ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672
11313 SENATE RESOURCES

interests and private property," and imposed an affirmative burden on the Secretary of Agriculture to justify the eradication program in light of wilderness values. *Lyng*, 662 F. Supp. at 42-43.[9]

The consideration of purpose and effect of challenged actions not infrequently assists in determining whether a prohibition is to be applied to complex conduct. For example, the United States Supreme Court has long looked to the purpose and effect of state action to determine whether it violates the Establishment Clause. *E.g., Agostini v. Felton*, 521 U.S. 203, 218 (1997); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Mayweathers v. Newland*, 314 F.3d 1062, 1068 (9th Cir. 2002). It is also commonplace to assess purpose and effect to determine whether a trade restraint is unreasonable. *E.g., Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *Palladin Assocs. v. Mont. Power Co.*, 328 F.3d 1145, 1156 & n.9 (9th Cir. 2003). Similarly, the Supreme Court has directed us to rely on considerations of purpose and effect in determining whether there is a conflict between state and federal law that leads to preemption of the state law. *E.g. Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 106-07 (1992); *Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665, 672 (9th Cir. 2003). The Supreme Court has also focused our review on purpose and effect in evaluating whether a statute

[9]The USFWS contends that *Lyng* is not persuasive authority because the district court later found a scaled-back version of the eradication program permissible under the Wilderness Act. *Sierra Club v. Lyng*, 663 F. Supp. 556, 557, 560-61 (D.D.C. 1987). However, this subsequent holding does not undercut the stress the *Lyng* court placed on consideration of purpose and effect. The district court only later approved the eradication program upon the Secretary of Agriculture's showing that the scaled-back program's primary purpose and effect was to protect wilderness resources, not commercial interests, *id.* at 558, and that the program was "necessary to effectively control the threatened outside harm" to designated wilderness. *Id.* at 559. Thus the second *Lyng* decision equally supports the important role of purpose and effect in our analysis of the Enhancement Project.

is properly characterized as civil or criminal. *E.g.*, *Hudson v. United States*, 522 U.S. 92, 99 (1997); *Rivera v. Pugh*, 194 F.3d 1064, 1068 (9th Cir. 1999).

The importance of considering purpose and effect to judge the legality of challenged action is also a recurring theme in statutory law. Section five of the Voting Rights Act requires that a covered jurisdiction seeking preclearance of a proposed change to voting qualifications, prerequisites, standards, practices, or procedures demonstrate that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c; *see Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 328 (2000). And copyright law prohibits the import, manufacture or distribution of devices or services with the primary purpose or effect of circumventing controls on the reproduction of copyrighted works. 17 U.S.C. § 1002(c).

[8] For all these reasons, we conclude that as a general rule both the purpose and the effect of challenged activities must be carefully assessed in deciding whether a project is a "commercial enterprise" within the wilderness that is prohibited by the Wilderness Act. Thus we will give great weight to an assessment of purpose and effect in deciding whether the Enhancement Project is a proscribed commercial enterprise within the Kenai Wilderness. This familiar test looking to "purpose and effect" is persuasive here because it gets to the heart of what has occurred in the wilderness.

[9] The primary purpose of the Enhancement Project is to advance commercial interests of Cook Inlet fishermen by swelling the salmon runs from which they will eventually make their catch. The Enhancement Project is operated by an organization primarily funded by a voluntary self-imposed tax instituted by the Cook Inlet fishing industry on the value of its salmon catch. In the words of the Kenai Refuge Manager, in a memorandum to the Department of Interior's Regional Solicitor:

> The *primary purpose of the enhancement activity is to supplement sockeye catches* for East Side Cook Inlet set-net commercial fishermen, and for lower Cook Inlet enhancement projects.
>
> A secondary purpose is use of the excess eggs taken from Tustumena in a CIAA cost recovery project to help finance the Tustumena lake and lower Cook Inlet sockeye salmon enhancement projects.
>
> *The activity is no longer experimental in nature, nor is restoration of fish stocks an objective. It is strictly an enhancement effort to increase the number of sockeye salmon available to the commercial fishery.*

Memorandum from Kenai Refuge Manager to Regional Solicitor 2-3 (undated), ER 224-26 (emphasis added). The Fishery Management Plan for the Kenai Refuge characterizes the purpose of the Enhancement Project as "commercial enhancement of sockeye salmon populations in . . . Tustumena lake[ ]." This primary purpose is not contradicted by evidence that the Enhancement Project serves other secondary non-commercial purposes, including providing a general benefit to the fishery commonly used by commercial and recreational fishermen alike. Incidental purposes do not contradict that the Enhancement Project's principal aim is stock enhancement for the commercial fishing industry.[10]

[10] The primary effect of the Enhancement Project is to aid commercial enterprise of fishermen. More than eighty percent of the salmon produced by the Enhancement Project are

[10]USFWS's own definition of "commercial enhancement," as set forth in the Kenai Refuge Fishery Management Plan, confirms this conclusion. According to this definition, although commercial enhancement "is primarily directed toward maintaining commercial fisheries," "[s]ome sport and subsistence harvest of the enhanced fish may occur."

caught by commercial fishermen, who realize over $1.5 million in additional annual revenue from project-produced fish. USFWS documents highlight the primary effect of the Enhancement Project to aid commercial enterprise. For example, the July 1997 EA states that "[i]t is apparent because commercial fishing economics is emphasized . . . the main reason for continuing the project is economic[ ] in nature." Similarly a USFWS "Briefing Statement" concludes that "[w]e should consider [CIAA's cost-recovery harvest] to be a commercial fishing operation." The 1997 Compatibility Determination concludes that the Enhancement Project "primarily benefits Eastside Cook Inlet set-net commercial fishermen." In light of this primary effect, any incidental benefit to sport fishermen or others is not controlling. The incidental benefit that the program may provide to recreational and sport fishermen is subordinate to the primary benefit conferred on the commercial fishing industry.

In light of the unmistakable primary purpose and effect of the Enhancement Project, we reject arguments advanced by the USFWS that were credited by the district court.[11] The district court reasoned in part that the CIAA is itself a non-profit organization. But the non-profit status of the CIAA cannot be controlling because its non-profit activities are funded by the fishing industry and are aimed at providing benefits to that industry. The CIAA's continued funding and operation is dependent upon the revenues of commercial fishermen, and we have previously recognized that even non-profit entities may engage in commercial activity. *Dedication and Everlasting Love to Animals v. Humane Soc.*, 50 F.3d 710, 713 (9th Cir. 1995) ("A nonprofit organization . . . may engage in commercial activity.").[12]

[11]The district court did not give the same weight to considerations of purpose and effect as we do here. That is perhaps because, as above indicated, our prior precedent has not given guidance on this issue.

[12]The CIAA itself, to some extent, engages in commercial activity through its cost-recovery sale of the excess salmon produced each year by

In addition, the district court relied on the involvement of the State of Alaska, which previously had run the stocking project to research the viability of artificially enhancing salmon runs. But prior management activity and present regulatory control by the State of Alaska is irrelevant to assessing the primary purpose and effect of the current Enhancement Project. When the State had direct control of operations, the project's primary purpose was research-oriented. As set forth in the 1985 Memorandum of Understanding, the project was aimed at researching the viability of techniques to enhance the salmon run and evaluating the side effects of stocking, including its effect on lake-reared fish, escapement levels, and the incidence of disease in the salmon population. But now the project, as run by the CIAA, is aimed at enhancing salmon runs to increase the catch of commercial fishermen. The purpose of the project has changed from research on techniques to practical operations to swell the catch of fish and the commerce thereon. That the State maintains regulatory control over the Enhancement Project, by its permitting authority over the CIAA's hatchery operations, *see* Alaska Stat. §§ 16.10.380, 16.10.400(a) (2003), does not matter. The State regulates an array of commercial enterprises, from cruise ship operation to oil exploration. *See, e.g.,* Alaska Stat. §§ 31.05.090, 46.03.460 *et seq.* (2003). That an industry or activity is regulated does not mean that it is no longer a commercial activity.

Furthermore, the essential nature of the Enhancement Proj-

---

the Enhancement Project, from which it realizes nearly one million dollars in annual revenue. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787-88 (1975) ("[T]he exchange of . . . a service for money is 'commerce' in the most common usage of that word."). We need not stress this factor, for in light of the primary purpose and effect to benefit the commercial activities of fishermen, our conclusion that a commercial enterprise prohibited within wilderness has been shown would remain the same even if the CIAA discarded without sale all fry supplementary to the stocking program.

ect is not changed merely because the commercial benefit derived from the Enhancement Project is conferred when fishermen make their salmon catch outside the bounds of the Kenai Wilderness. It is correct that what the Wilderness Act bars is the operation of a "commercial enterprise . . . *within* any wilderness area." 16 U.S.C. § 1133(c) (emphasis added). But it is not disputed that substantial and essential parts of the Enhancement Project's operation, the collection of eggs taken to a hatchery and the stocking of six million fry returned to Bear Creek, occur within the Kenai Wilderness.[13]

Implicit in the justifications urged for the project is the premise that we may recognize that the benign purposes of the project should be permitted to continue because the Wilderness Act resulted from a "compromise" of the legislature.[14] But regardless of any tradeoffs considered by Congress in enacting the Wilderness Act, we interpret and apply the language chosen by Congress, for that language was chosen in order to incorporate and effectuate those tradeoffs. The plain language of the Wilderness Act states that there shall be "*no* commercial enterprise" within designated wilderness. 16 U.S.C. § 1133(c) (emphasis added). This mandatory language does not provide exception to the prohibition on commercial enterprise within wilderness if aimed at achieving a benign goal for commerce with modest impact on wilderness. That

[13]If we were to accept the argument that the Enhancement Project, despite its commercial aims, is exempt from the Wilderness Act because the project's commercial benefit is conferred outside the wilderness, we would likely soon face arguments that other commercial operations, more intrusive on the wilderness, might be sustained under the Wilderness Act, if transactions constituting commerce occur outside of the wilderness area's bounds. The weakness in this line of argument is obvious if we consider that a logging operation within the wilderness could not sensibly be urged to be permissible, even though the trees harvested were sold outside of the wilderness area.

[14]The Regional Solicitor's opinion on which USFWS relied urges that "[the Wilderness Act] is a legislative compromise that by no means reflects pure or absolute preservationism."

compromises may have been made in the legislative process does not alter an analysis of Congress's words of proscription based on traditional canons of statutory construction. *See American Ass'n of Retired Persons v. E.E.O.C.*, 823 F.2d 600, 604 (D.C. Cir. 1987) ("[S]tatutes are records of legislative compromise, and the best guide to the purposes of a statute is the language of the statute itself.").

[11] We must abide by Congress's prohibition of commercial enterprise in wilderness and may not defer to the contrary interpretation argued by the USFWS. In light of the clear statutory mandate, the Wilderness Act requires that the lands and waters duly designated as wilderness must be left untouched, untrammeled, and unaltered by commerce. By contrast, the Enhancement Project is a commercial enterprise within the boundaries of a designated wilderness and violates the Wilderness Act.

III

As an alternative holding in support of our decision, even if we were to assume that the Wilderness Act's prohibition on commercial enterprise within the wilderness is ambiguous, we would reach the same conclusion that the Enhancement Project offends the Wilderness Act. Assuming ambiguity in the scope of the prohibition, under *Mead* agency action is not entitled to heightened *Chevron* deference unless the agency can demonstrate that it has the general power to "make rules carrying the force of law" and that the challenged action was taken "in the exercise of that authority." *Mead*, 533 U.S. at 226-27. Administrative interpretations not meeting these standards are entitled not to deference, but to a lesser "respect" based on the persuasiveness of the agency decision. *Id.* at 228; *Skidmore*, 323 U.S. at 139-40.

Applying *Mead*, we conclude that this case involves only an agency's application of law in a particular permitting context, and not an interpretation of a statute that will have the

force of law generally for others in similar circumstances. The issuance of a permit by a federal agency cannot in this case be characterized as the exercise of a congressionally delegated legislative function. *Mead*, 533 U.S. at 229-30. Even when considered together, the Special Use Permit and the underlying documents supporting it do not "bespeak the legislative type of activity that would naturally bind more than the parties to the ruling." *Id.* at 232.

Pursuant to the NEPA process, the USFWS issued several documents before granting the CIAA a Refuge Special Use Permit for the Enhancement Project. These documents included the EA, a Mitigated Finding of No Significant Impact, a Wilderness Act Consistency Review, and a Compatibility Determination. Only the Consistency Review and Compatibility Determination contain legal analysis of the Wilderness Act. Both the Consistency Review and the Compatibility Determination speak in terms specific to the Enhancement Project, and do not address general principles of law.[15] The analysis that these documents give to the permissibility of the Enhancement Project relies on an opinion letter prepared by the Department of the Interior's Regional Solicitor's office. Entitled "Kenai National Wildlife Refuge; Tustumena Lake Enhancement Project," this opinion letter speaks only to the permissibility of the CIAA-operated Enhancement Project in Tustumena Lake, and does not attempt to draw broader conclusions regarding the permissibility of this type

[15]In answering the question of whether fishery enhancement is an appropriate activity in the designated wilderness, the Consistency Review quotes an opinion of the Department of the Interior Regional Solicitor's office concluding that the "[USFWS] has administrative discretion sufficient to grant [CIAA] a special use permit for operation of a compatible enhancement project in the Kenai Wilderness." The Consistency Review relies on the same Solicitor's opinion, and concludes that "the proposed action is consistent with the legal requirements of the Wilderness Act and ANILCA." These conclusions are inconsistent with a view that the USFWS intended the analyses in these documents to have legal force beyond determination of the permissibility of this Enhancement Project.

of enterprise within wilderness. Nothing in the review documents or the Solicitor's opinion would bind the USFWS to permit a similar activity in another wilderness.

We recently stated in the context of the National Marine Fisheries Service's interpretation of the High Seas Compliance Act, 16 U.S.C. § 5501-5509, that "[i]nterpretations such as those in opinion letters . . . do not warrant *Chevron*-style deference." *Turtle Island Restoration Network v. Nat'l Marine Fisheries Service*, 340 F.3d 969, 975 n.10 (9th Cir. 2003) (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)).[16] The Solicitor's opinion relied upon by the USFWS in issuing the Special Use Permit to CIAA was not a document intended to have the general force of law. *See* generally Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 Yale J. on Reg. 1, 58 (1990) (surveying the landscape of deference to agency action and concluding that "[i]nterpretations presented in [opinion letters] do[ ] not have the force of law"). Neither can the project-specific documents that rely upon this opinion be considered to carry the general force of law.

Under *Mead* and *Skidmore*, the weight that we are to give an administrative interpretation not intended by an agency to carry the general force of law is a function of that interpretation's thoroughness, rational validity, and consistency with

[16]There has been judicial suggestion that Solicitor's opinions specifically are not entitled to *Chevron* deference. *Manning v. United States*, 146 F.3d 808, 814 n.4 (10th Cir. 1998) (addressing a Department of the Interior Solicitor's opinion regarding the Multiple Use Mining Act of 1955). In terms of the principles set forth in *Chevron* and *Mead*, we likewise conclude that Solicitor's opinions, helpful as they may be to agencies which study them, cannot properly be viewed as an administrative agency interpretation of statute that has the force of law. Such opinions, which normally are the product of individual lawyers advising their client agencies, and which do not in their formulation involve procedural protections comparable to an agency's rulemaking procedures, do not invoke *Chevron* deference.

prior and subsequent pronouncements. *Skidmore*, 323 U.S. at 140. *Mead* adds as other relevant factors the "logic[ ] and expertness" of an agency decision, the care used in reaching the decision, as well as the formality of the process used. *Mead*, 533 U.S. at 228, 235. Even if we assume the Wilderness Act's prohibition on commercial enterprise to be ambiguous, the USFWS's permitting of the Enhancement Project "goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 481 (2001). Whatever else might be done permissibly within wilderness in extraordinary circumstances for purposes relating to conservation or preservation of the wilderness, we conclude that it is "quite clear" that conduct with the primary purpose and effect to aid commercial enterprise cannot be countenanced.

Moreover, the USFWS's decision-making process shows little attention to the precise question of whether the Enhancement Project is a commercial enterprise. Although the USFWS argues that the Regional Solicitor was specifically asked if the project was a precluded commercial enterprise, the issue of commercial enterprise was not addressed explicitly by the Solicitor's opinion upon which the USFWS relied; the Solicitor's opinion cannot be considered persuasive on interpretation of a statutory term that it does not discuss with specificity.[17] And the record before the agency in our view supports a conclusion squarely contrary to that reached by the USFWS.

[17]On the day before the USFWS's issuance of the Special Use Permit, the Regional Solicitor issued a second letter giving further consideration to the issues addressed in the initial opinion letter. This second letter concludes that § 1315(b) of ANILCA does not prohibit fishery enhancement projects in Alaskan refuge wilderness areas. ANILCA § 1315(b) permits fishery enhancement "[i]n accordance with the goal of restoring and maintaining fish production in the State of Alaska." *Id.* However, this letter gives no express consideration to the Wilderness Act's specific prohibition on commercial enterprise within a designated wilderness. As such it is not helpful or persuasive in interpreting the Wilderness Act.

The final USFWS decision that the Enhancement Project is not a commercial enterprise contains little analysis of the commercial enterprise issue. Relying on the Regional Solicitor's opinion, the Wilderness Act Consistency Review devotes only a few sentences to the question of whether the Enhancement Project is a commercial enterprise, concluding that close state regulation of the project obviates the commercial enterprise issue. We have concluded to the contrary that state regulation does not preclude characterizing as a commercial enterprise an activity with the primary purpose and effect to benefit commerce. The USFWS analysis on consistency was not thorough, *see Skidmore*, 323 U.S. at 140, and we are not impressed by "persuasiveness of the agency's position." *See Mead*, 533 U.S. at 228. We do not consider the USFWS decision to have significant "rational validity," *Skidmore*, 323 U.S. at 140, or to reflect the product of specialized agency expertise. *Mead*, 533 U.S. at 228, 235.

[12] Having considered the *Mead* and *Skidmore* factors, we are not persuaded by the agency's analysis. We hold, alternatively, that even if the term "commercial enterprise" within designated wilderness is ambiguous, the Enhancement Project under the total circumstances is a prohibited commercial enterprise within wilderness.[18]

[18]Plaintiffs also assert that the Enhancement Project violates the Wilderness Act's requirement that any action taken within a federally-designated wilderness area preserve the "natural conditions" that are a part of the "wilderness character" of such an area, 16 U.S.C. §§ 1131, 1133, and also that the project violates the Refuge Act's mandate that special use permits be issued only after a determination that "such uses are compatible with the major purposes for which such areas were established." 16 U.S.C. § 668dd(d)(1)(A). Because we have determined that the district court erred in granting summary judgment to the USFWS because the Enhancement Project is a prohibited commercial enterprise, we need not and do not consider these additional claims.

IV

[13] Plaintiffs were entitled to prevail on their motion for summary judgment establishing that the USFWS's permit for the commercial enhancement program violated the Wilderness Act. Plaintiffs were entitled to gain a final judgment setting aside the USFWS's permit. Plaintiffs were entitled to gain a final judgment enjoining operation of the Tustumena Lake Sockeye Salmon Enhancement Project.

REVERSED and **REMANDED** for further proceedings not inconsistent with this opinion. Costs shall be borne by Defendant.[19]

[19]Plaintiff Wilderness Society has requested an award of reasonable attorney's fees under the Equal Access to Justice Act. We do not reach this issue. Plaintiffs may file a motion seeking such an award of fees, to be addressed after defendant has had an opportunity to be heard.

United Southeast Alaska Gillnetters
P.O. Box 23378, Ketchikan, AK 99901 Phone & Fax (907) 247-2471 Email. usa_gillnetters@att.net

February 19, 2004

The Honorable Scott Ogan, Chair
Senate Resources Committee
State Capitol, Room 103
Juneau, AK 99801 Send Via Fax: 465-3265

Dear Senator Ogan,

The United Southeast Alaska Gillnetters (USAG) is an association of about 150 small business owners who catch salmon by drift gillnetting in Southeast Alaska and market salmon throughout the United States. Many of our members also participate in other fisheries such as crab, shrimp, longline, and dive fisheries.

USAG strongly supports SJR 26 asking the Justice Department to appeal the decision by the Ninth Circuit Court of Appeals to exclude salmon enhancement from Tustumena Lake. This resolution rightly identifies the fact that in Alaska we have a large number of acres of wilderness and to be restricted from using these areas in traditional ways would be a very real hardship on the many Alaskans who depend on them one way or another for their livelihood or recreational enjoyment. More than this, we are seeing a gradual erosion of what can be done in and around wilderness areas. The commercial fishing industry has been restricted from fishing the waters of Glacier Bay National Park, a wilderness area, and now we cannot enhance fish runs by using a freshwater lake in a wilderness area. Many of our fishing districts here in Southeast are located adjacent to wilderness areas (Misty Fjords National Monument in district 1 for example) and I am sure the Wilderness Society would like nothing better than to stop our fishing along the shorelines in these areas. We believe that this movement toward restricting the uses in and around wilderness areas must be stopped now and this resolution is one step in this direction.

SJR 26 calls for the Departments of Interior and Justice to appeal the Tustumena decision and we believe this is appropriate. Certainly the Cook Inlet Regional Aquaculture Association does not have the resources to pursue such an appeal. It is our hope that if Interior or Justice will not accept this duty, that the State of Alaska will pursue correcting this wrongful court action. The decision itself harms commercial and subsistence fishermen in Cook Inlet but even more important is the precedence it sets

concerning activities in and around Alaska's wilderness areas. We are again on a slippery slope that will lead to reduced activity and economic health of the communities that depend in part on the resources of these wilderness areas. We urge the Senate Resources Committee to approve this resolution.

Yours truly,

Kenneth Duckett
Executive Director

cc: Senator Wagoner Via Fax: 465-4779
Southern Southeast Regional Aquaculture Association Via fax to: 225-1348
Northern Southeast Regional Aquaculture Association Via fax to: 747-1470
Douglas Island Pink and Chum Via fax to: 463-3213
United Fishermen of Alaska Via email

COOK INLET
AQUACULTURE ASSOCIATION

40610 KALIFORNSKY BEACH ROAD
KENAI, AK 99611
(907) 283-5761
FAX: (907) 283-9433
email: ciaa@plialaska.net

February 19, 2004

The Honorable Thomas Wagoner
State Capitol, Room 427
Juneau, AK 99801-1182

Re: Senate Joint Resolution 26 – Salmon Enhancement in Wilderness Areas

Dear Senator Wagoner:

The Cook Inlet Aquaculture Association (CIAA) would like to thank you for recognizing the importance of the Tustumena Lake Sockeye Salmon Enhancement Project to the Cook Inlet fishing community; and, in recognizing the important implications to the State of Alaska as a result of the 9th Circuit Court of Appeals' failure to fully consider all the facts in their decision to enjoin the Tustumena Lake project.

The Tustumena Lake Salmon Enhancement Project has been in continuous operation since 1974, developed and managed first by the Alaska Department of Fish and Game, and now managed by the CIAA. For over 29 years this well designed project has provided fish for sport, personal use, subsistence and commercial users in the heart of Alaska's Cook Inlet fishery. It has evolved into a model for hatchery supported enhancement projects throughout Cook Inlet and the rest of the State.

On behalf of CIAA, I support SJR 26 and recognize the following facts:

- CIAA is not a "commercial operation." We were formed under Alaska Statutes Section 16.10.380 as a "qualified" not-for-profit Regional Association that includes all user groups and representative local communities.
- All fish released by CIAA are considered part of the common property fishery resource whose harvest is determined through the State's public process.
- The only user group restricted from harvesting fish from a CIAA project is commercial fishermen.
- CIAA may harvest some of the fish returning to a project to recover project costs. Cost recovery goals are set in the Annual Management Plan through a public process.
- The Tustumena Lake project is limited in size to prevent conflicts with the State's management priorities and other interests.

- CIAA collects gametes (eggs and sperm) from broodstock in proportion to the spawning migration. CIAA does not collect broodstock based on any phenotypic (genetic) characteristics.
- All fish released to Tustumena Lake are screened for disease prior to release.
- All fish released to Tustumena Lake are marked. CIAA annually monitors Tustumena Lake tributaries to assess the impact on other spawning populations.
- All fish released to Tustumena Lake are "incubated" at Trail lakes Hatchery. Hatchery rearing (growth) is minimal.
- The Tustumena Lake project supports three lower Cook Inlet sockeye projects which provide a substantial resource for both commercial and personal use harvests.
- CIAA annually monitors the Tustumena Lake smolt migration. This information is important to the management of the Cook Inlet fishery and would not be available without the project.

The 9th Circuit Court of Appeals decision to enjoin the Tustumena Lake project severely restricts CIAA's ability to complete its goal of providing for and protecting the Cook Inlet salmon resource. The decision also limits the ability of the State to manage its fishery resources, particularly those resources providing the basis for the State's rural economy.

Sincerely,

Gary Fandrei

Gary Fandrei, Executive Director
FAXed 2/19/04, original to follow

Kenai Peninsula Online

Powered by Peninsula Clarion

-18° Deadhorse
19° Fairbanks
30° Anchorage
37° Kenai
43° Homer
43° Juneau

February

S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29						

Web posted Sunday, January 4, 2004

Impact of court decision unknown in salmon project

Staff and wire reports

The impact of Tuesday's decision by the 9th Circuit Court of Appeals to declare a long-running salmon enhancement project in Tustumena Lake illegal under federal law has yet to sink in, but it may be appealed to the U.S. Supreme Court, an official with the nonprofit agency that has conducted the stocking operations since the mid-1990s said Friday.

Though the court said the stocking program that releases 6 million salmon fry into the lake each year likely doesn't harm the environment or diminish the enjoyment of visitors to the Kenai National Wildlife Refuge, the program clearly runs counter the intent of Congress when it passed the Wilderness Act of 1964.

"At this point, we haven't had a chance to fully evaluate the impact of decision," said Gary Fandrei, Cook Inlet Aquaculture Associa-tion's executive director. "Until we do, we probably don't fully understand the repercussions of the decision."

He went on to say he wasn't certain what the appeal procedure was, but said CIAA might be the entity to file such an appeal.

"We haven't made a decision yet," he said.

The CIAA board of directors' executive committee is expected to meet this week to discuss the decision's fallout, followed by a full board meeting Jan. 17, where members likely would "come up with a decision for future plans with respect to this decision and the Tustumena Lake project," Fandrei said.

In ordering a halt to the long-running salmon stocking program, the federal appeals court called it an improper commercial activity inside a wilderness area.

The court overturned two earlier decisions Tuesday, ruling that the project at Tustumena Lake to help commercial fishing is barred inside wilderness areas of the Kenai National Wildlife Refuge.

"There is no exception given for commercial enterprise in wilderness when it has benign purpose and minimally intrusive impact," the court ruled.

Hatchery-incubated red salmon make up about 10 percent of the run up the Kasilof River into Alaska's fifth-largest lake. The fish are caught primarily by commercial fishers and by dipnetters and anglers. Eggs from Tustumena Lake also are used to enhance several other runs in Southcentral Alaska.

"It's another nail in our coffin," said Paul Shadura, president of the Kenai Peninsula Fishermen's Association, a setnetter group that helps pay for the salmon project. "This program is extremely important to

pay for the salmon project. "This program is extremely important to the commercial fishermen."

The lawsuit was brought by The Wilderness Society and the Alaska Center for the Environment.

"This goes right to the heart of the Wilderness Act and whether any type of extractive resource activities are going to be allowed in a wilderness area," said Allen Smith, Alaska senior policy analyst for The Wilderness Society. "The court ruled 11-0 that the Wilderness Act had a bright line in it."

The ruling overturned a 2000 decision by U.S. District Judge James Singleton and a 2-1 9th Circuit decision by a three-judge panel last January supporting the salmon enhancement program.

Both earlier decisions deferred to the administrative decisions of the Kenai National Wildlife Refuge, which allowed the project. The ruling last week says the agency does not have that latitude.

"What's important here is the agencies don't have discretion to fudge around the edges" of what's permissible in wilderness, said Trustees for Alaska attorney Rebecca Bernard, who argued the case last September.

In their decision Tuesday, the appeals court judges said the enhancement project was unlikely to destroy the area's wilderness values.

"Surely this fish-stocking program, whose antecedents were a state-run research project, is nothing like the building of a McDonald's restaurant or a Wal-Mart store on the shores of Tustumena Lake," Judge Ronald Gould wrote.

But, he concluded, the law is absolute.

"The Wilderness Act requires that the lands and waters duly be designated as wilderness must be left untouched, untrammeled and unaltered by commerce," he wrote.

The project, which hatches eggs from salmon native to the lake and returns them as fingerlings, was started by the state and later turned over to CIAA.

Federal biologists have long had concerns that the project might introduce disease or disrupt the genetic mix of natural sockeye salmon runs in Tustumena Lake.

A list of 34 regulations was meant to protect the several genetic strains in the lake, said Gary Sonnevil, a field supervisor with the U.S. Fish and Wildlife Ser-vice.

Advocates of the program say it's not a big moneymaker ‹ fewer than 100,000 adult salmon return thanks to the stocking, they say. But it can help smooth out production in years when natural runs decline.

"It's a very key element of our programs," Fandrei said.

THE WILDERNESS SOCIETY * ALASKA CENTER FOR THE ENVIRONMENT

February 18, 2004

Hon. Scott Ogan, Chair
Senate Resources Committee
Alaska State Legislature
State Capitol (MS 3100)
Juneau, Alaska 99801-1182

Re: SJR 26, Salmon Enhancement in Wilderness Areas

Dear Senator Ogan:

We write to offer our comments on SJR 26, Salmon Enhancement in Wilderness Areas. This resolution is scheduled for hearing before the Senate Resources Committee on February 20, 2004. We ask that these comments be included in the hearing record.

As an initial matter, we believe strongly that the Ninth Circuit decision is a common sense decision that respects Congress' intent in creating wilderness areas. The decision also protects the long-term health of the Kasilof River wild sockeye salmon run and the Tustumena Lake ecosystem. We are aware, though, that because of the timing of the Court's decision, the Cook Inlet Aquaculture Association (CIAA) now has a problem on its hands – what to do with the 6 million sockeye salmon fry that it planned to stock into Tustumena Lake this spring. In an effort to help solve this immediate problem in the final phase of the project, we've contacted the CIAA and the U.S. Fish and Wildlife Service and have scheduled a meeting for Friday, February 20, to learn more about the situation and to brainstorm about possible solutions.

The Wilderness Society decision was issued on December 30, 2003, by eleven judges of the Ninth Circuit (a full quarter of the Court's judges), who held unanimously that the Tustumena Lake salmon stocking project violates the Wilderness Act's prohibition on commercial activities in federally designated wilderness. The judges looked to the plain language of the Wilderness Act, in which the United States Congress stated that "there shall be no commercial enterprise . . . within any wilderness area . . . ." (16 U.S.C. § 1133(c).) The decision recognizes that Congress' goal in enacting the Wilderness Act was to set aside some areas as wild places off limits to commercial activity: "These statutory declarations show a mandate of preservation for wilderness

and the essential need to keep commerce out of it." The opinion quotes President Lyndon B. Johnson as remarking, as he signed the Wilderness Act into law in 1964:

> "If future generations are to remember us with gratitude rather than contempt, we must leave them more than the miracles of technology. We must leave them a glimpse of the world as it was in the beginning, not just after we got through with it."

In short, the Ninth Circuit decision gives effect to Congress' intent that wilderness areas be left in their natural state, off-limits to man's commercial undertakings.

The Wilderness Society and the Alaska Center for the Environment initiated this lawsuit in 1998 both because this commercial salmon enhancement operation doesn't belong in a designated wilderness, and because of the project's potential to harm the wild sockeye run by introducing disease, reducing genetic diversity, and altering the natural balance of the Tustumena Lake ecosystem. By bringing the project to a close, the Ninth Circuit decision helps to perpetuate the wild sockeye salmon run and ensure that it will remain healthy for future generations of people seeking to use and enjoy the wilderness areas of the Kenai National Wildlife Refuge.

The decision will not affect the State of Alaska's fish and wildlife management and research programs designed to monitor and manage the resources for all Alaskans. Legitimate state management activities aimed at protecting the fishery resource so that it remains available to commercial, sport, subsistence, and recreational users are not undertaken for the primary purpose and benefit of commercial fisheries and will not be affected by this decision. The decision also will not affect outfitting and guiding activities in designated wilderness, because these are governed by a different provision of the Wilderness Act, 16 U.S.C. § 1133(d)(5), that is not addressed in *The Wilderness Society* decision.

Enclosed is a factsheet that gives more information about the Ninth Circuit decision in *The Wilderness Society v. U.S. Fish and Wildlife Service* and its implications. We hope this information will assist you and the members of the Senate Resources Committee as you consider taking action on SJR 26.

Sincerely,

Nicole Whittington-Evans

Nicole Whittington-Evans
Assistant Regional Director
The Wilderness Society

Nicole Whittington-Evans for

Cliff Eames
Public Lands Director
Alaska Center for the Environment

The Wilderness Society comments on SJR 26, cont.

cc: Governor Frank Murkowski
Rowan Gould, Regional Director, U.S. Fish & Wildlife Service
Gary Fandrei, Executive Director, Cook Inlet Aquaculture Association

THE WILDERNESS SOCIETY * ALASKA CENTER FOR THE ENVIRONMENT

FACTSHEET

The Wilderness Society v. U.S. Fish & Wildlife Service (9th Cir., Dec. 30, 2003) (en banc)
Tustumena Lake Sockeye Salmon Enhancement Project
Andy Simons Wilderness, Kenai National Wildlife Refuge, Alaska

- The Tustumena Lake Sockeye Salmon Enhancement Project is run by a commercial fishermen's association that takes sockeye salmon eggs from a tributary of Tustumena Lake within designated wilderness in the Kenai National Wildlife Refuge, grows these eggs into fry at the Trail Lakes Hatchery, and stocks 6 million fry back into the wilderness lake, where they feed and grow into oceangoing smolts. The project produces 60,000 surplus sockeye salmon each year, over 95% of which are caught and sold by Cook Inlet commercial fishermen.

- Conservation groups have objected to the Tustumena Project for years because:

  - It is a commercial activity operating in violation of the Wilderness Act prohibition on commercial enterprise within wilderness areas;
  - It could harm the wild sockeye salmon run by introducing disease and reducing genetic diversity;
  - It is inconsistent with the purpose of the Kenai Refuge to protect the natural diversity of fish and wildlife populations.

- Agency biologists have for years raised concerns about the Tustumena Project's potential to harm the wild sockeye salmon run by introducing disease, reducing genetic diversity, and altering the natural balance of the Tustumena Lake ecosystem.

- When the U.S. Fish & Wildlife Service undertook an environmental analysis of the project in the 1990s, conservation groups commented that the project violates the Wilderness Act. When the Service concluded its environmental analysis and issued a special use permit for the project in 1997, The Wilderness Society and Alaska Center for the Environment, represented by Trustees for Alaska, took the federal agency to court.

- On December 30, 2003, an "en banc"[1] 11-judge panel of the U.S. Court of Appeals for the Ninth Circuit ruled unanimously that the Tustumena Project is a commercial enterprise operating within a federal designated wilderness area in violation of the Wilderness Act. (*slip op.* at 13247.)

---

[1] An "en banc" panel of 11 judges is convened to rehear an appeal when a majority of the Court's active judges concludes that the initial decision by the usual 3-judge panel was wrong. "En banc" means "full court," but in the Ninth Circuit an en banc panel is composed of 11 randomly selected judges rather than all 44 of the Court's judges.

- The Court's common sense analysis is based on the plain meaning of the Wilderness Act, which states that, subject to exceptions not relevant in this case, "there shall be no commercial enterprise . . . within any wilderness area . . . ." (16 U.S.C. § 1133(c).)

- The Court found that the Tustumena Project is an illegal commercial activity within wilderness because both its primary purpose and its primary effect are "to advance commercial interests of Cook Inlet fishermen by swelling the salmon runs from which they will eventually make their catch." (*slip op.* at 13264.) Because "substantial and essential parts" of the project occur within the wilderness boundaries, (*slip op.* at 13268), the project violates the prohibition.

- The Court's opinion recognizes that Congress' goal in enacting the Wilderness Act was to set aside some areas as wild places off limits to commercial activity: "These statutory declarations show a mandate of preservation for wilderness and the essential need to keep commerce out of it." (*slip op.* at 13259.) The opinion quotes President Lyndon B. Johnson as remarking, as he signed the Wilderness Act into law in 1964:

  > "If future generations are to remember us with gratitude rather than contempt, we must leave them more than the miracles of technology. We must leave them a glimpse of the world as it was in the beginning, not just after we got through with it." (*slip op.* at 13248.)

  This decision has important implications for wilderness nationwide in light of increasing pressure for commercialization of wilderness areas.

- The Ninth Circuit sent the case back to the District Court for issuance of an order halting the Tustumena Project. (*slip op.* at 13247.) By shutting down the project, the decision helps to perpetuate the wild sockeye salmon run and ensure that it will remain healthy for future generations of people seeking to use and enjoy the wilderness areas of the Kenai National Wildlife Refuge.

- The Court declined to reach a second issue in the case – whether the Tustumena Project impairs the wilderness area's "natural conditions" in violation of the Wilderness Act. (*slip op.* at 13273 n.18.) The Court acknowledged, however, that this issue is in dispute, and agreed with The Wilderness Society and Alaska Center for the Environment that the Tustumena Project does "not appear to be aimed at furthering the goals of the Wilderness Act." (*slip op.* at 13261.)

- Because the Tustumena enhancement project was increasing the lake's sockeye salmon run by only about 10%, halting the project should have little impact on the Cook Inlet sockeye salmon commercial fishery. The benefits of maintaining the "natural condition" of the wild run, as called for by the Wilderness Act, and eliminating the potential of introducing disease and reducing genetic diversity, far outweigh the relatively small gain to commercial fishermen.

Fairbanks Daily News-Miner

Court ruling leaves 6 million salmon fry in limbo

By HAL SPENCE

Saturday, January 31, 2004 -

KENAI

Six million salmon fry swim now in a kind of limbo at the Trail Lakes Hatchery in Moose Pass since the 9th U.S. Circuit Court of Appeals banned their release into Tustumena Lake.

The fry represent a potential return of 100,000 salmon, averaging four pounds apiece, if eventually released to grow in the wild.

The ruling last month, in a lawsuit filed in 1998 by The Wilderness Society and the Alaska Center for the Environment, overturned lower court decisions that had upheld the program run by Cook Inlet Aquaculture Association, which has stocked the lake with juvenile salmon since 1997.

The plaintiffs had argued that the stocking program, started in 1993 by the aquaculture organization under a contract with the Alaska Department of Fish and Game, violated provisions of the 1964 Wilderness Act.

The 9th Circuit agreed, ruling 11-0 that the stocking program, while likely harmless to the environment, did run counter to the intent of Congress that no commercial activities be conducted in wilderness areas.

Robin West, manager of the Kenai National Wildlife Refuge where Tustumena Lake is located, said the Department of the Interior is considering an appeal to the U.S. Supreme Court.

In the meantime, Cook Inlet Aquaculture Association has a growing problem, said director Gary Fandrei.

"The ruling enjoining the project leaves us in question about what we would do with the 6 million fish we have in the hatchery," he said. "We have had no guidance from the U.S. Fish and Wildlife Service as to whether or not we are going to be able to stock those fish. We have had no direction from Fish and Game as to what we can do with those fish."

In the past, he said, the state has directed the association to kill any surplus fry. That would be costly and environmentally problematic.

The association has spent between $125,000 and $150,000 on the young salmon.

Of 6 million fry released into the lake, 600,000 to 900,000 would survive to the smolt stage and swim to the ocean. Some 60,000 to 120,000 adult salmon could then be expected to return _ to the nets and lines of commercial, sport and subsistence fishers or to spawn in Tustumena Lake.

"You'd be looking at a 4-pound average," Fandrei said, which would represent roughly $400,000 worth of fish.

But the program wasn't designed to add income to commercial fisheries, Fandrei said. It was meant to smooth out periodic dips in the numbers of fish returning from the sea.

Return rates are cyclic, he said. When runs are big, CIAA's stocking program has little effect. When runs are small, however, the added fish enhance the chances for fishermen, he said.

If the association has no choice but to kill the fish, a couple of bottles of bleach will do it. Essentially, it's just a matter of chlorinating the water, Fandrei said.

Once the fish are killed, the association would have as much as two tons of remains to get rid of.

Dead fish have been buried in landfills, and small amounts have been burned at the hatchery, but the hatchery's incinerator is too small to handle 6 million dead fry, he said.

Fandrei said he hopes it doesn't come to that. Perhaps the fish could be released into other Cook Inlet lakes, he said, suggesting Ursus, Bruin, Chenik and the upper and lower Paint lakes as possible choices.

Another alternative would be to keep the fish and raise them until they are smolt, which would take another 14 months. However, that would still mean transferring the fry to the Tutka Bay hatchery at Kachemak Bay.

The Trail Lakes Hatchery doesn't have the room, Fandrei said. For permitting purposes, some decision is needed by the middle of February as to where the fish might go.

If, by chance, a decision were reached allowing release into Tustumena, the hatchery would have until June.

The Interior Department contends that the 9th Circuit erred by not giving some deference to the administrative decision of the refuge regarding the stocking, West said. Additionally, the 9th Circuit, in an attempt to clear up some ambiguity used a definition of commercial enterprise not seen before.

West also said provisions of the Alaska National Interest Lands Conservation Act didn't appear to have received any attention in the court's review. He said that though nothing is written down specifically, it was Interior's opinion that the intent was to permit such noncommercial stocking programs.

"In a nutshell, the court focused directly on the Wilderness Act without any tempering by ANILCA," West said.

Allen Smith, Alaska senior policy analyst for The Wilderness Society, said recently that the issues went to the heart of the Wilderness Act and whether any type of extractive resource activities would be allowed in a wilderness area.

"The court ruled 11-0 that the Wilderness Act had a bright red line in it," he said.

Rebecca Bernard, attorney for Trustees for Alaska who argued the case for the plaintiffs, said the ruling meant agencies "don't have discretion to fudge around the edges."

Ninth Circuit Judge Ronald Gould wrote that under the act, areas designated wilderness "must be left untouched, untrammeled and unaltered by commerce."

Fairbanks Daily News-Miner

Court ruling leaves 6 million salmon fry in limbo

By HAL SPENCE

Saturday, January 31, 2004 -

KENAI

Six million salmon fry swim now in a kind of limbo at the Trail Lakes Hatchery in Moose Pass since the 9th U.S. Circuit Court of Appeals banned their release into Tustumena Lake.

The fry represent a potential return of 100,000 salmon, averaging four pounds apiece, if eventually released to grow in the wild.

The ruling last month, in a lawsuit filed in 1998 by The Wilderness Society and the Alaska Center for the Environment, overturned lower court decisions that had upheld the program run by Cook Inlet Aquaculture Association, which has stocked the lake with juvenile salmon since 1997.

The plaintiffs had argued that the stocking program, started in 1993 by the aquaculture organization under a contract with the Alaska Department of Fish and Game, violated provisions of the 1964 Wilderness Act.

The 9th Circuit agreed, ruling 11-0 that the stocking program, while likely harmless to the environment, did run counter to the intent of Congress that no commercial activities be conducted in wilderness areas.

Robin West, manager of the Kenai National Wildlife Refuge where Tustumena Lake is located, said the Department of the Interior is considering an appeal to the U.S. Supreme Court.

In the meantime, Cook Inlet Aquaculture Association has a growing problem, said director Gary Fandrei.

"The ruling enjoining the project leaves us in question about what we would do with the 6 million fish we have in the hatchery," he said. "We have had no guidance from the U.S. Fish and Wildlife Service as to whether or not we are going to be able to stock those fish. We have had no direction from Fish and Game as to what we can do with those fish."

In the past, he said, the state has directed the association to kill any surplus fry. That would be costly and environmentally problematic.

The association has spent between $125,000 and $150,000 on the young salmon.

Of 6 million fry released into the lake, 600,000 to 900,000 would survive to the smolt stage and swim to the ocean. Some 60,000 to 120,000 adult salmon could then be expected to return _ to the nets and lines of commercial, sport and subsistence fishers or to spawn in Tustumena Lake.

"You'd be looking at a 4-pound average," Fandrei said, which would represent roughly $400,000 worth of fish.

But the program wasn't designed to add income to commercial fisheries, Fandrei said. It was meant to smooth out periodic dips in the numbers of fish returning from the sea.

Return rates are cyclic, he said. When runs are big, CIAA's stocking program has little effect. When runs are small, however, the added fish enhance the chances for fishermen, he said.

If the association has no choice but to kill the fish, a couple of bottles of bleach will do it. Essentially, it's just a matter of chlorinating the water, Fandrei said.

Once the fish are killed, the association would have as much as two tons of remains to get rid of.

Dead fish have been buried in landfills, and small amounts have been burned at the hatchery, but the hatchery's incinerator is too small to handle 6 million dead fry, he said.

Fandrei said he hopes it doesn't come to that. Perhaps the fish could be released into other Cook Inlet lakes, he said, suggesting Ursus, Bruin, Chenik and the upper and lower Paint lakes as possible choices.

Another alternative would be to keep the fish and raise them until they are smolt, which would take another 14 months. However, that would still mean transferring the fry to the Tutka Bay hatchery at Kachemak Bay.

The Trail Lakes Hatchery doesn't have the room, Fandrei said. For permitting purposes, some decision is needed by the middle of February as to where the fish might go.

If, by chance, a decision were reached allowing release into Tustumena, the hatchery would have until June.

The Interior Department contends that the 9th Circuit erred by not giving some deference to the administrative decision of the refuge regarding the stocking, West said. Additionally, the 9th Circuit, in an attempt to clear up some ambiguity used a definition of commercial enterprise not seen before.

West also said provisions of the Alaska National Interest Lands Conservation Act didn't appear to have received any attention in the court's review. He said that though nothing is written down specifically, it was Interior's opinion that the intent was to permit such noncommercial stocking programs.

"In a nutshell, the court focused directly on the Wilderness Act without any tempering by ANILCA," West said.

Allen Smith, Alaska senior policy analyst for The Wilderness Society, said recently that the issues went to the heart of the Wilderness Act and whether any type of extractive resource activities would be allowed in a wilderness area.

"The court ruled 11-0 that the Wilderness Act had a bright red line in it," he said.

Rebecca Bernard, attorney for Trustees for Alaska who argued the case for the plaintiffs, said the ruling meant agencies "don't have discretion to fudge around the edges."

Ninth Circuit Judge Ronald Gould wrote that under the act, areas designated wilderness "must be left untouched, untrammeled and unaltered by commerce."

UNITED FISHERMEN OF ALASKA

211 Fourth Street, Suite 110
Juneau, Alaska 99801-1172
(907) 586-2820
(907) 463-2545 Fax
E-Mail: ufa@ufa-fish.org
www.ufa-fish.org

February 20, 2004

The Honorable Scott Ogan
Chair, Senate Resources Committee
State Capitol (Mail Stop 3100)
Juneau, AK 99801

Dear Senator Ogan,

United Fishermen of Alaska strongly supports SJR 26 asking the U.S. Department of Interior and U.S. Department of Justice to appeal the decision by the Ninth Circuit Court of Appeals to prohibit salmon enhancement in Tustumena Lake. We agree with the language of the resolution that this court decision erroneously concluded that the stocking of fry was an impermissible commercial activity, even though no commercial fishing takes place within the Wilderness area. We also agree that the threat that the decision imposes on fishery enhancement programs throughout the State has grave ramifications for a broad range of other recreation activities enjoyed by many Alaskans.

United Fishermen of Alaska represents 33 Alaska Commercial fishing organizations and hundreds of individual fishermen and fishing related businesses, altogether representing over 10,000 Alaska fishermen. We wholeheartedly support SJR 26.

Sincerely,

Bob Thorstenson, Jr.
President

CC: Senator Tom Wagoner

adn.com
Anchorage Daily News

Halt ordered to Tustumena fish stocking

COURT: Even harmless commercial activity not OK in wilderness areas.

By TOM KIZZIA
Anchorage Daily News

(Published: January 2, 2004)

HOMER -- A federal appeals court has ordered a halt to a long-running salmon stocking program in Tustumena Lake on the Kenai Peninsula, calling it an improper commercial activity inside a wilderness area.

The 9th U.S. Circuit Court of Appeals overturned two earlier decisions Tuesday, ruling that the project to help commercial fishing is barred inside wilderness areas of the Kenai National Wildlife Refuge.

"There is no exception given for commercial enterprise in wilderness when it has benign purpose and minimally intrusive impact," the court ruled.

Hatchery-incubated red salmon make up about 10 percent of the run up the Kasilof River into Alaska's fifth-largest lake. The fish are caught primarily by commercial fishermen and also by dipnetters and anglers. Eggs from Tustumena Lake also are used to enhance several other runs in Southcentral Alaska.

"It's another nail in our coffin," said Paul Shadura, president of the Kenai Peninsula Fishermen's Association, a setnetter group that helps pay for the salmon project. "This program is extremely important to the commercial fishermen."

The lawsuit was brought by The Wilderness Society and the Alaska Center for the Environment.

"This goes right to the heart of the Wilderness Act and whether any type of extractive resource activities are going to be allowed in a wilderness area," said Allen Smith, Alaska senior policy analyst for The Wilderness Society. "The court ruled 11-0 that the Wilderness Act had a bright line in it."

The ruling by the 11 judges sitting en banc overturned a 2000 decision by U.S. District Judge James Singleton and a 2-1 9th Circuit decision by a three-judge panel last January supporting the salmon enhancement program.

Both earlier decisions deferred to the administrative decisions of the Kenai National Wildlife Refuge, which allowed the project. This week's ruling says the agency doesn't have that latitude.

"What's important here is the agencies don't have discretion to fudge around the edges" of what's permissible in wilderness, said Trustees for Alaska attorney Rebecca Bernard, who argued the case last September.

In their Dec. 30 decision, the appeals court judges said the enhancement project was unlikely to destroy the area's wilderness values.

"Surely this fish-stocking program, whose antecedents were a state-run research project, is nothing like the building of a McDonald's restaurant or a Wal-Mart store on the shores of Tustumena Lake," Judge Ronald Gould wrote.

But, he concluded, the law is absolute.

"The Wilderness Act requires that the lands and waters duly designated as wilderness must be left untouched, untrammeled and unaltered by commerce," he wrote.

The project, which hatches eggs from salmon native to the lake and returns them as fingerlings, was started by the state and later turned over to a nonprofit aquaculture association.

Federal biologists have long had concerns that the project might introduce disease or disrupt the genetic mix of natural sockeye salmon runs in Tustumena Lake. A list of 34 regulations was meant to protect the several genetic strains in the lake, said Gary Sonnevil, a field supervisor with the U.S. Fish and Wildlife Service.

"We don't want to lose any of those populations," Sonnevil said.

Red flags went up in 2002 after hatchery-reared salmon were found mixing with other genetic strains in the lake, Sonnevil said. Project managers say that problem was probably a one-time result of flooding in creeks that flushed spawners back into the lake.

Advocates of the program say it's not a big moneymaker -- fewer than 100,000 adult salmon return thanks to the stocking, they say. But it can help smooth out production in years when natural runs decline, they say.

"It's a very key element of our programs," said Gary Fandrei, executive director of the Cook Inlet Aquaculture Association, the fishermen-funded group that runs the salmon project. "I assume it's the end of the project, but there may be some other alternatives."

The program hatches eggs from Tustumena Lake at the Trail Lakes hatchery near Seward, then returns 6 million fingerlings annually to grow and migrate. Eggs from Tustumena Lake are used for other enhanced runs targeted by commercial boats, including China Poot Lake near Homer and Kirschner Lake in Kamishak Bay, Fandrei said.

The program started as an experiment in 1974 as the state looked for ways to invest its new oil wealth to improve then-depressed salmon runs, Sonnevil said. The number of fry released grew to 17 million by 1984. That proved to be too many for the food available in the lake, he said. Fry release was cut back to 6 million annually after 1987.

Meanwhile the lake had been designated as wilderness under the 1980 Alaska National Interest Lands and Conservation Act.

By 1993, the state was backing out of its enhancement role around Alaska and turned the Tustumena project over to Cook Inlet Aquaculture. The federal government prepared an environmental assessment in 1997 that concluded the commercial operation could go forward. Environmentalists sued in 1998.

Since then, plummeting salmon prices have meant a struggle both for fishermen and for the

aquaculture association, which depends on a tax based on the value of salmon catches. The association has kept the Tustumena project going lately with loans and federal grants aimed at helping the troubled industry.

Shadura said setnet fishermen from Ninilchik north to the Kasilof River would feel the most impact from loss of the hatchery fish.

Commercial fishermen, whose side was represented in the appeal by federal attorneys, say the project shouldn't be deemed "commercial" because other fishermen benefit and municipal representatives sit on the aquaculture association board.

"Once we release the fish they're public domain. This is not a fish farm situation or sea ranching," Shadura said.

The judges disagreed, calling it plainly commercial in purpose.

Environmentalists said they weren't out to target commercial fishermen, with whom they share many common interests.

"We both have at heart the goal of maintaining our wildlands to protect a fishery resource," Smith said. "When they try to get that little amount on top is where we have a conflict."

Reporter Tom Kizzia can be reached at tkizzia@adn.com or in Homer at 1-907-235-4244.

Print Page | Close Window

SJR

27

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 2/6/04

FURTHER:

Date of 5-Day Notice: _____
(in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: 2-19-04

Resources Committee considered SENATE JOINT RESOLUTION NO. 27

SJR 27 SUBMERGED LAND TITLE DISPUTES

Relating to the resolution of submerged land title disputes.

and recommends:

[ ] be **replaced** with _____ **CS** _____ (_____)

[ ] adopt **previous** _____ **CS** _____ (_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

Senate Bill:
[ ] Same Title
[ ] New Title

House Bill:
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #_____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#
DNR	2/17/04			✓	

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
	✓			
	✓			
	✓			
			✓	
CHAIR:	✓			

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SJR27-DNR-MLW-02-17-04
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Natural Resources
Title: Submerged Land Title Disputes
RDU: Resource Development
Component: RS2477 and Navigability
Sponsor: Sen. Seekins
Requester: Senate Resources
Component No.: 2226

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2004) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

There is no fiscal impact to DNR associated with passage of a resolution.

Prepared by: Dick Mylius
Phone: 907-269-8532
Division: Mining, Land & Water
Date/Time: 2/17/04
Approved by: Thomas Irwin, Commissioner
Date: 2/17/04
Agency: Natural Resources

(Revised 9/2003 OMB)

ALASKA STATE SENATE

Session:
State Capitol
Juneau, Alaska 99801-1182
(907) 465-2327
(907) 465-5241 Fax

Interim:
119 N. Cushman, Suite 201
Fairbanks, Alaska 99701
(907) 456-8161
Senator_Ralph_Seekins@legis.state.ak.us

Senator Ralph Seekins
District D

Senate Joint Resolution 27 Sponsor Statement

A Resolution relating to the resolution of land title disputes

Alaska holds over 20,000 rivers and more than 1,000,000 lakes considered to be potentially navigable waterways. This amounts to nearly 60,000,000 acres of submerged lands. At statehood, title to all submerged land was to be transferred to Alaska from the federal government. It's important to note that up until statehood this land was held in trust for the future state by the federal government. Now, more than 45 years after Alaska became a sovereign state, the federal government has yet to transfer title to these promised lands.

SJR 27 does three things:

1. It encourages the Secretary of the Interior and the Alaska congressional delegation to support and endorse the continuation of the process for recording federal disclaimers of interest for quieting title to submerged lands;
2. It requests the Alaska congressional delegation to introduce legislation in the Congress to provide for federal participation in the proposed state and federal Navigable Waters Commission for Alaska; and
3. It requests the introduction of legislation in the Congress to amend the Quiet Title Act to ensure federal cooperation in resolving submerged land title disputes.

The dilemma is clearly illustrated in the U.S. 9th Circuit Court of Appeals case of *Alaska v. USA* (decision filed on January 28, 2000). Circuit Judge Andrew Kleinfeld authored the opinion of the court excerpted as follows:

It is undisputed that when the Union [United States of America] was created, each of the thirteen original states retained title to the lands covered by navigable waters, and that under the "equal footing doctrine" each new state succeeds upon statehood to the federal interest in these lands. The Submerged Lands Act gave Alaska title to the beds of navigable rivers on January 3, 1959.

Under [the Quiet Title Act] . . . the federal government takes the position that its sovereign immunity shields it from the state government's claim [to clear title to submerged lands] until the federal government itself makes a claim. Because Alaska is very large, much of it is wilderness, and there are innumerable waters, the federal government has not had time yet (45 years) to determine what claims it wishes to make. Therefore, the state government must wait until the federal government makes a claim, if it ever does, before settling whether it has title.

In a nutshell, the federal government's preferred method for reconciling these disputes appears to be to wait the state out. When (if ever) the government decides to make a claim against state ownership, only then does Alaska have an opportunity to protect its ownership interest. This is accomplished by filing a quiet title suit against the federal government – just as it did in the case cited above relating to the Nation, Kandik and Black Rivers.

The bottom line? That which should be indisputable – that Alaska holds title to its submerged lands – has, in fact, been effectively disputed as a function of the federal government's foot dragging. Without doubt, the existing processes of resolving submerged lands title disputes are inadequate and exceptionally slow. SJR 27 seeks resolution to this extraordinarily unfair dilemma.

ALASKA STATE SENATE

Session:
State Capitol
Juneau, Alaska 99801-1182
(907) 465-2327
(907) 465-5241 Fax

Interim:
119 N. Cushman, Suite 201
Fairbanks, Alaska 99701
(907) 456-8161
Senator_Ralph_Seekins@legis.state.ak.us

Senator Ralph Seekins
District D

Senate Joint Resolution 27

A Resolution relating to the settlement of land title disputes

The proposed Resolution is intended to encourage settlement of submerged land title disputes between the federal government and the State of Alaska.

3 Facts

1. Alaska holds over 20,000 potentially navigable rivers.
2. Alaska holds more than 1,000,000 navigable lakes.
3. Alaska holds nearly 60,000,000 acres of submerged land.

3 Statements

1. Prior to statehood, title to all submerged lands in Alaska was held in trust by the federal government; upon statehood title to all submerged lands was to be transferred to Alaska.
2. Under the "equal footing doctrine", the Submerged Lands Act gave Alaska title to the beds of navigable rivers as of January 3, 1959.
3. Yet, the federal government claims its sovereign immunity shields it from Alaska's claim to these lands until the federal government itself makes a claim thereby bringing the process to a virtual halt.

ALASKA STATE LEGISLATURE

CONFLICTS CONCERNING TITLE TO SUBMERGED LANDS IN ALASKA

By: Ron Somerville, Resource Consultant
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.

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 451-2811
FAX: (907) 451-2846

☐ P.O. BOX 110300 - STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

Appendix A

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

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 Tenmile Creek

Koyukuk River Region

Mouth of Hogatza 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 Comma 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
Lowe 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 B

TONY KNOWLES, 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
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 451-2811
FAX. (907) 451-2846

☐ P.O. BOX 110300-DIMOND COURT HOU
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-6735

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-C5LH

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

---

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.

thereof on issuance of process or institution of prosecution of any proceedings does not exempt United States from posting appeal bond with state court. U.S. Dept. of Air Force v. Wilhelm, Tex.Civ. App.1977, 555 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

similar action between private persons
were substituted for "shall proceed as
other cases for partition by courts of equity, and in making such partition the court shall be governed by the same principles of equity that control courts of equity, in partition proceedings between private persons." in view of Rule 2 of the Federal Rules of Civil Procedure [this title].

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 618 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

which it was acquired,
ie United States.

all interest in the real
iff at any time prior to the
disclaimer is confirmed by
district court shall cease
r suit on ground other than
ed by section 1346(f) of
d States under this section

ion, except for an action
it is commenced within
accrued. Such action
e the plaintiff or his
own of the claim of the

ned under this section by a
luding land) of the United
g used or required by the
as determined by the head
ver the lands involved,
brought more than twelve
ve known of the claims
ch use or requirement, the
suant to the provisions
the Federal agency is not

State under this section
submerged lands, on which
of-way or easement grantee
substantial investments or
d substantial activities
e improvement, timber
ming, wildlife habitat
ll be barred unless the
er the date the State
nds.

ction brought by a State
tide lands on which the
or easement grantee has
ial investments is adverse
t the State's action was
e received notice of the

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. 5641.

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).

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

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.

SJR

31

SENATE COMMITTEE REPORT

DATE: 3/19/04

FURTHER:

DATE TURNED IN TO OFFICE: 3-30-04

Resources Committee considered SENATE JOINT RESOLUTION NO. 31

SJR 31 FEDERAL FUNDING FOR EDUCATION

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.

and recommends:

[ ] be **replaced** with _____ **CS** _____ (_____)

[X] adopt **previous** _____ **CS** SJR31 (STA)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

Senate Bill:
[X] Same Title
[ ] New Title

House Bill:
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #_____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#
S. STA	3/19/04			✓	1

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
	✓			
	✓			
			✓	
			✓	
VICE CHAIR	✓			

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSSJR 31(STA)
(S) Publish Date: 3/19/04

Revision Date/Time (Note if correction):
Dept. Affected: None
Title: Federal Funding for Education
BRU
Component
Sponsor: Senator Therriault
Requester: Senate State Affairs Committee
Component No.

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

Prepared by: Senate State Affairs Committee
Division
Phone 465-4522
Date/Time 3/19/04 8:44 AM

Approved by: Senator Gary Stevens, Chair
Agency
Date 3/19/2004

(Revised 9/2003 OMB)

COMMITTEE COPY

Alaska State Legislature

SENATOR
GENE THERRIAULT
Mailing Address:
119 N. Cushman, Suite 101
Fairbanks, Alaska 99701
(907) 488-0857
Fax: (907) 488-4271

President of the Senate

While in session
State Capitol
Juneau, Alaska
99801-1182
(907) 465-4797
Fax: (907) 465-3884
SENATE DISTRICT F

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.

Alaska State Legislature

SENATOR
GENE THERRIAULT
Mailing Address:
119 N. Cushman, Suite 101
Fairbanks, Alaska 99701
(907) 488-0857
Fax: (907) 488-4271

President of the Senate

While in session
State Capitol
Juneau, Alaska
99801-1182
(907) 465-4797
Fax: (907) 465-3884
SENATE DISTRICT F

DATE: March 24, 2004

TO: Senator Scott Ogan, Chair
Senate Resources Committee

FROM: Senator Gene Therriault
Senate President

RE: SJR 31 – Request For Hearing

This is to request the Senate Resource Committee hear SJR 31 – Relating to urging the United States Congress to compensate Alaska for the effect of federal land ownership on the state's ability to fund public education.

Attached is a copy of the bill and information for the Committee. Please contact myself, or Tom Maher of my staff, for questions or additional information.

Thanks you for your consideration.

attachments

Email: Senator_Gene_Therriault@legis.state.ak.us

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

"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
Phone: (916)553-4423 - Fax: (916)446-5760

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.

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

MARTIN R. STEPHENS
WEBER COUNTY

LEGISLATURE
(801) 536-1030
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

SENATOR
GENE THERRIAULT
Mailing Address:
119 N. Cushman, Suite 101
Fairbanks, Alaska 99701
(907) 488-0857
Fax: (907) 486-4271

Alaska State Legislature

President of the Senate

While in session
State Capitol
Juneau, Alaska
99801-1182
(907) 465-4797
Fax: (907) 465-3884

SENATE DISTRICT F

DATE: March 24, 2004

TO: Senator Scott Ogan, Chair
Senate Resources Committee

FROM: Senator Gene Therriault
Senate President

RE: SJR 31 – Request For Hearing

This is to request the Senate Resource Committee hear SJR 31 – Relating to urging the United States Congress to compensate Alaska for the effect of federal land ownership on the state's ability to fund public education.

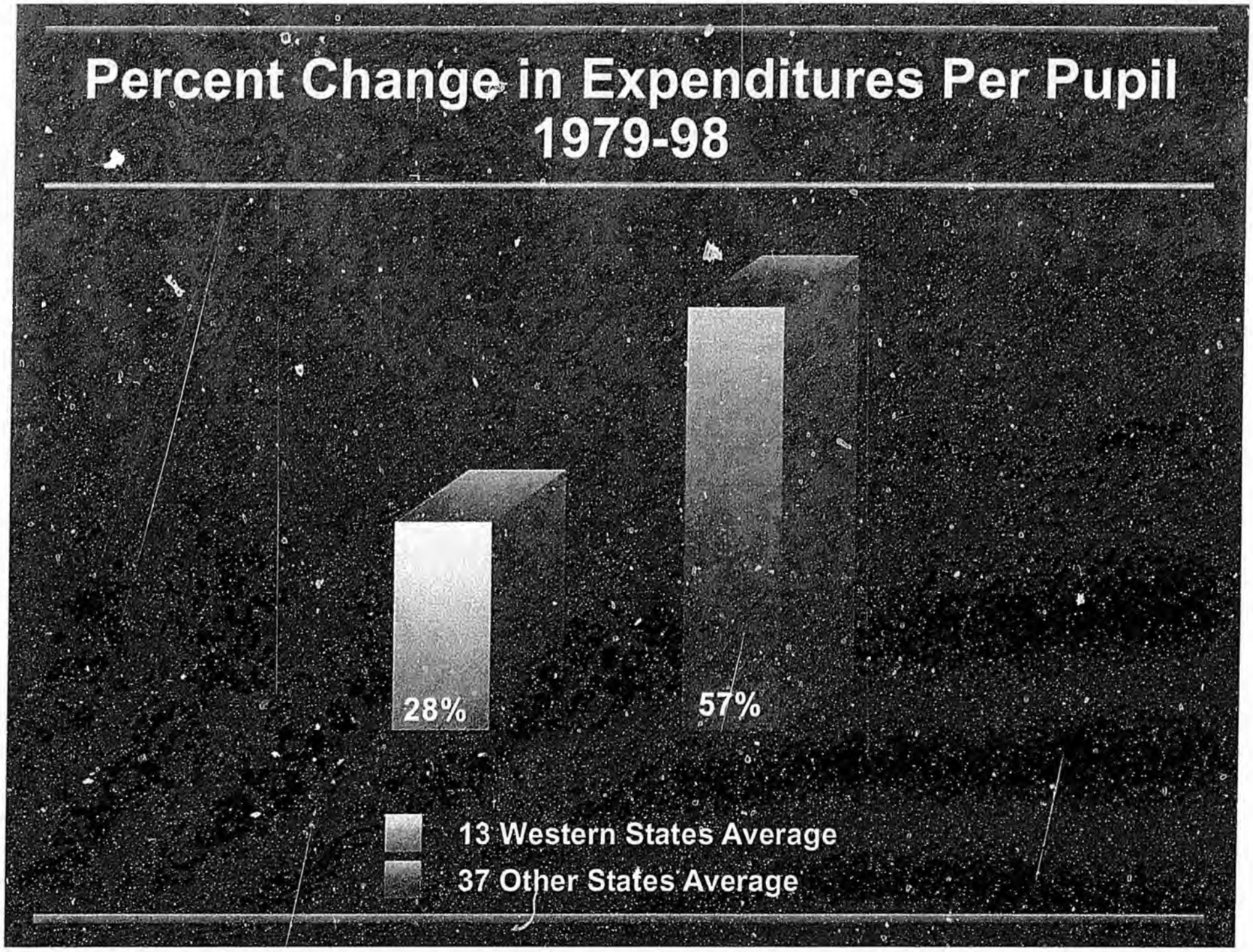
Attached is a copy of the bill and information for the Committee. Please contact myself, or Tom Maher of my staff, for questions or additional information.

Thanks you for your consideration.

attachments

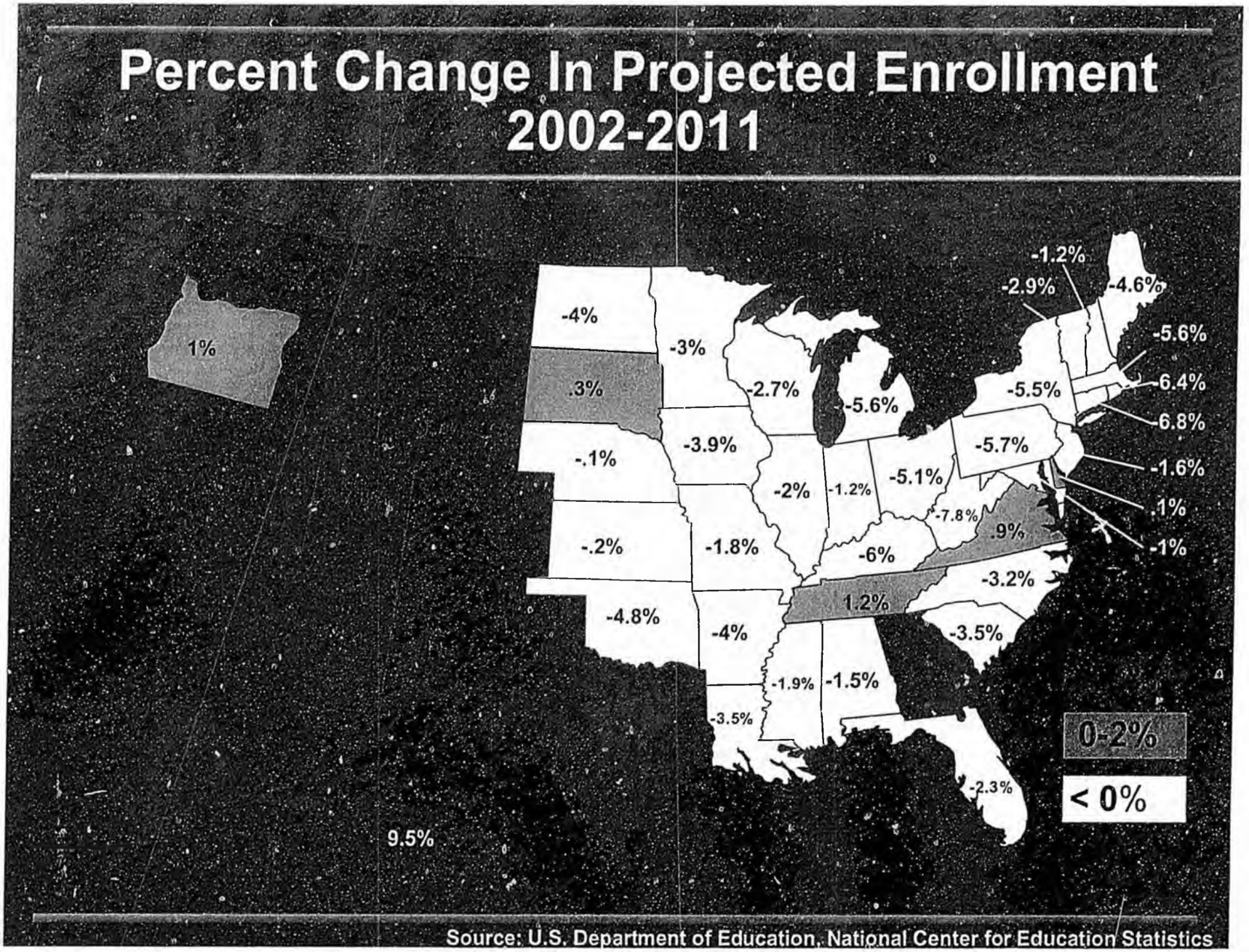
Email: Senator_Gene_Therriault@legis.state.ak.us

#1


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

#2

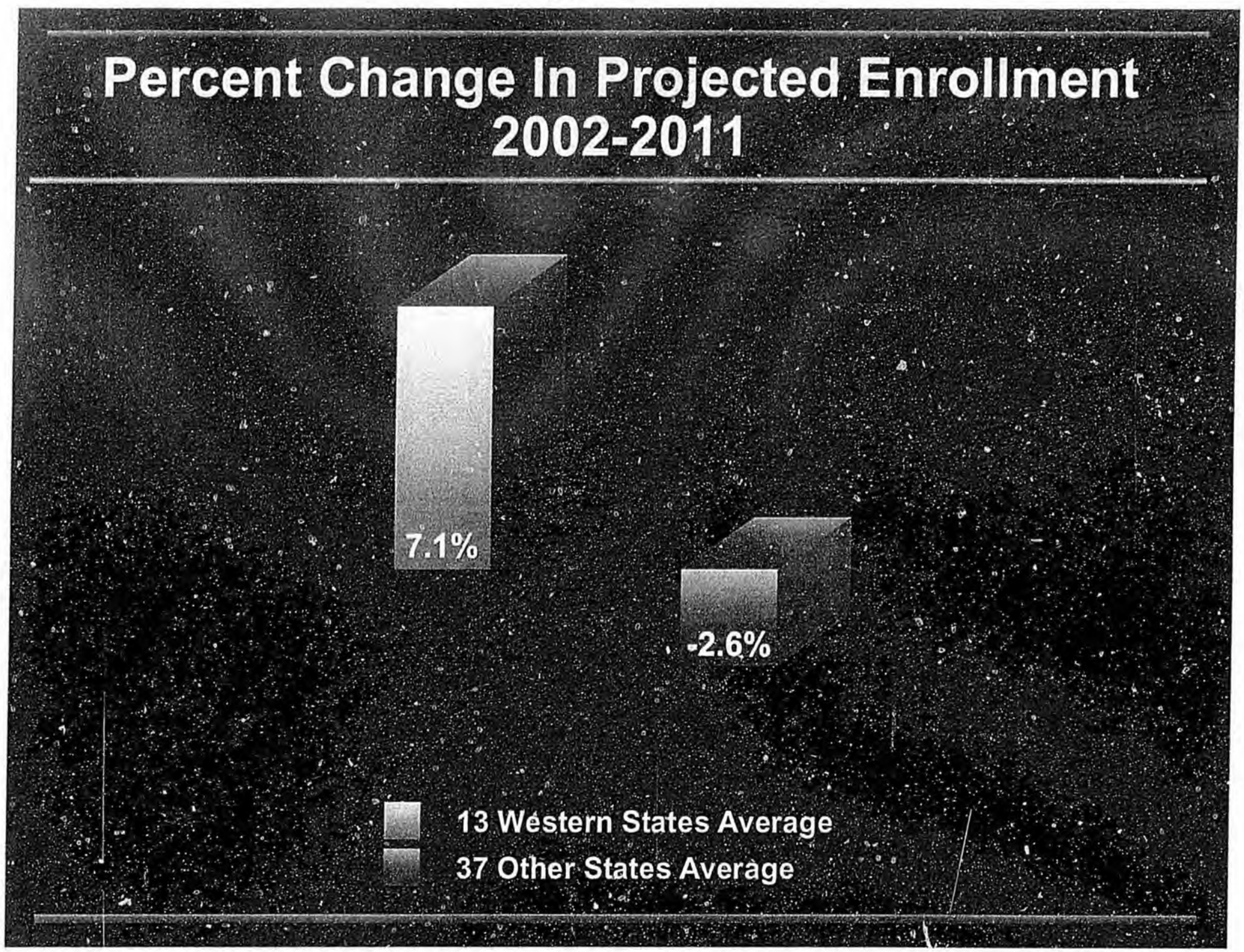
Percent Change In Projected Enrollment 2002-2011



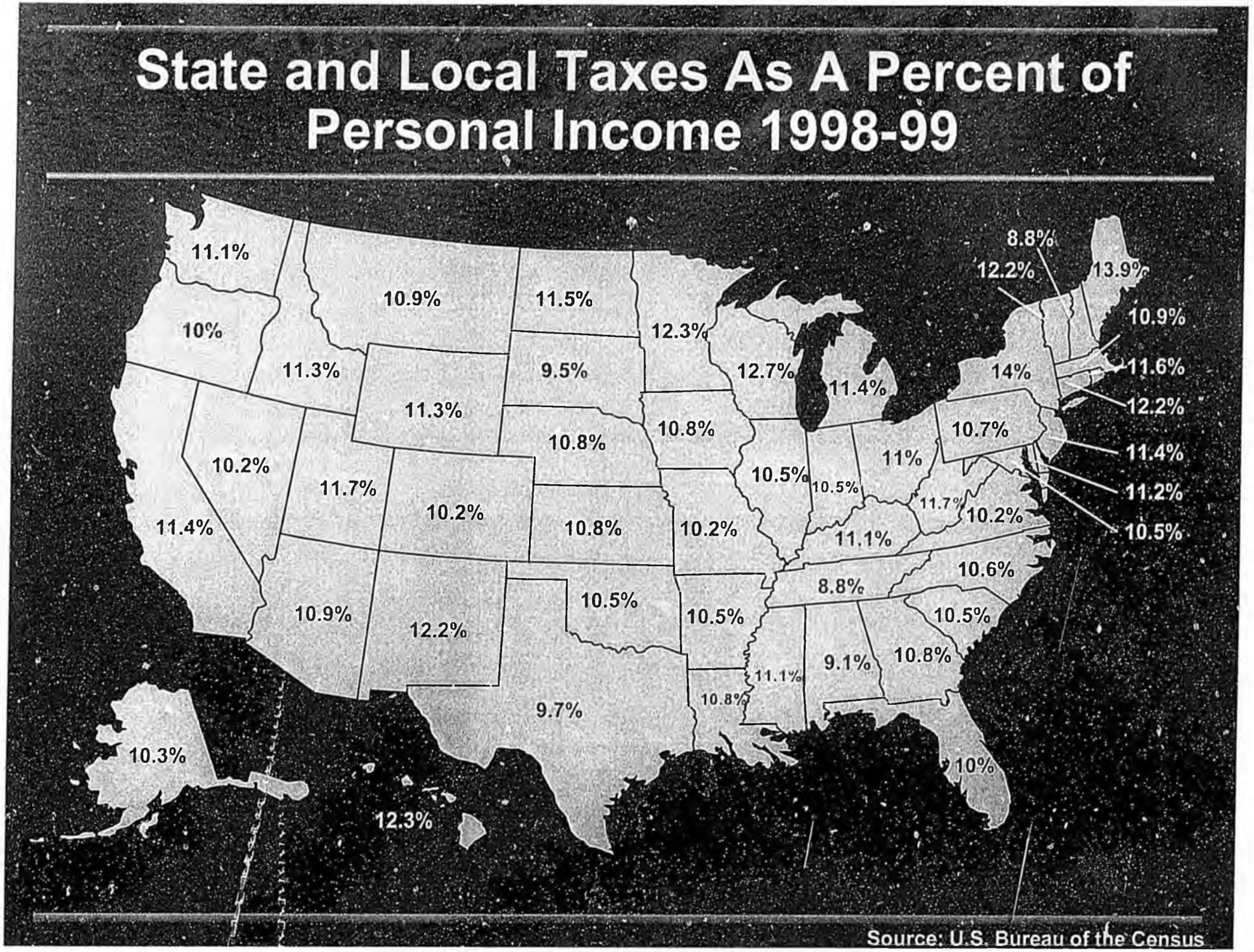
Source: U.S. Department of Education, National Center for Education Statistics

#3

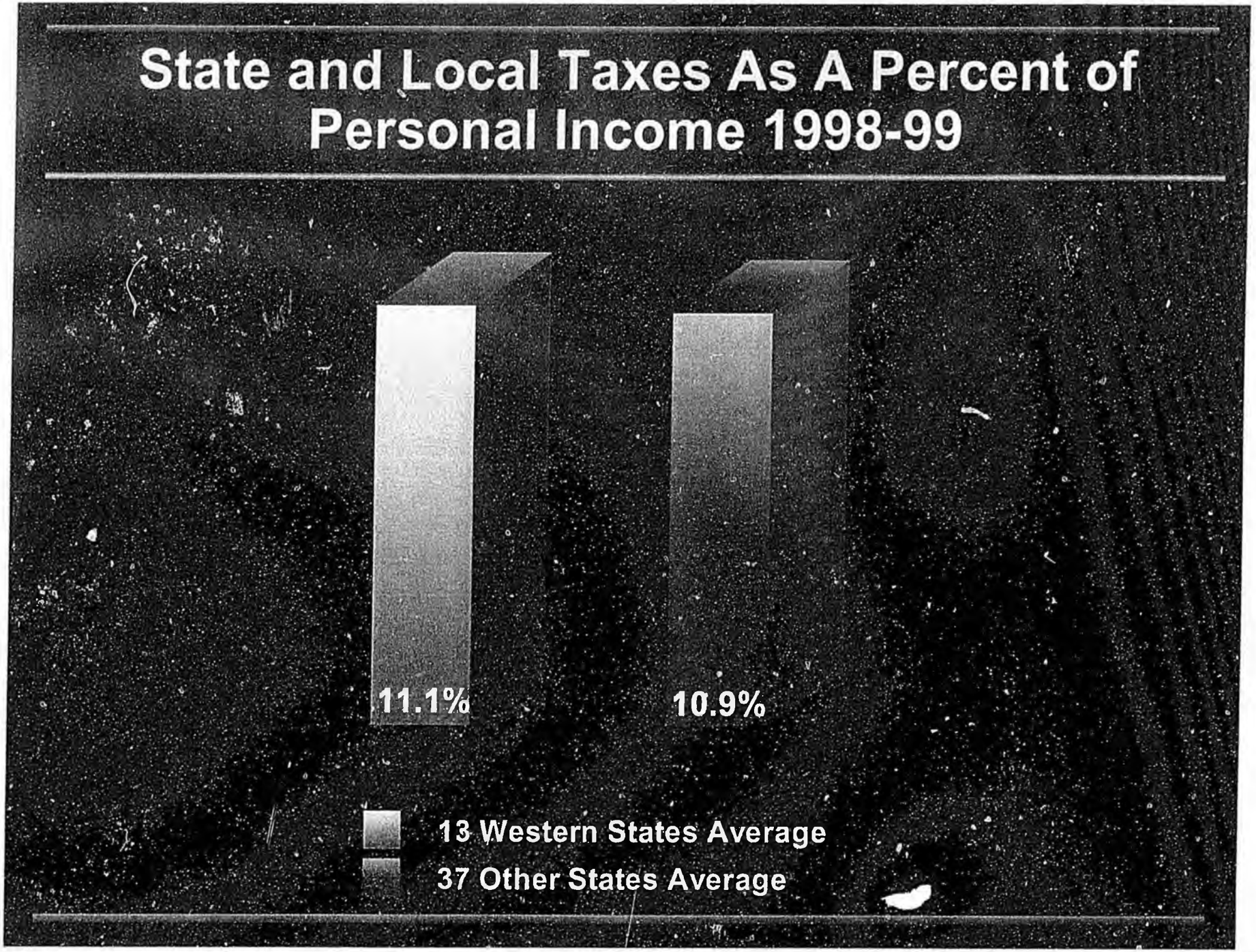
Percent Change In Projected Enrollment 2002-2011



#4


State and Local Taxes As A Percent of Personal Income 1998-99
11.1%
10%
10.9%
11.5%
12.3%
11.3%
9.5%
12.7%
11.4%
11.3%
10.8%
10.8%
10.2%
11.7%
10.2%
11.4%
10.8%
10.2%
10.9%
12.2%
10.5%
10.5%
9.7%
10.3%
12.3%
8.8%
12.2%
13.9%
10.9%
11.6%
14%
12.2%
10.7%
11.4%
11%
10.5%
10.5%
11.2%
11.7%
10.2%
10.5%
11.1%
10.6%
8.8%
10.5%
10.5%
11.1%
9.1%
10.8%
10.8%
10%
Source: U.S. Bureau of the Census

#5


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