deadline for completing land conveyances. ANCSA corporations may be unable to replace erroneously conveyed submerged lands if the selection process had been terminated.

Difficulties Quieting Title to Submerged Lands

The State must file a Quiet Title Action in federal court to definitively resolve a dispute with the federal government regarding ownership of a navigable water body. The federal government has made it very difficult to quiet title. The Quiet Title Act provides that the United States may be named as a party defendant in a civil action "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S. C. § 2409a(a). The United States has adopted a very narrow view of the term "claims and interest," asserting that the federal court has no jurisdiction to hear quiet title actions against it unless the federal government actively and expressly asserts an interest in the lands. In the context of the submerged lands, this will occur only in rare circumstances.

While the Ninth Circuit Court of Appeals has decided that a federal non-navigability decision is a sufficient federal claim of interest to give the court jurisdiction under the Quiet Title Act, for these few waterways the State still may be unable to get a judgment, for the following reason. The State receives notice of a non-navigability determination when BLM issues a conveyance decision. Both because the State must give 180 days notice under the Quiet Title Act before filing a complaint, and because a preliminary injunction to prevent the conveyance is unavailable under the Quiet Title Act, the United States will likely convey the lands to a third party before the State can do anything to prevent it, and the State could arguably lose its cause of action against the United States.

Therefore, the State rarely has a viable cause of action to quiet title to submerged lands. The United States is in virtually the same position it was before the Quiet Title Act was passed: it controls when and how a court resolves title disputes. The exception to this general rule will be title disputes based on the issue of whether the United States defeated the State's right to submerged lands before statehood, where the United States has expressly taken a position.

The final legal determination of whether a water-body is navigable is a complex process requiring factual determinations that a waterway had been effectively used for commerce prior to statehood. In the States' litigation to quiet title to the Black, Kandik, and Nation Rivers in northeast Alaska, a panel for the Ninth Circuit Court of Appeals noted in January, 2000:

"There is also a serious policy concern in favor of allowing resolution of disputes based on the United States' inchoate claim to everything in Alaska but what it has disclaimed. Eventually, all the witnesses will be dead, reducing the reliability of litigation. Someone who used one of these rivers in 1959 at age 20 is now 60. The population in the area was so sparse at all relevant times – probably no more than a couple of hundred people who might have used the three rivers during the relevant time, most too young to have relevant knowledge or too old to have survived the forty years since statehood – that a few deaths by old age can remove most or all the knowledgeable witnesses. Also, a state entitled as of 1959 to all the incidents of ownership in its rivers, yet still deprived of clear title forty years later, is effectively deprived of what it is entitled to under the equal footing doctrine."

In addition, the process has become incomprehensibly complicated and expensive. A case in point is the quiet title action by the State to resolve submerged lands ownership under the Black, Kandik and Nation rivers in northeast Alaska. These three rivers clearly meet the criteria established by the federal courts for determining navigability in Alaska. Despite the fact that no one contested the State's claim that these three rivers met the federal courts criteria for determining navigability, this case took nine years and upwards of a million of state and federal dollars to litigate, eventually resulting in the State winning two of the three cases and achieving no solution on the third.

Solutions Through Administrative Action – Recordable Disclaimer of Interest

Following meetings with the Legislative leadership in 2002, the Department of the Interior offered to examine the possibility of using a "Recordable Disclaimer of Interest" as a means of resolving submerged lands title disputes between the state and the federal government. In 2003, the Department of the Interior issued a "Recordable Disclaimer of Interest" in the Black River located in Northeast Alaska. This River was one of three rivers in that region that the ownership of the submerged lands was not resolved through litigation.

The legislature, through Legislative Budget and Audit, has funded a special project for the Alaska Departments of Natural Resources and Fish and Game to expedite the petition process to the Department of the Interior for issuing "Recordable Disclaimers of Interest" for navigable waters and RS 2477 Rights-of-way. The major emphasis of the project has been directed at navigable waters. Some petitions are pending and others are due to be submitted early in 2004.

Solutions Through Federal Legislation

A. **Changes to the Quiet Title Act.** The precise issue in dispute between the state and the United States is what should require the United States to "claim an interest" so as to trigger jurisdiction under the Quiet Title Act. A provision in the Quiet Title Act that defines this phrase broadly enough to permit the state to quiet title to its submerged lands would resolve the issue. This would require a definition that makes the existence of a legal cloud on title sufficient to constitute a federal claim of interest, so that the United States' refusal to take a position as to navigability for title purposes of waters on federal lands would give the state a cause of action in federal court.

B. **Joint State/Federal Navigable Waters Commission.** In 1971, Congress and the State of Alaska respectively created a Joint Federal/State Land Use Planning Commission for Alaska to assist in the massive land-use planning process following passage of the Alaska Native Claims Settlement Act. The State Legislature passed a bill in 2002 to create a similar State/Federal Commission for the purpose of expediting navigability determinations and providing recommendations for ways to improve the process of making water use and navigability decisions in Alaska. Similar legislation was introduced in Congress by the Alaska delegation to create the federal portion of the Commission. Unfortunately, this legislation did not pass as the federal and state administrations looked for other ways to accelerate title dispute resolutions.

Examples of Navigability Complexities & Additional Information

Appendix A is a copy of the State of Alaska's August 27, 1992 notice to Secretary of the Interior, Manuel Lujan, Jr. of its intent to quiet title to submerged lands described under 194 specific water-bodies in Alaska. Similarly, Appendix B contains a copy of the official notice to Secretary of the Interior Bruce Babbitt of the State's intent to quiet title to submerged lands described under an additional 9 water-bodies. Most of the water-bodies listed in Appendix A and Appendix B have been recognized by the Bureau of Land Management as being navigable for land conveyance purposes but have maintained that this assertion is not for title purposes.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Appendix A

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

☒ 1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-5100
FAX: (907) 276-3697

☐ KEY BANK BUILDING
100 CUSHMAN ST., SUITE 400
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☐ P.O. BOX 110300 - STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

August 27, 1992

Manuel Lujan, Jr., Secretary
Department of the Interior
1849 C Street NW
Washington, D.C. 20240

Dear Mr. Lujan:

The State of Alaska intends to file real property quiet title actions as to the submerged lands described on the list attached as appendix A, and is providing you this notice pursuant to 28 U.S.C. §2409a(m). Title to these lands passed to Alaska at statehood based on the equal footing doctrine, the Submerged Land Act of May 22, 1953, P.L. 83-31, 67 Stat. 29, 43 U.S.C. §§1301 et seq., and the Alaska Statehood Act of July 7, 1958, P.L. 85-508, 72 Stat. 339, 48 U.S.C. note preceding §21.

Sincerely,

CHARLES E. COLE
ATTORNEY GENERAL

By: Joanne M. Grace
Joanne M. Grace
Assistant Attorney General

JMG/sh
Attachment

cc: J. T. Tangen, Regional Solicitor, Department of Interior
Edward F. Spang, State Director, Bureau of Land Management
Niles Cesar, Area Director, Bureau of Indian Affairs
Walter Stieglitz, Regional Director, Fish and Wildlife Service
John Morehead, Regional Director, National Park Service

8/27 mailed cert return receipt

03-CSLH

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

Appendix A to letter of August 27, 1992.

Colville Region

Mouth of Colville River to Nuka River
Mouth of Kuna River to Chefornak

Northwest Region

Mouth of Agiapuk River to American River
Mouth of American River to Budd Creek
Mouth of Buckland River to West Fork
Mouth of Fish River to Omilak Creek
Mouth of Niukluk River to Council
Mouth of Kobuk River to Lower Kobuk Canyon
Mouth of Koyuk River to Dime Landing
Mouth of Kuzitrin River to Noxapaga River
Mouth of Noxapaga River to Turner Creek
Mouth of Noatak River to Aniuk River
Mouth of Selawik River to Kugarak River
Shaktoolik River
Throat River
Ungalik River
Mouth of Unalakleet River to Termile Creek

Koyukuk River Region

Mouth of Hoqatza River to Hog Landing
Mouth of Koyukuk River to Bettles
Mouth of Middle Fork to Wiseman

Upper Yukon Region

Mouth of Bearpaw River to Diamond
Mouth of Beaver Creek to Victoria Creek
Birch Creek
Mouth of Black River to Boundary
Mouth of Chandalar River to North and West Forks
Mouth of Charley River to Bear Creek
Mouth of Chatanika River to Steese Highway Bridge
Christian River
Mouth of Coleen River to Lake Creek (59 miles)
Mouth of Crooked Creek to Bridge
Grass River
Mouth of Hess Creek to North and South Forks
Mouth of Hodzana River to Pitka Fork (79 miles)
Jim Lake
Mouth of Kandik River to Boundary
Mouth of Nation River to Boundary

Mouth of Porcupine River to Boundary
Ray River
Mouth of Seventymile River to Barney Creek
Mouth of Sheenjek River to Thluickohnjik Creek
Mouth of Tatonduk River to Boundary

40 Mile Area

Forty Mile River
Mouth of North Fork Forty Mile River to Kink
Mouth of South Fork Forty Mile River to Mosquito Fork

South Central Region

Mouth of Chulitna River to Tokositna River
Mouth of Kasilof River to Tustumena Lake
Mouth of Kenai River to Kenai Lake
Kenai Lake
Knik River
Lake Louise and outlet
Lake Tustumena
Mouth of Skwentna River to Portage Creek
Susitna Lake
Mouth of Susitna River to Indian River
Mouth of Talkeetna River to Chunilna Creek
Mouth of Tokositna River to Home Lake Outlet
Tyone Lake
Mouth of Tyone River to Tyone Lake
Mouth of Yentna River to confluence of its East and West Forks
Johnson River
Red River

Tanana Region

Mouth of Chena River to North Fork
Mouth of Chisana River to Scottie Creek
Mouth of Goodpasture River to Central Creek
Harding Lake
Healy Lake and outlet
Johnson River
Mouth of Kantishna River to Lake Minchumina
Lake George and outlet
Lake Mansfield and outlet
Mouth of Nabesna River to Nabesna Mine
Mouth of Nenana River to Healy River
Mouth of Salcha River to Paldo Creek
Mouth of Tanana River to Nabesna and Chisana Rivers
Mouth of Teklanik River to near Couma Lake
Mouth of Tetlin River to Tetlin Lake
Mouth of Tolovana River to West Fork
Mouth of Wood River to Fish Creek

Middle Yukon River

Mouth of Innoko River to Cripple Creek
Mouth of Iditarod River to Iditarod
Khotol River
Little Melozitna River
Melozitna River
Mouth of Nowitna River and Sulstna Rivers to Tamarack Creek
Tozitna River

Lower Yukon Region

Anvik River
Bonasila River
Kotlik River
Nulato River
Pastolik River

Kuskokwim River Region

Mouth of Aniak River to Salmon River
Mouth of Big River to Otter Creek
Mouth of Chukowan River to Gemuk River
Crooked Creek
Mouth of East Fork Kuskokwim River to Slow Fork and Tonzona River
Mouth of Gemuk River to Beaver Creek
Mouth of George River to Julian Creek
Mouth of Holitna River to Chukowan River
Hoholitna River
Mouth of Johnson River from Mud Creek Portage to Crooked Creek
Mouth of Johnson River to Nunapitchuk and Atmautluak
Kisaralik River
Mouth of Kuguklik River to Kipnuk
Kulik Lake
Mouth of Kuskokwim River to North Fork
Little Tonzona River
Mouth of Middle Fork and Big River to Salmon River
Mouth of Middle Fork Kuskokwim River to Pitka Fork
Mouth of Nixon Fork to its West Fork
Mouth of North Fork Kuskokwim to Lake Minchumina Portage
Mouth of South Fork Kuskokwim River to Tatina River
Mouth of Stoney River to Lime Village
Mouth of Swift Fork to Highpower Creek
Mouth of Tokotna River to Fourth of July Creek
Mouth of Talbiksok River to Yukon-Kuskokwim Portage
Mouth of Tuluksak River to Upper Land
Whitefish Lake and outlet

Bristol Bay Region

Alec River chignik
Aniakchak River chignik

Black Lake Chignik
Mouth of Chignik River to Black Lake chignik
Chikuminuk Lake
Chilikadrotna River
Chulitna River
Clark River
Mouth of Copper River to Falls
Dago Creek - Ugashik
Dog Salmon River Ugashik
Eek River
Egegik River and Becharof Lake Naknek
Gibralter Lake and outlet
Mouth of Goodnews River to Watlamuse Creek
Mouth of Igushik River to Amanka Lake
Illiamna Lake
Mouth of Illiamna River to Forks
Mouth of Kanektok River to Kagati Lake
Kakhonak Lake
Mouth of King Salmon River to Olds Creek Ugashik
Mouth of Kvichak River to Illiamna Lake
Lake Aleknagik
Lake Chavekuktuli
Lake Clark
Lake Beverly
Lake Kulik Mt. Katmai
Lake Nerka
Lower Pike Lake and outlet Ugashik
Kokwok River
Koktuli River
Muklung River
Mouth of Mulchatna River to Summit Creek
Mouth of Naknek River to Naknek Lake Naknek/Mt. Katmai
Negukthlik River
Newhalen River
Nishlik Lake
Mouth of Nushagak River to New Stuyahok
Mouth of Nuyakuk River to Nuyakuk Lake
Ongoke River
Osviak River
Quigmy River
Pile River
Ruth Lake and outlet Ugashik
Mouth of Smelt Creek to Smelt Lake Naknek
Mouth of Snake River to Nunavaugaluk Lake
Stuyahok River
Tazmina River
Mouth of Togiak River to Togiak Lake
Tunulk River
Ualik Lake
Mouth of Ugashik River to Lower and Upper Ugashik Lakes Ugashik
Upnuk Lake
Weary River

Mouth of Wood River to Lake Aleknagik

Copper River Region

Mouth of Bering River to near Bering Lake
Mouth of Chitna River to Tana River
Mouth of Copper River to Batzulnetas (above Slana)
Crosswind Lake
Mouth of Eyak River and Eyak Lake
Mouth of Klutina River to Klutina Lake
Love River
Miles Lake and outlet
Nelchina River
- Tasmuna River
- Mouth of Tazlina River to Tazlina Lake

Southeast Region

Chilkat River
Chilkoot River
Stikine River

Kodiak Island and Shelikof Straight Region

Afognak Lake
Mouth of Afognak River to the remains of the Bridge
Akalura and Red Lakes
Mouth of Aniakchak River to Albert Johnson Creek
Karluk Lake
Mouth of Karluk River to Karluk Lake

Statewide Region

Yukon River

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Appendix 3

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

☒ 1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-5100
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JUNEAU, ALASKA 99811-0300
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December 17, 1996

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Bruce Babbitt
Department of the Interior
1849 C Street NW
Washington, D.C. 20240

Dear Mr. Babbitt:

The State of Alaska intends to file real property quiet title actions as to the submerged lands described on the list attached as appendix A, and is providing you this notice pursuant to 28 U.S.C. § 2409a(m). Title to these lands passed to Alaska at statehood based on the equal footing doctrine, the Submerged Land Act of May 22, 1953, P.L. 83-31, 67 Stat. 29, 43 U.S.C. §§ 1301 *et seq.*, and the Alaska Statehood Act of July 7, 1958, P.L. 85-508, 72 Stat. 339, 48 U.S C. note preceding §21.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Joanne M. Grace
Joanne M. Grace
Assistant Attorney General

Attachment

cc: Laurie Adams, Regional Solicitor, Department of Interior
Tom Allen, State Director, Bureau of Land Management
Niles Cesar, Area Director, Bureau of Indian Affairs
David B. Allen, Regional Director, Fish and Wildlife Service
Robert Barbee, Regional Director, National Park Service

03-CSLH

APPENIDIX A

Copper River Region
Copper River

Northern Region
Kuk River
Meade River
Kukpowruk River

Bristol Bay Region
Arolik River
Kanektok River
Kisaralik River
Goodnews River
Togiak River

MEMO

STATE OF ALASKA
DEPARTMENT OF LAW
NATURAL RESOURCES SECTION

To: Jane Anvik
Director, Division of Lands
Alaska Department of Natural Resources

Tina Cunning
Coordinator, ANILCA Program
Alaska Department of Fish and Game

From: Joanne Grace
Assistant Attorney General
Natural Resources Section

Re: Amendment to the Quiet Title Act

Date: May 12, 1997

This memorandum outlines the need to amend the Quiet Title Act, 28 U.S.C. § 2409a. The United States' current interpretation of the Quiet Title Act arguably renders it almost completely inapplicable to state claims of title to lands underlying navigable waterways and to RS 2477 rights-of-way.

The change requested: The state seeks clarification of the Quiet Title Act to indicate that a federal court has jurisdiction over claims by a state to quiet title to lands if a potential interest of the United States clouds the state's title. A "cloud" on the state's title is a possible claim or encumbrance by another that, if valid, would affect or impair the title of the state.

Why the change is necessary: The United States has developed an interpretation of the Quiet Title Act that may preclude the state from quieting title to its submerged lands[1] and RS 2477

---

[1] The state took title to lands underlying waters navigable-in-fact at statehood, pursuant to the Equal Footing Doctrine and the Submerged Lands Act of 1953, 43 U.S.C. §1301 et seq. Alaska has thousands of waterways that may be navigable, but the only

rights-of-way.[2] According to the United States' interpretation, the state may bring a quiet title action only when the United States essentially invites it to do so.

The Quiet Title Act provides that the United States may be named as a party defendant in a civil action "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). The United States has adopted a very narrow view of the term "claims an interest," asserting that the federal court has no jurisdiction to hear quiet title actions against it unless the federal government actively and expressly asserts an interest in the lands. In the context of submerged lands, this will occur only in rare circumstances. Where title to submerged lands is at stake, the dispositive issue is usually the navigability of the waters that overlie them. The United States Bureau of Land Management ("BLM") makes navigability determinations infrequently, only for lakes less than 50 acres and rivers less than three chains wide, and only when it is conveying the adjacent uplands. When waterways are larger than these measurements BLM conveys the land without navigability determinations. Even when BLM finds a smaller waterway non-navigable, however, it maintains that the determination is relevant only to the amount of acreage it is conveying and does not reflect a federal position on title.

The state disputes the United States' view, but even assuming that the state is correct and a non-navigability decision is a sufficient federal claim of interest to give the court jurisdiction under the Quiet Title Act, the state still may be unable to get a judgment, for the following reason. The state receives notice of a non-navigability determination when BLM issues a conveyance decision. Both because the state must give 180 days notice before filing a complaint, and because a preliminary injunction to prevent the conveyance is unavailable under the Quiet Title Act, the United States will likely convey the lands to a third party before the state can do anything to prevent it, and the state arguably will lose its cause of action

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way to definitively establish title to the submerged lands by obtaining a court judgment.

[2] Congress granted these rights-of-way by act of July 26, 1866, 43 U.S.C. § 932, Revised Statutes 2477. In *Hamerly v. Denton*, 359 P.2d 121, 123 (Alaska 1961), the Alaska Supreme Court stated the general rule about acceptance of this federal grant, holding that before a highway may be created the appropriate public authorities of the state must clearly manifest an intention to accept a grant, or the public must use the right-of-way for such a period of time and under such conditions as to prove acceptance.

against the United States.

If the United States prevails in its jurisdictional theories, therefore, the state will rarely have a viable cause of action to quiet title to submerged lands. The United States will be in virtually the same position it was in before the Quiet Title Act was passed: it controls when and how a court resolves title disputes. The exceptions to this general rule will be title disputes based on the issue of whether the United States defeated the state's right to submerged lands before statehood, where the United States has expressly taken a position.

Similar "claims an interest" problems arise in the context of RS 2477 rights-of-way. Under the United States' interpretation of the Quiet Title Act, the court will have jurisdiction to adjudicate the state's interest only in the few cases where the United States takes an affirmative, express position that rights-of-way do not exist. The United States has a policy of refusing to take a position on the existence of these rights-of-way, however; in general it will not express any opinion about the routes, so that a state cannot establish that the United States has "claimed an interest" as the United States interprets that phrase. The only exception would be a right-of-way that the United States vigorously disputes, but in such cases the United States might sue the state and the Quiet Title Act would not be invoked at all. Again, the United States wants to be in control of which, if any, cases are filed.

How the change could be effected: The precise issue in dispute between the state and the United States is what exactly it means for the United States to "claim an interest," so as to trigger jurisdiction under the Quiet Title Act. A provision in the Quiet Title Act that defines this phrase broadly enough to permit the state to quiet title to its submerged lands and RS 2477 rights-of-way would resolve the issue. This would require a definition that makes the existence of a legal cloud on title sufficient to constitute a federal claim of interest, so that the United States' refusal to take a position as to navigability for title purposes of waters on federal lands and general refusal to take a position on RS 2477 rights-of-way would give the state a cause of action in federal court.

4 thereof on issuance of process or institu-
6. tion of prosecution of any proceedings
does not exempt United States from post-
or ing appeal bond with state court. U.S.
of Dept. of Air Force v. Wilhelm, Tex.Civ.
cy App.1977, 535 S.W.2d 498.

nvolving United States

it in common or joint tenant owning
vhere the United States is one of such
ants, against the United States alone
nd any other of such owners, shall
the same manner as would a similar

court orders a sale of the property or
eneral may bid for the same in behalf
United States is the purchaser, the
shall be paid from the Treasury upon
ry of the Treasury on the requisition

2.)

D STATUTORY NOTES

ts similar action between private persons"
were substituted for "shall proceed as
. other cases for partition by courts of eq-
uity, and in making such partition the
court shall be governed by the same prin-
ciples of equity that control courts of eq-
uity, in partition proceedings between
private persons." in view of Rule 2 of the
Federal Rules of Civil Procedure (this ti-
tle).

Changes were made in phraseology.

EFERENCES

ules Civ.Proc. Rule 3, 28 USCA.
le 4, 28 USCA.

REFERENCES

nedy in general, see Partition ⇨10 et seq.

ure of proceedings. See C.J.S. Partition § 20

TRONIC RESEARCH

er].
ing the Explanation pages of this volume.

NOTES OF DECISIONS

Construction with Federal Rules of Civil Procedure 1
Jurisdiction 2

1. Construction with Federal Rules of Civil Procedure

Since the Federal Rules of Civil Procedure, this title, do not themselves enlarge the jurisdiction of the federal district courts granted by a statute waiving sovereign immunity, changes made in this section and § 1347 of this title relating to partition action involving United States, for express purpose of conforming the wording of this section and § 1347 of this title to rule 2, Federal Rules of Civil Procedure, this title, abolishing the procedural distinctions between actions at law and suits in equity, could not reasonably be construed to have enlarged the jurisdiction of the district courts. Stanton v. U.S., C.A.5 (Tex.) 1970, 434 F.2d 1273.

2. Jurisdiction

This section which waives sovereign immunity for partition suits in which United States is a joint tenant or a tenant in common does not confer subject-matter jurisdiction on district courts. Prater v. U.S., C.A.5 (Ga.) 1980, 612 F.2d 157, on rehearing 613 F.2d 263.

Statutes authorizing partition and quiet title actions against United States and permitting United States to be named as party in actions affecting property in which United States claims mortgage or lien did not apply to claims seeking to recover South Vietnamese assets blocked under Trading with the Enemy Act (TWEA), and did not provide basis for subject-matter jurisdiction. Can v. U.S., S.D.N.Y.1993, 820 F.Supp. 106, affirmed 14 F.3d 160.

§ 2409a. Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real

property, the circumstances under which it was acquired, and ~~the~~ any right, title, ~~or~~ interest ~~claimed by~~ or potential the United States ~~or~~ that may exist.

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this section. The decision of the head of the Federal agency is not subject to judicial review.

(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

(j) If a final determination in an action brought by a State under this section involving submerged or tide lands on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments is adverse to the United States and it is determined that the State's action was brought more than twelve years after the State received notice of the Federal

which it was acquired,
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claim to the lands, the State shall take title to the lands subject to any existing lease, easement, or right-of-way. Any compensation due with respect to such lease, easement, or right-of-way shall be determined under existing law.

(k) Notice for the purposes of the accrual of an action brought by a State under this section shall be—

(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or

(2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

(l) For purposes of this section, the term "tide or submerged lands" means "lands beneath navigable waters" as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301).

(m) Not less than one hundred and eighty days before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefor, and a description of the lands included in the suit.

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

(Added Pub.L. 92-562, § 3(a), Oct. 25, 1972, 86 Stat. 1176, and amended Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 99-598, Nov. 4, 1986, 100 Stat. 3351.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1972 Acts. House Report No. 92-1559, see 1972 U.S. Code Cong. and Adm. News, p. 4547.

1986 Acts. House Conference Report No. 99-841 and Statement by President, see 1986 U.S. Code Cong. and Adm. News, p. 4075.

House Report No. 99-924, see 1986 U.S. Code Cong. and Adm. News, p. 3643.

References In Text

Section 208 of the Act July 10, 1952, referred to in subsec. (a), is section 208 (a) to (d) of Act July 10, 1952, c. 651, 66 Stat. 560. Section 208 (a) to (c) is classified to section 666 of Title 43, Public Lands. Section 208(d) is not classified to the Code.

Amendments

1986 Amendments. Subsec. (a). Pub.L. 99-514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954".

Subsec. (c). Pub.L. 99-598, § 1(3), added subsec. (c). Former subsec. (c) was redesignated (d).

Subsecs. (d) to (f). Pub.L. 99-598, § 1(2), redesignated former subsecs. (c) to (e) as (d) to (f), respectively. Former subsec. (f) redesignated (g).

Subsec. (g). Pub.L. 99-598, § 1(2), (4), redesignated former subsec. (f) as (g) and, as so redesignated, added ", except for an action brought by a State," following "under this section". Former subsec. (g) was redesignated (n).

Subsecs. (h) to (m). Pub.L. 99-598, § 1(3), added subsecs. (h) to (m).

MEMO

STATE OF ALASKA
DEPARTMENT OF LAW
NATURAL RESOURCES SECTION

To: Jane Anvik
Director, Division of Lands
Alaska Department of Natural Resources

Tina Cunning
Coordinator, ANILCA Program
Alaska Department of Fish and Game

From: Joanne Grace
Assistant Attorney General
Natural Resources Section

Re: Amendment to the Quiet Title Act

Date: May 12, 1997

This memorandum outlines the need to amend the Quiet Title Act, 28 U.S.C. § 2409a. The United States' current interpretation of the Quiet Title Act arguably renders it almost completely inapplicable to state claims of title to lands underlying navigable waterways and to RS 2477 rights-of-way.

The change requested: The state seeks clarification of the Quiet Title Act to indicate that a federal court has jurisdiction over claims by a state to quiet title to lands if a potential interest of the United States clouds the state's title. A "cloud" on the state's title is a possible claim or encumbrance by another that, if valid, would affect or impair the title of the state.

Why the change is necessary: The United States has developed an interpretation of the Quiet Title Act that may preclude the state from quieting title to its submerged lands[1] and RS 2477

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[1] The state took title to lands underlying waters navigable-in-fact at statehood, pursuant to the Equal Footing Doctrine and the Submerged Lands Act of 1953, 43 U.S.C. §1301 et seq. Alaska has thousands of waterways that may be navigable, but the only

rights-of-way.[2] According to the United States' interpretation, the state may bring a quiet title action only when the United States essentially invites it to do so.

The Quiet Title Act provides that the United States may be named as a party defendant in a civil action "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). The United States has adopted a very narrow view of the term "claims an interest," asserting that the federal court has no jurisdiction to hear quiet title actions against it unless the federal government actively and expressly asserts an interest in the lands. In the context of submerged lands, this will occur only in rare circumstances. Where title to submerged lands is at stake, the dispositive issue is usually the navigability of the waters that overlie them. The United States Bureau of Land Management ("BLM") makes navigability determinations infrequently, only for lakes less than 50 acres and rivers less than three chains wide, and only when it is conveying the adjacent uplands. When waterways are larger than these measurements BLM conveys the land without navigability determinations. Even when BLM finds a smaller waterway non-navigable, however, it maintains that the determination is relevant only to the amount of acreage it is conveying and does not reflect a federal position on title.

The state disputes the United States' view, but even assuming that the state is correct and a non-navigability decision is a sufficient federal claim of interest to give the court jurisdiction under the Quiet Title Act, the state still may be unable to get a judgment, for the following reason. The state receives notice of a non-navigability determination when BLM issues a conveyance decision. Both because the state must give 180 days notice before filing a complaint, and because a preliminary injunction to prevent the conveyance is unavailable under the Quiet Title Act, the United States will likely convey the lands to a third party before the state can do anything to prevent it, and the state arguably will lose its cause of action

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way to definitively establish title to the submerged lands by obtaining a court judgment.

[2] Congress granted these rights-of-way by act of July 26, 1866, 43 U.S.C. § 932, Revised Statutes 2477. In *Hamerly v. Denton*, 359 P.2d 121, 123 (Alaska 1961), the Alaska Supreme Court stated the general rule about acceptance of this federal grant, holding that before a highway may be created the appropriate public authorities of the state must clearly manifest an intention to accept a grant, or the public must use the right-of-way for such a period of time and under such conditions as to prove acceptance.

against the United States.

If the United States prevails in its jurisdictional theories, therefore, the state will rarely have a viable cause of action to quiet title to submerged lands. The United States will be in virtually the same position it was in before the Quiet Title Act was passed: it controls when and how a court resolves title disputes. The exceptions to this general rule will be title disputes based on the issue of whether the United States defeated the state's right to submerged lands before statehood, where the United States has expressly taken a position.

Similar "claims an interest" problems arise in the context of RS 2477 rights-of-way. Under the United States' interpretation of the Quiet Title Act, the court will have jurisdiction to adjudicate the state's interest only in the few cases where the United States takes an affirmative, express position that rights-of-way do not exist. The United States has a policy of refusing to take a position on the existence of these rights-of-way, however; in general it will not express any opinion about the routes, so that a state cannot establish that the United States has "claimed an interest" as the United States interprets that phrase. The only exception would be a right-of-way that the United States vigorously disputes, but in such cases the United States might sue the state and the Quiet Title Act would not be invoked at all. Again, the United States wants to be in control of which, if any, cases are filed.

How the change could be effected: The precise issue in dispute between the state and the United States is what exactly it means for the United States to "claim an interest," so as to trigger jurisdiction under the Quiet Title Act. A provision in the Quiet Title Act that defines this phrase broadly enough to permit the state to quiet title to its submerged lands and RS 2477 rights-of-way would resolve the issue. This would require a definition that makes the existence of a legal cloud on title sufficient to constitute a federal claim of interest, so that the United States' refusal to take a position as to navigability for title purposes of waters on federal lands and general refusal to take a position on RS 2477 rights-of-way would give the state a cause of action in federal court.

4 thereof on issuance of process or institu-
6. tion of prosecution of any proceedings
does not exempt United States from post-
or ing appeal bond with state court. U.S.
of Dept. of Air Force v. Wilhelm, Tex.Civ.
cy App.1977, 535 S.W.2d 498.

nvolving United States

it in common or joint tenant owning
vhere the United States is one of such
ants, against the United States alone
nd any other of such owners, shall
the same manner as would a similar

court orders a sale of the property or
neral may bid for the same in behalf
United States is the purchaser, the
shall be paid from the Treasury upon
try of the Treasury on the requisition

2.)

D STATUTORY NOTES

ts similar action between private persons"
were substituted for "shall proceed as
9. other cases for partition by courts of eq-
uity, and in making such partition the
court shall be governed by the same prin-
of ciples of equity that control courts of eq-
uity, in partition proceedings between
of private persons," in view of Rule 2 of the
is Federal Rules of Civil Procedure [this ti-
tle].

Changes were made in phraseology.

REFERENCES

ules Civ.Proc. Rule 3, 28 USCA.
le 4, 28 USCA.

REFERENCES

nedy in general, see Partition ⇐10 et seq.

ure of proceedings. See C.J.S. Partition § 20

TRONIC RESEARCH

er].
ing the Explanation pages of this volume.

NOTES OF DECISIONS

Construction with Federal Rules of Civil Procedure 1
Jurisdiction 2

1. Construction with Federal Rules of Civil Procedure

Since the Federal Rules of Civil Procedure, this title, do not themselves enlarge the jurisdiction of the federal district courts granted by a statute waiving sovereign immunity, changes made in this section and § 1347 of this title relating to partition action involving United States, for express purpose of conforming the wording of this section and § 1347 of this title to rule 2, Federal Rules of Civil Procedure, this title, abolishing the procedural distinctions between actions at law and suits in equity, could not reasonably be construed to have enlarged the jurisdiction of the district courts. Stanton v. U.S., C.A.5 (Tex.) 1970, 434 F.2d 1273.

2. Jurisdiction

This section which waives sovereign immunity for partition suits in which United States is a joint tenant or a tenant in common does not confer subject-matter jurisdiction on district courts. Prater v. U.S., C.A.5 (Ga.) 1980, 612 F.2d 157, on rehearing 613 F.2d 263.

Statutes authorizing partition and quiet title actions against United States and permitting United States to be named as party in actions affecting property in which United States claims mortgage or lien did not apply to claims seeking to recover South Vietnamese assets blocked under Trading with the Enemy Act (TWEA), and did not provide basis for subject-matter jurisdiction. Can v. U.S., S.D.N.Y.1993, 820 F.Supp. 106, affirmed 14 F.3d 160.

§ 2409a. Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate ~~a disputed~~ may have title to real property in which the United States ~~claims~~ an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real

property, the circumstances under which it was acquired, and ~~the~~ any right, title, ~~or~~ interest ~~claimed by~~ the United States ~~or~~ that may exist.

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this section. The decision of the head of the Federal agency is not subject to judicial review.

(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

(j) If a final determination in an action brought by a State under this section involving submerged or tide lands on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments is adverse to the United States and it is determined that the State's action was brought more than twelve years after the State received notice of the Federal

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claim to the lands, the State shall take title to the lands subject to any existing lease, easement, or right-of-way. Any compensation due with respect to such lease, easement, or right-of-way shall be determined under existing law.

(k) Notice for the purposes of the accrual of an action brought by a State under this section shall be—

(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or

(2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

(l) For purposes of this section, the term "tide or submerged lands" means "lands beneath navigable waters" as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301).

(m) Not less than one hundred and eighty days before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefor, and a description of the lands included in the suit.

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

(Added Pub.L. 92-562, § 3(a), Oct. 25, 1972, 86 Stat. 1176, and amended Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 99-598, Nov. 4, 1986, 100 Stat. 3351.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports
1972 Acts. House Report No. 92-1559, see 1972 U.S. Code Cong. and Adm. News, p. 4547.

1986 Acts. House Conference Report No. 99-841 and Statement by President, see 1986 U.S. Code Cong. and Adm. News, p. 4075.

House Report No. 99-924, see 1986 U.S. Code Cong. and Adm. News, p. 4643.

References In Text
Section 208 of the Act July 10, 1952, referred to in subsec. (a), is section 208 (a) to (d) of Act July 10, 1952, c. 651, 66 Stat. 560. Section 208 (a) to (c) is classified to section 666 of Title 43, Public Lands. Section 208(d) is not classified to the Code.

Amendments
1986 Amendments. Subsec. (a). Pub.L. 99-514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954".

Subsec. (c). Pub.L. 99-598, § 1(3), added subsec. (c). Former subsec. (c) was redesignated (d).

Subsecs. (d) to (f). Pub.L. 99-598, § 1(2), redesignated former subsecs. (c) to (e) as (d) to (f), respectively. Former subsec. (f) redesignated (g).

Subsec. (g). Pub.L. 99-598, § 1(2), (4), redesignated former subsec. (f) as (g) and, as so redesignated, added ", except for an action brought by a State," following "under this section". Former subsec. (g) was redesignated (n).

Subsecs. (h) to (m). Pub.L. 99-598, § 1(3), added subsecs. (h) to (m).

LAWS OF ALASKA

2002

Source
CSSB 219(FIN)

Chapter No.
71

AN ACT

Establishing and relating to the Navigable Waters Commission for Alaska.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

THE ACT FOLLOWS ON PAGE 1

AN ACT

Establishing and relating to the Navigable Waters Commission for Alaska.

---

* Section 1. The uncodified law of the State of Alaska is amended by adding a new section to read:

STATE POLICY. The legislature determines that the efficient and orderly development of the state will be better achieved if the state and the federal governments join together in a carefully coordinated approach to land and water use planning and management. The legislature recognizes that, although the state is the primary trustee of public trust resources, it is in the best interest of the citizens if the state and federal governments, as designated stewards of these resources, cooperate to the maximum extent possible in determining their uses. However, the legislature also recognizes that, even without federal participation, the state must proceed to make management decisions. The state is particularly blessed with significant water resources that are invaluable in numerous ways to state residents and all citizens of the United States. With the massive numbers of navigable waterways and bodies of water in the state, the task of resolving submerged land ownership

and navigable water determinations has been painfully slow, counter-productive from an orderly resource management standpoint, and costly as the state, private landowners, and the federal government attempt to initiate long-range planning processes. For this reason, it is determined by the legislature that the State of Alaska and the United States should cooperate in establishing a joint state and federal commission or, if the federal government elects not to participate, a state commission must be established to proceed efficiently and effectively to

(1) expedite the process of quieting legitimate title to the state's submerged lands;

(2) determine, to the extent possible, which bodies of water are navigable or non-navigable; and

(3) provide recommendations to the state and the federal governments concerning ways to improve the process of making navigability determinations and ways to quiet title to the state's submerged lands fairly and expeditiously.

* Sec. 2. The uncodified law of the State of Alaska is amended by adding a new section to read:

NAVIGABLE WATERS COMMISSION FOR ALASKA. (a) A Navigable Waters Commission for Alaska is established. If authorized by federal law, the commission shall be a joint federal and state commission.

(b) The governor or the governor's designee shall serve as chair of the commission. If federal participation is authorized by federal law, the member appointed by the President of the United States or the United States Secretary of the Interior shall serve as co-chair of the joint commission. The chair or co-chairs of the commission shall call meetings.

(c) If a joint commission is formed, four state and four federal members of the commission constitute a quorum, and all decisions of the commission require concurrence by at least four state and four federal members of the commission. Otherwise, four state members of the commission constitute a quorum, and all decisions of the commission require concurrence by at least four members.

(d) A vacancy in the membership of the commission does not affect its powers. The vacancy shall be filled in the same manner in which the original appointment was made.

(e) Subject to procedures adopted by the commission, the chair or co-chairs, in accordance with applicable laws, may

(1) appoint and fix the compensation of the commission staff and personnel as they consider necessary; and

(2) procure temporary and intermittent services.

* Sec. 3. The uncodified law of the State of Alaska is amended by adding a new section to read:

MEMBERSHIP OF THE COMMISSION. (a) The state membership on the Navigable Waters Commission for Alaska is composed of the governor or the governor's designee, two members appointed by the governor, two members appointed by the president of the senate, and two members appointed by the speaker of the house, all of whom serve at the pleasure of the appointing authority.

(b) The membership also includes individuals appointed under federal law if a joint commission is authorized.

* Sec. 4. The uncodified law of the State of Alaska is amended by adding a new section to read:

COMPENSATION AND PER DIEM. (a) A state member of the Navigable Waters Commission for Alaska who is a state officer or employee serves without compensation in addition to that received for regular employment. Other state members of the commission receive compensation as authorized for the Board of Fisheries under AS 16.05.290.

(b) State members of the commission are entitled to per diem and travel expenses authorized by law for boards and commissions under AS 39.20.180.

* Sec. 5. The uncodified law of the State of Alaska is amended by adding a new section to read:

DUTIES OF THE COMMISSION. The Navigable Waters Commission for Alaska shall

(1) establish a process for researching navigability determinations that affect land title;

(2) develop procedures for involving private landowners and the general public in the navigability determination process of the commission;

(3) undertake a process of navigable and non-navigable waters identification under criteria established in law;

(4) make recommendations to improve coordination and consultation between

the state and federal governments in making navigability determinations and decisions concerning title to submerged lands.

* Sec. 6. The uncodified law of the State of Alaska is amended by adding a new section to read:

HEARINGS. The Navigable Waters Commission for Alaska or, on the authorization of the commission, any subcommittee or member of the commission may, for the purposes of carrying out its duties, hold hearings, take testimony, receive evidence, print or otherwise reproduce and distribute all or part of commission proceedings and reports, and sit and act at those times and places as the commission, subcommittee, or members consider desirable.

* Sec. 7. The uncodified law of the State of Alaska is amended by adding a new section to read:

INFORMATION FOR THE COMMISSION. Each agency, department, board, or commission of the state government is authorized to furnish to the Navigable Waters Commission for Alaska, upon request of a chair or co-chair, information the commission considers necessary to carry out its functions under this Act.

* Sec. 8. The uncodified law of the State of Alaska is amended by adding a new section to read:

REPORTS. (a) On or before January 31 of each year, the Navigable Waters Commission for Alaska shall submit to the President of the United States, the United States Secretary of the Interior, the United States Congress, the governor, and the state legislature a written report describing its activities during the preceding year and its recommendations regarding its duties under sec. 5 of this Act.

(b) The commission shall submit its final comprehensive report at least 10 days before the date the commission is terminated.

* Sec. 9. The uncodified law of the State of Alaska is amended by adding a new section to read:

TERMINATION OF THE COMMISSION. The Navigable Waters Commission for Alaska is terminated two years after the effective date of this Act.

Prev | Next

TITLE 43 > CHAPTER 35 > SUBCHAPTER III > Sec. 1745.

Sec. 1745. - Disclaimer of interest in lands

(a) Issuance of recordable document; criteria

After consulting with any affected Federal agency, the Secretary is authorized to issue a document of disclaimer of interest or interests in any lands in any form suitable for recordation, where the disclaimer will help remove a cloud on the title of such lands and where he determines

(1)

a record interest of the United States in lands has terminated by operation of law or is otherwise invalid; or

(2)

the lands lying between the meander line shown on a plat of survey approved by the Bureau or its predecessors and the actual shoreline of a body of water are not lands of the United States; or

(3)

accreted, relicted, or avulsed lands are not lands of the United States.

(b) Procedures applicable

No document or disclaimer shall be issued pursuant to this section unless the applicant therefor has filed with the Secretary an application in writing and notice of such application setting forth the grounds supporting such application has been published in the Federal Register at least ninety days preceding the issuance of such disclaimer and until the applicant therefor has paid to the Secretary the administrative costs of issuing the disclaimer as determined by the Secretary. All receipts shall be deposited to the then-current appropriation from which expended.

(c) Construction as quit-claim deed from United States

Issuance of a document of disclaimer by the Secretary pursuant to the provisions of this section and regulations promulgated hereunder shall have the same effect as a quit-claim deed from the United States

Search this title:

Search Title 43

Notes
Updates
Parallel authorities (CFR)
Topical references

SJR

31

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SPONSOR STATEMENT – SJR 31

SJR 31, "Relating to urging the United States Congress to compensate the State of Alaska for the effect of federal land ownership on the State's ability to fund public education".

This legislation stems from a resolution adopted in July of 2002 by the Executive Committee of the Council of State Governments-WEST urging its membership of thirteen states to support and pass joint resolutions expressing how federal land ownership hinders western states' ability to fund education. Since then, all thirteen states have introduced similar resolutions and all but four (CA, WA, CO, AK) have passed them. The Western Governors' Association has also endorsed this resolution, termed "APPLE" for Action Plan for Public Land and Education.

This resolution is the result of years of research and preparation by legislators from the State of Utah in an attempt to bring western states up to equity with the rest of the nation in the funding of public education.

Western states as group are falling behind in education funding when measured in growth of real per pupil expenditures during the period of 1979 – 98. Eleven of the twelve states with the lowest real growth in pupil expenditures are western states. The growth rate of real per pupil expenditures in the thirteen western states is less than half (28% versus 57%) of that in the thirty-seven other states. On average, enrollment in western states is projected to increase dramatically while the growth rate in other states is projected to actually decrease (2002-2011 western states 7.1% vs. – 2.6%).

Yet, Western states' state and local taxes as a percent of personal income are as high or higher than other states (1998-99 western states 11.1% vs. 10.9%) and Western states' commitment to education as a percent of state budget is equal to that of other states (in year 2000 western states 32.6% vs. 32.7%)

The problem lies with the federal government and the enormous amount of land it owns in western states. If an imaginary line was drawn from Montana to New Mexico, no state east of that line has more than 14% of its land owned by the federal government. No state west of that line has less than 27% of their land federally owned (with the exception of Hawaii). Four western states have more than 62% of their land federally owned. (Alaska, Idaho, Nevada & Utah).

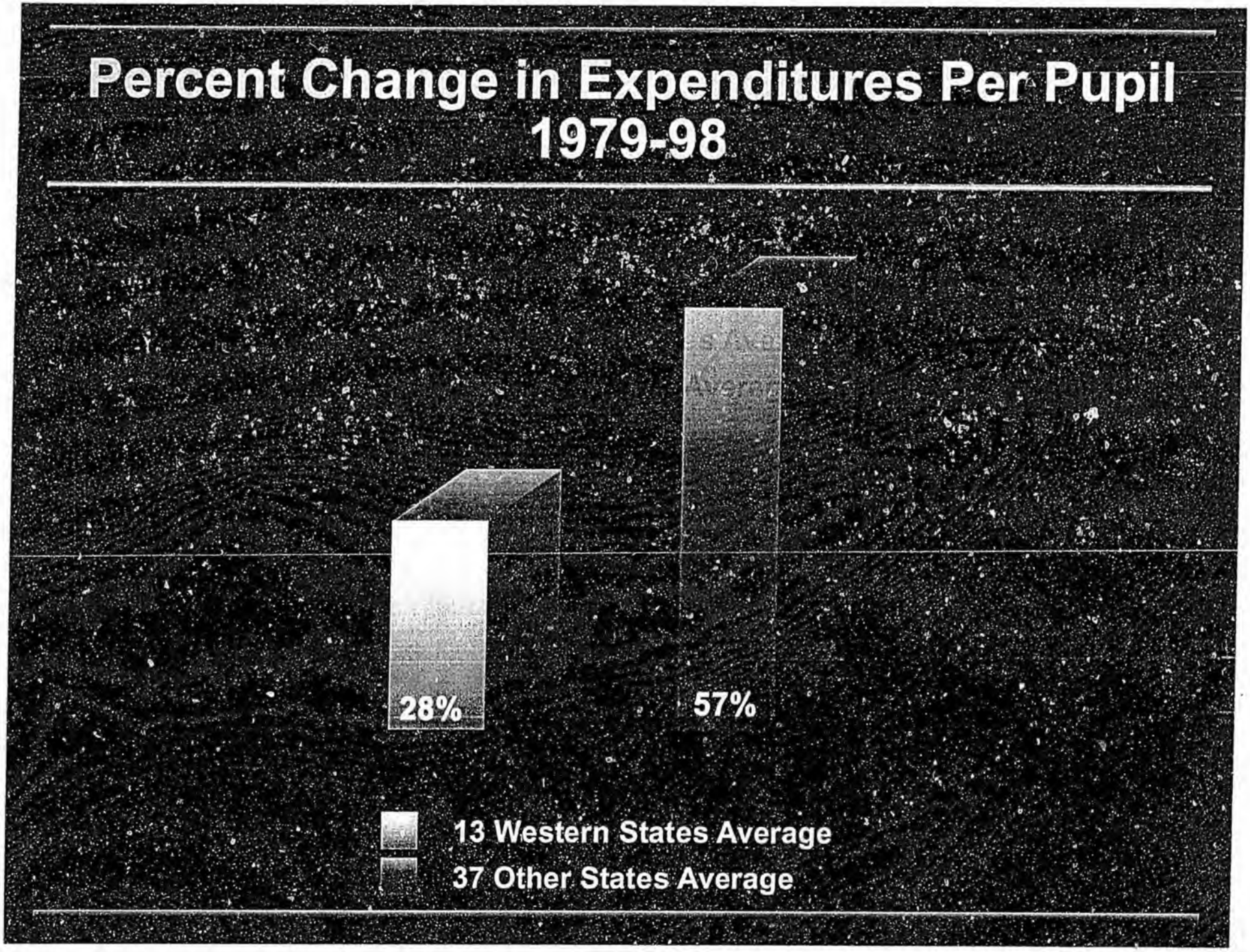
Email: Senator_Gene_Therriault@legis.state.ak.us

Most enabling acts for western states, including Alaska, promised to give the state 5% of the proceeds from the sale of federal land for the benefit of public education. In 1977 the federal government abandoned its original policy to dispose of public lands, depriving the states of public education funding estimated to be over $14 billion dollars. This resolution does not recommend that federally owned lands be sold, only that states be compensated as promised.

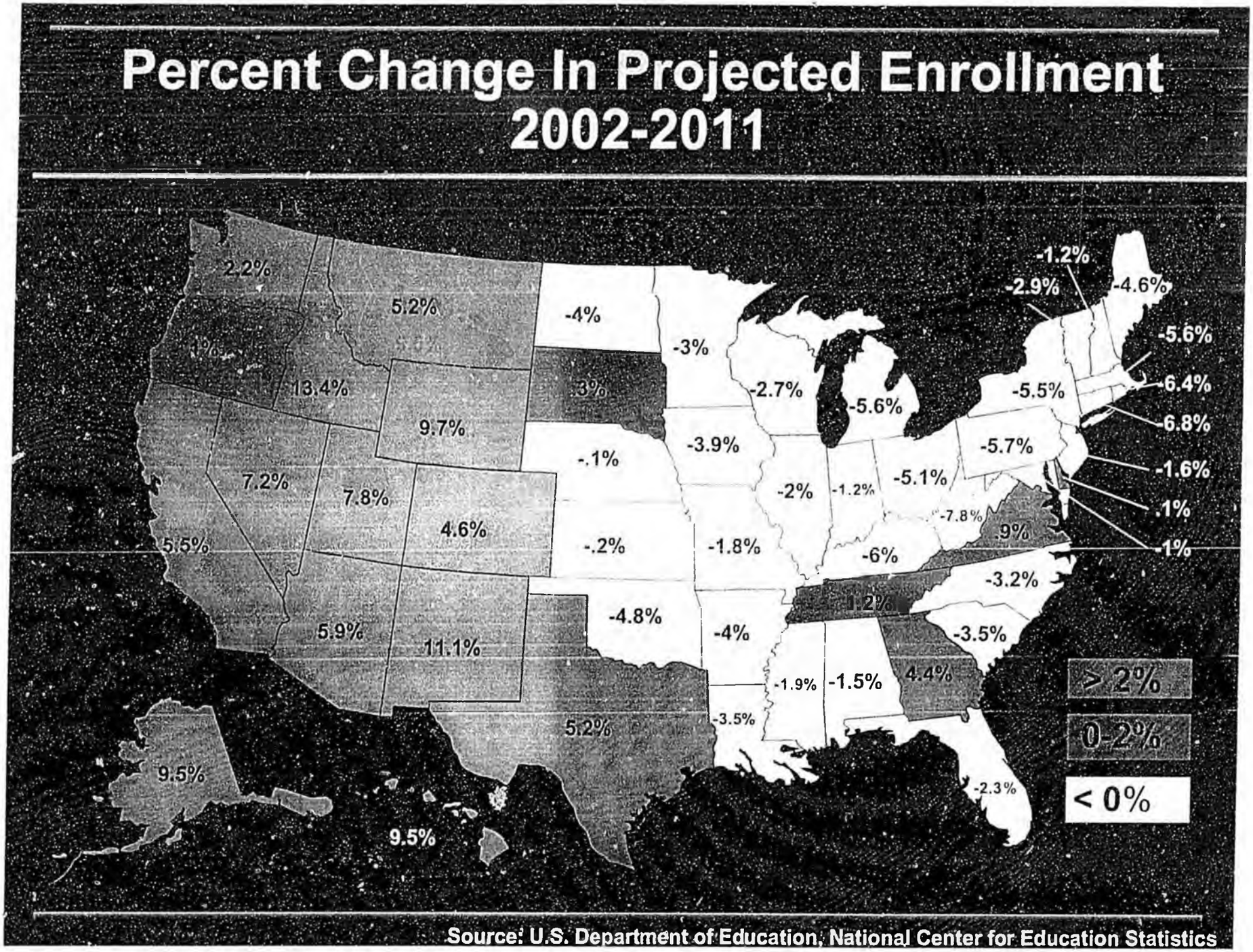
States are not allowed to assess property tax on federal lands, impacting western states in an amount over $4 billion annually. The federal government does provide "payments in lieu of taxes" (PILT) since states cannot tax federal lands, but the amount of PILT payments to states in 2001 was only about 4% of the annual property tax revenue lost by western states.

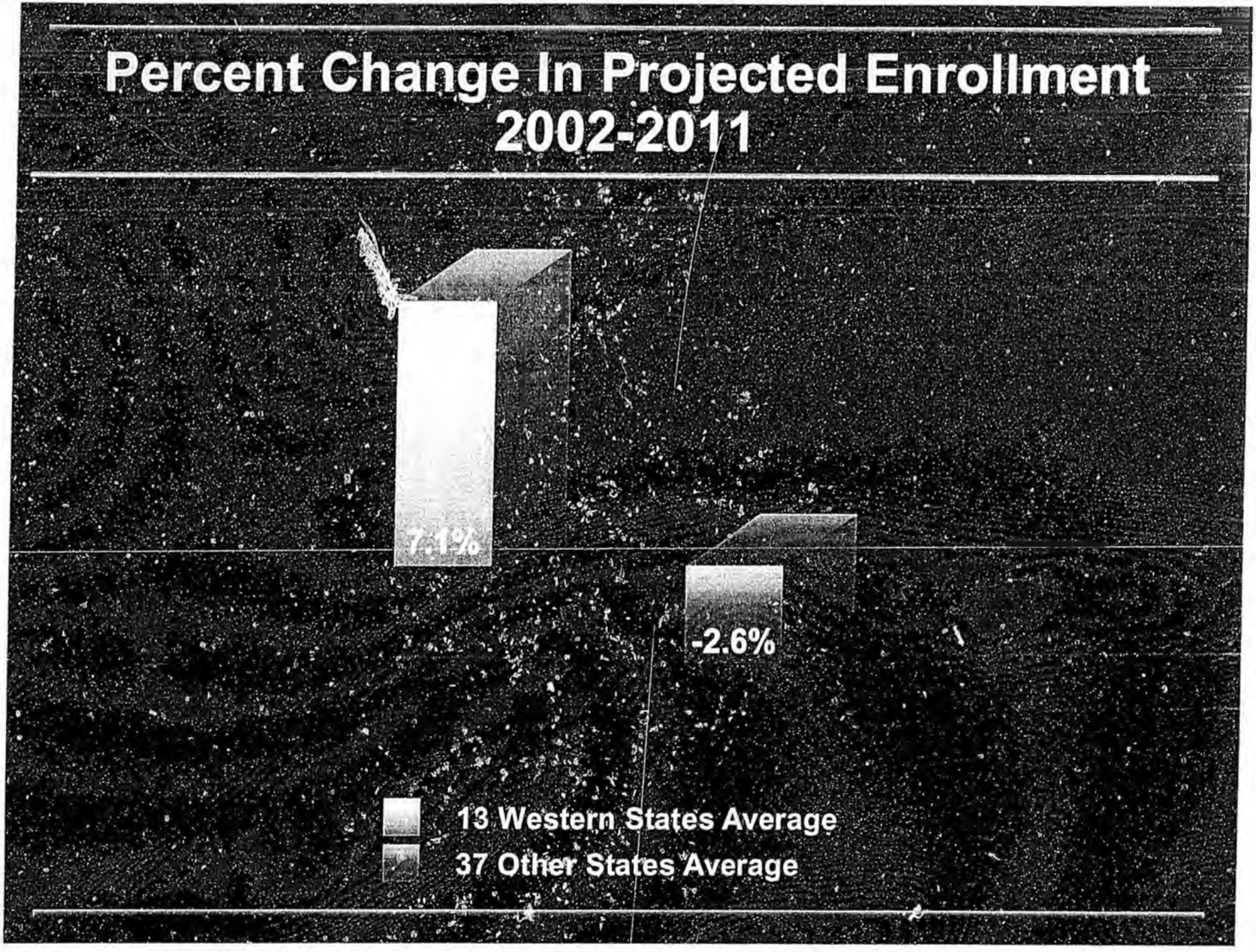
This resolution proposes to: (1) create legislative awareness, (2) educate the public, (3) build a western states coalition, and, (4) petition Congress to compensate western states.

In summary, western states are financially harmed in a significant way by the amount of federal land ownership. The conclusion is that federal land ownership hinders western states' ability to fund public education.

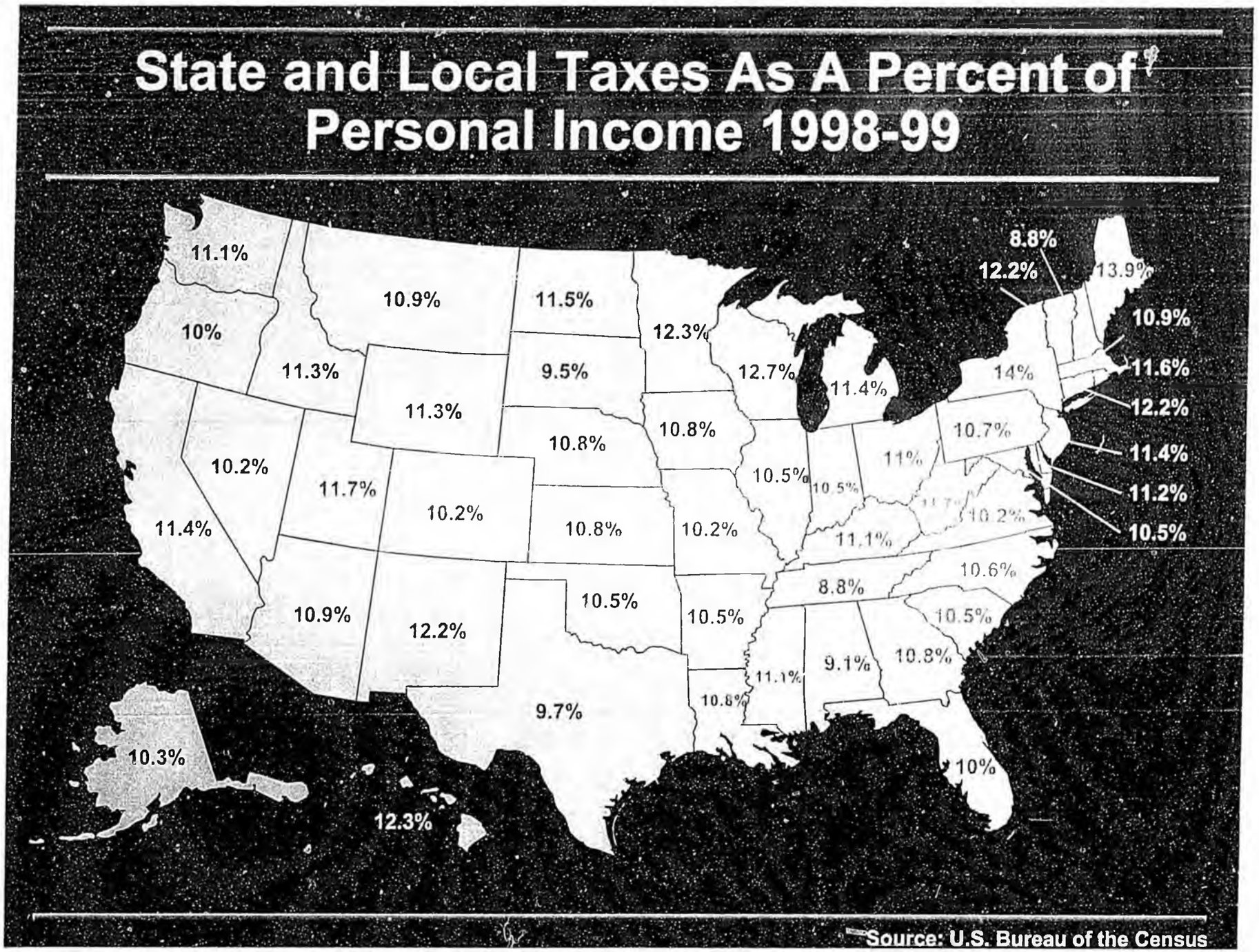

Percent Change in Expenditures Per Pupil
1979-98
28%
57%
13 Western States Average
37 Other States Average

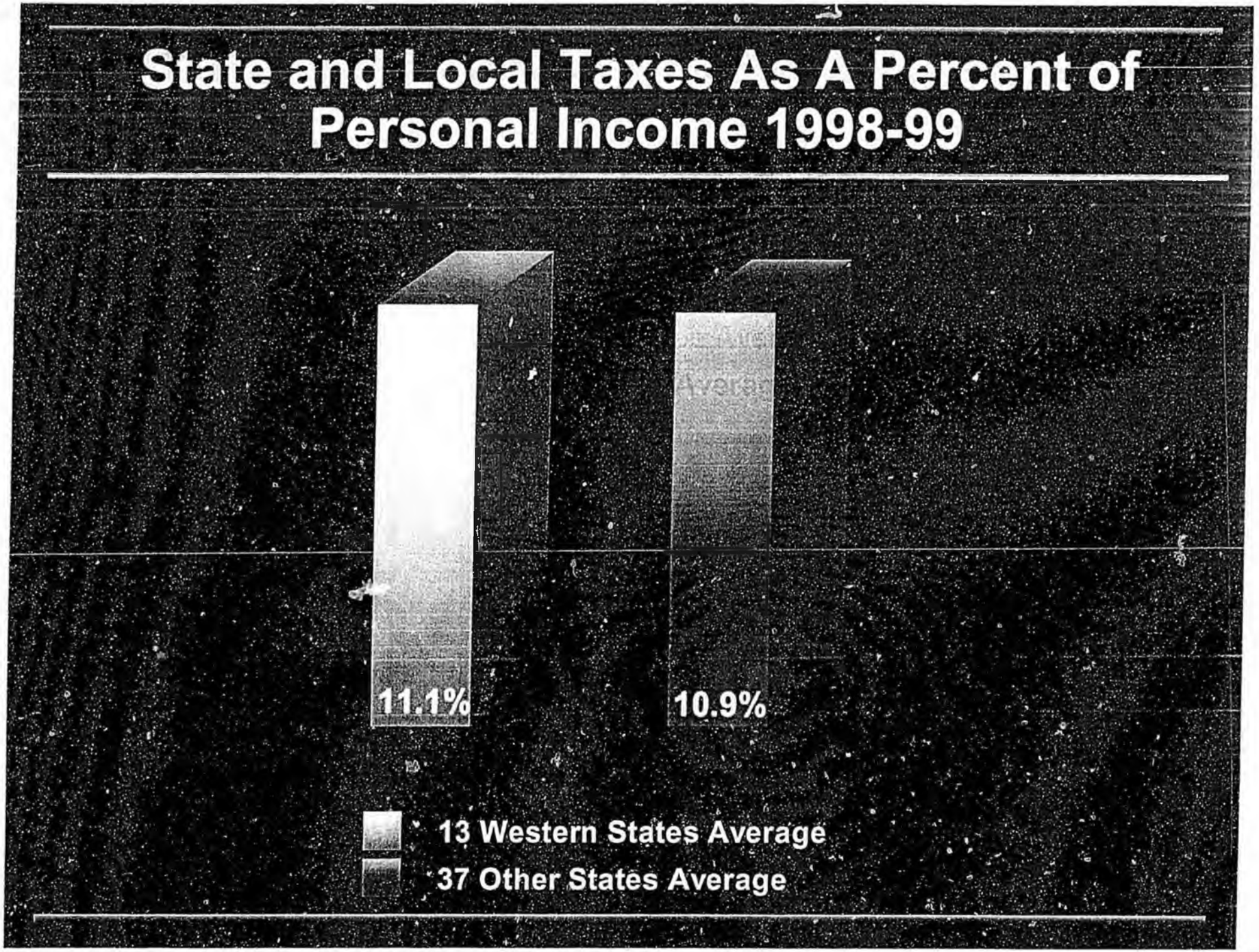
2

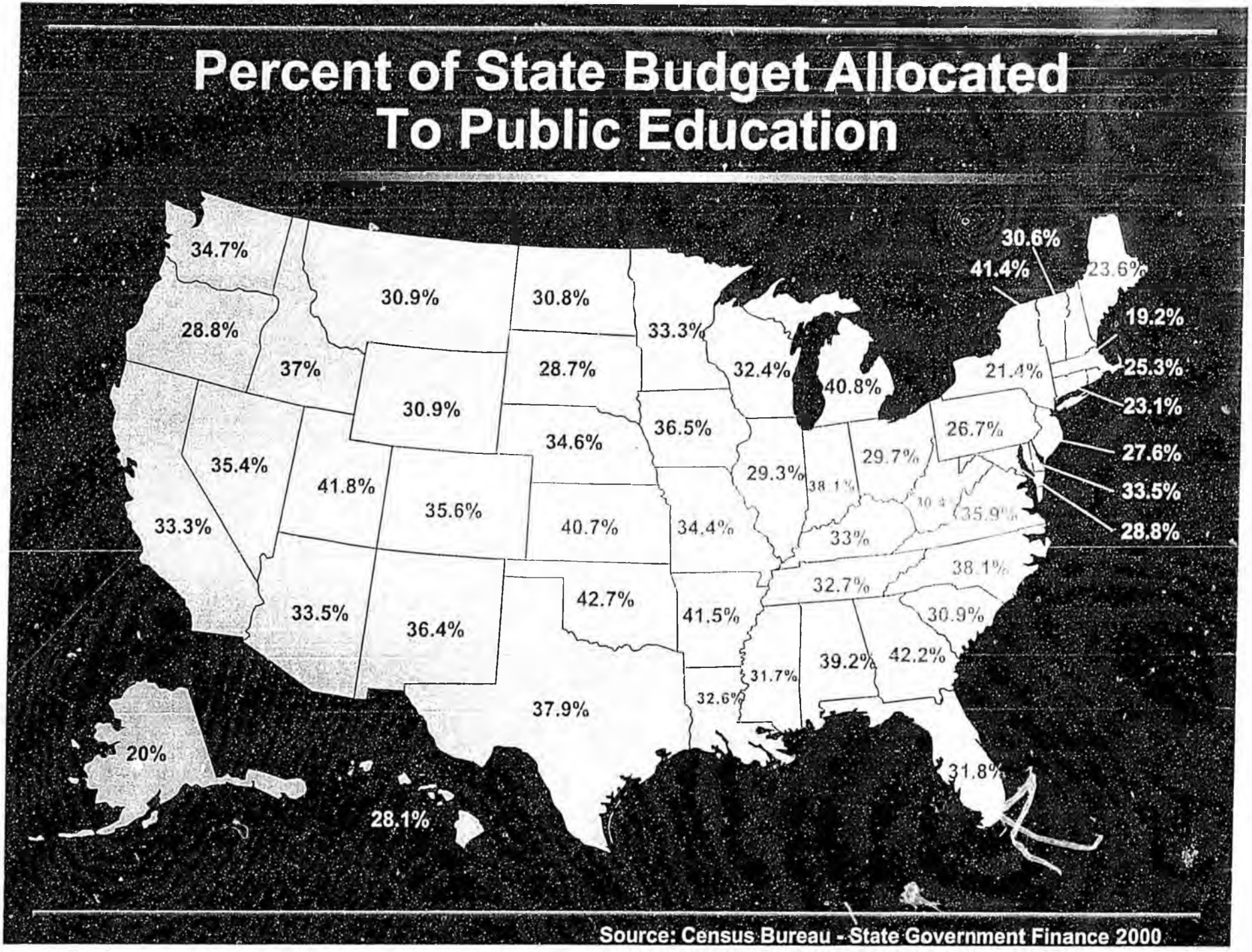

Percent Change In Projected Enrollment
2002-2011
2.2%
5.2%
-4%
-3%
-1.2%
-2.9%
-4.6%
-5.6%
13.4%
3%
-2.7%
-5.6%
-5.5%
6.4%
6.8%
9.7%
-3.9%
-.1%
-5.7%
-1.6%
7.2%
7.8%
-2%
-1.2%
-5.1%
.1%
4.6%
-7.8%
.9%
5.5%
-.2%
-1.8%
-6%
-1%
-3.2%
1.2%
-4.8%
-4%
5.9%
11.1%
-3.5%
-1.9%
-1.5%
4.4%
> 2%
0-2%
-3.5%
5.2%
9.5%
-2.3%
< 0%
9.5%
Source: U.S. Department of Education, National Center for Education Statistics

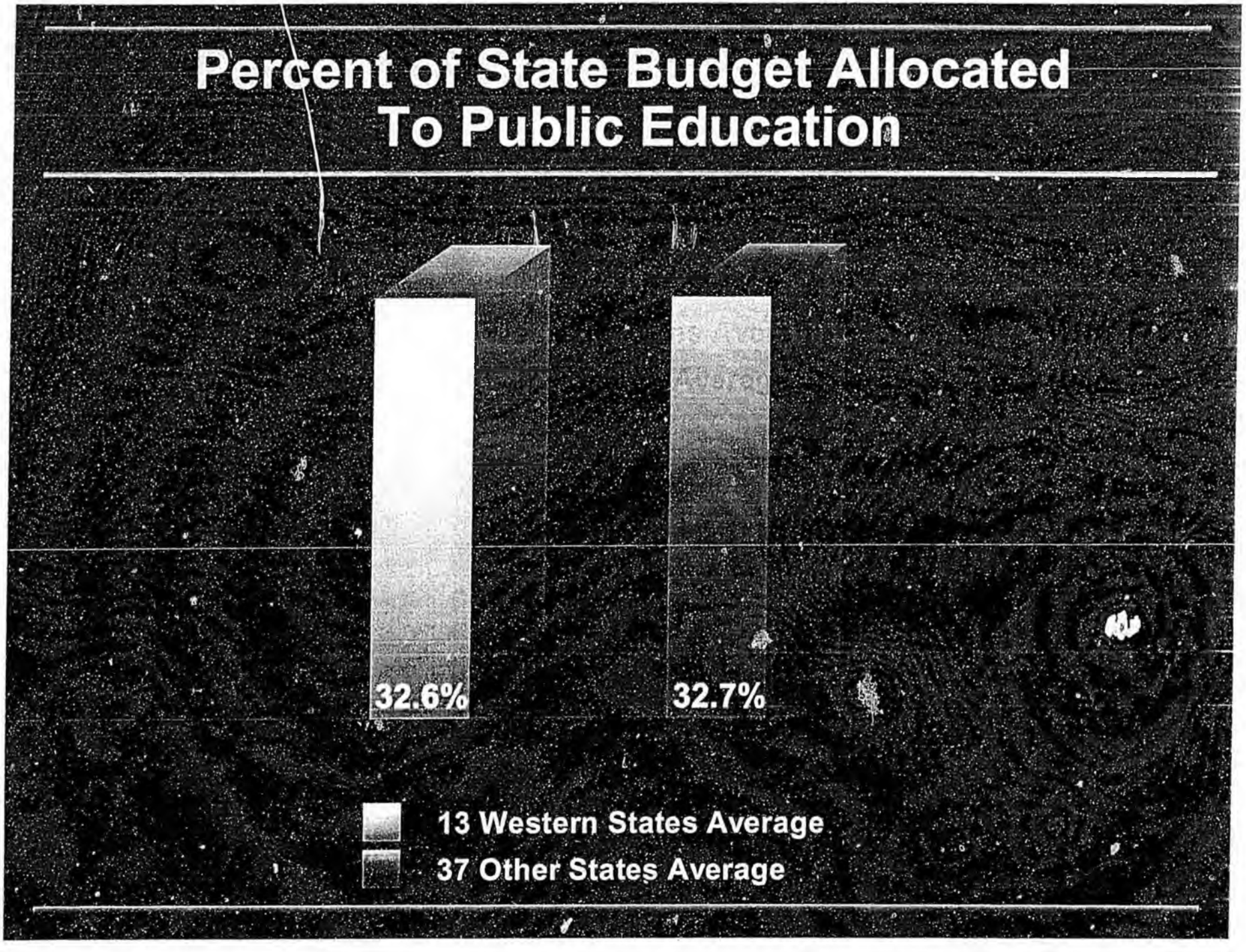

Percent Change In Projected Enrollment
2002-2011
7.1%
-2.6%
13 Western States Average
37 Other States Average

State and Local Taxes As A Percent of Personal Income 1998-99

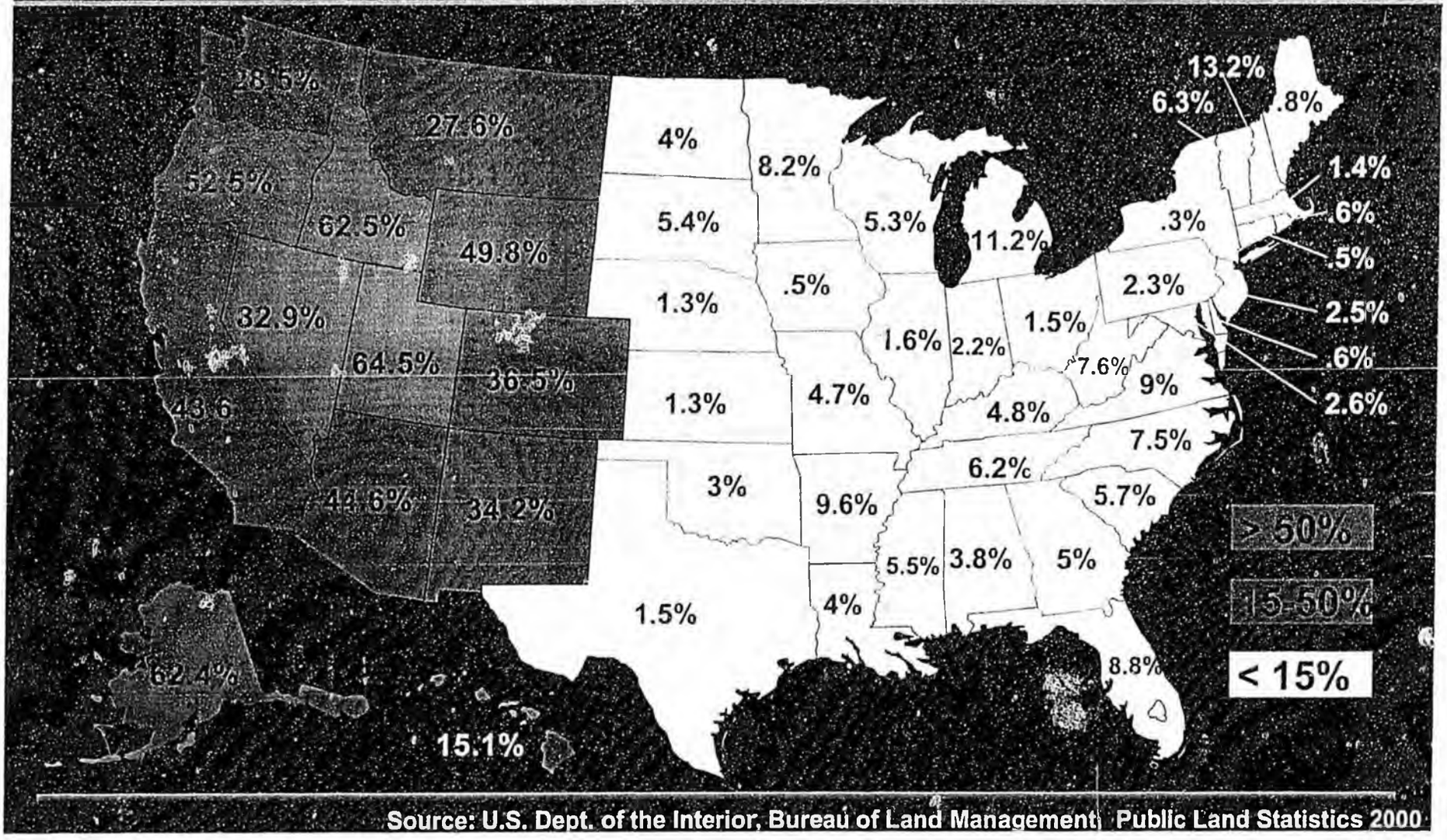



State and Local Taxes As A Percent of Personal Income 1998-99
11.1%
10.9%
13 Western States Average
37 Other States Average


Percent of State Budget Allocated To Public Education
34.7%
30.9%
30.8%
33.3%
30.6%
41.4%
23.6%
19.2%
28.8%
37%
28.7%
32.4%
40.8%
21.4%
25.3%
23.1%
30.9%
36.5%
26.7%
34.6%
27.6%
35.4%
29.3%
29.7%
33.5%
41.8%
38.1%
35.6%
33.3%
40.7%
34.4%
35.9%
28.8%
33%
38.1%
32.7%
42.7%
33.5%
41.5%
36.4%
30.9%
39.2%
42.2%
31.7%
32.6%
37.9%
20%
31.8%
28.1%
Source: Census Bureau - State Government Finance 2000

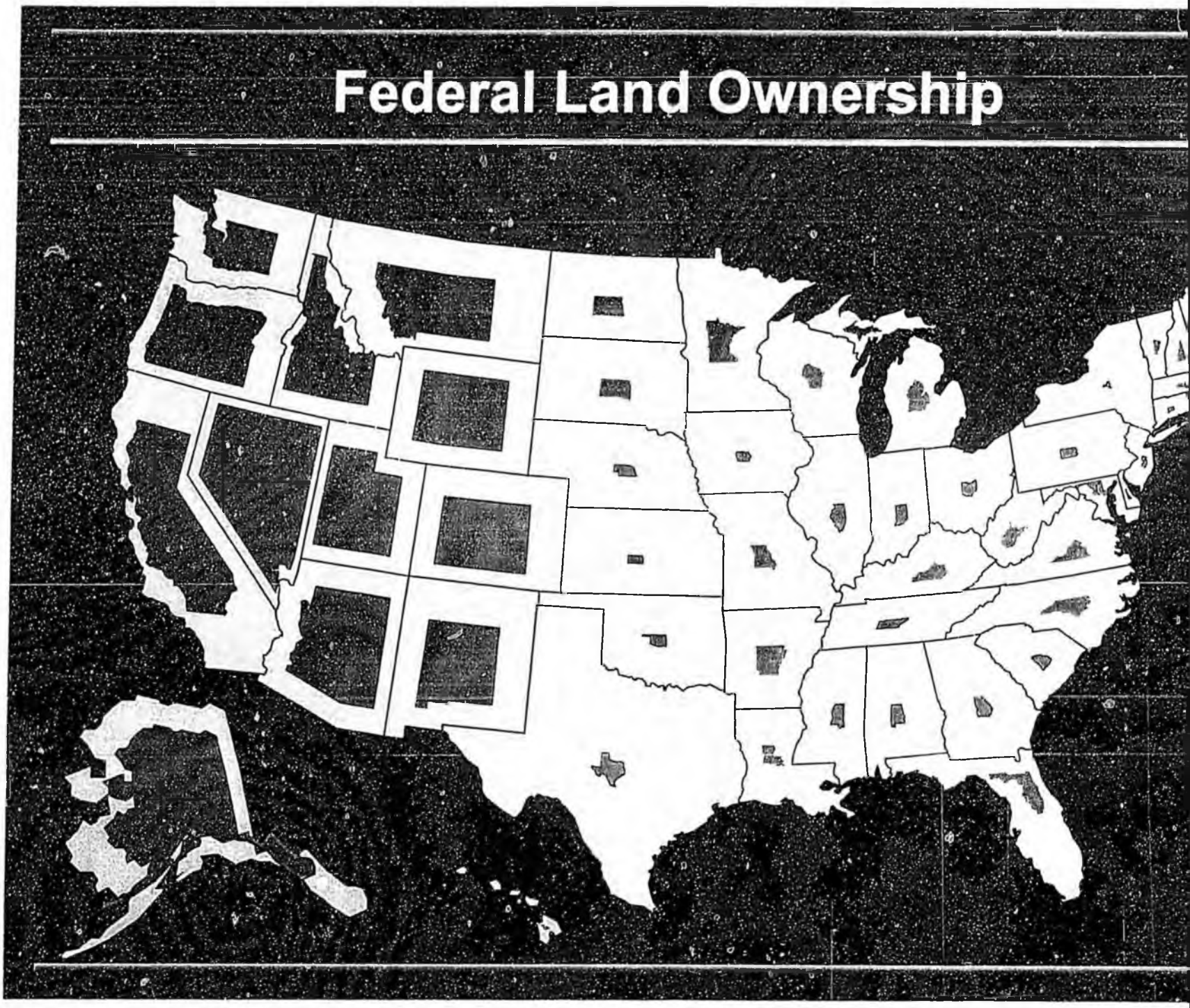

Percent of State Budget Allocated To Public Education
32.6%
32.7%
13 Western States Average
37 Other States Average

The Problem: High Percent of Federal Land Ownership In The West

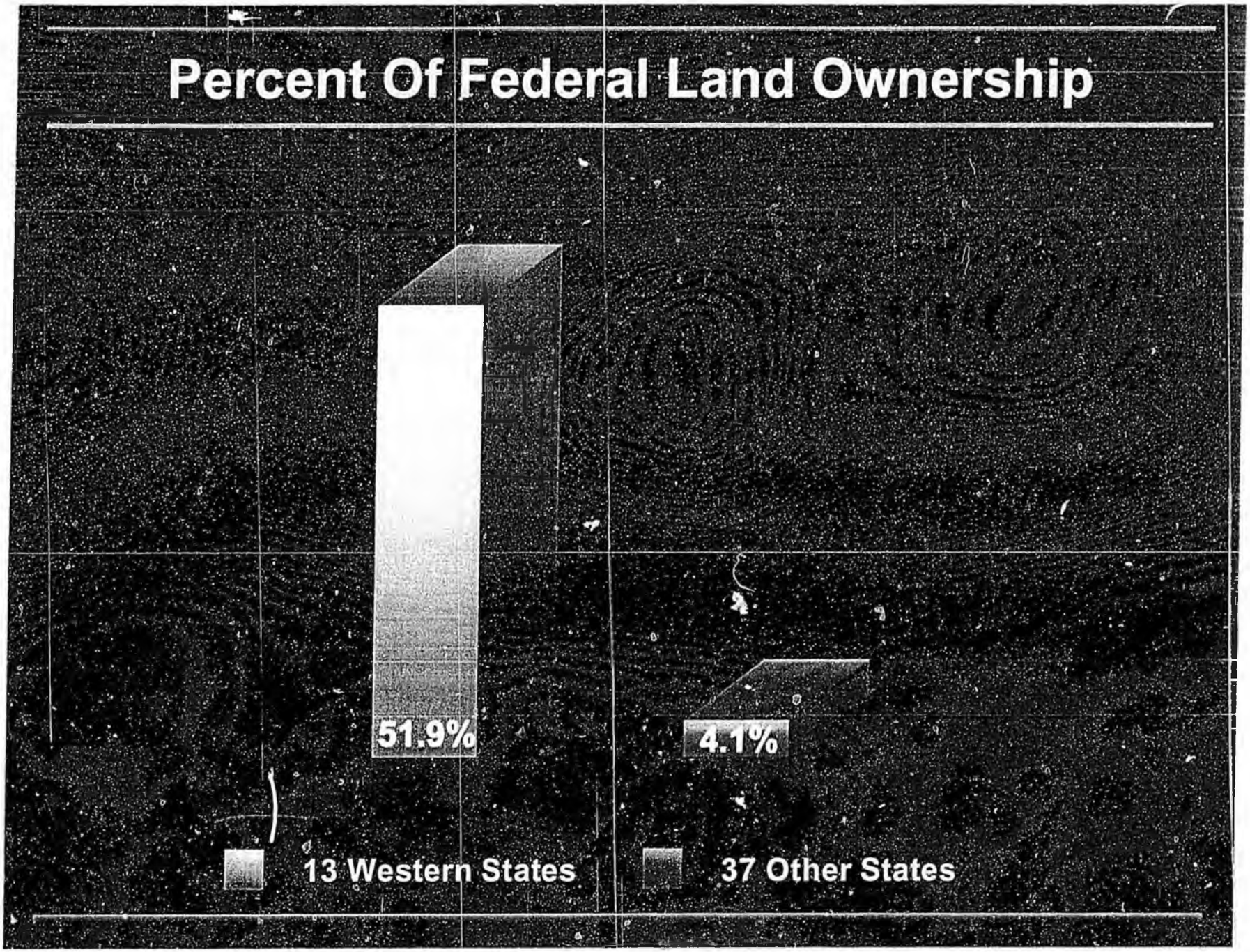


Source: U.S. Dept. of the Interior, Bureau of Land Management, Public Land Statistics 2000

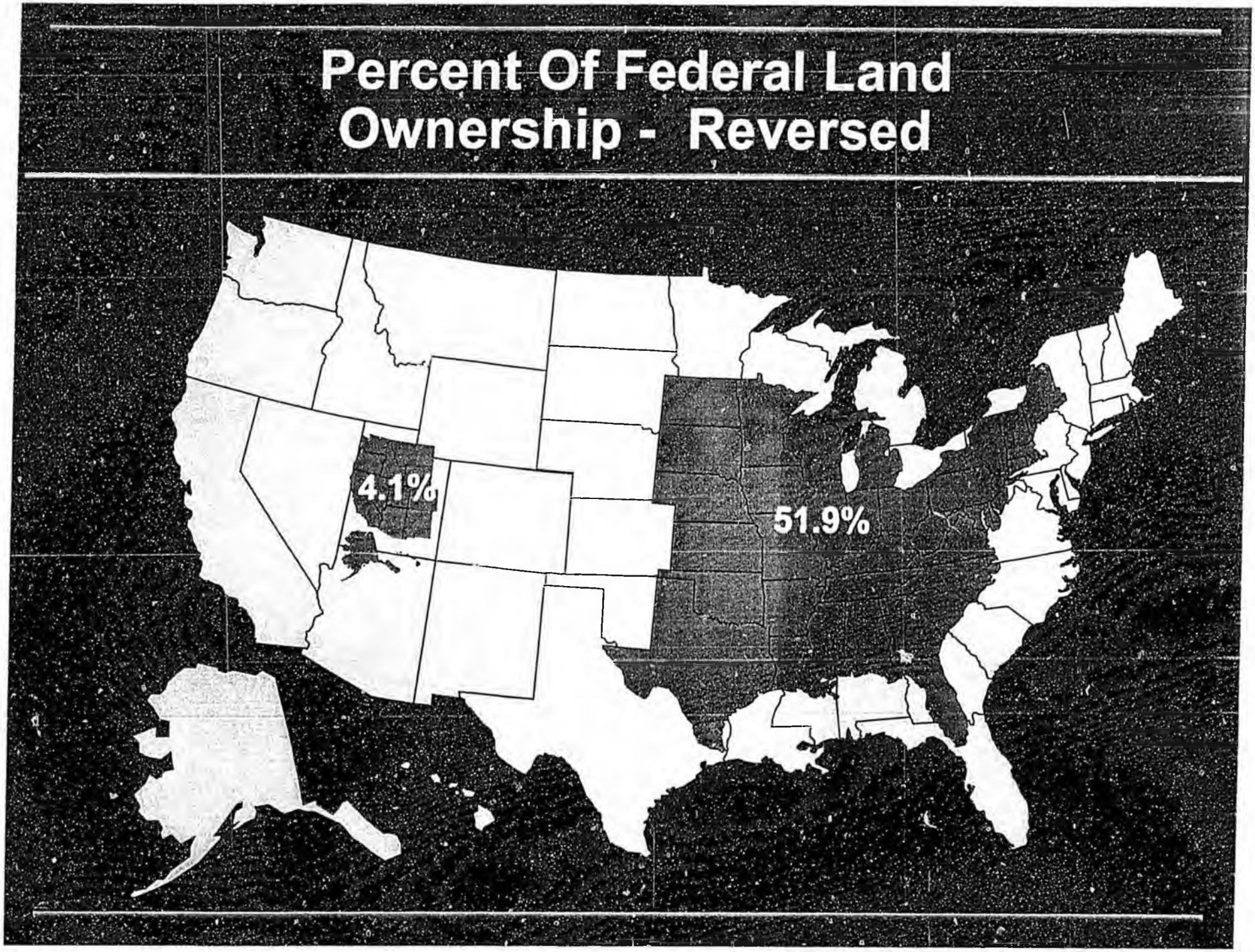
Federal Land Ownership



Percent Of Federal Land Ownership



Percent Of Federal Land Ownership - Reversed



HOUSE OF REPRESENTATIVES
OFFICE OF THE SPEAKER
SALT LAKE CITY, UTAH 84114

MARTIN R. STEPHENS
WEBER COUNTY

LEGISLATURE
(801) 538-1930
RESIDENCE
(801) 731-5346

President Gene Therriault
Alaska State Senate
State Capitol, Room 111
Juneau, AK 99801-1182

Speaker Pete Kott
Alaska House of Representatives
State Capitol, Room 208
Juneau, AK 99801-1182

Dear President Therriault and Speaker Kott:

We are writing to make you aware of a resolution that is being circulated to presiding officers in the legislatures of all thirteen western states and to request your support as legislative leaders of its introduction and passage in Alaska. A copy of the resolution, entitled "Joint Resolution Supporting Action Plan for Public Land and Education," (APPLE) is enclosed for your review.

The concept and language of the joint resolution is supported by western legislators and governors through the actions and resolutions of The Council of State Governments-*WEST* (CSG-*WEST*) and the Western Governors' Association (WGA). Speaker Kott will recall that the APPLE Initiative, as the resolution is called, was unanimously adopted by the Executive Committee of CSG-*WEST* at our annual meeting in Lake Tahoe, Nevada in July of 2002; subsequently, the Western Governors' Association unanimously endorsed the APPLE initiative at their winter meeting in Las Vegas this past December. A copy of the CSG-*WEST* resolution is also enclosed as well as a brief summary of the APPLE initiative.

We believe that adoption of the resolution is an important step toward creating a broad-based coalition in support of just compensation for public schools in western states where the federal government owns nearly 52% of the land within our borders. Based on our research, the western states would receive one-time revenues from the federal government of 14.1 billion dollars and 6.4 billion annual revenue from property tax and royalties. For Alaska, this would mean 5.59 billion in one-time revenue and 2.05 billion in annual recurring revenue. This money is vital in a region where enrollment and higher pupil per teacher ratios are projected to increase dramatically in the foreseeable future.

We hope that you will be willing to support this joint resolution in your legislature and to serve or appoint members from your legislature to work with us on a steering committee to build a western coalition in support of the APPLE Initiative. As you might imagine, we have received a tremendous expression of interest and support from the education community.

We look forward to answering any questions you may have about the APPLE initiative. Please contact either of us, Speaker Marty Stephens in Salt Lake City, Utah at (801) 538-1930 or Assemblyman Lynn Hettrick in Carson City, Nevada at (775) 684-8843. Kent Briggs of the CSG-*WEST* staff is also assisting with this project and can be contacted at (916) 553-4423 in Sacramento, California. The detailed power point presentation of the APPLE Initiative can be easily accessed on the CSG-*WEST* web site at www.csgwest.org.

Our best wishes on a successful legislative session; we look forward to working with you as part of a unique western coalition to secure in the language of the resolution, " just compensation that will allow western states to be on equal footing with the rest of the nation in their efforts to provide education."

Sincerely,

Speaker Marty Stephens
Utah House of Representatives
Chair, APPLE Initiative Steering Committee

Assemblyman Lynn Hettrick
Minority Leader, Nevada State Assembly
Immediate Past Chair, CSG-*WEST*

Enclosures

"Serving Western Legislatures"

Resolution No. 2002-01

Resolution Urging the United States Congress to Compensate Western States for the Impact of Federal Land Ownership on State Education Funding

Introduced by the Executive Committee

Whereas, for many years western states have grappled with the challenge of providing the best education for their citizens;

Whereas, western states face unique challenges in achieving this goal;

Whereas, from 1979 to 1998 the percent change in expenditures per pupil in 13 western states was 28%, compared to 57% in the remaining states;

Whereas, in 2000-2001, the pupil per teacher ratio in 13 western states averaged 17.9 to one compared with 14.8 to one in the remaining states;

Whereas, the conditions in western states are exacerbated by projections that enrollment will increase by an average of 7.1% compared to an average decrease of 2.6% in the rest of the nation;

Whereas, despite the wide disparities in expenditures per pupil and pupil per teacher ratio, western states tax at a comparable rate and allocate as much of their Budgets to public education as the rest of the nation;

Whereas, the ability of western states to fund education is directly related to federal ownership of state lands;

Whereas, the federal government owns an average of 51.9% of the land in 13 western states, compared to 4.1% in the remaining states;

Whereas, the enabling acts of most western states promise that 5% of the proceeds from the sale of federal lands will go to the states for public education;

Whereas, a federal policy change in 1977 ended these sales resulting in an estimated 14 billion in lost public education funding for western states;

Whereas, the ability of western states to fund public education is further impacted by the fact that state and local property taxes which public education relies heavily upon to fund education and cannot be assessed on federal lands;

CSG-*WEST*
1107 9th Street, Su. 650 - Sacramento, CA 95814
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Whereas, the estimated annual impact of this property tax prohibition on western lands is over 4 billion;

Whereas, the federal government shares only half of its royalty revenue with the states;

Whereas, royalties are further reduced because federal lands are less likely to be developed and federal laws often place stipulations on the use of state royalty payments;

Whereas, the estimated annual impact of royalty payment policies on western states is over 1.86 billion;

Whereas, much of the land that the federal government transferred to states upon statehood as a trust for public education is difficult to administer and to make productive because it is surrounded by federal land;

Whereas, federal land ownership greatly hinders the ability of western states to fund public education;

Whereas, the federal government should compensate western states for the significant impact federal land ownership has on the ability of western states to educate its citizens;

Whereas, just compensation will allow western states to be on equal footing with the rest of the nation in their efforts to provide education for their citizens;

NOW, THEREFORE, BE IT RESOLVED that the Executive Committee of the Council of State Governments-*WEST* endorses and supports the Action Plan for Public Lands and Education;

BE IT FURTHER RESOLVED that the Executive Committee of the Council of State Governments-*WEST* endorses an initiative seeking just compenstation from the federal government for the impact its ownership of lands within western states has on the ability on the states' ability to fund public education;

BE IT FURTHER RESOLVED that the Executive Committee of the Council of State Governments –*WEST* endorses an initiative urging the federal government to provide an expedited land exchange process for land not contended for wilderness designation;

BE IT FURTHER RESOLVED that the chair of The Council of State Governments-*WEST* appoint from the members of the CSG-*WEST* Executive Committee a steering committee to prepare the initiative for congressional consideration. These appointments shall be from both political parties and from all parts of the West. The CSG-*WEST* chair will also appoint the chair of the initiative steering committee;

BE IT FURTHER RESOLVED that the executive director of the Council of State Governments-*WEST* is authorized to assign staff to the initiative's steering committee to accomplish the successful implementation of the initiative; and

BE IT FURTHER RESOLVED that a copy of this resolution be sent to the Majority Leader of the United States Senate, the Speaker of the United States House of Representatives, the President of the United States and other officers as deemed advisable.

Adopted by the CSG-WEST Executive Committee on July 19, 2002
Assembled in Annual Meeting in Lake Tahoe, Nevada.