No. 84, Original

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF ALASKA

ON THE REPORT OF THE SPECIAL MASTER

EXCEPTIONS OF THE STATE OF ALASKA AND SUPPORTING BRIEF

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ON THE REPORT OF THE SPECIAL MASTER

EXCEPTIONS OF THE STATE OF ALASKA

The Report of the Special Master addresses the rights of the State of Alaska under the equal footing doctrine and the Submerged Lands Act, 43 U.S.C. §§ 1301 et seq., along Alaska's north coast. The State excepts to three of the Master's recommendations: (1) that, where there are near-shore fringing islands less than ten miles apart, Alaska's rights are to be determined not under the 10-mile rule, which the Court in *United States v. Louisiana (Alabama and Mississippi Boundary Case)*, 470 U.S. 93 (1985), found was the United States' official policy from 1903 to 1961 but, instead, under the United States' current practice; (2) that the feature known as "Dinkum Sands" is not an island and thus is not part of Alaska's "coast line" for Submerged Lands Act purposes; and (3) that Alaska's entitlement to the tide and submerged lands within the exterior boundaries of the National Petroleum Reserve-Alaska was defeated by Alaska's Statehood Act. The Master discusses these matters at pages 19-174, 227-310, and 343-445 of his Report, states

his conclusions at pages 174-75, 310, and 445-46, and summarizes his recommendations at pages 503-06.

August 1996.

Respectfully submitted,

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BRIEF FOR THE STATE OF ALASKA IN SUPPORT OF ITS EXCEPTIONS

INTRODUCTION AND SUMMARY OF ARGUMENT

Alaska owns the lands beneath its inland waters under the equal footing doctrine and offshore submerged lands within three miles of its coast line under the Submerged Lands Act. The United States has exclusive rights to the seabed seaward and outside of Alaska's submerged lands to a distance of at least 200 miles. The issues in this case address Alaska's submerged land ownership along its north coast, and involve both lands beneath inland waters and offshore submerged lands. The Special Master recommends against Alaska in three respects, urging (1) that the 10-mile rule

the Court found was the United States' policy from at least 1903 to 1961, *United States v. Louisiana (Alabama and Mississippi Boundary Case)*, 470 U.S. 93, 106-07 (1985), not apply to Alaska because the Court erred in that case, (2) that the feature known as Dinkum Sands be deemed not an island and thus not part of Alaska's coast line because the accepted definition of an island contains an "implicit modifier" that precludes island status for Dinkum Sands, and (3) that Congress in the Alaska Statehood Act tacitly intended to defeat Alaska's equal footing doctrine rights to the submerged lands within the National Petroleum Reserve-Alaska ("NPRA"). Alaska excepts to these three recommendations.

This Court more than 150 years ago established that lands underlying navigable waters within State boundaries belong to the States as an inherent attribute of State sovereignty. The original thirteen States succeeded to the British Crown's sovereign title to such lands following the Revolution. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842). Title to such lands must vest in subsequently admitted States to ensure that they join the Union on an "equal footing" with the original thirteen. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 229-30 (1845). "The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively." *Id.* at 230. "Thus under *Pollard's Lessee* the State's title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself." *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

Despite the long-standing rule of State ownership, the United States challenged California's title to offshore submerged lands shortly after World War II. The Court held that the equal footing doctrine applied only to lands underlying inland navigable waters and that the United States had "paramount rights" to offshore submerged lands, *United*

States v. California, 332 U.S. 19, 38-39 (1947), despite prior cases indicating that States own all lands underlying navigable waters within their boundaries, including those offshore. *Id.* at 36.

Believing the 1947 *California* decision had improperly divested the States of title to submerged lands, *United States v. Louisiana ("Louisiana")*, 363 U.S. 1, 16-20 (1960), Congress enacted the Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1988), to restore offshore submerged lands to the States. *See United States v. California*, 436 U.S. 32, 37 (1978). The Act also confirmed State title to lands underlying inland navigable waters because of concern that the 1947 *California* decision might apply to title to those lands as well. *See, e.g.*, S. Rep. No. 133, 83d Cong., 1st Sess. 6-7, 62-63 (1953), *reprinted in* 2 1953 U.S. Code Cong. & Admin. News 1474. In the Act, Congress "recognized, confirmed, established, and vested" in the States the title to lands beneath navigable waters within their boundaries. 43 U.S.C. § 1311(a). The Act defines "boundaries" as the seaward boundaries of a State as they existed at statehood or as later confirmed by the Congress, but extending from the "coast line" no more than three miles into the Atlantic or the Pacific or more than three marine leagues into the Gulf of Mexico. 43 U.S.C. § 1301(b). "Coast line" includes the "line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." 43 U.S.C. § 1301(c).

Despite enactment of the Submerged Lands Act, few disputes between States and the United States have occupied as much of the Court's docket as those involving submerged lands. These cases are fundamentally important to the States. Title to lands beneath inland waters vests in the States as a direct consequence of admission to the Union on an equal footing with all other States. A State's seaward boundaries define its offshore submerged lands, and State

control over offshore resources is key to a coastal State's economy and quality of life. In contrast, the United States' proprietary interest offshore dwarfs the States'[1] (*see, e.g.*, Alaska Exhibit ("Ak. Ex.") 84A-015, reproduced opposite) even though it does not have the same intimate and direct connection with near-shore resources as coastal States.

This dispute arose in the mid-1970s. Alaska and the United States each claimed ownership of submerged lands in Stefansson Sound, "an extensive lagoon"[2] on Alaska's north coast enclosed by a fringe of near-shore islands less than ten miles apart. Alaska considered the Sound inland waters whose submerged lands vested in the State at statehood under the equal footing doctrine. Its coast line for Submerged Lands Act purposes thus should include the seaward shores of the islands and straight lines connecting them. Alaska's contention as to its submerged lands ownership in the vicinity of Stefansson Sound is shown on Figure 3.4 of the Report (facing 28).

The United States claimed that Stefansson Sound is not inland waters, that Alaska owns only those submerged lands granted by the Submerged Lands Act, and that this grant must be determined by strictly applying the "arcs-of-cir-

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[1] In 1945, the United States was the first nation to claim the entire continental shelf off its shores. Proclamation No. 2667, 59 Stat. 884 (1945). Justice Black thus found it "difficult to understand why the Federal Government is subjecting the State of Louisiana and this Court to a long series of technical and wasteful lawsuits" because, once concluded, "the United States will have little more undersea land than it already had." *United States v. Louisiana (Louisiana Boundary Case)*, 394 U.S. 11, 78 n. 2 (1969) (Black, J., dissenting). The United States now claims resource jurisdiction over a 200-mile Exclusive Economic Zone ("EEZ"). Proclamation No. 5030, 3 C.F.R. 22 (1983), *reprinted in* 16 U.S.C. § 1453 (1985).

[2] *United States Coast Pilot, Pacific and Arctic Coasts Alaska: Cape Spencer to Beaufort Sea ("Coast Pilot")* 345 (9th Ed., 1979) (Ak. Ex. 136 at the 1980 hearing).

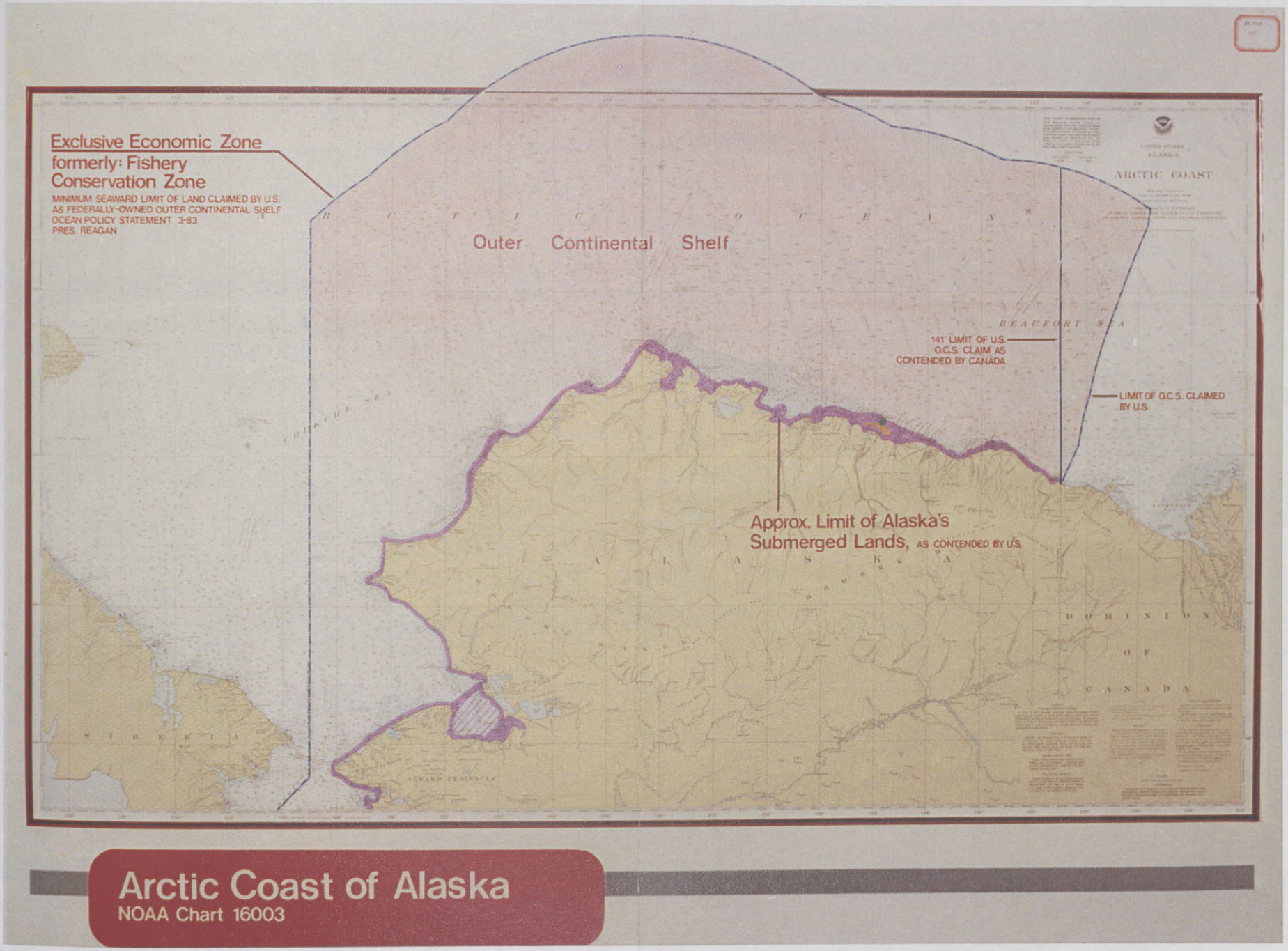

Figure 1. Chart of Alaska's north coast, AK 84A-015, showing the United States' EEZ in pink, Alaska's Submerged Lands Act grant in purple, and the disputed lands in Stefansson Sound in amber and green.

cles" method — *i.e.*, by swinging three-mile arcs from points on the mainland and each island.[3] In the United States' view, all lands outside those arcs, even if surrounded by submerged lands owned by Alaska, constitute federal outer continental shelf ("OCS") under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (1988 & Supp. V 1993). The United States' contention in the vicinity of Stefansson Sound is shown on Figure 3.2 of the Report (facing 24).

To resolve the dispute, the United States moved for leave to file a complaint against Alaska under the Court's original jurisdiction in May, 1979. The Court granted the motion and directed Alaska to answer. 442 U.S. 937 (1979). Alaska answered and sought leave to file a counterclaim raising additional submerged land disputes along its north coast. The Court appointed J. Keith Mann as Special Master to conduct proceedings and report to the Court. 444 U.S. 1065 (1980).

The Master has now submitted his report (the "Report"). Alaska excepts to the Master's recommendations that (1) Alaska's submerged land ownership in Stefansson Sound and other areas enclosed by near-shore fringing islands less than ten miles apart is limited to lands within three miles of the mainland and each island; (2) Dinkum Sands, one of the islands enclosing Stefansson Sound, is not an island; and (3) submerged lands within NPRA did not pass to Alaska at statehood.[4]

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[3] 1 Aaron L. Shalowitz, *Shore and Sea Boundaries* ("1 Shalowitz") 171 (U.S. Dept. of Commerce Pub. 10-1, 1962). Strict application of the arcs-of-circles method is illustrated in Figure 3.1 of the Report (at 23).

[4] Alaska does not except to the Master's recommended finding that lands underlying coastal lagoons were included in the pre-statehood application for the Alaska National Wildlife Refuge ("ANWR"). *See* Report at 477-99. The Master concludes that title to these lands passed to Alaska at statehood because ANWR was not established until after

A penchant for making things more difficult than necessary runs through the Report. The issues on which Alaska excepts to the Master's recommendations, however, are easily resolved. Shortly before trial on the Stefansson Sound issue, the Court found in a related case that from at least 1903 until 1961 the United States had claimed as inland waters areas that, like Stefansson Sound, are enclosed by islands less than ten miles apart. *Alabama and Mississippi Boundary Case*, 470 U.S. at 106-07. The Master, however, reconsiders the Court's 1985 finding and, despite considerable evidence supporting it, concludes that the Court was wrong. On Dinkum Sands, the evidence shows that it was first surveyed as an island, has often been seen above high water since then, but on occasion submerges. Instead of recommending that it be considered an island as are similar features under both the common law and international law, he rewrites the internationally accepted definition of island by adding an implicit modifier that is virtually the same as one its drafters deliberately rejected. As to NPRA, a pre-statehood federal reservation can defeat a State's entitlement to submerged lands only if Congress clearly intended to include submerged lands within the reservation and affirmatively intended to defeat a new State's title to those lands. *Utah Division of State Lands v. United States ("Utah")*, 482 U.S. 193, 202 (1987). The Master finds both requirements met on the basis of speculative inferences and not direct evidence, an approach contrary to the strong presumption of State ownership established in *Utah* and earlier cases.

Alaska's admission. *See* Report at 447-77. The Court has indicated that subsidiary matters "need not be dealt with separately, as they are merged in the ultimate question whether . . . the master's finding as to the [ultimate question presented] is correct." *New Mexico v. Texas*, 275 U.S. 279, 286 (1928), *modified as to other issues*, 276 U.S. 557 (1928). Alaska will address the ANWR issues only if the United States excepts to the Master's recommendation on the title issue.

The Court should hold that Stefansson Sound is inland waters under the 10-mile rule and Alaska's Submerged Lands Act grant must be measured from the seaward shore of the islands that enclose it and straight lines connecting them, that Dinkum Sands is an island, and that title to the submerged lands within the exterior boundaries of NPRA passed to Alaska at statehood.

ARGUMENT

I. Stefansson Sound and other areas enclosed by near-shore fringing islands less than ten miles apart are inland waters under the 10-mile rule this Court in 1985 found was the United States' policy from 1903 to 1961, and Alaska owns the lands underlying them.

The question here is whether near-shore fringing islands less than ten miles apart enclose inland waters for, "[i]n the areas actually in dispute, the distances between islands are in fact all less than ten miles." Report at 26. This narrow question seemed resolved when, shortly before the 1985 trial on this issue, the Court found that the United States had claimed areas enclosed by islands less than ten miles apart as inland waters from at least 1903 to 1961:

> Prior to its ratification of the Convention [on the Territorial Sea and Contiguous Zone, discussed below] on March 24, 1961, the United States had adopted a policy of enclosing as inland waters those areas between the mainland and off-lying islands that were so closely grouped that no entrance exceeded 10 geographical miles. This 10-mile rule represented the publicly stated policy of the United States at least since the time of the Alaska Boundary Arbitration in 1903.

Alabama and Mississippi Boundary Case, 470 U.S. at 106-07 (footnotes omitted).

The Master nonetheless reconsiders and rejects the Court's 1985 finding as "plainly" unsupported by the evidence. Report at 127.

A. The United States should be precluded from relitigating the Court's finding that the 10-mile rule was the United States' policy.

The Master reconsiders the Court's 10-mile rule finding because "Alaska does not seek to invoke collateral estoppel against the United States." Report at 53-54. Alaska, however, did not waive the point, and the United States should be precluded from relitigating the Court's 1985 finding that the 10-mile rule was the United States' official policy from 1903 to 1961.

In *United States v. Mendoza*, 464 U.S. 154, 163 (1984), the Court held that the United States was not estopped from relitigating an issue that it had lost in the district court but had not appealed because estopping the United States would (1) deprive the Court of the benefit of having several courts consider an issue before certiorari is granted, (2) require the Solicitor General to revise the policy for determining when to appeal adverse trial court decisions, and (3) preclude subsequent administrations from taking a different position with respect to the particular issue in terms of pursuing or not pursuing an appeal. *Id.* at 160-61.

As Alaska pointed out to the Master, Transcript ("Tr.") 3523-34 and Alaska's Reply Brief on Questions 2, 3, 4, 12, 13, and 15 ("ARB"), Appendix A at 35, those policy considerations do not apply where the United States' interest in this case is identical to its interest in the contemporaneous *Alabama and Mississippi Boundary Case*, and both cases are under the Court's original jurisdiction. Estoppel remains appropriate to preclude the United States from relitigating the Court's 1985 finding.

B. The evidence supports the Court's 1985 finding that the 10-mile rule was the United States' policy from at least 1903 to 1961.

In any event, the evidence fully supports the Court's 1985 finding. Three examples illustrate the point. First, at the 1903 Alaska Boundary Arbitration, "the United States explicitly stated that the waters inside the islands were inland waters *because* none of the ocean entrances exceeded ten miles in width." *Alaska Boundary Controversy* 1 (1952), a Justice Department study prepared for use in litigation against California, *excerpted in* Ak. Ex. 85-099 (emphasis in original). Second, in 1951 the United States followed the 10-mile rule to draw the seaward limits of inland waters along the Louisiana coast: "[T]he principle followed in drawing the baseline was that waters enclosed between the mainland and offlying islands which were so closely grouped that no entrance exceeded 10 nautical miles in width were considered inland waters." 1 Shalowitz, *supra* note 3, at 161,[5] cited in support of the Court's 10-mile rule finding in the *Alabama and Mississippi Boundary Case*, 470 U.S. at 106 n. 9. Finally, in 1961 Solicitor General Cox found that both prior United States' practice and the Convention on the Territorial Sea and Contiguous Zone, ratified by the United States in 1961, 15 U.S.T. (pt. 2) 1607, T.I.A.S. N. 5639 ("the Convention") sanctioned the 10-mile rule, which he stated as: "Waters enclosed between the mainland and off-lying islands which are so closely grouped that no entrance exceeds ten miles in width shall be considered inland waters." *See* Ak. Ex. 85-145 and -159 at 1-3. Shalowitz concurred. Ak. Ex. 85-150 at 4. The Court has since incorporated the Convention into the Submerged

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[5] Shalowitz was a technical adviser to the Justice Department in Submerged Lands Act cases, 1 Shalowitz, *supra* note 3, at viii, and is perhaps the foremost commentator relied on by the Court in these cases.

Lands Act. *United States v. California ("California")*, 381 U.S. 139, 165 (1965).

These examples of the United States' policy reflect the balance of the evidence, as discussed in subsection 3 below. Under the Court's prior rulings, the 10-mile rule controls resolution of this issue.

1. The United States' maritime delimitation policy when Alaska became a State controls resolution of these questions.

For Submerged Lands Act purposes, Alaska's boundaries became effective when it joined the Union in 1959. They thus were fixed by the United States' policy in 1959 of enclosing as inland waters areas between the mainland and fringing islands less than ten miles apart. Using the current United States' policy of strictly applying the arcs-of-circles method would impermissibly contract Alaska's territory.

Articles 4 and 5 of the Convention authorize, but do not require, the use of "straight baselines" connecting offshore islands to delimit inland waters. The Court held in the 1965 *California* case that California could not use straight baselines to claim the areas between the mainland and remote islands as much as 56 miles off its coast (*see* 381 U.S. at 143 n. 4) if that would extend the United States' international boundaries over the United States' objection. *Id.* at 168. It cautioned, however, that the United States' responsibility for foreign relations must be "accommodated" with the States' territorial interests, and "a *contraction* of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable." *Id.* (emphasis added).

In the *Louisiana Boundary Case*, 394 U.S. at 73-74 n. 97 (1969), the Court warned that if the United States historically had used a straight baseline approach it could not change that policy merely to gain an advantage over the States in Submerged Lands Act cases. The United States

earlier had conceded that Chandeleur and Breton Sounds, enclosed by an island fringe like that enclosing Stefansson Sound, were inland waters, *id.* at 66-67 n. 87, and "to permit the National Government to distort [the Convention's] principles, in the name of its power over foreign relations" would be "inequitable." *Id.* at 77. Allowing it "to prevent recognition of a historic title which may already have ripened because of past events . . . would approach an *impermissible contraction* of territory against which [the Court] cautioned in [the 1965] *California* case." *Id.* at n. 104 (emphasis added).

The Master acknowledges that the United States has enclosed waters behind islands as inland waters "on some occasions," Report at 130-31, and that he must "consider how the United States' pre-Convention policy for waters inside near-shore barrier islands would have applied in Alaska." *Id.* at 136-37. He denies, however, that Alaska's Submerged Lands Act grant was fixed at statehood because the Court rejected the United States' similar argument in the 1965 *California* case. *Id.* at 50. The Court's rejection of the United States' argument in that case, however, did not cause a *contraction* of a State's recognized territory, and does not support the Master's conclusion that Alaska's Submerged Lands Act rights can be determined as of some time other than the date of statehood.

The prohibition against an impermissible contraction requires that State boundaries be fixed at *some* point. As applied to Alaska, the Submerged Lands Act defines "boundaries" as those in effect at statehood. 43 U.S.C. § 1301(b). "[T]he boundaries contemplated by the Submerged Lands Act are those fixed by virtue of Congressional power to admit new States and to define the extent of their territory." *Louisiana*, 363 U.S. at 51 (1960).

Congress exercised that power by defining Alaska's boundaries in terms of the United States' maritime delimitation policy in 1959. Both the Alaska Constitution and the

Alaska Statehood Act define Alaska to include "appurtenant territorial waters" at statehood.[6]

The Master suggests that, unlike every other State, Alaska's Submerged Lands Act grant may not be co-extensive with those boundaries. In his view, Congress "took special care to distinguish between the location of the boundary and the question of title to submerged lands inside the boundary." Report at 35 n. 9. The Master is simply wrong. Senator Cordon proposed what became the description of Alaska in section 2 of the Statehood Act at a 1954 committee hearing during the Second Session of the 83d Congress, *see Alaska Statehood: Hearings on S. 50 before the Senate Comm. on Interior and Insular Affairs*, 83d Cong., 2d Sess. 222 (1954) ("*Senate Hearings*"), the same Congress that enacted the Submerged Lands Act. Senator Cordon was the manager of the bill that became the Submerged Lands Act. *California*, 381 U.S. at 151. He intended that Alaska's boundary be co-extensive with "the three mile limit that this country has contended for always." *Senate Hearings* at 223. Senator Jackson asked him whether this would convey "everything there is up there, as far as the overall boundary lines are concerned, to the new State," and Senator Cordon assured him that it would. *Id.* at 282. The next year, Alaska's Delegate Bartlett explained to a House Committee that the Senate had used the phrase "together with the territorial waters appurtenant thereto" because "it would be more descriptive in respect to the Submerged Lands Act" and "tied in better with the Submerged Lands

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[6]Article XII, § 1 of the Alaska Constitution provides in part that Alaska consists of the Territory of Alaska "together with the territorial waters appurtenant thereto." Congress "accepted, ratified, and confirmed" the Alaska Constitution in § 1 of the Alaska Statehood Act, and section 2 states that Alaska consists of the Territory of Alaska "including the territorial waters appurtenant thereto." Pub. L. No. 85-508, 72 Stat. 339 (1958), *reprinted as amended in* 48 U.S.C. note preceding § 21 (1987).

Act." *Hawaii-Alaska Statehood: Hearings on H.R. 2535, H.R. 2536, and Related Bills before the House Comm. on Interior and Insular Affairs*, 84th Cong., 1st Sess. 114 (1955).

Congress applied the Submerged Lands Act to Alaska in section 6(m) of the Alaska Statehood Act, which also provides that Alaska "shall have the same rights as do existing States thereunder." Congress, in considering statehood for Alaska, recognized that the Submerged Lands Act "confirms to the existing States title to their tidelands and submerged lands out to their historic boundaries." S. Rep. No. 1028, 83d Cong., 2d Sess. 33 (1954). A different rule for Alaska as the Master suggests would contravene section 6(m)'s requirement that Alaska have the same Submerged Lands Act rights as other States.

State boundaries which cannot be unilaterally contracted by the United States are determined, like Alaska's, by the action taken jointly by Congress and the State "to fix the States' boundaries against subsequent change without their consent." *Louisiana*, 363 U.S. at 28-29. In terms of *impermissible contraction*, both Alaska's equal footing doctrine lands and its Submerged Lands Act grant were fixed at statehood.

2. The Master overlooked well-established principles governing consideration of the evidence of the United States' policy.

The Master assigned to Alaska the burden of proving that the Court's 1985 10-mile rule finding was correct. Report at 52. Whether that assignment was proper or not,[7] the

[7] In making this assignment the Master cites decisions in which the Court has shown deference to the position taken by the United States. Report at 51-52. Since the Court has already made the finding regarding the 10-mile rule, such deference seems particularly inappropriate here. One commentator has argued persuasively that such deference to the United States' position, afforded because of a perceived connection to

Master's conclusion that Alaska did not meet the burden ignores a number of well-established principles governing consideration of the evidence of the United States' policy. For example, he affords undue significance to minor variations in the way the United States expressed its otherwise consistent policy over time, ignoring the principle that minor uncertainties and even contradictions in a nation's practice are legally insignificant. As the International Court of Justice noted with respect to Norway's historic maritime delimitation practice,

> *too much importance need not be attached to the few uncertainties or contradictions, real or apparent*, which the United Kingdom Government claims to have discovered in Norwegian practice. *They may easily be understood in the light of the variety of the facts and conditions prevailing in the long period of time which has elapsed* since 1812, and are not such as to modify the conclusions reached by the Court.

Fisheries Case (U.K. v. Norway), 1951 I.C.J. 116, 138 (emphasis added).

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foreign relations, "should play no role in these cases." Jonathan I. Charney, *Judicial Deference in the Submerged Lands Cases*, 7 Vand. J. Transnat'l L. 383, 454 (1974). Professor Charney is uniquely qualified to make such an observation. Prior to his academic appointment, the Justice Department hired him "specifically" to handle Submerged Lands Act litigation. He served as Chief of the Marine Resources Section and was either a trial attorney or supervisor in proceedings before Special Masters in the *Louisiana* (No. 9, Original) and *Maine* (No. 35, Original) cases and lower court proceedings leading to *United States v. Alaska*, 422 U.S. 184 (1975). Tr. 3029-30. He was a member of the United States Public Advisory Committee on the Law of the Sea, participating in law of the sea negotiations and related matters, and served as a consultant to the State Department on litigation before the International Court of Justice. *Id.* at 3034. The Master accepted Professor Charney as "an expert in international law and law of the sea, with particular expertise in those two areas as they relate to United States foreign policy and interests." *Id.* at 3037.

A policy different from long-established practice must be shown by "convincing evidence to the contrary":

> In the light of these considerations, *and in the absence of convincing evidence to the contrary*, the Court is bound to hold that the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose.

Id. (emphasis added).

The Master also failed to follow the more general rule that a litigant does not have the burden "of establishing facts peculiarly within the knowledge of his adversary." *United States v. New York, New Haven & Hartford Railroad*, 355 U.S. 253, 256 n. 5 (1957). "[A]ll evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted." *Mammoth Oil Co. v. United States*, 275 U.S. 13, 51 (1927) (citation omitted). The evidence of the United States' maritime delimitation policy necessarily comes primarily from official government documents in its exclusive possession.

Further, "[t]he production of weak evidence when strong is available can only lead to the conclusion that the strong would have been adverse." *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) (citations omitted). "Silence then becomes evidence of the most convincing character." *Id.* (citations omitted). The United States produced only weak evidence to contradict the Court's 10-mile rule finding, and produced no evidence showing that it strictly applied the arcs-of-circles method to fringes of near-shore barrier islands less than ten miles apart prior to the 1971 publication of maps disclaiming the inland waters status of areas like Mississippi Sound, *see Alabama and Mississippi Boundary Case*, 470 U.S. at 111, and Stefansson Sound. Indeed, the federal executive explicitly rejected strict appli-

cation of the arcs-of-circles method in international relations in 1930 and Congress rejected it in the 1953 Submerged Lands Act. These facts are "evidence of the most convincing character" *Interstate Circuit*, 306 U.S. at 206, that the arcs-of-circles method was not the United States' policy at the time of Alaska's admission.

The United States, moreover, presented no evidence of a foreign relations rationale for changing its policy from the 10-mile rule to strict application of the arcs-of-circles method in 1971. As discussed below, its desire to prevail in domestic Submerged Lands Act cases was the only reason for the change.

Under the principles established by both this Court and the International Court of Justice, the minor variations in phraseology and application that the Master discusses are legally insignificant. They do not controvert the Court's 1985 finding that the 10-mile rule was the United States' consistent policy from at least 1903 until 1961, much less show that the United States would have applied its current policy of strictly applying the arcs-of-circles method to Alaska's north coast in 1959. The evidence establishes, moreover, that determining Alaska's Submerged Lands Act grant under the arcs-of-circles method would impermissibly contract Alaska's recognized territory, a result this Court condemned in both the 1965 *California* decision and the *Louisiana Boundary Case.*

3. The evidence shows that the Court was correct: The 10-mile rule was the United States' policy from at least 1903 to 1961.[8]

As late as 1964, the United States told the Court that its pre-Convention policy was to treat areas enclosed by near-

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[8]Because of space limitations, Alaska cannot address every point the Master makes in his discussion of the United States' historical policy. We do, however, point out the considerable evidence supporting the

shore fringing islands less than ten miles apart as straits leading to inland waters unless they "served as a passageway between two areas of high seas," in which case they would be territorial waters subject to the right of innocent passage:[9]

Court's 1985 10-mile-rule finding and show that the Master's criticisms of that evidence do not controvert that finding.

[9] In the *Louisiana Boundary Case*, the Court defined "inland [or internal] waters," "territorial sea," and "high seas," three terms that appear frequently in the evidence of the United States' maritime delimitation policy:

> Under generally accepted principles of international law, the navigable sea is divided into three zones, distinguished by the nature of the control which the contiguous nation can exercise over them. Nearest to the nation's shores are its inland, or internal waters. These are subject to the complete sovereignty of the nation, as much as if they were a part of its land territory, and the coastal nation has the privilege even to exclude foreign vessels altogether. Beyond the inland waters, and measured from their seaward edge, is a belt known as the marginal, or territorial, sea. Within it the coastal nation may exercise extensive control but cannot deny the right of innocent passage to foreign nations. Outside the territorial sea are the high seas, which are international waters not subject to the dominion of any single nation.

394 U.S. at 22-23 (footnotes omitted). A fourth term — "territorial waters," also used in the Alaska Statehood Act to describe the new State — includes both inland waters and the territorial sea. *See* 1 Shalowitz, *supra* note 3, at 23; Memorandum of the United States in Response to Request of Special Master of June 29, 1949, (August 1949) (Ak. Ex. 85-063) at 7, *United States v. California*, (No. 11 (now No. 5), Original) (Oct. Term, 1949). Employing these terms, Alaska's submerged lands are those underlying territorial waters — *i.e.*, inland or internal waters and the marginal or territorial sea — while the federal OCS underlies high seas. As used throughout the evidence of United States policy discussed herein, the "territorial sea" or "territorial waters" of the United States extended three miles offshore. In 1988 the United States extended its territorial sea to 12 miles offshore, a change in the United States' international policy that has no legal effect on the issues in this case. Report at 18 n. 3.

> (e) *Straits leading to inland waters* — Wherever the United States has insisted on the right of innocent passage through straits, denying them the status of inland waters, *the claim has rested on the character of the strait as a passageway between two areas of high seas. No such right is claimed as to a strait leading only to inland waters.* Such a strait is treated as a bay. Examples of this have already been discussed, including the straits leading into the Alaskan Archipelago, straits leading to waters between Cuba and its encircling reefs and keys, and Chandeleur Sound.

Brief for the United States in Answer to California's Exceptions to the Report of the Special Master ("United States 1964 Brief") (June 1964), (Ak. Ex. 85-016) at 130-31, *United States v. California*, (No. 5, Original) (Oct. Term, 1963) (footnote and citations omitted) (emphasis added). Thus, according to the United States, the key determinant for inland waters status was whether the United States insisted on a right of innocent passage.

This simple, functional distinction between inland waters and territorial sea reconciled two sometimes competing national interests. The United States has both a "maritime interest" in freedom of navigation in other countries' waters and a "coastal interest" in maintaining exclusive jurisdiction over its own. Tr. 3039-40 (testimony by Professor Charney). Preserving a right of innocent passage where required for international navigation while claiming plenary jurisdiction where innocent passage is not necessary accommodates both interests. The United States employed this approach until 1971.

The evidence shows that the United States held this position for more than 150 years prior to Alaska's admission, held it in 1959 when Alaska was admitted to the Union and its submerged lands title vested, held it in 1965 when the United States submitted its first brief to this Court following the Court's adoption of the Convention for purposes of the

Submerged Lands Act, and publicly renounced it only with the 1971 publication of the charts noted by the Court in the *Alabama and Mississippi Boundary Case*, 470 U.S. at 111. The 1971 renunciation constituted what the Court warned against in both the 1965 *California* and the 1969 *Louisiana* cases, an impermissible attempt to contract the States' — including Alaska's — recognized territory in the name of foreign policy. *California*, 381 U.S. at 168; *Louisiana Boundary Case*, 394 U.S. at 77 n. 104. As the Court there quoted its Master, Walter F. Armstrong, "[I]t is difficult to accept the [renunciation] as entirely extrajudicial in its motivation." 470 U.S. at 112 (citations omitted).

a. The United States articulated the 10-mile rule as its policy at the 1903 Alaska Boundary Arbitration.

The 1903 Alaska Boundary Arbitration crystallized the preceding century of the United States' maritime delimitation policy[10] in an explicit 10-mile rule for inland waters enclosed by islands. The Arbitration determined the baseline for measuring the 10-league-wide "panhandle" of Southeast Alaska, a strip ("*lisière*") of mainland constituting part of Alaska under an 1825 treaty between Russia and Great Britain. *See* Report at 61-64. Under the treaty, the *lisière* was to be measured from the "windings of the coast." *Id.* at 62 n. 22. The United States favored the physical shoreline of the mainland, including all of its sinuousities; Great Britain argued for the mainland shore but with straight lines across the mouths of inlets. *Id.* at 63. The United States' Agent, Hannis Taylor, emphasized the difference between the political coast line from which a nation's

[10]The Master discusses only three examples of the United States' maritime delimitation policy leading up to the 1903 Alaska Boundary Arbitration. Report at 56-61. Appendix A summarizes additional Pre-1903 evidence that the United States claimed enclosed areas as inland waters and traces the evolution of the 10-mile distance criterion.

maritime jurisdiction is measured and the physical coast line from which the 10-league *lisière* should be measured:

> [T]here are but two possible coast lines known to international law. One is the physical coast line traced by the hand of nature, where the salt water touches the land, which exists for the purpose of boundary: the second is the political coast line — that invisible thing superimposed upon the physical coast by the operation of law, which exists for the purpose of jurisdiction.

Argument of Hannis Taylor, *Proceedings of the Alaskan Boundary Tribunal*, S. Doc. No. 162, 58th Cong., 2d Sess. (1903-04) at 605 (Ak. Ex. 85-018). He explained that the political coast line ran along the outer edge of the Alexander Archipelago and that straight lines less than ten miles long across the water entrances between the islands enclosed inland waters:

> [The political coast line] is an imaginary line which the law superimposes upon the physical coast line as a basis. But for the purposes of international law, instead of following all the convolutions and sinuousities of the coast, it is permitted to go across the heads of bays and inlets, and it is in that particular that the rule of international law comes in as to the width of bays and inlets, either 6 or 10 miles. We are not encumbered with that question, because the British Case contends that they must be 10 miles, and we do not dispute it, and these outside inlets are 10 miles.
>
> . . . .
>
> The minute you fix it, all waters back of it, whether they are waters of the Archipelago there of Alexander or the Archipiélago de Los Canarios, of Cuba, they all became, as Hall says, salt-water lakes: they are just as

> much interior waters as the interior waters of Loch Lomond . . . .

Id. at 611.

The key fact was that the islands were less than ten miles apart: "[T]he United States explicitly stated that the waters inside the islands were inland waters *because* none of the ocean entrances exceeded ten miles in width." *Alaska Boundary Controversy* 1 (1952), a Justice Department study prepared for use in the *California* litigation, *in* Ak. Ex. 85-099 (emphasis in original). The United States claimed that the Alexander Archipelago was inland waters as late as 1964, *see* United States 1964 Brief, *supra* page 18, at 131 (Ak. Ex. 85-016), and first disclaimed inland waters status for the Alexander Archipelago in 1971. Report at 166-67.

b. The Court recognized that islands enclose inland waters shortly after the Alaska Boundary Arbitration.

Shortly after the Alaska Boundary Arbitration, this Court, in *Louisiana v. Mississippi*, 202 U.S. 1 (1906), determined the boundary between those two States in Lake Borgne and Mississippi Sound. The Court's analysis reflected the principle that areas enclosed by islands are inland waters and not open sea, consistent with the United States' position at the Alaska Boundary Arbitration. The Court described Mississippi Sound as "an enclosed arm of the sea" formed by a chain of fringing islands. *Id.* at 48. The Court held that the States' common boundary in Mississippi Sound should be determined under the "thalweg" doctrine that applies only to inland waters. As explained in the *Alabama and Mississippi Boundary Case*,

> [u]nder that doctrine, the water boundary between States is defined as the middle of the deepest or most navigable channel, as distinguished from the geographic center or a line midway between the banks.

> The Court concluded that the "principle of thalweg is applicable," not only to navigable rivers, but also to "sounds, bays, straits, gulfs, estuaries and other arms of the sea." The Court rejected the contention that the doctrine did not apply in Lake Borgne and Mississippi Sound because those bodies were "open sea." The Court noted that the record showed that Lake Borgne and the relevant part of Mississippi Sound are not open sea but "a very shallow arm of the sea, having outside of the deep water channel an inconsiderable depth." The Court clearly treated Mississippi Sound as inland waters, under the category of "bays wholly within [the Nation's] territory not exceeding two marine leagues in width at the mouth."

470 U.S. at 108 (citations omitted).

The case was significant because it put foreign nations on notice that the United States claimed Mississippi Sound as inland waters, *id.*, just as the Alaska Boundary Arbitration gave notice that the United States claimed the Alexander Archipelago as inland waters. It also alerted foreign nations that the same inland water rule applied to other "sounds, bays, straits, gulfs, estuaries and other arms of the sea." *Id.*

c. Two events in 1929 are consistent with the 10-mile rule.

Two events in 1929 leave the Master "in some doubt as to whether a ten-mile rule for islands, as of 1929, was quite so well established" as the Court found in 1985. Report at 70. The first is a July 13, 1929 letter from the State Department to Norway that is entirely consistent with the 10-mile rule. It did not describe the United States' maritime delimitation policy, saying only that "precise lines [delimiting inland waters] had not been established." Report at 68 n. 28. (The 1971 charts noted by the Court in the *Alabama and Mississippi Boundary Case*, 470 U.S. at 111, apparently were the

first time the United States publicly established such lines.) The letter did not disavow, contradict, or repudiate the 10-mile rule, and thus did not signal a policy change. *Cf. Fisheries Case*, 1951 I.C.J. at 138 ("convincing evidence to the contrary" is required to show a change in prior consistent practice).

The second event is the United States' response to a League of Nations' questionnaire in which it said it would not tolerate exclusive claims to the Straits of Magellan by any nation. *See* Report at 70 and n. 30. In pursuit of its maritime interest, however, the United States frequently takes positions with respect to *other countries'* jurisdiction that differ considerably from its position as to its *own.*[11] Limitations the United States would impose on other countries' jurisdiction thus provide questionable evidence of its domestic policy.

The few straits used for international navigation like the Straits of Magellan, moreover, differ from the openings between near-shore barrier islands less than ten miles apart that lead only to enclosed areas like Stefansson Sound. The United States' maritime interest calls for a right of innocent passage in the former, but its coastal interest supports inland waters status for the latter. As with the letter to Norway, the United States' response to the League of Nations' questionnaire rejecting exclusive claims to the Straits of Magellan

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[11] *Compare* Secretary of State Bayard's June 14, 1886, letter protesting Canadian interference with American fishermen's "unquestionable rights to pursue their business at any point not within three marine miles of the shore," cited in Thomas Baty, *The Three-Mile Limit*, 22 Am. J. Int'l L. 503, 525 (1928) (Ak. Ex. 85-801), *with* the United States' August 1886 seizure of three British schooners engaged in pelagic sealing 70, 75, and 115 miles from the nearest land. Christopher B.V. Meyer, *Extent of Jurisdiction in Coastal Waters* 305 (1937) (Ak. Ex. 85-804); 2 *Great Britain and the Law of Nations* 369 (Appendix, "The Behring Sea Arbitration, Argument of Her Majesty's Government") (Herbert A. Smith, ed. 1935) (Ak. Ex. 85-034).

does not evidence a change in policy. *Fisheries Case*, 1951 I.C.J. at 138.

d. The United States in 1930 preserved the 10-mile rule as a rule for straits leading to inland seas and rejected the arcs-of-circles method for islands less than ten miles apart.

In 1930, the League of Nations sponsored a Conference for the Codification of International Law at the Hague. The United States proposed a comprehensive delimitation scheme that rejected strict application of the arcs-of-circles method, preserved the 10-mile rule in terms of a rule for straits leading to inland seas, and included a new proposal for assimilating "objectionable pockets" of high seas to the territorial sea.[12]

The United States proposed that the seaward limit of territorial waters be determined by the arcs-of-circles method with arcs swung from the coast of the mainland, individual islands, and the seaward limit of inland waters. Where this produced pockets or enclaves of high seas near islands less than ten miles apart, the pockets or enclaves would be assimilated to the territorial sea, thus simplifying the seaward boundary. *See* Report at 33, Figure 3.6. A bay would be inland waters if its mouth was less than ten miles wide and it satisfied a formula based on the area of a semicircle. Where both entrances of a strait connecting two areas of high seas belonged to the same country and were less than six miles wide, the strait would be territorial waters; if an entrance exceeded six miles in width, the territorial sea would extend three miles from each coast.

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[12] *See 3 Acts of the Conference for the Codification of International Law, Minutes of the Second Committee: Territorial Waters*, League of Nations Doc. C.351(b).M.145(b).1930.V (1930) ("*Acts of Conference*"), excerpted in Ak. Ex. 85-001 and summarized in the Report at 69.

Finally, the 10-mile rule for bays would apply where a strait was merely a "channel of communication with an inland sea." This proposal for straits leading to inland seas is fully consistent with the Court's finding that the 10-mile rule was the United States' policy from at least 1903 to 1961, and was how the United States often expressed the rule from this point on.

The greater significance of the 1930 proposals, however, was that the United States rejected strict application of the arcs-of-circles method. State Department Geographer Boggs explained that strictly applying the arcs-of-circles method produces "objectionable," "anomalous," and "undesirable" pockets and enclaves of high seas that must be eliminated for the same reason that inland waters are enclosed. S. Whittemore Boggs, *Delimitation of the Territorial Sea: The Method of Delimitation Proposed by the Delegation of the United States at the Hague Conference for the Codification of International Law*, 24 Am. J. Int'l L. 541, 552-53 (1930) (Ak. Ex. 85-061). Whether inland waters or territorial sea, these pockets and enclaves would be subject to the adjacent nation's jurisdiction *and* part of its sovereign territory. The only distinction was that there is a right of innocent passage in the territorial sea but not in inland waters. *Louisiana Boundary Case*, 394 U.S. at 22-23. These pockets and enclaves would never be high seas.

The 1930 assimilation and simplification proposal which the Master finds at odds with the 10-mile rule, Report at 71-74, thus was at most one of the legally insignificant "uncertainties or contradictions, real or apparent," not amounting to "convincing evidence to the contrary" showing a change in prior policy. *Fisheries Case*, 1951 I.C.J. at 138. Indeed, the United States *never* applied assimilation and simplification to its own waters. Ak. Ex. 85-062 at 10 (answer to Interrogatory 10). Thus, while it may have been included in general statements of the United States' policy, it was never actually followed in practice.

e. After 1930, the United States continued to follow the 10-mile rule.

The United States' most significant post-1930 application of the 10-mile rule came in 1950 with the drawing of the Chapman line to delimit the coast line of Louisiana:

> [T]he United States followed this [10-mile rule] policy in drawing the Chapman line along the Louisiana coast following the decision in *United States v. Louisiana*, 339 U.S. 699 (1950). See 1 Shalowitz,[*supra* note 3], at 161.

Alabama and Mississippi Boundary Case, 470 U.S. at 106 n. 9. At the place cited, Shalowitz explained that "the principle followed in drawing the [Chapman line] was that waters enclosed between the mainland and offlying islands which were so closely grouped that no entrance exceeded 10 nautical miles in width were considered inland waters" — *i.e.*, the 10-mile rule. The 10-mile rule was used to draw the Chapman line because it was the United States' policy in its international relations:

> [The Chapman Line] represented an effort to apply, as accurately as possible, the principles of delimitation advocated by the United States in the proceedings before the Special Master [in the *California* litigation then pending].7/

7/ These principles had been developed in international law or had been promulgated by the United States in its international relations. They involved the semicircular rule and the 10-mile rule for bays, and the rule for straits leading to inland waters .... Along the Louisiana coast all islands are so situated in relation to the mainland and to each other as to enclose all waters landward of the islands as inland waters .... The openings between the numerous islands along the Loui-

> siana coast constitute channels leading to inland waters and the rule as to bays becomes applicable.

1 Shalowitz, *supra* note 3, at 108 (citations and footnote 6 omitted).

The Master rejects Shalowitz's explanation, arguing that (1) his book "was written long after the fact," Report at 93, and "was published some twelve years after the Chapman line was drawn," *id.* at 89, (2) an "unqualified" 10-mile rule would conflict with the United States' 1930 proposals, *id.* at 89-93, and (3) the 10-mile rule as described by Shalowitz "is a significant extension to the 1930 statements of the rule" for a strait leading to an inland sea, *id.* at 93. Shalowitz may well have written the passages soon after the fact, however, and the timing of his book's publication does not diminish his explanation. It was "based on personal knowledge of the author who assisted the Department of Justice throughout the pendency of the boundary phases of the submerged lands cases." 1 Shalowitz, *supra* note 3, at 109 n. 8. The Master's concerns with Shalowitz's explanation of the Chapman line do not provide "convincing evidence to the contrary" overcoming the Court's finding that the 10-mile rule was the United States' policy.[13] *Fisheries Case*, 1951 I.C.J. at 138.

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[13]The Master also suggests that the United States, in designating Chandeleur and Breton Sounds as inland waters, may have relied on an absence of foreign traffic in the Sounds and the fact that islands cover more than half of the line enclosing them. Report at 86-87, citing a July 6, 1950 draft memorandum by State Department Geographer Boggs (Ak. Ex. 85-085). No evidence indicates that the draft memorandum was ever finalized, sent to anyone, or in any way reflected the United States' official policy. More significantly, the draft memorandum did not suggest that these factors were additional criteria for inland waters status. It simply stated that, because of these facts, "it seems apparent that the waters of these two sounds should be regarded as inland waters, and not as territorial sea." Ak. Ex. 85-085 at 1. Were they additional criteria for inland waters status, Boggs surely would have

In the *Fisheries Case*, both Great Britain and Norway interpreted the United States' policy in the same way the Court and Shalowitz did. Norway contended that the United States' system was the same as the Norwegian straight baseline system, a contention the Master incorrectly concludes "was not justified." Report at 95. The 10-mile rule was a system of baselines, all of which were straight — literally, a system of straight baselines — albeit with a 10-mile limitation on the length of lines. The United Kingdom argued that the United States' policy provided no precedent for straight baselines to enclose as inland waters areas that were *seaward* of any islands, citing the United States' 10-mile limit for bays and straits leading to inland waters at both the Alaska Boundary Arbitration and the 1930 Hague conference. Report at 97. The Master discounts this evidence, maintaining that the United Kingdom did not claim that every opening between islands less than ten miles apart would in the United States' view be a strait leading to

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mentioned them in a paper "that grew out of his work on the Louisiana coastline," Report at 88, but he did not. *See* S. Whittemore Boggs, *Delimitation of Seaward Areas under National Jurisdiction*, 45 Am. J. Int'l L. 240 (1951) (Ak. Ex. 85-96). In this paper, Boggs proposed that the seaward limit of inland waters be determined by swinging reverse arcs from the outer limit of the territorial sea. *Id.* at 254-56. Although more complicated than the 10-mile rule and never cited as representing the United States' official policy, Report at 128 n. 96, that proposal was consistent with the 10-mile rule's premise that areas enclosed by fringing islands less than ten miles apart were inland waters. The Master also interprets Boggs' assimilation of areas in the Alexander Archipelago to "territorial waters" as a significant departure from the United States' position at the 1903 Alaska boundary arbitration where they were considered inland waters. Report at 107. The term "territorial waters," however, includes both territorial sea and inland waters. *See* note 9 *supra*. Boggs did not separately address inland waters and territorial sea because they both were "territorial waters." Under his procedure for delimiting inland waters by swinging reverse arcs from the seaward limit of the territorial sea, moreover, the Alexander Archipelago would have been inland waters.

inland waters. *Id.* If the United Kingdom believed the United States' practice was to employ the 10-mile rule with respect to island fringes under only limited conditions, however, it would have said so in trying to limit Norway's claim. The United Kingdom's failure to make this argument demonstrates that it viewed the 10-mile rule described by the Court and Shalowitz as the United States' policy.

Secretary of State Webb restated the 10-mile rule for straits leading to inland seas in his November 13, 1951, letter submitted in the *California* litigation (Ak. Ex. 85-094, reprinted as Appendix D in 1 Shalowitz, *supra* note 3, at 354). *See* Report at 98-103. Webb distinguished between international straits which connect two areas of high seas and straits which are merely channels of communication with inland seas, stating simply that "the rules regarding bays should apply" to the latter. Ak. Ex. 85-094 at 3-4, 1 Shalowitz, *supra* note 3, at 356. As noted above, the rule for straits leading to inland seas is the only provision that the United States applied to its own waters enclosed by fringing islands less than ten miles apart.[14]

Again, all of this evidence is consistent with the Court's 1985 finding that the 10-mile rule was the United States' policy from at least 1903 to 1961. Nothing provides the "convincing evidence to the contrary" required to contravene that finding. *Fisheries Case*, 1951 I.C.J. at 138.

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[14]This explains Webb's omission from the letter of assimilation and simplification. The United States never applied assimilation and simplification to its own waters. Ak. Ex. 85-062 at 10 (answer to Interrogatory 30). Instead, it consistently employed the 10-mile rule in terms of straits leading to inland seas, as it did in drawing the Chapman line along the Louisiana coast. As the Master notes, "it would have seemed inconsistent with the Chapman line to represent assimilation as the general policy." Report at 101 n. 75. This also answers the Master's concerns, *id.* at 104-05, regarding Special Master Davis's findings as to the United States' policy in his report in the *California* litigation.

f. Congress in 1953 rejected the arcs-of-circles method in the Submerged Lands Act.

The Submerged Lands Act defines the coast line from which the States' grant is measured as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." 43 U.S.C. § 1301(c). In the Senate floor debate on the Act, Senator Douglas moved to amend the definition to provide that coast line would be defined as "the line of ordinary low water along that portion of the coast *of the main continent* which is in direct contact with the open sea and the line marking the seaward limit of inland waters, *and in the case of any island seaward of such coast, means the line of ordinary low water around such island.*" 99 Cong. Rec. 4240 (1953) (proposed new language emphasized). He feared that the current definition of "coast line" would permit States to make expansive claims where they have islands a substantial distance from the mainland — *i.e.*, "remote islands" such as those off California. *Id.; see also California*, 381 U.S. at 158 n. 23.

While Congress did not contemplate remote islands giving States a claim to all of the water areas between the mainland and the islands, it was concerned that the amendment would require strict application of the arcs-of-circles method to all islands, including those like the near-shore fringing islands enclosing Chandeleur Sound. "The effect of the Douglas amendment would be to make Chandeleur Sound a part of the high seas, although the Federal Government has never contended that Chandeleur Sound was part of the high seas, and the State government has always claimed it was inland waters." 99 Cong. Rec. 4242 (1953) (comments of Senator Long). "We would have to apply this amendment instead of the present rule of inland waters which permits both the Nation and the State to measure from the outer line along those islands." *Id.* at 4242 (comments of Senator Daniel). Senator Holland explained that

the "coast which is in direct contact with the open sea" in the definition refers to the seaward shore of the islands:

> The point I am making now is that under the definition in the joint resolution [now in the Act] . . . there would be no question about the outer rim of the Chandeleur Islands being that portion of the coast which is in contact with the open sea — which would be the open Gulf of Mexico in that case — and that that line, when joined to other segments which mark the seaward limits of inland waters, and other portions of the coast in contact with the open gulf, would make a contiguous co-extensive line extending all the way along the gulf frontage of Louisiana. There would be a failure to accomplish that result under the amendment of the Senator from Illinois. So I hope the amendment of the Senator from Illinois will be rejected.

99 Cong. Rec. 4242 (comments of Senator Holland).

Senator Douglas's amendment, his colleagues believed, would have made the *landward* shore of near-shore barrier islands part of the coast line for Submerged Lands Act purposes. The Senate avoided that result by defeating Senator Douglas's amendment on a vote of 50 to 26. *Id.* at 4243.

Another provision of the Submerged Lands Act furnishes additional evidence of Congress's intent that the States would receive title to submerged lands between the mainland and near-shore barrier islands. Nothing in the Act is to affect the United States' rights to "that portion of the subsoil and seabed of the Continental Shelf *lying seaward and outside of*" the lands granted to the States under the Act. 43 U.S.C. § 1302 (emphasis added). The Outer Continental Shelf Lands Act similarly defines the federal OCS as "all submerged lands lying *seaward and outside of* the area of lands beneath navigable waters as defined in [the Submerged Lands Act]." 43 U.S.C. § 1331(a) (emphasis added). Enclaves and pockets of submerged lands created by

strict application of the arcs-of-circles method in areas like Stefansson Sound simply are not "seaward and outside of" the lands granted to the States under the Submerged Lands Act. They are "landward and inside of" those lands.

Finally, the Court did not mandate strict application of the arcs-of-circles method, thereby precluding States from relying on the United States' historical practice embodied in the 10-mile rule, when it adopted the Convention for Submerged Lands Act purposes. If it had, the Court would not have warned against "impermissible contraction" of a State's recognized territory in the name of foreign policy in both the 1965 *California* decision and the *Louisiana Boundary Case.*

g. The United States in the 1950s and 1960s used island fringes to delimit inland waters for Submerged Lands Act purposes.

The federal executive initially implemented the Submerged Lands Act as Congress intended, treating the seaward shores of fringing islands near the mainland as "in direct contact with the open sea" and drawing straight lines connecting such islands to mark the "seaward limits of inland waters," the position the United States was taking in its international relations.[15] The United States also considered water areas enclosed by islands as inland waters for fisheries purposes in a series of regulations between 1956

[15] *See, e.g.*, Ak. Ex. 85-087 (June 23, 1954 memorandum for the record by D. O'Connor, Assistant Chief, Division of Cadastral Engineering in the Bureau of Land Management, outlining the theory underlying the Chapman line); Ak. Ex. 85-107 (December 7, 1954 memorandum from Mr. Clement, Bureau of Land Management, to Mr. Parriott, Department of the Interior, stating that Mississippi Sound constituted inland waters of the State of Alabama); Ak. Ex. 85-126 (June 15, 1956 letter from the Director, Bureau of Land Management, to Assistant Interior Secretary D'Ewart stating that Alabama's coast line "follows the outer limit of the barrier islands").

and 1960, regulations later characterized by the State Department as "adoption by United States of [the] straight baseline method in measuring limits of [the] territorial waters of Alaska." *See* Report at 116-18.[16] State Department Geographer Pearcy, moreover, prepared charts "showing straight baselines in southern Alaska, and some use was made of them by the Coast Guard and the Bureau of Commercial Fisheries" throughout the 1960s. Id. at 164-65 (footnotes omitted).[17]

In the late 1950s, the United States with the approval of the State Department took the same position in the *Louisiana* litigation.[18] Report at 112-13. The Master refuses to

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[16]The Master dismisses this evidence on the basis of the Court's analysis of these regulations in deciding that Cook Inlet in Alaska was not a historic bay, Report at 121, citing *United States v. Alaska*, 422 U.S. 184, 198 (1975), and because Interior Secretary Udall wrote Secretary of State Rusk that the fishery regulations "were not intended to enlarge or extend the territorial waters of Alaska in a legal or jurisdictional sense." *See* Report at 122 n. 88 and 119 n. 86. Alaska does not claim that Stefansson Sound is a historic bay, however. If the 10-mile rule were the United States' policy as the Court found in 1985, moreover, the regulations closing areas fringed by near-shore islands as inland waters did not enlarge or extend the waters of Alaska. They instead simply implemented the United States' 10-mile rule policy. This is far more plausible than construing the regulations as dramatically exceeding the jurisdictional authority of the Interior Department as the Master suggests.

[17]The Master dismisses this evidence, too, as being of questionable application to the Arctic and inconsistent with Pearcy's treatment of Chandeleur Sound. *Id.* at 165-66. The Pearcy charts nonetheless were consistent with the United States' pre-Convention position. As discussed below, moreover, whatever Pearcy thought about closing Chandeleur Sound did not prevent the United States from continuing to close it as inland waters under the Submerged Lands Act.

[18]*See, e.g.*, Brief for the United States in Support of Motion for Judgment (Feb. 1957) (AK. Ex. 85-006) at 128-29, *United States v. Louisiana* (No. 11 (now No. 9), Original) (Oct. Term, 1956) (Chandeleur Sound is inland waters); United States' Brief in Support of

give the United States' briefs much weight as evidence of the delimitation method the United States would have applied to Alaska's Arctic coast at statehood, finding them subject to "three difficulties": (1) the Court did not determine the location of the Gulf States' coast line, leaving it for later adjudication; (2) the briefs were based on the United States' policy in 1953 when the Submerged Lands Act became law and did not reflect any changes required by the 1958 Convention; and (3) the briefs did not explain the theory underlying the concession that waters behind islands in Louisiana, Mississippi, and Alabama were inland waters. *Id.* at 113-15. The Master's "difficulties" aside, the United States' briefs show a continuing adherence to the 10-mile rule described by the Court in the *Alabama and Mississippi Boundary Case.*

In March 1961, Solicitor General Archibald Cox recited a number of principles for delimiting the Louisiana coast line that he derived from "various sources," including Secretary of State Webb's 1951 letter and the Convention, in nearly identical letters to the Coast and Geodetic Survey (Ak. Ex. 85-145, U.S. Ex. 85-407) and the State Department (Ak. Ex. 85-159, U.S. Ex. 85-406). Report at 144. He explained that the principles did not include the Convention's 24-mile closing line rule for bays, because that was "a departure from existing law." *Id.* The remaining principles, however, necessarily reflected prior United States' policy that was consistent with the Convention, including the 10-mile rule for near-shore islands: "Waters enclosed between the main-

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Motion for Judgment on Amended Complaint (May 1958) (Ak. Ex. 85-007) at 177-78, *United States v. Louisiana* (No. 11 (now No. 9), Original) (Oct. Term, 1957) (areas between the mainland and barrier islands offshore Louisiana are inland waters); United States' Reply Brief on Motion for Judgment on Amended Complaint (Sept. 1958) (Ak. Ex. 85-014) at 43-44, *United States v. Louisiana* (No. 10 (now No. 9), Original) (Oct. Term, 1958) (fringing islands enclose inland waters, citing the Gulf States as examples).

land and off-lying islands which are so closely grouped that no entrance exceeds ten miles in width shall be considered inland waters." *Id.*

The Coast and Geodetic Survey's April 18, 1961 response included a memorandum by Shalowitz in which he concurred in Cox's statement of the 10-mile rule and found it "in conformity" with a general principle for islands:

> The coast line should not depart from the mainland to embrace offshore islands, except where such islands either *form a portico to the mainland and are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters*, or they form an integral part of a land form.

Id. at 145-46 (emphasis added). The emphasized language, Shalowitz explained, "was the basis for drawing the Chapman Line and is in conformity with the concession [that Chandeleur Sound was inland waters] made by the Government in . . . the Louisiana case." *Id.* at 146 n. 110. He described the portico concept as an "amplification" of the ten-mile rule and illustrated it with a figure "which could equally well be described as showing a fringe of islands." *Id.* at 147 n. 111.

This evidence shows conclusively that the United States' historical 10-mile rule policy simply mirrors the straight baseline provisions of the Convention, albeit with a 10-mile limitation. Cox's 10-mile rule, Shalowitz's portico concept illustrated as a fringe of islands, and the Convention's authorization in Article 4.1 of straight baselines where there is a "fringe of islands" are simply different ways of saying the same thing.

The Master finds even this evidence insufficient to support the Court's 10-mile rule finding. Report at 150. His reasons, however, do not amount to "convincing evidence to

the contrary" that the Court's finding was wrong.[19] The federal executive's implementation of the Submerged Lands Act, the United States' position in litigation under the Act in this Court, and both Cox's and Shalowitz's statements of principle derived from prior United States' policy and the Convention all support the Court's finding that the 10-mile rule was the United States policy from at least 1903 to 1961.

h. The United States followed the 10-mile rule even after the Court adopted the Convention for Submerged Lands Act purposes.

The United States continued to follow its pre-Convention 10-mile rule policy in its first submission to this Court *after* the Court adopted the Convention for Submerged Lands Act purposes in the 1965 *California* case.[20] Motion for

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[19]The Master believes this evidence does not support the Court's 10-mile rule finding for three reasons: (1) Shalowitz did not close Redfish Bay as inland waters, *id.* at 147; (2) a State Department official cryptically noted that closure of Chandeleur Sound as inland waters "has been questioned," *id.* at 149 and n. 118; and (3) Shalowitz did not close Caillou Bay as inland waters, *id.* at 149. Redfish Bay, however, is not fringed by islands, *compare* U.S. Ex. 85-416, a chartlet of Redfish Bay, with 1 Shalowitz, *supra* note 3, at 162, Figure 25, nor is Caillou Bay. *See* Tr. 2950 (testimony of J.R.V. Prescott, an expert on political geography with a particular emphasis on international maritime boundaries, Tr. 2767 and Ak. Ex. 85-401, and author of *The Maritime Political Boundaries of the World* (1985)). A "questioning" of a foreign policy position by a State Department employee is hardly renunciation of that policy.

[20]Precisely when the United States began to follow the Convention thus is not critical to determining its policy at the time of Alaska's admission in 1959. The United States, however, claimed before the Master that it "moved to the Convention rules immediately upon signing" it on September 15, 1958, Report at 134, a claim unequivocally refuted by evidence showing that the United States began to follow the Convention upon ratification in 1961. Raymond T. Yingling, Assistant Legal Adviser at the Department of State, stated in an affidavit the United States submitted in litigation with Alaska over Yakutat Bay that

Entry of a Supplemental Decree (No. 1).[21] In this motion, the United States acknowledged that some of its claims were untenable in light of the Court's adoption of the Convention for Submerged Lands Act purposes, including its claims as to artificial jetties, islets and low-tide elevations, and 10-mile bay closing lines. *Id.* at 18-19. Nevertheless, the United States continued to "concede Chandeleur and Breton Sounds as inland water," Report at 156, a position entirely consistent with both the United States' pre-Convention 10-mile rule policy and the Convention's straight baseline provisions.

The Master finds the United States' lack of explanation for the continued concession "surprising." Report at 157. It is only surprising, however, if the Court's adoption of the Convention for Submerged Lands Act purposes *required* the United States to *change* its litigation position to comply with the Convention. Such changes *were* required for artificial jetties, low-tide elevations, and bay closing lines, all of which the United States explained. Where the United States' prior litigation position and the Convention's rules

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the United States "maintained its traditional position" from Alaska's admission on January 3, 1959, until the Convention was ratified on March 24, 1961. *See United States v. Alaska*, 236 F.Supp. 388, 391-92 (D. Alaska 1964), *rev'd on other grounds sub nom. Alaska v. United States*, 353 F.2d 210 (9th Cir. 1965). Following ratification, the Convention expressed the United States' policy. *Id.; also see* Ak. Ex. 85-177 (January 15, 1963 letter from Secretary of State Rusk to Attorney General Kennedy) at 2 ("in view of the ratification of the Convention by the President with the advice and consent of the Senate, it must be regarded as having the approval of this Government and as expressive of its current policy").

[21] Motion by the United States for Entry of a Supplemental Decree (No. 1), Proposed Supplemental Decree, and Memorandum in Support of Motion (Nov. 1965), *United States v. Louisiana* (No. 9, Original) (Oct. Term, 1965) (Ak. Ex. 85-167). The Court handed down the *California* decision on May 31, 1965. The United States filed this motion on November 23, 1965.

were the *same*, as they were for claiming Chandeleur and Breton Sounds as inland waters, no explanatory comment was either necessary or appropriate.

In 1962, moreover, the United States and Louisiana had completed a joint study of the application of the Convention to the Louisiana coast, a study widely distributed to federal agencies. *See* Ak. Exs. 85-173 and -174. The United States, however, did not produce the study in this proceeding. Since the study specifically addressed the application of the Convention to the Louisiana coast, this "silence" is "evidence of the most convincing character," *Interstate Circuit*, 306 U.S. at 226, that the United States' continued closure of Chandeleur and Breton Sounds as inland waters was pursuant to Article 4 of the Convention. *See New York, New Haven & Hartford Railroad*, 355 U.S. at 256 n. 5; *Mammoth Oil Company*, 275 U.S. at 51.

The United States first signaled a possible change in its 10-mile rule policy three years later in a second motion in the *Louisiana* case. Motion for Entry of a Supplemental Decree (No. 2).[22] The United States acknowledged claiming waters between the mainland and coastal islands as inland, citing Chandeleur and Breton Sounds, but claimed that policy was "at variance with the Convention." *Id.* at 79.

This claim was patently wrong. The United States only a page earlier had explained that the Convention authorized closing areas like Chandeleur and Breton Sounds as inland waters under Article 4. *Id.* at 78. Both the United States' pre-Convention practice and its continuing concession as to

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[22] Motion by the United States for Entry of a Supplemental Decree as to the State of Louisiana (No. 2), Proposed Supplemental Decree, and Memorandum in Support of the Motion of the United States and in Opposition to the Motion of the State of Louisiana (Jan. 1968) (Ak. Ex. 85-168), *United States v. Louisiana* (No. 9, Original) (Oct. Term, 1968).

Chandeleur and Breton Sounds were expressly permitted by — and not "at variance with" — the Convention.

The United States, thus, continued to follow the 10-mile rule at least through 1965, *after* the Court had adopted the Convention for Submerged Lands Act purposes.

i. The United States changed its position in 1971 for reasons unrelated to international relations.

In April 1971, a federal "Baseline Committee" for the first time marked the seaward limits of inland waters and the seaward limit of the United States' territorial sea on nautical charts. The Committee was instructed to apply the arcs-of-circles method strictly and "not to take up the political issue of whether the United States should or should not employ the method of straight baselines." U.S. Ex. 85-112 at 1. In Mississippi, Chandeleur, and Breton Sounds along the Gulf coast, in the Alexander Archipelago in Southeast Alaska, and in Stefansson Sound, the charts showed enclaves and pockets of high seas. Report at 166-67. This was the first time the United States disclaimed the inland waters status of those areas. *See Alabama and Mississippi Boundary Case*, 470 U.S. at 111 (discussing Mississippi Sound).

In response to Alaska's protests, the State Department considered adopting straight baselines for the Alexander Archipelago, a return to the United States' pre-Convention position. Two successive State Department Legal Advisers determined that the United States could employ straight baselines that were "fully consistent with the most conservative possible reading of Article 4" of the Convention and would have no adverse effect on the United States' *international* relations. Ak. Ex. 85-276 (January 16, 1973 memorandum from Legal Adviser Brower to various federal officials) at 2. One adviser took an even stronger position: "We do not believe the use of such a system will have a negative impact on our Law-of-the-Sea negotiating position, *nor do we believe a continued refusal to use such a system is*

justifiable in light of the fact that it is so clearly appropriate to this situation." Ak. Ex. 85-280 (August 30, 1972 memorandum from Legal Adviser Stevenson to various federal officials) at 12 (emphasis added).

Concerns over the *domestic* implications such a move might have, however, prompted the State Department to condition its non-opposition on a waiver by Alaska of Submerged Lands Act claims it otherwise might make if the United States adopted a system of straight baselines. Ak. Ex. 85-217 at 1, 3. Because of these domestic concerns, the matter was referred to the Office of Management and Budget, Ak. Ex. 85-290, and no further action was taken.

C. Stefansson Sound and other areas enclosed by islands on Alaska's north coast are inland waters.

This Court correctly determined in the *Alabama and Mississippi Boundary Case* that the 10-mile rule was the United States' policy from at least 1903 to 1961. "[I]n the *Fisheries Case*, the International Court of Justice ruled that the consistent and prolonged application of the Norwegian system of delimiting inland waters, combined with the general toleration of foreign states, gave rise to a historic right to apply the *system*." *Alabama and Mississippi Boundary Case*, 470 U.S. at 107 n. 10 (emphasis added). Alaska accordingly is entitled to apply the 10-mile rule to delimit its inland waters and its Submerged Lands Act grant.

The Master argues, however, that "fairness" might require a recommendation against Alaska, citing the Florida Keys, Nantucket Sound, and Caillou Bay. Report at 172-74. Florida, however, received "a three-marine-league [*i.e.*, nine mile] belt of land" off its Gulf coast, *United States v. Florida*, 363 U.S. 121, 129 (1960). It stipulated with the United States that "the narrow waters within the lower Florida Keys, the Marquesas and the Dry Tortugas are generally territorial seas and not inland waters" apparently because it had no practical effect on Florida's Submerged

Lands Act grant.[23] The 10-mile rule was a rule for *fringing* islands, moreover, and did not apply to other island groups. Massachusetts relied solely on a historic waters argument and did not argue that failure to use the 10-mile rule impermissibly contracted its recognized territory. As discussed above, the islands forming Caillou Bay do not fringe the coast. In any event, Caillou Bay bears no resemblance to Stefansson Sound and provides no support for denying application of the 10-mile rule in Alaska on the basis of "fairness." All of the States with coast lines that fit the 10-mile rule — Alabama, Louisiana, and Mississippi — have not had their boundaries redrawn to comport with the United States' current position, strict application of the arcs-of-circles method. A different result for Alaska, as recommended by the Master, would be both unfair and violate the requirement in section 6(m) of the Alaska Statehood Act that Alaska "shall have the same rights" as other States under the Submerged Lands Act.

Finally, the Master suggests that Stefansson Sound might have been considered an international strait, and not an inland sea, because the *Coast Pilot* says "[v]essels following the coast may avoid the heavy ice . . . off the barrier islands by passing inside the islands by way of one of the deeper entrances." Report at 139-40. Nothing in the record, however, indicates any use of Stefansson Sound for international navigation. In contrast, Special Master Walter E. Hoffman found that neither Vineyard Sound nor Nantucket Sound

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[23] *See* Coast & Geodetic Charts C. & G. S. 1249-53, 1351, *reprinted in* Report of Albert B. Maris, Special Master (Sept. 1971), *United States v. Florida* (No. 52, Original) (Oct. Term, 1973) at 92-103, *reprinted in The Reports of the Special Masters of the United States Supreme Court in the Submerged Lands Cases 1949-1987* (Michael W. Reed, G. Thomas Koester and John Briscoe, eds., 1991), at 562-73, showing that all of those "narrow waters" are within the three mile arcs delimiting the territorial sea and the lands underlying them thus were included in the Submerged Lands Act grant to Florida.

was an international strait despite some evidence of international shipping. Report of the Special Master at 67-68, *United States v. Maine (Massachusetts Boundary Case)*, (No. 35, Original) (Oct. Term, 1984), *reprinted in* Reed, *et al., supra* note 23, at 779-80. Moreover, he also noted that the United States had conceded that Buzzard's Bay was inland waters even though "a significant amount of international shipping passes through the Cape Cod Canal." *Id.* at 68. Stefansson Sound's possible usefulness for domestic coastal traffic simply strengthens the analogy to Mississippi Sound, characterized in the *Alabama and Mississippi Boundary Case* as "an intracoastal waterway of commercial and strategic importance to the United States" but "of little significance to foreign nations." 470 U.S. at 102 (*see id.* at 102-05 as to its usefulness and importance).

The Court's 1985 finding that the 10-mile rule was the United States' position from at least 1903 until 1961 thus compels a ruling in Alaska's favor. The 10-mile rule was the United States' policy on January 3, 1959, when Alaska joined the Union and its title under the equal footing doctrine and the Submerged Lands Act vested. Along Alaska's north coast, all of the islands are less than ten miles apart. Report at 30. Strictly applying the arcs-of-circles method to delimit Alaska's Submerged Lands Act grant would impermissibly contract Alaska's recognized territory, a result the Court condemned in both the 1965 *California* decision, 381 U.S. at 168, and the 1969 *Louisiana Boundary Case*. 394 U.S. at 73-74 n. 97. It would contradict Congress's intent underlying both the Submerged Lands Act and the Alaska Statehood Act. Finally, it would reward the United States for adopting a position in its international relations to gain an advantage over the States in domestic Submerged Lands Act cases. *See Alabama and Mississippi Boundary Case*, 470 U.S. at 112. For these reasons the Court should reject the Master's recommendation that Alaska's Submerged Lands Act grant be determined by

strictly applying the arcs-of-circles method, and instead hold that the 10-mile rule for islands applies.

II. Dinkum Sands is an island under the Convention and is part of Alaska's coast line for Submerged Lands Act purposes.

The question here is whether Dinkum Sands is an island and therefore constitutes part of Alaska's coast line for purposes of delimiting the State's submerged lands. Dinkum Sands is an alluvial formation in the Flaxman Island chain (the islands that enclose Stefansson Sound) about eleven miles north-northeast of Prudhoe Bay. Article 10 of the Convention defines "island" as "a naturally-formed area of land, surrounded by water, which is above water at high tide."

The United States Coast and Geodetic Survey first surveyed Dinkum Sands in 1949-50. Report at 230-31. The federal surveyors reported that the feature "bares three feet at mean high water[24]," *id.* at 231, making it unqualifiedly an island. Official United States' nautical charts showed it as an island for some years thereafter. *Id.* at 232, 242; Ak. Exs. 84A-201, -324, -325, -327, -328; *see* Tr. 510-15, 1514-18, 1611-12. In 1970 the Baseline Committee used it as a base point — that is, as part of Alaska's coast line — for delimiting the territorial sea, and continued to do so until 1983 (Report at 244; Ak. Ex. 84A-208), four years after this case was filed. The official leasing map the United States proposed in January of 1979 used Dinkum Sands as part of Alaska's coast line and measured the seaward limit of Alaska's submerged lands from it. Ak. Ex. 84A-102. The

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[24]The Convention's expression "high tide" has been equated with the tidal datum of mean high water. *See United States v. California* (Supplemental Decree), 382 U.S. 448, 450 (1966); *see also Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 23, 26 (1935); 2 Aaron L. Shalowitz, *Shore and Boundaries* ("2 Shalowitz") 365, n. 10 (U.S. Dept. of Commerce Pub. 10-1, 1964).

United States retreated from this position only after this case was filed,[25] and despite the Baseline Committee's continued treatment of Dinkum Sands as an island.

The 1949 survey remains the only "basic hydrographic survey"[26] of the area. Tr. 496-497. The United States concedes that Dinkum Sands was above mean high water then — *i.e.*, it was an island. Report at 244. Since then, it has been observed many times both above water (*id.* at 233) and above mean high water (*id.* at 276-77, 282), although it occasionally has been observed submerged, the fact that gives rise to this dispute.[27]

The Master acknowledges that the Convention does not require that an island be *permanently* above high tide. *Id.* at 300. Without support in law or "legislative history," however, he finds that the Convention's definition of an island nonetheless contains an "implicit modifier" at least as strong as " 'generally,' 'normally,' or 'usually.' " *Id.* at 302. Unsure how much of the time Dinkum Sands is below high tide, he cannot conclude that it is "generally, usually or normally" above high tide and therefore recommends that it be found not an island. *Id.* at 310.

Dinkum Sands is no less an island, however, than the far more dynamic "mudlumps" off Louisiana's coast. This

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[25]The United States filed the case in May 1979, and proposed not using Dinkum Sands to delimit Alaska's submerged lands in June, 1979. Report at 233.

[26]Shalowitz describes a basic hydrographic survey in 2 Shalowitz, *supra* note 24, at 240, *quoted* in the Master's Report at 231 n. 6.

[27]It is impossible to determine whether Dinkum Sands is an island by simply observing whether it is above or below water. The tidal range in the Beaufort Sea is only six inches, *id.* at 236, and much larger changes in water level are caused by non-tidal seasonal influences and weather. *Id.* at 236-239 and 246. During the open water months (July through September, when observations the Master relies on "primarily" were made), sea level can be 1.5 feet higher than at other times. *Id.* at 236-39, 246.

Court and others have consistently treated the mudlumps as islands despite their episodic submergence or outright disappearance. Dinkum Sands must be similarly treated. It is a permanent feature, *id.* at 288; since 1949 it has been observed above high tide and sometimes below, *id.* at 307-08; and the United States considered it an island for Submerged Lands Act purposes until 1979 and for purposes of its international relations until 1983.

Alaska makes alternative submissions. First, the Convention's definition of island contains no implicit modifier, and both prior law and practice establish that an island that is occasionally submerged is no less an island. Alternatively, Dinkum Sands is an island except when it is below high tide, even though it may be difficult to determine when that is.

A. A feature retains its status as an island even if it is sometimes submerged.

Although more dynamic than Dinkum Sands — to the point of ephemeralness — the alluvial islands and mudlumps off the mouth of the Mississippi River are strikingly similar to Dinkum Sands. They move, disappear, and reappear.[28] Since *The Anna*, 165 E.R. 809 (1805), they

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[28] Mr. Miller, United States delegate to the 1930 Hague Codification Conference, described them as "moving islands off the mouth of the Mississippi." 3 Acts of Conference, *supra* note 11, at 147 (AK. Ex. 85-001). B. A. Hardey, Chairman of the Louisiana Mineral Board, testified at a Submerged Lands Act hearing that "[s]ome of the islands disappear and bob up somewhere else sometimes." *Joint Hearings on S. 1988*, 80th Cong., 2d Sess. 111-112 (1948). John L. Madden, Louisiana Special Assistant Attorney General, explained that "[o]ver broad and far-reaching spaces offcoast, our marginal waters are astoundingly shallow — so shallow, in fact, that islands therein appear to move in some mysterious manner, emerging here and sinking there, and being lost until they are discovered as forming a part of the coast or other islands of greater permanence." *Id.* at 384-385. Solicitor General Cox "described them as islands despite their highly changeable and perhaps mobile nature." Report at 292 (citation omitted). The Master, however, inti-

have consistently been treated as islands and used to delimit both the nation's maritime boundaries and Louisiana's Submerged Lands Act grant.

The Anna presented the issue whether a British privateer had captured the vessel on the high seas or within the United States' maritime boundaries. Resolution of the issue turned on whether the boundaries were reckoned from certain mudlumps off the mouth of the Mississippi River. Captor's counsel argued that the mudlumps were not United States' territory because they had "no line of coast" and were merely "temporary deposits," that the court should not recognize such "equivocal" features as possessing "the ordinary qualities of territory," that territory "should form a visible part of the country to which they are ascribed" so neutrals could see them, and that they should but did not afford a base for defending the nation. *Id.* at 811-12 (emphasis deleted). The court rejected the argument:

> [T]here are a number of little mud islands composed of earth and trees drifted down by the river which form a kind of portico to the mainland. It is contended that these are not to be considered as any part of the territory of America, that they are a sort of "*no man's land*," not of consistency enough to support the purposes of life, uninhabited, and resorted to, only, for shooting and taking birds' nests. . . . I am of a different opinion; I think that the protection of territory is to be reckoned from these island; and that they are the natural appendages of the coast on which they border, and from which they indeed are formed. . . . Whether

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mates (without determining) that the record in this case may not establish sufficient similarity between the Mississippi mudlumps and Dinkum Sands: "The record contains no evidence, however, of the behavior of these features in general." Report at 292-93 n. 49. With all due respect, the foregoing descriptions of the mudlumps' behavior establishes that they are a remarkably apposite precedent for determining whether Dinkum Sands is an island.

> they are composed of earth or solid rock, will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil.

Id. at 815 (footnote omitted).

Since *The Anna*, this nation has uniformly treated these ephemeral features as islands for various purposes,[29] including using them to delimit its maritime boundaries in international relations and Louisiana's Submerged Lands Act grant. For example, the United States' delegate to the 1930 Hague Codification Conference observed that any definition of island would have to accommodate a wide variety of circumstances, including "the moving islands at the mouth of the Mississippi." 3 *Acts of Conference, supra* note 11, at 146-47 (AK. Ex. 85-001). In 1963, "Solicitor General Archibald Cox described them as islands [in an opinion addressing 'Title to Naturally-Made Lands Under the Submerged Lands Act'] despite their highly changeable and perhaps mobile nature." Report at 292 (citation omitted). The *Louisiana* case presented the question whether certain mudlumps were "extensions of the mainland" from which bay closing lines could be drawn. The United States argued that *The Anna* determined only that the mudlumps were islands, not that they were part of the mainland. *Louisiana Boundary Case*, 394 U.S. at 64 n. 84. The Court equated the mudlumps with islands when it stated that "every... mudlump *or other insular formation*" could, under proper circumstances, be deemed part of the mainland. *Id.* at 65 n. 84 (emphasis added).

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[29] *See, e.g.*, Armstrong's discussion of President Roosevelt's executive orders proclaiming certain bird refuges that treated the mudlumps as islands. Report of Special Master Walter P. Armstrong, Jr. (July 31, 1974) at 11-12, *United States v. Louisiana* (No. 9, Original) (Oct. Term, 1974), *reprinted in* Reed, *et al., supra* note 23, at 173 (discussing Exec. Order No. 675 (1907) and Exec. Order 682 (1907)).

Five years after the decision in the *Louisiana Boundary Case*, Special Master Armstrong recommended, and the Court agreed, that Louisiana's coast line should be measured from the mudlumps. Report at 292.

Further, both English and United States common law have accorded island status to other features that periodically disappear. For centuries, the English rule has been that land that submerges retains its character unless it is submerged for so long that it is no longer identifiable if it eventually reappears. Sir Matthew Hale's[30] description has often been quoted:

> If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced; yet if by situation and extent of quantity, and bounding upon the firm land, the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject doth not lose his propriety . . . .

Hale, *De Jure Maris* (Francis Hargrave, ed. 1787), *reprinted in* Stuart A. Moore, *A History of the Foreshore* 381 (1888). How long the land is submerged is irrelevant so long as it is not permanent:

> [A]ccordingly it was held by Cooke and Foster, *M. 7 Jac. C.B.* though the inundation continue forty years.
>
> . . . .
>
> But if it be freely left again by the reflux and recess of the sea, the owner may have his land as before, if he can make it out where and what it was; for he cannot lose his propriety of the soil, though it be for a time

[30]Described by Shalowitz as "one of the foremost jurists of 17th century England." 1 Shalowitz, *supra* note 3, at 91.

> become part of the sea, and within the admiral jurisdiction while it so continues.

Id. at 381, 383.

State courts also have employed Lord Hale's rule. The Supreme Court of Illinois found that a landowner did not lose title to an island, totally submerged for a considerable length of time, when it reappeared and was identifiable by its original description. *Randolph v. Hinck*, 277 Ill. 11, 18, 115 N.E. 182, 184 (1917). Similarly, the court in *Mulry v. Norton*, 100 N.Y. 424, 434, 3 N.E. 581, 585 (1885), stated that submergence does not affect title unless it is "followed by such a lapse of time as will preclude the identity of the property from being established upon its reliction," and the owners of beach property did not lose their title when the beach submerged due to storms and tides and subsequently reformed. *Id.* at 436; 3 N.E. at 586. In *Baumhart v. McClure*, 21 Ohio App. 491, 153 N.E. 211 (1926), the court found that a lot along Lake Erie that had been submerged for forty or fifty years still belonged, upon reappearance, to the original owner. *Id.* at 494; 153 N.E. at 212. *See also City of Chicago v. Ward*, 169 Ill. 392, 407-408; 48 N.E. 927, 931-32 (1897) (owner retained title to lands submerged and subsequently reclaimed in Lake Michigan).

Federal courts also follow the common law rule. In *Widdicombe v. Rosemiller*, 118 F.Cas. 295, 299-300 (C.C.W.D. Mo. 1902) (Nos. 2, 253-55), the court invoked "the fundamental doctrine laid down by Sir Matthew Hale's De Jure Maris" in holding that the United States' title to an island was not lost by erosion or submergence during a period of high water of the Missouri River. *Hammonds v. Ingram Industries, Inc.*, 716 F.2d 365, 369 (6th Cir. 1983), reaffirmed the rule "that an island's submergence effects its disappearance only if lasting for an extended period of time."

Finally, international law today affords continuing coast line status, in the context of straight baselines, to unstable islands even if the islands disappear altogether. Article 7.2 of the 1982 Law of the Sea Convention provides that base points for drawing straight baselines "may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State . . . ."[31]

Notwithstanding these precedents, the United States argued that Article 10 implicitly requires that an island be "permanently" above high tide. The Master rejects this argument, noting that the word "permanently" had modified "above water at high tide" in a draft of the Convention's definition of an island and was *deleted* at the United States' urging. Report at 299-300. The Master nevertheless finds that Article 10 contains an "implicit modifier that is at least as strong as 'generally,' 'normally,' or 'usually'." Report at 302. As the Court wrote in discussing the United States' argument that a spoil bank should not be part of the coast because "it is not 'purposeful or useful' and is likely to be 'short-lived'," "[i]t suffices to say the Convention contains no such criteria." *Louisiana Boundary Case*, 394 U.S. at 40-41, n. 48. Even the United States' expert on islands in international law has written that an island need not be *permanently* above high tide, citing *The Anna* among other authorities. Clive Symmons, *The Maritime Zones of Islands in International Law* 23 (1979).

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[31] United Nations, *The Law of the Sea, Official Text of the United Nations Convention on the Law of the Sea* 4 (1983). This "deltaic baseline" provision of the 1982 Convention is among those recognized by the United States, while refusing to ratify the Convention, as reflecting customary international law. *See* Statement on United States Ocean Policy, I Pub. Papers of the President 378 (Ronald Reagan) (Mar. 10, 1983), 3 C.F.R. 22 (1983).

Figure 2. Admiral Nygren's 1949 photograph of Dinkum Sands, AK 84A-204, showing a 30-foot high survey target supported by guy wires anchored to 55-gallon drums filled with sand and gravel. Tr. 1330-32.

The Master's finding of an "implicit modifier" in Article 10 is unsupported by case law or the preparatory work of the Convention to which the Court has looked in interpreting equivocal provisions of the Convention. *See, e.g., Louisiana Boundary Case*, 394 U.S. at 43-47, nn. 52-63. Article 10 is unequivocal, however. Moreover, the preparatory work evidences no requirement that an island be "generally, normally, or usually" above water at high tide. In urging this revision of the Convention's definition, the Master recommends what the Court has repeatedly refused to do, *i.e.*, "fashion a new rule" that the drafters chose not to adopt. *See Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 97 (1981); *see generally Federenko v. United States*, 449 U.S. 490, 512-513 and cases cited.

B. Dinkum Sands, a permanent alluvial formation that is far more stable than the Mississippi mudlumps, is an island under the Convention.

As discussed above, an island retains its island status even if sometimes submerged. While the feature is sometimes submerged, the United States concedes that Dinkum Sands has not disappeared. Report at 288. In fact the evidence shows that Dinkum Sands is far more stable than the Mississippi mudlumps.

Dinkum Sands was first definitively charted in 1949 when a United States Coast and Geodetic Survey party reported it had discovered an island lying between Cross Island and Narwhal Island in the Alaskan Beaufort Sea. Report at 231. The official record of the survey, or "smooth sheet," states that Dinkum Sands "bares three feet at mean high water." *Id.* Admiral Harley Nygren, a member of the survey party, described the 1949 survey of the Beaufort Sea and the discovery of Dinkum Sands, and produced a photographic slide he had taken of Dinkum Sands several weeks after its first sighting by his party. Ak. Ex. 84A-204 (reproduced opposite); *see* Tr. 1330-32 and 1362-63. At that time, the

island was "3 feet or 4 feet above the water level." Tr. at 1330.

The 1949 survey of the Beaufort Sea produced, insofar as relevant here, two nautical charts of the Dinkum Sands area. Report at 232. These were denominated Coast and Geodetic Survey Charts Nos. 9472 and 9473 (today redesignated as 16061 and 16046). Both charts as originally published depicted Dinkum Sands as an island, Report at 232, consistent with the survey's report that it "bares three feet at MHW." (Other maps also showed Dinkum Sands as an island, including maps prepared by the United States Geological Survey and the Army Mapping Service. Report at 243 and n. 15.)

That depiction changed as a result of a 1955 report from the *Merrick*, a Navy vessel that passed through the area and cryptically reported "Dinkum Sands — survey target and island not there." Report at 232 and 242; *see* Ak. Ex. 84A-330(a) at 9. The *Merrick* got no closer to Dinkum Sands than three miles, however, and "observations were impeded by dangerous ice conditions and a strong southwest wind tending to raise the sea level significantly." Report at 242. To avoid icebergs bearing down on it, the *Merrick* had to weigh anchor several times and take evasive action in poor visibility. Ak. Ex. 84A-330(b) and (c); Tr. 1521-40, 1666-1700. Since strong winds can elevate water levels "significantly," Report at 242, the *Merrick* easily could have missed a temporarily submerged Dinkum Sands, even if it was well above mean high water.

Although the 1949 survey remains the only "basic survey" of the area, Report at 231 and n. 6, the cryptic 1955 *Merrick* report prompted the Coast and Geodetic Survey — which in charting waters chooses to err on the side of navigational safety, *see, e.g.*, 2 Shalowitz, *supra* note 24, at 89, 248 — to change its charts. Subsequent editions of the charts "conservatively" depicted Dinkum Sands as a low-tide elevation rather than an island. Report at 243. As a low-tide elevation,

Dinkum Sands would concededly be "insufficient to create Submerged Lands Act rights in Alaska." Report at 230.

Nevertheless, the Baseline Committee on July 27, 1970 used Dinkum Sands as an island to delimit the United States' territorial sea and Alaska's Submerged Lands Act grant. Ak. Ex. 84A-205, -210. In drawing the three-mile boundary from Dinkum Sands as it did from the other barrier islands in the Flaxman chain, the Committee relied on the only basic survey of the Beaufort Sea. Nygren, then an Admiral and a Committee member, believed the change in the chart's depiction of Dinkum Sands was based on insufficient evidence, and the Committee treated Dinkum Sands as an island for the next thirteen years, until nearly four years after this case was filed in 1979. Tr. 1369-71; *see* Ak. Ex. 84A-208 (Baseline Committee minutes for January 12, 1983, reflecting the Committee's elimination of the arcs of territorial sea generated by using Dinkum Sands as a basepoint).

Consistent with the Baseline Committee's approach, federal and state officials agreed on a proposed leasing map showing the submerged lands within three miles of Dinkum Sands as belonging to Alaska. Report at 232-33. Erk Reimnitz, an Interior Department staffer who was the United States' principal witness at the 1984 trial and had erroneously claimed that the 1949 survey was off by three feet,[32] urged that Dinkum Sands not be treated as an island. Higher officials ultimately adopted his view, but not until June of 1979 (*id.* at 233), after this case had been filed.

In light of the legal authorities, the Baseline Committee's treatment of Dinkum Sands as an island and thus part of Alaska's coast line was correct. The Master elects not to treat it as an island because, applying his "implicitly modi-

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[32]*See* Erk Reimnitz, et al., U.S. Dept. of the Interior Geological Survey, *Dinkum Sands* (Open File Report 80-360) (U.S. Ex. 84A-504).

fied" definition of "island" to observations made "primarily" during the brief open-water seasons of 1981 through 1983, Report at 308, he cannot find that it is above water at high tide "generally," "normally," or "usually." Report at 309. Again, it should suffice that "the Convention contains no such criteria." *Louisiana Boundary Case*, 394 U.S. at 41 n. 48.

The Master's findings establish that Dinkum Sands has more island characteristics than the Mississippi mudlumps repeatedly deemed to be islands. It is a permanent feature, as the United States concedes. Report at 288. The few occasions it has been observed below high tide have generally been at the end of the open water period in late summer, *id.* at 309 and n. 66, just before it rebuilds prior to the autumn freeze-up. *Id.* at 286. The only "basic hydrographic survey" of the area found Dinkum Sands an island in 1949, a determination the United States concedes was correct. *Id.* at 242, 244, and 308. And the United States used it to delimit the territorial sea and Alaska's Submerged Lands Act grant until long after this litigation was begun. In light of this evidence, the handful of occasions on which Dinkum Sands was submerged are insufficient to change its status as an island.

C. Alternatively, Dinkum Sands is an island except when it is below high tide.

At the very least, Dinkum Sands should be deemed an island except when it is below the level of mean high water. The Master is uncomfortable with this notion, although he recognizes that it is consistent with the concept that the "normal baseline changes when the shoreline changes." Report at 305. According to the Master, "Article 10 does not demand an interpretation under which islands may frequently come and go." *Id.* He dismisses the argument summarily, without so much as a glance at the common law, asserting that it would require difficult monitoring and "go

against the Court's strong emphasis on definiteness and stability of grants under the Submerged Lands Act."[33] *Id.* at 306.

While monitoring may be inconvenient, the parties have practical means at their disposal to deal with those matters if they wish. *See Louisiana Boundary Case*, 394 U.S. at 34 (parties may resolve such problems through legislation or agreement). In any event, the Court's emphasis on definiteness and stability of Submerged Lands Act grants is unrelated to "definite and stable" *coast lines.* The Court emphasized certainty in the *definitions* used for Submerged Lands Act purposes. *See United States v. California*, 381 U.S. at 167. Indeed, in *United States v. Louisiana (Texas Boundary Case)*, 394 U.S. 1, 5 (1969), the Court expressed its view that an ambulatory coast line was a necessary consequence of its adoption of the Convention's *definitions* for Submerged Lands Act purposes because the Convention *defines* coast line as "the modern, ambulatory coastline." *Id.*

This concept became more deeply embedded in the Submerged Lands Act in the *Louisiana Boundary Case*, 394 U.S. at 32-35. There, Louisiana raised concerns identical to the Master's with regard to defining inland waters along Louisiana's shifting, changeable coast line. Louisiana argued that a fixed " 'Inland Water Line' " was the only way to fulfill the " 'requirements of definiteness and stability which should attend any congressional grant of property rights belonging to the United States' " as required by this Court in the 1965 *California* case. *Louisiana Boundary Case*, 394

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[33]The Master also asserts that "navigational interests" favor using "reliably visible basepoints," and that this provides justification for why a feature that "frequently slumps below the high-water datum . . . should not be treated as an island." Report at 304. Under the Convention, however, low-tide elevations within the territorial sea are used as basepoints for measuring the territorial sea. *See* Article 11. In light of its repeated sightings above mean high water, Dinkum Sands is more "reliably visible" than the average low-tide elevation.

U.S. at 32-33. The Court rejected Louisiana's concerns, and with them the notion that the Court was free "to adopt the definition which best solved the problems of . . . the peculiarities of the highly unstable Louisiana shore." *Id.* at 33.

At the least, then, Dinkum Sands is an island except when it is below high tide. To deny Alaska that much, when Louisiana received *permanent* property rights on the basis of the ephemeral Mississippi mudlumps, would contravene section 6(m) of the Alaska Statehood Act which entitles Alaska to the same rights under the Submerged Lands Act as other States.

The Court accordingly should reject the Master's recommendation with respect to Dinkum Sands and decree that it is an island to be used as part of Alaska's coast line under the Submerged Lands Act. Alternatively, it is an island except when it is below water at high tide.

III. The submerged lands within the exterior boundaries of NPRA passed to Alaska at statehood.

Alaska excepts to the Master's recommended finding that the United States retained title to lands underlying tidally influenced waters inside the boundary of the National Petroleum Reserve-Alaska ("NPRA") and, as a result, defeated Alaska's title to those lands at statehood.

Whether a pre-statehood federal reservation defeated State title to submerged lands and retained title in the United States was addressed in *Utah Division of State Lands v. United States ("Utah")*, 482 U.S. 193 (1987). In *Utah*, the Court summarized the teachings of prior equal footing doctrine cases: (1) the United States holds lands under navigable waters in Territories " 'in trust' " for future States; (2) while the United States can defeat a new State's title by a pre-statehood conveyance to a third party, it will do so "*only* 'in case of some international duty or public exigency' "; and (3) the Court will not "lightly infer a congressional intent to defeat a State's title" and will "begin

with a strong presumption against conveyance" that will not be overcome "unless the intention was definitely declared or otherwise made very plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the waters . . . ." *Id.* at 196-98 (citations omitted) (emphasis in original).

The Court has found only once that Congress intended to *convey* submerged lands within a territory, a "singular exception" to the rule of State ownership which "depended 'on very peculiar circumstances.' " *Id.* at 198 (citation omitted). Unlike a pre-statehood *conveyance* that necessarily defeats State title, moreover, Congress may not intend a pre-statehood *reservation* to have that effect as it may still hold the lands "for the ultimate benefit of future States" and "control, develop, and use the waters for its own purposes" even if the land later passes to the State. *Id.* at 202 (citation omitted). As a result, the Court will not find that a pre-statehood federal reservation defeats a new State's title unless the United States establishes both "that Congress *clearly intended to include* land under navigable waters within the federal reservation" *and* "that Congress *affirmatively intended to defeat* the future State's title to such land."[34] *Id.* (emphasis added). Under this stringent two-

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[34]The Master finds that there is "a less demanding standard" for showing that a pre-statehood withdrawal and reservation of lands underlying the territorial sea defeated State title under the Submerged Lands Act than the *Utah* standard for showing that a pre-statehood withdrawal and reservation of lands underlying inland waters defeated State title under the equal footing doctrine. Report at 394. Congress intended, however, that *Pollard* and its progeny apply equally to both inland waters and the marginal sea. See S. Rep. No. 133, 83d Cong., 1st Sess. 6-8 (1953), *reprinted in* 2 1953 U.S. Code Cong. & Admin. News 1474; H.R. Rep. No. 695, 82d Cong., 1st Sess. 5 (1951), *reprinted in* 2 1953 U.S. Code Cong. & Admin. News 1395 ("1951 House Report"), incorporated in H.R. Rep. No. 215, 83d Cong., 1st Sess. 1 (1953), *reprinted in* 2 1953 U.S. Code Cong. & Admin. News 1385; H.R. Rep. No. 1778, 80th Cong., 2d Sess. 6-9, 14-16 (1948), *reprinted in* 2 1953

pronged test, Congress did not defeat Alaska's title to the submerged lands within the NPRA's boundaries.

A. Congress did not clearly intend to include submerged lands in NPRA and did not clearly intend to defeat Alaska's title to them.

1. The Pickett Act did not authorize the federal executive to reserve the submerged lands in NPRA.

The Alaska Right-of-Way Act of May 14, 1898, ch. 299, 30 Stat. 409 (current version primarily at 43 U.S.C. §§ 942-1 - 942-9 (1988)), limited any "implied authority" the federal executive might have had to withdraw submerged lands. *See* Report at 406 n. 45. This Act codified for Alaska the principle that the United States holds the beds of navigable waters in territories "in trust" for future States. *Id.* The Master nonetheless concludes that Congress impliedly delegated to the federal executive authority to reserve Alaska's equal footing doctrine lands within NPRA in the Pickett Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847 (formerly codified at 43 U.S.C. §§ 141-42 (1970); repealed in part 1976; current version at 43 U.S.C. § 142 (1986)). *Id.* at 413. With "no direct evidence that thought was given to withdrawal of tidelands and submerged lands," the Master believes the Pickett Act must be construed to authorize such withdrawals by implication because some purposes for which it was enacted "may have been thought at the time to require them." *Id.*

Both the language of the Act and the circumstances at the time of its enactment, however, compel finding that

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U.S. Code Cong. & Admin. News 1415 incorporated in the 1951 House Report at 6. The Submerged Lands Act excepts from the statutory grant to the States "all lands *expressly* retained by . . . the United States when the State entered the Union," 43 U.S.C. § 1313(a) (emphasis added), a statutory standard that is at least as strong as that for inland waters under *Pollard* and its progeny.

Congress did not intend the Pickett Act to authorize reservation of submerged lands. Congress limited the authority delegated to reservation of "public lands," 43 U.S.C. § 141 — *i.e.*, lands subject to sale or disposal under general laws unless another meaning is clear.[35] Tidelands and inland navigable waterways are not subject to sale or other disposal under general laws and therefore are not "public lands."[36] While the definition of "public lands" is not absolute in every context, the general definition is presumptively intended unless a different intent is clearly expressed.[37] The Pickett Act, moreover, grants authority to withdraw public lands "from settlement, location, sale, or entry" under the public land laws and reserve "the same" for public purposes. 43 U.S.C. § 141. Submerged lands, however, "were *already* exempt from sale, entry, settlement, or occupation under the general land laws." *Utah*, 482 U.S. at 203 (emphasis added) and cases cited.

The Master rejects application of the *Utah* analysis of "public lands" for two reasons. First, he finds that lands beneath navigable waters in Alaska were not "wholly immune from the general land laws" because Congress had opened a small area of tidelands to gold mining at the turn

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[35] *Minnesota v. Hitchcock*, 185 U.S. 373, 391 (1902); *Barker v. Harvey*, 181 U.S. 481, 490 (1901); *Newhall v. Sanger*, 92 U.S. 761, 763 (1876).

[36] *Mann v. Tacoma Land Company*, 153 U.S. 273, 284 (1894); *see also Borax Consolidated, Ltd.*, 296 U.S. at 17 (1935); 2 Curtis H. Lindley, *Lindley on Mines* 1015 (3rd Ed. 1914) ("[t]here is no principle involved in the consideration of the public land system better settled or more clearly enunciated than that lands under tidal waters, and below the line of ordinary high tide, are not 'public lands' ").

[37] *See Northern Lumber Co. v. O'Brien*, 139 F. 614, 616, (8th Cir. 1905) ("[T]he words 'public land' have long had a settled meaning in the legislation of Congress, and, when a different intention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws.").

of the century. Report at 408. The Master's point here is unclear; the Pickett Act did not authorize withdrawals from the mining laws. *See* 43 U.S.C. §142 (1970) (before 1976 amendment). Second, he finds that the context of the Pickett Act suggests a different meaning for "public lands." His idea of "context" completely ignores the language of the statute, which is entirely consistent with the common definition of "public lands" — *i.e.*, lands subject to sale, location, and entry under the public land laws. This Court has defined "context" for the meaning of "public lands" as "reference to a definitional section or . . . context in a statute." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 549 n.15 (1987).

Nevertheless, even ignoring the plain language of the Pickett Act, its purposes did not require inclusion of the submerged lands. Recognizing that this Court found in *Utah* that even a reservation for a reservoir did not necessarily indicate an intent to reserve the bed of the lake, the Master says that some Pickett Act purposes "may have been thought at the time to require [submerged lands]." Report at 413. Attributing such a speculative intent to Congress disregards this Court's finding that "Congress 'early adopted and constantly has adhered' to a policy of holding land under navigable waters 'for the ultimate benefit of future States.' " *Utah*, 482 U.S. at 201. Further, it defies logic to infer that Congress thought it necessary to include submerged lands within the Act's otherwise nationwide purview when it would apply only to Arizona, New Mexico, Hawaii, and Alaska; the other 46 States had already entered the Union and taken title to their submerged lands.

Simply put, nothing establishes "that Congress clearly intended to include land under navigable waters within the federal reservation" authority granted by the Pickett Act, and such authority should not be inferred. *Utah*, 482 U.S. at 202.

2. There was no "public exigency" requiring the inclusion of submerged lands in NPRA.

The Master significantly weakens *Utah*'s stringent standards for finding that submerged lands had been included in a reservation. Congress must make clear its intent to reserve submerged lands, and the reservation must be based on a "public exigency" or "international duty." Report at 416-17; *Utah*, 482 U.S. at 197-98. The Master, however, interprets those standards so broadly that the required intent might be found in any case, effectively eliminating them. He concludes that there was a "public exigency" justifying the reservation of submerged lands in NPRA because the executive order creating it said that "the future supply of oil for the Navy is at all times a matter of national concern." Report at 423-25. He finds the requirement that the federal government clearly express an intent to include submerged lands satisfied because, in light of its purpose, NPRA's boundaries were drawn to include submerged lands. *Id.* at 422. Neither of those facts meets the standards for establishing that the United States intended to reserve the submerged lands.

The Master characterizes a "public exigency" as "an important purpose justifying the conveyance or reservation." Report at 417. Every reservation presumably is for an "important purpose." It is hardly to be supposed that federal reservations are created for unimportant purposes. "Exigency" connotes something more than merely "important," however, and is defined as "exacting or requiring immediate aid or action: pressing, critical." 5 Oxford English Dictionary 539 (2d ed. 1989). "Emergency" is defined as "a state of things unexpectedly arising, and urgently demanding immediate action." *Id.* at 176. Thus, emergency differs from exigency only in its unexpected nature. Reserving submerged lands for reasons that are pressing, urgent, and requiring immediate action is quite different from reserving them simply for "important reasons." Reserving them as a

possible future source of supply for the Navy was inherently not urgent as there was no immediate need and the lands in any event were already reserved and unavailable for private exploitation.

Further, mere inclusion of submerged lands within a reservation's boundaries does not establish an intent to reserve them. *See Utah*, 482 U.S. at 203. The Master inferred such an intent, however, from his speculative conclusion that the drafters had no reason to include submerged lands within the reserve's boundaries if they did not intend to reserve them. Report at 422. The United States frequently includes water areas within the exterior boundaries of reserves, however, without intending to reserve the submerged lands. *Utah*, 482 U.S. at 202; *Montana v. United States*, 450 U.S. 544, 554 (1981).

The plain language of the order, moreover, indicates that NPRA was to serve as a possible "future supply of oil for the Navy." Reserving the submerged lands was unnecessary for this purpose. The United States already held them in trust for the future State — *i.e.*, they already were reserved. No State yet existed that could interfere with their continued reservation or NPRA's purpose. Finally, oil and gas development was not permitted in submerged lands in Alaska in 1923 or for 35 years thereafter. Therefore, reserving the submerged lands was unnecessary to preserve the oil under them, and no "public exigency" required their inclusion.

3. Section 11(b) of the Alaska Statehood Act is not "affirmative" evidence that Congress intended to defeat Alaska's title.

The Master does not conclude that the executive order creating NPRA indicated that Congress intended to defeat Alaska's title to the submerged lands within NPRA. He instead finds the required expression of intent in section 11(b) of the Alaska Statehood Act, passed some 35 years later. Section 11(b) does not address submerged

lands at all, however. The Master bases his conclusion on inferences about how Congress might have wanted to exercise jurisdiction in NPRA rather than on any congressional expression of intent to defeat State title.

Because section 11(b) broadly describes the lands that would be subject to Congress's power to exercise exclusive legislation after statehood, the Master infers that Congress must have intended the United States to continue to own the submerged lands. His analysis does not satisfy this Court's requirement that Congress definitely declare or otherwise make very plain its intent to defeat the future state's title. He does not identify when or how Congress decided to defeat the State's title, and understandably so, for Section 11(b) contains no such provision. He concludes only that the manner in which Congress addressed exclusive legislative authority is *consistent* with federal ownership of the submerged lands. This does not meet the stringent *Utah* standard for defeating State title to sovereign submerged lands.

Section 11(b)'s purpose was to ensure that the State would not impose laws inconsistent with the military's use of certain lands. It does not address *title* at all. It provides that the lands it reaches are subject to Congress's power to exercise exclusive legislative *jurisdiction*, and defines the areas subject to this power as those lands to which the United States has title and uses for military purposes, including NPRA.

Section 11(b) constitutes State consent to exclusive Congressional legislative authority for military areas as required by the "enclave clause" of the United States Constitution, art. I, § 8, cl. 1.[38] This Court has interpreted the State

[38]The enclave clause provides that Congress shall have power "[t]o exercise exclusive Legislation... over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings."

consent requirement as applying only to exclusive federal *jurisdiction, not* to the United States' ability to "*purchase*" land. *See, e.g., Kohl v. United States*, 91 U.S. 367, 374 (1876). The Congressman primarily advocating Section 11(b) explained that it would give Congress the *option* to exercise exclusive jurisdiction *if it chose*, but that "there shall be *concurrent* jurisdiction *unless* Congress by future action should reserve or pass legislation which would grant *exclusive* jurisdiction to the Federal Government." *Hawaii-Alaska Statehood: Hearing Before the House Comm. on Interior and Insular Affairs*, 84th Cong., 1st Sess. 261 (1955) (comments by Rep. Saylor) (emphasis added). Thus, interpreting section 11(b) as definitely declaring an intent to defeat Alaska's title gives it unintended meaning.

The Master assumes that the United States must *own* all lands within a military area to exercise exclusive *jurisdiction.* Ownership is not required for the exercise of jurisdiction, however, and Congress had no reason to defeat State title to submerged lands for it always retains plenary authority to regulate navigable waters for defense purposes. *See* 43 U.S.C. § 1314(a); *Pollard*, 44 U.S. (3 How.) at 229-30; *cf. Utah*, 482 U.S. at 208 (vesting of Utah's title to the bed of Utah Lake would not prevent the United States from subsequently developing a reservoir or water reclamation project).

The District Court for Alaska recently rejected the United States' similar section 11(b) analysis in a case addressing the effect of Public Land Order ("PLO") 82, a 1943 withdrawal of the entire North Slope of Alaska (48 million acres) that reserved minerals "for use in prosecution of the war":[39]

> The United States attaches talismanic significance to section 11(b) and 11(b)(iii) of the [Alaska Statehood

[39] 8 Fed. Reg. 1599 (1943). PLO 82 was revoked in 1960, barely a year after Alaska's admission. Public Land Order 2215, 25 Fed. Reg.

> Act], yet these sections simply make no reference to lands beneath navigable waters in PLO 82. When considered in light of Congress' definite intent not to defeat state title to PLO 82 submerged lands [when the lands were reserved] in 1943, it is extraordinary to suggest that Congress expressed the opposite intent through the broad terms of section 11(b) and 11(b)(iii).

Alaska v. United States, No. A87-0450-CV (HRH) (D. Alaska 1996) (Order on State of Alaska's Motion for Partial Summary Judgment and the United States' Cross-Motion for Partial Summary Judgment) at 64-65 (attached hereto as Appendix B).

The Master analyzes Congress's intent in a manner prohibited by *Utah*, inferring from Congress's reservation of the power of exclusive legislation an intent to defeat State title to the submerged lands. *Utah* precludes that conclusion because Congress in no way indicated that it meant to defeat the State's title. Doing so simply was not necessary to regulate the waters for defense purposes. Without the requisite clear expression of Congress's intent to defeat State title to these lands, title is presumed to have passed to the State. *Utah*, 482 U.S. at 197-98.

That presumption is bolstered by Congress's awareness of both the general rule that the United States holds submerged lands in territories in trust for future States and the codification of the rule in the 1898 Alaska Right-of-Way Act. Report at 438. The Master concludes that this fact shows only "congressional awareness of the general rule" and "does not speak to whether Congress meant to make an exception to the general rule" for NPRA. *Id.* The Master's

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12,599 (1960). Nonetheless, the United States claims that it defeated Alaska's equal footing doctrine title to all of the lands underlying navigable waters on the North Slope. Solicitor's Opinion M-36911, 86 Interior Dec. 151 (1978), *supplemented and modified*, 100 Interior Dec. 103 (1992).

comment misses the point, for the rule is that title to lands underlying navigable waters passes to a new State under the equal footing doctrine *unless* Congress *affirmatively defeats* State title. Had Congress intended an exception to the general rule, it would have said so. In the face of its awareness of the equal footing doctrine and silence as to any exception, the only permissible inference is that it intended no exception.

B. An attempt by the United States to retain title to submerged lands in a statehood act would violate the equal footing doctrine.

Even if Congress had clearly expressed an intent *in the Alaska Statehood Act* to retain the submerged lands in NPRA after statehood, it would have run afoul of the equal footing doctrine. The doctrine prohibits federal retention of sovereign lands as *a condition of statehood;* alternatively, it limits any federal retention to the narrowest interests necessary.

1. Withholding sovereign rights as a condition of statehood would violate the equal footing doctrine.

The equal footing doctrine prohibits the United States' retention of submerged lands in a statehood act. The Master's conclusion that a section of the Alaska Statehood Act defeated State title is based on the unconstitutional premise that Congress can withhold State sovereign rights as a condition to granting statehood. If section 11(b) in fact provided that the State would not receive title to the lands underlying navigable waters in NPRA, it would be an unconstitutional condition to statehood, an infringement of State sovereignty that would be void.

This Court has long considered provisions of a statehood act that purport to condition the new State's admission to the Union on a retention by the United States of a part of the new State's sovereignty to be a violation of the equal

footing doctrine. In *Pollard*, the Court held that a State's title to lands underlying navigable waters is conferred not by Congress but by the Constitution, and Congress cannot retain title as a condition of statehood:

> [T]o Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights.

Id. at 229. As the Court stated in *Corvallis Sand & Gravel*, 429 U.S. at 374 (footnote omitted),

> the Court [in *Pollard*] established the absolute title of the States to the beds of navigable waters, a title which neither a provision in the Act admitting the State to the Union nor a grant from Congress to a third party [after statehood] was capable of defeating.

The Court reaffirmed the *Pollard* equal footing rule and extended it to State sovereign rights generally in *Coyle v. Smith*, 221 U.S. 559, 570 (1911). The Court determined that limitations on State sovereignty imposed as a condition of admission to the Union included in a statehood act (in that case a limitation on Oklahoma's power to determine the location of its capital) were invalid because the Constitution requires that all new States be admitted with all the powers of sovereignty and jurisdiction that pertain to original States. *Id.* at 566-74.

The United States' retention of lands underlying navigable waters as a condition of statehood would require that the State enter the Union on less than equal footing. Title to such lands is a direct incident of State sovereignty. *Hardin v. Jordan*, 140 U.S. 371, 381 (1891). "Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a

presumption against their separation from sovereignty must be indulged." *United States v. Oregon*, 295 U.S. 1, 14 (1934). A State's interest in lands underlying navigable waters is different from its interest in uplands, which can be bargained for in a statehood compact without infringing upon State sovereignty. *See Stearns v. Minnesota ex rel. Marr*, 179 U.S. 223, 244-45 (1900) (drawing a distinction between the validity of statehood compact provisions referring to Sovereign State rights and obligations and those that constitute "a mere agreement in reference to property").

A compact provision under which the United States would retain lands that are a direct incident of State sovereignty is no "mere agreement in reference to property." A State, as sovereign, holds title to the lands underlying navigable waters in trust for the public. *See Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892). While a pre-statehood conveyance does not violate the equal footing doctrine, this differs from federal retention of submerged lands as a condition of statehood. Federal territories are not entitled to equal rights of sovereignty. Conditioning a State's admission on a relinquishment of title to sovereign lands, on the other hand, diminishes the new State's sovereignty and forces admission on a less-than-equal footing with other States.

The authorities the Master cites cannot be read to condone a federal retention of submerged lands as a condition of statehood. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), found that an offshore fish trap was within the Metlakatla Indian Reservation. The Master finds significant the Court's statement that Congress's power "to make the reservation inclusive of the adjacent waters and submerged land, as well as the upland, needs little more than statement." *Id.* at 87; Report at 399. This was dictum, however, as the issue was whether Congress included adjacent *waters* within the boundaries of the reservation, described in the Act creating it as "the body of lands known as

Annette Islands." *Id.* Reservation of the submerged *lands* was not an issue in the case. Further, the case did not address Congress's power to defeat a State's title by retaining submerged lands. The Court decided it more than 40 years before Alaska's statehood and nearly 70 years before declaring this issue undecided in *Utah.*

The Master also cites two cases in which the Ninth Circuit found that pre-statehood reservations defeated Alaska's title to submerged lands. *United States v. City of Anchorage*, 437 F.2d 1081 (9th Cir. 1971); *United States v. Alaska*, 423 F.2d 764 (9th Cir. 1970), *cert. denied* 400 U.S. 967 (1970); Report at 401. These cases preceded *Utah*, however, and simply assumed that federal reservations defeated State title without applying *Utah's* two-prong test.

Finally, the Master notes that the Submerged Lands Act assumes that the United States may retain lands beneath navigable waters, as the rights it grants or confirms are subject to an exception for "all lands expressly retained by . . . the United States when the State entered the Union." 43 U.S.C. § 1313(a); Report at 401. Equal footing doctrine lands, however, are not lands that Congress *decides* to convey at statehood, and thus are unaffected by any exceptions in the Submerged Lands Act. These lands pass as a matter of constitutional law to the new State because of their special nature as sovereign lands. *Pollard*, 44 U.S. at 230.

The lands that pass to the new State under the equal footing doctrine consist of those underlying inland navigable waters and tidally influenced waters, and between ordinary high and low tides. The incorporation of the Submerged Lands Act into the Alaska Statehood Act constituted a *grant* only of the lands extending three miles seaward of the State's coast line, which do not pass to the State automatically. *See United States v. California*, 332 U.S. 19 (1947). As Congress *granted* only the lands underlying the marginal sea, it could only exclude lands within this category. The

Submerged Lands Act could not supersede the constitutionally-based equal footing doctrine. *See Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 318 (1973) ("The Submerged Lands Act of 1953 did not disturb [the equal footing doctrine]"); *see also Corvallis Sand & Gravel*, 429 U.S. at 371 n. 4. As to lands that Congress *could* except from the Submerged Lands Act grant to the States, moreover, Congress mandated that they be "*expressly* retained," 43 U.S.C. § 1313(a) (emphasis added), a requirement at least as stringent as that for equal footing doctrine lands. See n. 34 *supra*.

2. When an international duty or a public exigency necessitates federal retention of submerged lands, the United States' retained interest should be limited to those rights absolutely necessary rather than fee title.

Even if the Court finds that in some circumstances the United States can defeat a new State's title to submerged lands as a condition of statehood, the Master's recommendation still goes too far. His conclusion that the United States retains full title to the NPRA submerged lands unnecessarily diminishes the equal footing doctrine. If the United States must retain some ownership of submerged lands after statehood, it should retain only those interests justified by a public exigency or international duty and only as long as that condition exists. In this case, for example, the NPRA executive order would reserve only the oil and gas and not interfere with any uses of the submerged lands or waters that are compatible with that purpose.

Federal reservations and withdrawals often do not require a taking of full title. This Court recognized early that the United States could convey title subject to certain reserved rights. The earliest cases dealt with conveyances to private parties subject to the right of Indians to occupy the lands. *See, e.g., Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

Moreover, the United States commonly transfers ownership of land to third parties while reserving certain specific rights to itself. *See, e.g.*, Act of March 8, 1922, ch. 96, § 2, 42 Stat. 416, *codified as amended* at 43 U.S.C. § 270-12 (1996) (oil, gas, and mineral rights reserved from homestead patents).

Under this analysis, even when the United States clearly intends to continue using submerged lands after statehood because of some international duty or public exigency, it should retain only such limited rights as are essential to effectuate the purpose of the withdrawal. A necessary corollary of this principle is that once the international duty or public exigency no longer exists and a withdrawal or reservation is revoked, the State's "naked fee" ripens into full fee simple title. *See, e.g., Beecher v. Wetherby*, 95 U.S. 517, 525 (1877).

This result would best serve the public interest in using navigable waters for commerce, fishing, and navigation. In Alaska, the Master's assumption that the United States will substitute for the State in holding submerged lands in trust for the public has not proven true. The United States systematically has conveyed submerged lands within pre-statehood withdrawals to private parties without determining navigability. *See, e.g., Alaska v. United States*, No. 87-0450-CV (HRH) (Appendix B), *supra* 65, at 7 n. 12.

For all of the foregoing reasons, the Court should reject the Master's recommendation that the United States be found to have retained the submerged lands within NPRA. The Court instead should hold that they passed to Alaska at statehood as a direct incident of State sovereignty under the equal footing doctrine.

CONCLUSION

Alaska accordingly submits that the Master's labored recommendations on Stefansson Sound and other areas enclosed by fringing islands less than ten miles apart,

Dinkum Sands' status as an island, and ownership of the submerged lands within NPRA should not be followed. The Court instead should enter a decree that (1) Alaska's rights in Stefansson Sound and other areas enclosed by near-shore fringing islands less than ten miles apart must be determined under the 10-mile rule that the Court found was the United States' policy from at least 1903 until 1961; (2) Dinkum Sands is an island and constitutes a part of Alaska's coast line for Submerged Lands Act purposes (or, alternatively, that it is an island for Submerged Lands Act purposes except when it is below high tide); and (3) the submerged lands within the exterior boundaries of NPRA became Alaska's at statehood because Congress did not intend to include them in the reservation and did not affirmatively intend to defeat Alaska's title.

August 1996

Respectfully submitted,

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Appendix A

APPENDIX A:

Summary of evidence of American baselines practice leading up to the United States' Statement of the 10-mile rule at the 1903 Alaska Boundary Arbitration

(Excerpted from the record and from the "Chronological Outline of Relevant Events in American Foreign Policy with Respect to the Delimitation of the Territorial Sea and Other Maritime Zones, 1782-1985, filed with the Special Master May 28, 1985. A Revised version of the document was, with consent of counsel, submitted for the record in June of 1995. See Report at 20 n. 3.)

The Attorney General wrote in 1793: "[T]he property and dominion of the sea might belong to him who is in possession of the lands on both sides, though it be open as a gulf, or open above and below as a strait." Seizure in Neutral Waters, 1 Op. Att'y Gen. 32, 36 (1793) (citation omitted). (Another of the Court's Masters rested his conclusion that islands could enclose inland waters in part on this statement. Report of the Special Master, *United States v. Maine (Massachusetts Boundary Case)* (No. 35, Original) (Oct. Term, 1984), *reprinted in The Reports of the Special Masters of the United States Supreme Court in the Submerged Lands Cases 1949-1987* (Michael W. Reed, G. Thomas Koester and John Briscoe, eds., 1991), at 750.

Secretary of State Pickering informed Virginia Lieutenant Governor Wood on September 2, 1796, that the United States' offshore jurisdiction extended three miles "from our shores, with the exception of any waters or bays which are so landlocked as to be unquestionably within the jurisdiction of the United States, be their extent what they may." Ak. Ex. 85-009.

On May 17, 1800, Secretary of State Madison directed United States representatives Monroe and Pinkney to negotiate for a neutrality zone that would include "the harbours or the chambers formed by headlands." Quoted in 13 Naval

War College, *International Law Topics and Discussions 1913* 36 (1914) (Ak. Ex. 85-008). The "collection district" for the collection of duties on imports and tonnage within territory ceded to the United States under the Louisiana Purchase was described as including "all navigable waters, rivers, creeks, bays and inlets" in the Gulf of Mexico. Ch. 13, Act of February 24, 1804.

President Jefferson explained the "line of sight rule" for determining the seaward limit of inland waters on September 8, 1804:

> The rule of the common law is that wherever you can see from land to land all the water within the line of sight is in the body of the adjacent country and within common-law jurisdiction. Thus, if in this curvature $a_c b$ you can see from *a* to *b*, all the water within the line of sight is within common law jurisdiction, and a murder committed at *c* is to be tried as at common [as opposed to admiralty] law.

Quoted in 13 Naval War College, *International Law Topics and Discussions 1913* 17 (1914) (Ak. Ex. 85-008).

In *The Anna*, 165 E.R. 809 (1805), the British Admiralty Court held that the United States' territorial sea was to be measured from alluvial islands off the mouth of the Mississippi River but more than three miles offshore. The islands, according to the court, form "a kind of portico to the mainland . . . [and are] the natural appendages of the coast on which they border, and from which, indeed, they are formed." *The Anna* at 815. (In the 1903 Alaska Boundary Arbitration, United States' representative Hannis Taylor observed that the British court in *The Anna* had fixed the United States' political coastline at the "uttermost limit of these mud banks." *7 Proceedings of the Alaska Boundary Tribunal*, S. Doc. No. 162, 58th Cong., 2d Sess. 608 (1903).)

Wheaton advocated in 1815 that the seaward limits of jurisdiction be measured from a line extending "to the ports, harbours, bays, and chambers formed by headlands of the neutral Power." Henry Wheaton, *A Digest of the Law of Maritime Captures or Prizes* 55 (1815), *quoted in* Christopher B. V. Meyer, *The Extent of Jurisdiction in Coastal Waters* 94 (1937) ("*Coastal Waters*") (Ak. Ex. 85-804).

In the 1817 arbitration between Great Britain and the United States over the Bay of Fundy, the United States did not object to the "principle of base lines, the 'headland doctrine', ('Systeme de cap a cap')," represented by Great Britain as

> a well known principle in the usage of States. The objections of the United States were not directed against this principle; but they produced evidence showing that the islands in question had for purposes of administration been treated as a part of Massachusetts.

Id. at 287.

In the Convention Respecting Fisheries, Boundary and the Restoration of Slaves (Oct. 20, 1818) between the United States and Great Britain, 8 Stat. 248, 1 *Treaties, Conventions, International Acts, Protocols and Agreements* 631 (William M. Malloy, ed. 1910) (S. Doc No. 357, 61st Cong., 2d Sess. (1910)), the United States renounced the rights of its citizens to fish "within three marine miles of any of the coasts, bays, creeks, or harbours, of his Britannic Majesty's dominions in America, not included within the above mentioned limits . . . ." According to Meyer, this was recognition by the United States of a British system of straight baselines. *Coastal Waters, supra*, at 290 (Ak. Ex. 85-804).

Kent in 1826 advocated claiming jurisdiction over areas between headlands considerably far apart. James Kent, *Commentaries on American Law* John M. Gould, ed. 30

(14th ed. 1896); *see Coastal Waters, supra* page 3, at 94 (Ak. Ex. 85-804) (quoting Kent).

In 1836, Wheaton revised his 1815 work and reaffirmed his support for a "headland-to-headland" theory of territorial jurisdiction. *Id.* (Ak. Ex. 85-804); Thomas W. Fulton, *The Sovereignty of the Sea* 598-99 (1911) (both citing Henry Wheaton, *Elements of International Law* (1836)).

On May 25, 1844, the United States protested the British seizure of the American schooner *Washington.* The protest note acknowledged that the intent of the 1818 United States/Great Britain Convention Respecting Fisheries, Boundary and the Restoration of Slaves was, "as it is in itself reasonable, to have regard to the general line of the coast; and to consider its bays, creeks, and harbours (that is, the indentations so accounted) as included within that line." *See Coastal Waters supra* page 3, at 290 (Ak. Ex. 85-804) (citing the British Case in the North Atlantic Coast Fisheries Arbitration at 92).

On January 23, 1849, Secretary of State Buchanan observed that "[t]he exclusive jurisdiction of a nation extends to the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands" in responding to an inquiry from Mr. Matthew Jordan about possible redress for the British impressment of an American sailor. Buchanan's letter is quoted at page 44 of the Brief for the United States in Support of Motion for Judgment, *United States v. Louisiana* (Feb. 1957) (No. 11 (now No. 9), Original) (Oct. Term, 1956) (Ak. Ex. 85-006).

In 1853, Umpire Bates rendered arbitration decisions concerning the British seizure of two American vessels, the *Washington* and the *Argus*, which had been taken in the Bay of Fundy on the Canadian Coast. Great Britain claimed that the Bay of Fundy, 65 to 75 miles wide and 130 to 140 miles long, should be considered British waters closed by a line drawn from headland to headland. Umpire Bates ruled that the Bay of Fundy could not be considered a British bay, or

even a bay at all, to be closed from headland to headland because (1) it was too large, (2) it served as an international shipping area, and (3) one headland belonged to the United States. The decisions reaffirmed the headland-to-headland principle underlying the 1818 United States/Great Britain Convention Respecting Fisheries, Boundary and the Restoration of Slaves, but with a ten mile limit on the length of closing lines:

> It was urged on behalf of the British Government that, by coasts, bays, etc., is understood an imaginary line drawn along the coast from headland to headland, and that the jurisdiction of Her Majesty thus extends three marine miles outside of this line; thus closing all the bays on the coast or shore, and that great body of water called the Bay of Fundy against Americans and others, making the latter a British bay. This doctrine of headlands is new, and has received a proper limit in the Convention between France and Great Britain of 2nd August, 1839, in which 'it is agreed that the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland.'

4 John B. Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party* 4344 (1898). *And see* August, 1957 State Department Memorandum from Frank Boas to Raymond T. Yingling re "Article 7 of Part I of the Final Report of the International Law Commission on the Regime of the Territorial Sea and Other Material on the Delimitation of Bays" (Ak. Ex. 85-003) at 21:

> Secretary of State Bayard in a letter to Secretary of the Treasury Manning, dated May 28, 1887, cited with approval the ten-mile rule for bays as used by Umpire

> Bates on the London Commission of 1853 to set a "proper limit" upon the headland-to-headland doctrine.

On August 10, 1863, Secretary of State Seward wrote the Spanish Minister for Cuba that

> the line of keys which confront other portions of the Cuban coast resemble . . . the keys which lie off the Southern Florida coast of the United States. The undersigned assumes that this line of keys is properly to be regarded as the exterior coast-line, and that the inland jurisdiction ceases there, while the maritime jurisdiction of Spain begins from the exterior sea front of those keys.

Ak. Ex. 85-029. In a May 18, 1869 letter to Secretary of the Navy Borie, Secretary of State Fish pointed out that the maritime jurisdiction of Spain extends one marine league "from the coast-line of the several islets or keys with which Cuba itself is surrounded." 1 John B. Moore, *Digest of International Law* 713 (1906). As Norway pointed out to the International Court of Justice in the *Fisheries Case*, the United States subsequently cited those letters as evidence of its policy. Counter-Memorial of the Government of the Kingdom of Norway, *Anglo-Norwegian Fisheries Case*, 1951 I.C.J. Pleadings (para. 446) (July 31, 1950) (English translation).

The New York Court of Appeals in 1866 noted that claiming territorial dominion over water areas enclosed by islands subject to a nation's military control was a "universal" rule

> The rule is one of universal recognition, that a bay, strait, sound or arm of the sea, lying wholly within the domain of a sovereign, and admitting no ingress from the ocean, except by a channel between contiguous headlands which he can command with his cannon on either side, is the subject of territorial dominion. . . . Within this rule, the islands as the eastern extremity of

> Long Island Sound are the *fauces terrae*, which define the limits of territorial authority, and mark the line of separation between the open ocean and the inland sea.

Mahler v. Norwich & New York Transportation Co., 35 N.Y. 352, 355-56 (1866) (citations omitted). The United States commented that *Mahler* "is in exact accord with the position of the United States." Reply Brief for the United States on Motion for Judgment on Amended Complaint (Sept. 1958) (Ak. Ex. 85-014) at 85, *United States v. Louisiana* (No. 10 (now No. 9), Original) (Oct. Term, 1958).

Secretary of State Bayard, in a May 28, 1886 letter to Secretary of the Treasury Manning, describes the United States' general position as measuring the territorial sea from the low-water mark on the mainland and each island. (Ak. Ex. 85-033) He makes clear, however, that there is an exception for bays and "landlocked" areas by citing (1) Secretary of State Pickering's September 2, 1796 letter to Virginia Lieutenant Governor Wood (discussed above, describing the United States' jurisdiction as extending three miles "from our shores, with the exception of any waters or bays which are so landlocked as to be unquestionably within the jurisdiction of the United States, be their extent what they may"); (2) Secretary of State Seward's correspondence with Spain in the 1860s (discussed above, in which the coast of Cuba is recognized as the line of islands off her shore); and (3) the "opinion of the umpire of the London commission of 1853" (discussed above, in which Umpire Bates established ten miles as "the proper limit" of the headland-to-headland doctrine).

In *Manchester v. Massachusetts*, 139 U.S. 240 (1891), this Court affirmed the Massachusetts Supreme Court's determination in *Commonwealth v. Manchester*, 152 Mass. 230, 25 N.E. 113 (1890), that Massachusetts could regulate fishing in Buzzard's Bay and that its State courts had jurisdiction over fishing violations therein. The Court noted

that the Island of Cuttyhunk, one of the Elizabeth Islands, was one headland of Buzzard's Bay, 139 U.S. at 243, and relied (among other cases cited) on *Martin v. Waddell* and *Pollard* in finding that Massachusetts possessed fisheries jurisdiction in Buzzard's Bay. 139 U.S. at 260. In reaching that conclusion, the Court established a six-mile criterion as the minimum for claiming areas enclosed in part by islands as inland waters:

> We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from its coast; that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit . . . .

Id. at 258. Making clear that the two marine leagues referred to by the Court is a minimum, but not a maximum, the Court earlier stated that

> [t]he limits of the right of a nation to control the fisheries on its seacoasts, and in the bays and arms of the sea within its territory, have never been placed at less than a marine league from the coast on the open sea; and bays wholly within the territory of a nation, the headlands of which are not more than two marine leagues, or six geographical miles, apart, have always been regarded as a part of the territory of the nation in which they lie.

139 U.S. at 257 (citations omitted)

The United States Naval War Code (June 27, 1900), explains that the territorial waters of a nation "include, to a reasonable extent, which is in many cases determined by usage, adjacent parts of the sea, such as bays, gulfs, and estuaries enclosed within headlands." The Code is quoted in Naval War College, *International Law Discussions*, (1903) (Ak. Ex. 85-039) at 18 and 103.

Appendix B

In the United States District Court For the District of Alaska

STATE OF ALASKA,
Plaintiff

vs.

UNITED STATES OF AMERICA,
et al., Defendants.

No. A87-0450-CV (HRH)

ORDER

State of Alaska
Motion for Partial Summary Judgment
and
United States of America
Cross-Motion for Partial Summary Judgment

The State of Alaska has filed a motion for partial summary judgment.[1] The United States has filed a cross-motion for partial summary judgment.[2] Intervenor-defendants Arctic Slope Regional Corporation (ASRC) and Cully Corporation oppose the State's motion and support the United

[1] Clerk's Docket No. 94.

[2] Docket No. 96. Defendants include: the United States, the Secretary of the Department of the Interior, the Director of the Bureau of Land Management, and the Alaska State Director of the Bureau of Land Management. The Arctic Slope Regional Corporation and the Cully Corporation subsequently intervened as defendants.

States' motion.[3] The State of Alaska has filed an opposition and reply,[4] and the United States has filed an opposition and reply.[5] ASRC and Cully Corporation have also filed a reply.[6] Oral argument has been heard.

These motions raise the issue of whether title to lands underlying the Kukpowruk River in northwestern Alaska, if presumed to be navigable,[7] passed to the State of Alaska at statehood or remained with the federal government pursuant to a pre-statehood withdrawal and reservation. The question of whether the state has title to the bed of the Kukpowruk River requires the resolution of two principal issues: (1) whether title to the lands underlying navigable waters within the boundaries of Public Land Order 82 (PLO 82) passed to the state at statehood; and (2) whether the Kukpowruk River is navigable. The parties agree that only the first question, whether title to the submerged lands in PLO 82 passed to the state at statehood,[8] should be addressed at this point. The court will consider the motions pursuant to Rule 56, Federal Rules of civil Procedure.

Undisputed Facts

The Kukpowruk River arises in northwest Alaska and runs generally northward from its source in the De Long Mountains to its mouth near Point Lay on the Arctic Ocean.

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[3]Clerk's Docket No. 98.

[4]Clerk's Docket No. 102.

[5]Clerk's Docket No. 105.

[6]Clerk's Docket No. 106. Supplemental authority was filed at Clerk's Docket No. 107.

[7]A river is navigable if it is used or susceptible to being used, in its ordinary condition, as a highway for commerce. *Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1404 (9th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990).

[8]The phrase "submerged lands" is used throughout to refer to lands beneath navigable waters.

The United States acquired the lands surrounding and beneath the Kukpowruk River in 1867 when it ratified the treaty of cession with Russia and purchased Russian America (Alaska) for $7,200,000. 15 Stat. 539 (1867).

On January 22, 1943, the Department of the Interior (DOI) issued PLO 82, 8 Fed. Reg. 1599 (Jan. 22, 1943). PLO 82 withdrew certain public lands in Alaska "from sale, location, selection, and entry under the public land laws of the United States, including the mining laws, and from leasing under the mineral-leasing laws . . ." *Id.* The Kukpowruk River lies completely within the withdrawn land.

The purpose of PLO 82 was to reserve minerals for use in the prosecution of World War II. *Id.* PLO 82 included 48,800,000 acres in northern Alaska, 15,600,000 acres in the Alaska Peninsula, and 3,040,000 acres in the Katalla-Yakataga region. The area in northern Alaska was described as:

> All that part of Alaska lying north of a line beginning at a point on the boundary between the United States and Canada, on the divide between the north and south forks of the Firth River, approximate latitude 680° 52′ N. longitude 141° 00′ W., thence westerly, along this divide, and the periphery of the watershed northward to the Arctic Ocean, along the crest of portions of the Brooks Range and the De Long Mountains, to Cape Lisburne.

Id.[9]

Shortly after the end of the war, and prior to statehood,[10] the DOI revoked PLO 82 as to the Alaska Peninsula and Katalla-Yakataga acreage. Public Land Order 323, 11 Fed.

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[9] Northern Alaska, as refrenced in the Federal Register, is commonly referred to as the North Slope.

[10] Alaska entered the Union in 1959.

Reg. 9141 (Aug. 14, 1946). In 1958, PLO 1621 amended PLO 82 to permit mining and mineral leasing in an area between the Canning and Colville Rivers and in an area west of National Petroleum Reserve No. 4 (NPR-4) and east of Cape Lisburne. 23 Fed. Reg. 2637-38 (Apr. 18, 1958). The Kukpowruk River lies within the western portion of the area open to mining and mineral leasing. Alaska became a state in 1959 and entered the Union "on an equal footing" with all other states. Alaska Statehood Act (ASA), § I. The ASA included a provision making the Submerged Lands Act applicable to the State of Alaska. *Id.* at § 6(m). In 1960, subsequent to Alaska statehood, the DOI issued PLO 2215 which revoked PLO 82 as to the northern region of Alaska. 25 Fed. Reg. 12599 (1960).

Procedural History

In 1978, Solicitor Leo Krulitz addressed: (1) whether PLO 82 withdrew inland submerged lands; (2) if yes, whether the withdrawal prevented transfer of title to the submerged lands to Alaska at statehood; and (3) if so, whether revocation of PLO 82 in 1960 transferred ownership of the submerged lands to Alaska. *See The Effect of Public Land Order 82 on the Ownership of Coastal Submerged Lands in Northern Alaska*, M-36911, 86 Interior Dec. 151 (Dec. 12, 1978) (Krulitz Opinion). Solicitor Krulitz reached the following conclusion:

> PLO 82 expressly reserved the submerged lands underlying inland navigable waters within the area it withdrew in northern Alaska, and . . . therefore such lands did not pass to the State of Alaska under the Alaska Statehood Act, by operation of the Submerged Lands Act, and did not pass to the State upon revocation of PLO 82.

Id. at 174-75.

Solicitor Krulitz based his conclusion on the following: (1) the United States' sovereign power over land in the territories included the power to reserve submerged lands to itself; (2) the phrase "public lands" in PLO 82 should be construed to encompass submerged lands; (3) the comprehensive language of PLO 82 implies the withdrawal of everything within the boundaries of the withdrawal, including submerged lands; (4) the purpose of PLO 82 was to protect oil resources from private interference during World War II; (5) PLO 82 expressly retained inland submerged lands at statehood pursuant to the Submerged Lands Act of 1953, 43 U.S.C. § 1302 *et seq.*; (6) the decision in *United States v. Holt State Bank*, 270 U.S. 49 (1926), that lands under navigable waters in territories are held by the United States and disposal "should not be regarded as intended unless the intention was definitely declared . . . . "*Id.* at 55; and (7) the revocation of PLO 82, nearly two years subsequent to statehood, did not transfer inland submerged lands to Alaska because the United States had expressly retained the in land submerged lands at the time of statehood pursuant to the Submerged Lands Act (SLA).[11]

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[11]The significance of the Submerged Lands Act on the solicitor's opinion warrants further discussion. Ten years subsequent to promulgation of PLO 82, Congress enacted the Submerged Lands Act of 1953. The Submerged Lands Act granted to states title to land beneath inland navigable waters — SLA § 3 (a); 43 U.S.C. § 1311(a). The Alaska Statehood Act made the SLA applicable to Alaska. However, section 1313(a) of the Submerged Lands Act provided that [t]here is excepted from the operation of section 1311 of this title . . . all lands expressly retained by . . . the United States when the State entered the Union . . . ." *Id.* Solicitor Krulitz concluded that PLO 82 "expressly retained" the lands under inland navigable water and that title to such land did not pass to Alaska at statehood. According to the Solicitor, subsequent revocation of PLO 82 did not divest the United States of title to the inland submerged land because the section 1313(a) exception applied to Alaska at statehood, thus constituting "a permanent retention by the United States of those submerged lands." Krulitz Opinion at 174. The

In 1989, the State of Alaska filed a two-count amended complaint requesting that the court declare that PLO 82 did not defeat the State of Alaska's title to the beds of navigable waters. The complaint also seeks to quiet title in the State of Alaska to the bed on the Kukpowruk River. Additionally, the complaint requests injunctive relief requiring defendants, when claiming that a federal reservation of land prevented title of the beds of navigable water from vesting in the State of Alaska, to apply certain standards set forth in *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987) (*Utah Lake*).[12]

In 1988, the Secretary of the Interior asked Solicitor Sansonetti to consider the impact of *Utah Lake* on the Krulitz Opinion. The parties in this suit agreed to a stay pending issuance of the solicitor's opinion. On April 20, 1992, Solicitor Sansonetti issued: *Ownership of Submerged Lands in Northern Alaska in Light of Utah Division of State Lands v. United States,* M-36911 (Supp. I) (April 20, 1992) (Sansonetti Opinion).[13] The Sansonetti Opinion agreed with the Krulitz Opinion that title to the land beneath inland navigable waters in northern Alaska did not pass to Alaska at statehood. After Solicitor Sansonetti issued his opinion, the parties filed their respective motions for summary judgment in which they agreed that the court

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Solicitor reasoned further that if title to certain submerged lands was not transferred to Alaska because of a section 1313(a) exception, "mere revocation of [PLO 82 in 1960] could not have automatically transferred title to the State." Krulitz Opinion at 174 (footnote omitted).

[12]The amended complaint also seeks certain relief regarding interim conveyances issued by the United States which purport to convey title to the bed of the Kukpowruk River and other submerged land. Clerk's Docket No. 50.

[13]Copy attached to affidavit of counsel regarding supporting documents, in support of plaintiff's motion for partial summary judgment (filed Nov. 2, 1992), Clerk's Docket No. 94; *published at* 100 Interior Dec. 103 (Apr. 20, 1992).

need only decide, at this point, whether title to the lands underlying navigable water in the PLO 82 area passed to the State of Alaska at statehood. Specifically, the cross-motions for summary judgment address only Count I of plaintiff's amended complaint in which the State of Alaska seeks to quiet title to itself to the bed of the Kukpowruk River.

To set the issues into proper context, the court will review *Utah Lake* and the Sansonetti Opinion.

Utah Lake

In *Utah Lake,* the Supreme Court considered "whether title to the bed of Utah Lake passed to the State of Utah under the equal footing doctrine upon Utah's admission to the Union in 1896. *Utah Lake*, 482 U.S. at 195. The equal footing doctrine is based upon the status of the original 13 states which, as successors to the English Crown, claimed title to land beneath navigable waters within their boundaries. "Because all subsequently admitted States enter the Union on an 'equal footing' with the original 13 States, they too hold title to the land under navigable waters within their boundaries upon entry into the Union." *Id.* at 196 (citation omitted).

While a prospective state is still a territory, Congress, under the Property Clause of the Constitution[14], has the power to make grants of submerged lands in any territory "to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to

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[14]The Property Clause states:

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other Property belonging to the United States . . . .

U.S. Const. art. IV, § 3 cl. 2.

the objects for which the United States hold the territory." *Shively v. Bowlby,* 152 U.S. 1, 48 (1894). Thus, in the appropriate circumstances, Congress can defeat a prospective state's title to submerged land.

Utah Lake, however, did not involve a situation in which Congress granted title of territorial submerged land to a private party. Rather, pursuant to the Sundry Appropriations Act of 1888, Congress authorized the reservation of Utah Lake in the Territory of Utah as property of the United States.[15] In 1896, Utah entered the Union "on an equal footing with the original States. *Utah Lake,* 482 U.S. at 200 (citations omitted).

In 1976, the DOI issued oil and gas leases for lands underlying Utah Lake. The State of Utah filed suit seeking a declaratory judgment that it, and not the United States, owned the lake bed. The district court found that title to the lake bed remained with the United States pursuant to the federal government's reservation of Utah Lake as a reservoir site in 1889.

In considering the issues, the Supreme Court discussed several principles of fundamental importance to the case at bar. "[N]othing in the Constitution . . . prevent[s] the Federal Government from defeating a State's title to land under navigable waters by its own reservation for a particular use . . . [however] the strong presumption is against finding an intent to defeat the State's title." *Id.* at 201. The Court noted that Congress was to hold submerged lands "for the ultimate benefit of future States" and that Congress

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[15] The Sundry Appropriations Act of 1888 authorized the United States Geological Service to select potential reservoir sites for irrigation purposes. The sites were to be "reserved from sale as the property of the United States, and shall not be subject . . . to entry, settlement, or occupation . . ." The 1890 Act repealed the 1888 Act, but that did not affect the status of lands already selected and reserved, including Utah Lake which had been reserved in 1889. *Utah Lake*, 482 U.S. at 198-99 (citation omitted).

would defeat a prospective state's entitlement to submerged land only "in exceptional instances." *Id.* (citation omitted). Accordingly, the Court stated "whether faced with a reservation or a conveyance, we simply cannot infer that Congress intended to defeat a future State's title to land under navigable waters 'unless the intention was definitely declared or otherwise made very plain.'" *Id.* at 201-202 (citation omitted).

A significant difference exists between a *reservation* of land and a *conveyance* of land. When Congress *conveys* submerged land, "of necessity it must also intend to defeat a future state's claim to the land." *Id.* at 202. Thus Congress' intent to defeat state title to submerged land is made plain through the act of conveyance. *Reservation* of land, however, may not evince an intent to defeat a prospective state's claim; the land remains in federal control and "may still be held for the ultimate benefit of future States." *Id.* at 201 (citation omitted). For example, in *Montana v. United States*, 450 U.S. 544 (1981), the Court considered whether Congress intended to permit the State of Montana to take title to the bed of the Big Horn River at statehood, even though the Big Horn flows through the Crow Indian Reservation. Although various treaties between the United States and the tribe established the Crow Indian Reservation boundaries, nothing in the treaties overcame. The strong "presumption against the sovereign's conveyance of the riverbed." *Montana*, 450 U.S. at 554. The treaties presented no public exigency requiring Congress to depart from the policy of reserving ownership of submerged lands for a prospective state. Thus, in *Montana*, Congress intended for the state to take title of the bed of the navigable river at statehood, even though the land through which the Big Horn flows was reserved for the Crow Tribe."[16]

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[16] In Montana, the court stated:

Similarly, in *United States v. Holt State Bank*, 270 U.S. 49 (1925), the Supreme Court rejected an Indian tribe's claim to title to the bed of a navigable lake which lay within the boundaries of the Red Lake Indian Reservation in Minnesota. The Court held that although certain land was reserved as a permanent home for the Indians pursuant to treaties, nothing in the treaties "approache[d] a grant of rights in lands underlying navigable waters ... nor ... evince[d] a purpose to depart from the established policy ... of treating [submerged] lands as held for the benefit of the future State". *Id.* at 58-59.[17] In the Court's opinion,

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> A court deciding a question of title to the bed of a navigable water must ... begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance unless the intention was definitely declared or otherwise made plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the water of the stream.

Montana, 450 U.S. at 552 (citations and internal quotation marks omitted). The phrase "confirmed in terms embraces the land" is rather awkward, and may have made more sense when it was written in 1891 in *Packer v. Bird*, 137 U.S. 661, 672 (1891). From the manner in which succeeding cases interpret the phrase, it is obvious that the terms of a land claim must "embrace[ ] the land under the waters of the stream" in order to defeat the strong presumption against conveyance by the United States.

[17] *Holt* reiterated the policy set out in *Shively*:

> [T]he United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future States, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.

Holt, 279 U.S. 55.

the creation of the Red Lake Indian Reservation did not "operate[ ] as a disposal of the lands under . . . navigable waters within [the reservation] limits . . . ." *Id.* at 58. Consequently, title to the submerged lands passed to Minnesota at statehood.[18]

Based on its previous decisions in *Shively*, *Montana*, and *Holt State Bank*, the Court in *Utah Lake* set forth a dual inquiry for determining whether a reservation of land could defeat a prospective state's title to submerged land. The Court explained as follows:

> Given the longstanding policy of holding land under navigable waters for the ultimate benefit of the States . . . we would not infer an intent to defeat a State's equal footing entitlement from the mere act, of reservation itself. Assuming, *argruendo*, [sic] that a reservation of land could be effective to overcome the strong presumption against the defeat of state title, the United States would not merely be required to [1] establish that Congress clearly intended to include land under navigable waters within the federal reservation; the United States would additionally have to [2] establish that Congress affirmatively intended to defeat the future State's title to such land.

Utah Lake, 482 U.S. at 202.

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[18]The meaning of "reservation" at issue in *Utah Lake* is legally different from the meaning of "reservation" in *Montana* and *Holt State Bank*. In the latter two cases, "reservation" referred to the creation of Indian title, while in *Utah Lake*, "reservation" referred to land reserved for the United States. Thus, in *Utah Lake*, the Court stated that "we have *never* decided whether Congress may defeat a State's claim to title by a federal reservation or withdrawal of land under navigable waters." *Utah Lake*, 482 U.S. at 200. The distinction is discussed in greater detail in *Coeur D'Alene Tribe of Idaho v. State of Idaho*, 42 F.3d 1244, 1256 (9th Cir. 1994).

In applying the first part of the two part test, the *Utah Lake* court found that the United States failed to establish that Congress intended to reserve the bed of Utah Lake in either the 1888 or 1890 Act. Regarding the 1888 Act, the Court noted that the Act reserved certain lands "from sale as the property of the United States" such that the land was not subject "to entry, settlement, or occupation until further provided by law." *Id.* at 203 (citation omitted). However, the 1888 Act did not reserve submerged lands because those lands "were *already* the property of the United States and *already* exempt from sale, settlement, or occupation. . . ." *Id.* at 203. Thus, "little purpose would have been served by the reservation of the bed of Utah Lake." *Id.*[19]

The Court also found that the 1890 Act did not reserve the bed of Utah Lake. The 1890 Act repealed the 1888 Act, but in doing so it specifically reserved from entry or settlement previously selected reservoir sites, including Utah Lake. Nonetheless, the Court found that Congress, in enacting the 1890 Act, did not reserve the bed of Utah Lake. The Court specifically stated that the "scattered references to the bed of Utah Lake in the material submitted to Congress . . . presents no unambiguous evidence that Members of Congress actually understood these references as pointing to a reservation of the bed of Utah Lake." *Id.* at 207. The Court concluded by stating that "the 1890 Act no more definitely declared or otherwise made very plain Congress' intent to reserve Utah Lake than had the 1888 Act. *Id.* (citations and internal quotation marks omitted). Accord-

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[19]The Court advanced another reason as to why the lake bed had not been reserved. The Court referred to a proviso in the 1888 Act which permitted the President to open *any* land reserved to settlement. The Court stated that it was "inconceivable that Congress intended by this simple proviso to abandon its long-held and unyielding policy of never permitting the sale or settlement of land under navigable waters . . . ." *Utah Lake*, 482 U.S. at 204 (citation omitted).

ingly, the United States failed to meet the first part of the *Utah Lake* test.

Even if the United States did intend to reserve the bed of Utah Lake, thus satisfying the first part of the test, the Court found that neither the 1888 nor 1890 Act clearly expressed congressional intent to defeat Utah's claim to the lake bed under the equal footing doctrine. The 1888 Act merely provided that the reserved land was reserved from sale and not subject to settlement or occupation; it did not mention Utah's entitlement to land beneath navigable rivers and lakes at statehood. *Id.* at 208. The Court stated that "the broad sweep of the 1888 Act cannot be reconciled with an intent to defeat the States' title to the land under navigable waters." *Id.* The Court stated further that defeating the State's title to the bed of Utah Lake in the absence of "international duty [or] public exigency . . . would be wholly at odds with Congress' policy of holding this land for the ultimate benefit of the future States." *Id.* at 208-09 (citation and internal quotation omitted). The Court concluded:

> Congress did not definitely declare or otherwise make very plain either its intention to reserve the bed of Utah Lake or to defeat Utah's title to the bed under the equal footing doctrine. Accordingly, we hold that the bed of Utah Lake passed to Utah upon that State's entry into statehood on January 4, 1896.

Id. at 209.[20]

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[20]The only case in which the Supreme Court found that Congress intended to grant the bed of a navigable river to a private party was *Choctaw Nation v. Oklahoma,* 397 U.S. 620 (1970). *Choctaw* is cited as the "singular exception", "based on very peculiar circumstances [and] the unusual history of the treaties there at issue [.]" *Montana,* 450 U.S. at 555 n.5. The circumstances included a series of broken treaties and forced relocation of the Cherokee and Choctaw farther and farther west. Eventually, land west of the Arkansas Territory was conveyed to the

The Sansonetti Opinion

The Sansonetti Opinion contains an exhaustive review of the facts and law applicable to PLO 82, much of which this court has already discussed. Accordingly, the court need only highlight the Sansonetti opinion's major points. The Sansonetti Opinion concluded that the *Utah Lake* test applied to PLO 82. This is significant because PLO 82 involves a *reservation* of land, and *Utah Lake* did *not* answer the question of whether a reservation of land could defeat a prospective state's title to submerged land. Although *Utah Lake* discussed the issue in detail, the Court stated that "[w]e need not decide that question today . . . because . . . a reservation of the bed of Utah Lake was not accomplished on these facts. *Id.* at 201. The Court set out the two-part test only after [a]ssuming, *arguendo,* that a *reservation* of land could be effective to overcome the strong presumption against the defeat of state title . . . ." *Id.* at 202 (emphasis added).

The Sansonetti Opinion next discussed whether the *Executive* withdrawal accomplished by PLO 82 could satisfy the test. The *Utah Lake* test, of course, asked whether *Congress* intended to include submerged land in an expressly authorized federal reservation and whether *Congress* intended to defeat state title to such land. PLO 82, on the other hand, was an *Executive* withdrawal by the Secretary of the Interior pursuant to authority from President Roosevelt. The Sansonetti Opinion noted, however, that the Executive Branch acted as the agent of Congress in exercising its constitutional authority over the public domain. *United States v. Midwest Oil Co.,* 236 U.S. 459, 471-75 (1915). The San-

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Choctaw Nation in fee simple. Relevant treaties promised that *no part* of reservation lands would ever become part of any state. The Cherokee signed similar treaties. Such circumstances had no counterpart in the Crow treaties at issue in *Montana.*

sonetti Opinion then analyzed the Executive's intent at the time of the issuance of PLO 82.

The Sansonetti Opinion concluded that PLO 82 satisfied the first part of the *Utah Lake* test (clear intent to include submerged land within the federal reservation) for three reasons. First, PLO 82 was "all-inclusive" in withdrawing "all that part of Alaska north of the Brooks Range and the De Long Mountains, including the watershed northward to the Arctic Ocean . . . ." Sansonetti Opinion at 31 (citation and internal quotations omitted). Additionally, a contemporaneous map of the withdrawal area did not exclude any bodies of water or submerged land.

Second, the Sansonetti Opinion stated that "PLO 82's reference to 'public lands' was consistent with an intent to withdraw submerged lands" because reserving the submerged lands furthered the purpose of the withdrawal.[21] Sansonetti Opinion at 31. The Sansonetti Opinion cited *Alaska Pac. Fisheries Co. v. United States*, 248 U.S. 78, 87, which suggested that a withdrawal of "Public lands" could, depending upon the withdrawal's purpose, include submerged lands.[22]

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[21] In *United States v. Alaska*, 423 F.2d 764 (9th Cir.), *cert. denied*, 400 U.S. 967 (1970), the court stated "the courts have consistently held that the words 'public domain', 'public lands' and 'land', include land under water." *Id.* at 766 (citing: *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827 (1947); *Alaska Pac. Fisheries v. United States*, 248 U.S. 78 (1918); and *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949)).

[22] In *Alaska Pac. Fisheries*, the Court considered whether Congress' withdrawal of "the body of lands known as Annette Islands" for the Metlakatla Indians included waters overlying coastal submerged lands. *Alaska Pac. Fisheries*, 248 U.S. at 87. "The principal question for decision [was] whether the reservation created by the Act of 1891 embrace[d] only the upland of the islands or include[d] as well the adjacent waters and submerged land." *Id.* In answering the question, the Court considered the "purpose of creating the reservation". *Id.* at 89. That purpose was to provide for the needs of the Metlakatla who were

Third, the Sansonetti Opinion stated that the purpose of PLO 82 was to protect oil and gas resources for the prosecution of World War II. The Sansonetti Opinion stated that failing to reserve the submerged lands would have been illogical and incompatible with PLO 82's purpose, because it would have left some of the most productive areas available for private development.[23]

For these reasons, the Sansonetti Opinion concluded that PLO 82 clearly intended to include submerged lands, thus satisfying the first part of the *Utah Lake* test.

The Sansonetti Opinion then considered whether PLO 82 satisfied the second part of the *Utah Lake* test (whether Congress affirmatively intended to defeat Alaska's title to the submerged land at statehood). The Sansonetti Opinion noted that at the time PLO 82 was issued in 1943, Alaska statehood was not imminent and nothing in PLO 82 purported to defeat Alaska's equal footing entitlement to the submerged lands of PLO 82.[24] Accordingly, the Sansonetti opinion concluded that PLO 82 did not meet the second prong of the *Utah Lake* test in 1943. Consequently, the Sansonetti Opinion considered whether the Executive or

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fishermen. Accordingly, the Court concluded that Congress, in reserving the Annette Islands as a single body, intended to reserve the surrounding waters as well. "That Congress had the power to make the reservation inclusive of the adjacent waters and submerged land as well as the upland needs little more than statement". *Id.* at 87.

[23]The Sansonetti Opinion contrasted PLO 82's purpose with the reservation of *Utah Lake*. The purpose of reserving Utah Lake was to protect an irrigation reservoir; this purpose could be accomplished without reserving the lakebed. However, the purpose of PLO 82, protecting oil resources, could not be met without reserving the submerged land.

[24]Had statehood been imminent, given the public exigency of protecting petroleum resources for the prosecution of World War II, the Sansonetti Opinion "would conclude as a necessary inference flowing from the purpose of the withdrawal, that inland submerged lands were intended to be retained in federal ownership." Sansonetti Opinion at 34.

Congress, subsequent to the issuance of PLO 82 but prior to statehood, evinced a clear intent to withhold the submerged lands from Alaska. Sansonetti's review of congressional and executive actions during the years following the issuance of PLO 82 was extensive, but can be summarized with reference to certain conclusions drawn in the opinion.

The Sansonetti Opinion stated:

> The Executive intended to defeat the future state's title to submerged lands within the boundaries of NPR-4 and the proposed boundaries of the Arctic National Wildlife Range . . . and Congress affirmed this executive intent in the Alaska Statehood Act.[25]

Sansonetti Opinion at 80.

In supporting the above conclusion, the Sansonetti Opinion considered PLO 1621, which issued on April 18, 1958. PLO 1621 modified PLO 82 by permitting locations and entries under the mining laws and the issuance of mineral leases certain areas of PLO 82.[26] PLO 1621 continued to bar entry into NPR-4 and set aside several million acres of

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[25]NPR refers to Naval Petroleum Reserve. The United States Navy controlled petroleum reserves of approximately 23,000,000 acres lying within PLO 82 and obviously including submerged land. In 1954 the Navy indicated that it would not object to the revocation of PLO 82 so long as NPR-4 was specifically exempt. In 1955, the DOI asked the Chairman of the House Armed Services Committee for his views on the revocation of PLO 82. The Chairman "expressed his satisfaction . . . that Interior would leave intact NPR-4. Sansonetti Opinion at 44 (footnote omitted). The Arctic National Wildlife Range was redesignated as the Arctic National Wildlife Refuge pursuant to the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 668dd note.

[26]The areas opened to mining and mineral leasing included the area west of NPR-4 and an area between the Canning and Volville Rivers. The Kukpowruk River lies within the opened area west of NPR-4.

PLO 82 for the proposed Arctic National Wildlife Range (ANWR). According to the Sansonetti opinion:

> By specifically citing NPR-4 and the withdrawal application for the Arctic National Wildlife Range in PLO 1621, the Executive Branch enhanced the underlying protection provided by PLO 82 by plainly demonstrating the goal of retaining ANWR and NPR-4 in federal ownership. Furthermore, PLO 1621 did not revoke any prior orders, but rather was a modification of PLO 82. Thus, the modification left in place prior withdrawals such as PLO 82.

Sansonetti Opinion at 45.

At this point in its analysis the Sansonetti Opinion considered events relevant to PLO 82 which occurred *after* statehood. On December 6, 1960, the DOI established ANWR pursuant to PLO 2214, 25 Fed. Reg., 12598 (December 6, 1960). Approximately 9,000,000 acres were set aside for ANWR "*subject to* valid existing rights, and the provisions of any *existing withdrawals* [e.g., PLO 82]." Sansonetti Opinion at 47 (citation omitted).

On the same day that the DOI established ANWR, it revoked PLO 82 by PLO 2215. 25 Fed. Reg. 12599 (1960). Although PLO 82 was revoked with respect to the 48,800,000 acres originally withdrawn in northern Alaska by PLO 82, previous NPR-4 withdrawals within PLO 82 were preserved. Thus, the 23,000,000 acres of NPR-4 were not affected by the opening provided in PLO 2215. Another 5,000,000 acres were "segregated" from all forms of disposal under the public land laws . . . " for use as ANWR. Sansonetti Opinion at 48. *Id.* According to the Sansonetti Opinion, "[s]ubmerged lands were included within ANWR

and NPR-4 by 'necessary implication.' "[27] Sansonetti Opinion at 48 (citing *United States v. State of Alaska*, 423 F.2d 764 (9th Cir.), *cert. denied*, 400 U.S. 967 (1970); *United States v. City of Anchorage*, 437 F.2d 1081 (9th Cir. 1971)). *See infra*, pp. 36-38.

Returning to pre-statehood events, and specifically regarding NPR-4, the Sansonetti Opinion found that the Executive clearly intended to reserve the area at statehood to ensure military access to the petroleum resources. The Sansonetti Opinion stated that transfer of submerged lands in NPR-4 would have frustrated any federal oil and gas program.

The Sansonetti Opinion also addressed congressional intent to defeat state title to submerged lands in NPR-4 and ANWR. The Sansonetti Opinion concluded that congressional intent regarding NPR-4 and ANWR was manifested in section 6(e) of the ASA. Section 6(e) of the ASA excepted from transfer of real property to Alaska "lands withdrawn or otherwise set apart as refugees [sic] or reservations for the protection of wildlife . . . ." *Id.*[28] The Sansonetti Opinion elaborated as follows:

> The ANWR lands were clearly set apart (*i.e.*, segregated) as a refuge or reservation for wildlife. As such the lands were specifically withheld by section 6(e) from being transferred to the State of Alaska under the

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[27] The Kukpowruk River is located outside the boundaries of ANWR and NPR-4. *See* United States' memorandum in support of motion at 48, n.12.

[28] Section 6(e) of the ASA provides in part:

> All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife . . . shall be transferred and conveyed to the State of Alaska . . . *Provided*, That such transfer shall not include lands withdrawn or otherwise set apart as refuges reservations for the protection of wildlife . . . .

> equal footing doctrine because they were lands "otherwise set apart as reservations the protection of wildlife." Furthermore, I view the earlier withdrawal status provided by PLO 82, in addition to the segregative effect of PLO 1621 to preserve this area as a wildlife refuge as meeting the second prong of the *Utah Lake* test. Thus, section 6(e) established the affirmative intent to defeat the equal footing doctrine with respect to the submerged lands for ANWR.

Sansonetti Opinion at 49 (citation and footnote omitted).[29]

Regarding congressional intent with respect to submerged lands in NPR-4, the Sansonetti Opinion noted that section 11(b) of the ASA expressly withheld NPR-4 from the State of Alaska.[30] The Sansonetti Opinion stated that "[n]either ANWR nor NPR-4 could be administered and preserved for their primary purposes absent the inclusion of

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[29]The Izembek National Wildlife Range was established on December 6, 1960; submerged land was not included. The Kuskokwim Wildlife Range was created on December 7, 1960, and did not include submerged land. ANWR was also established on December 7, 1960, and did not concede state ownership to submerged land. According to the Sansonetti Opinion, the exclusion of submerged lands in the Izembek and Kuskokwim Wildlife Ranges, but failure to mention submerged lands in the creation of ANWR, "demonstrates that the [DOI] considered the underlying withdrawal of PLO 82 on its own as sufficient to withhold the submerged lands within the PLO 82 area from transfer to the State." Sansonetti Opinion at 50.

[30]Section 11(b) of the ASA states in pertinent part:

> Notwithstanding the admission of the State of Alaska into the Union, authority is reserved in the United States, subject to the proviso hereinafter set forth, for the exercise by the Congress . . . of exclusive legislation . . . in all cases whatsoever over such tracts or parcels of land as, immediately prior to admission of said State, are owned by the United States and held for military, naval, Air Force, or Coast Guard purposes, including naval petroleum reserve numbered 4. . . .

submerged lands." Sansonetti Opinion at 52. The Sansonetti Opinion stated further that the ASA and its legislative history establishes that Congress clearly intended to defeat state title to submerged lands in ANWR and NPR-4.

The Sansonetti Opinion next reached the following conclusion:

> The Executive took no official action prior to Alaska Statehood on January 3, 1959, to delete from reserved status those inland submerged lands that lay within the boundaries of the PLO 82 withdrawal, but outside of NPR-4 and the proposed Arctic National Wildlife Range.

Sansonetti Opinion at 80.

The Sansonetti Opinion recognized that PLO 1621 amended PLO 82 to permit mining and mineral leasing, under supervision of the DOI, in two areas of PLO 82.[31] The Sansonetti Opinion did not consider this action to be inconsistent with holding the land for military purposes and with Congress' action in the ASA in reserving jurisdiction over the lands.

The Sansonetti Opinion also noted that the DOI considered the land of PLO 82 to be intact at statehood. A DOI memorandum to the White House of July 4, 1958, stated:

> Naval Petroleum Reserve No. 4 and the area covered by Public Land Order 82 — areas already under the exclusive control of the Federal Government — contain about 48,800,000 acres. PLO 82 lands were opened to mineral entry, only, on April 16, 1958. No homesteading or other entry under the public land laws is permitted in either of these areas at the present time.

Sansonetti Opinion at 54 (citation omitted).

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[31] As noted above, the Kukpowruk River is located in one of two areas opened by PLO 1621.

The Sansonetti Opinion stated that the modification, rather than revocation, of PLO 82 by PLO 1621 implies that ownership of the land would not change at statehood. Yet the Sansonetti Opinion did not consider this sufficient to meet the second part of the *Utah Lake* test. Accordingly, the Sansonetti opinion examined the ASA "to determine whether there existed an affirmative intent to defeat state title to the remainder of the submerged lands within PLO 82." Sansonetti Opinion at 55.

In addressing the above issue, the Sansonetti Opinion noted that Congress did not address the Utah Lake withdrawal in the Utah Statehood Act. In the ASA, however, Congress addressed which lands would pass to the state. The Sansonetti Opinion then reviewed relevant sections of the ASA.

In section 4 of the ASA, Alaska agreed to disclaim right and title to land not granted to the state which was held by the United States. Section 5 provided that the United States would retain title to all land to which it had title "[e]xcept as provided in section 6 . . . . " Section 6 of the ASA makes provision for extensive land grants to the State of Alaska, and section 6(m) made the Submerged Lands Act applicable in the State of Alaska.

The Submerged Lands Act (SLA) codified the "equal footing" doctrine and provided that states were to take title to submerged lands beneath inland navigable waters and the marginal sea. 43 U.S.C. § 1312. The SLA was not without exceptions. The relevant exception in this case is set out in section 5(a) of the SLA. Section 5(a) states:

> *There is excepted from the operational of section 1311 of this title —*
>
> (a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from

> any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; *all lands expressly retained by or ceded to the United States when the State entered the Union* (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchases, cession, gift, or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and any rights the United States has in lands presently and actually occupied by the United States under claim of right[.]

SLA § 5(a); 43 U.S.C. § 1313(a) (emphasis added).[32]

[32]Of additional significance is the creation in ASA section 10(b) of the "PYK Line," so named because the line followed generally the Porcupine, Yukon, and Kuskokwim Rivers. The "PYK Line" delineates an area from which the President of the United States may make "special national defense withdrawals . . . ." ASA § 10(a).

Section 10(b) authorized:

> Special national defense withdrawals . . . shall be confined to those portions of Alaska that are situated to the north or west of the following line: Beginning at the point where the Porcupine River crosses the international boundary between Alaska and Canada; thence along a line parallel to, and five miles from, the right bank of the main channel of the Porcupine River to its confluence with the Yukon River; thence along a line parallel to, and five miles from, the right bank of the main channel of the Yukon River to its most southerly point of intersection with the meridian of longitude 160 degrees west of Greenwich; thence south to the intersection of said meridian with the Kuskokwim River; thence along a line parallel to, and five miles from the right bank of the Kuskokwim River to the mouth of said river; thence along the shoreline of Kuskokwim Bay to its intersection with the meridian of longitude 16 degrees 30 minutes west of Greenwich; thence south to the intersection of said meridian with the parallel of latitude 57 degrees 30 minutes north;

The Sansonetti Opinion summarized its discussion of the SLA and the ASA by noting that the ASA applied the SLA to Alaska, and the SLA excepted from its grant of submerged lands to Alaska that land "expressly retained by or ceded to the United States when the State entered the Union . . . ." Sansonetti Opinion at 63 (citation omitted).[33]

Having determined that the ASA applied the SLA to Alaska, the Sansonetti Opinion then considered whether congressional intent regarding PLO 82 could be gleaned from Alaska statehood proceedings before Congress. Not all of the salient points of the Senate and House debates need be repeated here. It is sufficient to note that according to the Sansonetti Opinion, both houses of Congress clearly understood that PLO 82 was an oil reserve that would remain under federal control at statehood.[34]

The Sansonetti Opinion concluded with an in-depth analysis of ASA section 11(b) which "makes plain Congress' intent to defeat state title to submerged lands which immediately prior to Statehood were owned by the United States

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thence east to the intersection of said parallel with the meridian of longitude 156 degrees west of Greenwich; thence south to the intersection of said meridian with the parallel of latitude 50 degrees north.

PLO 82 lies above the PYK Line and is in the area where Alaska could not select land "without approval of the President". ASA § 6(b). The PYK Line was reaffirmed by Congress in 1980 in the Alaska National Interest Lands Conservation Act ANILCA, 43 U.S.C. § 1635(p).

[33] In *Utah Lake*, the Court found that a reservation of Utah Lake had not occurred; therefore, the Court did not need to consider the SLA.

[34] Senator Jackson stated that the "northern portion of Alaska . . . is an oil reserve . . . the middle area is naval and the western and eastern portions . . . are under Public Land Order 82." Sansonetti opinion at 65 (citation omitted). Senator Cordon stated that "the petroleum reserve is a good reason not to grant the land in that area to the State of Alaska . . . ." *Id.* at 66 (citation omitted). Senator Cordon added "[t]he reservation there [PLO 82] is absolute." *Id.* at 66 (citation omitted).

and held for military purposes." Sansonetti Opinion at 70. Section 11(b) states as follows:

> *Notwithstanding the admission of the State of Alaska into the Union*, authority is reserved in the United States, subject to the proviso hereinafter set forth, for the exercise by the Congress of the United States of the power of exclusive legislation, as provided by article I, section 8, clause 17, of the Constitution of the United States, in all cases whatsoever over such tracts or parcels of land as, *immediately prior to the admission of said State, are owned by the United States* and held for military, naval, Air Force, or Coast Guard purposes, including naval petroleum reserve numbered 4, whether such lands were acquired by cession and transferred to the United States by Russia and set aside by Act of Congress or by Executive order or proclamation of the President or the Governor of Alaska for the use of the United States, or were acquired by the United States by purchase, condemnation, donation, exchange, or otherwise: *Provided* . . . (iii) that such power of exclusive legislation shall rest and remain in the United States only so long as the particular tract or parcel of land involved is owned by the United States and used for military, naval, Air Force, or Coast Guard purposes.[35]

ASA § 11(b) (emphasis added).

The Sansonetti Opinion noted that the lands in PLO 82 were owned by the United States immediately prior to statehood. The Sansonetti Opinion further stated that the phrase in section 11(b) "[n]otwithstanding the admission

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[35] Proviso (i) of section 11(b) allows the State of Alaska to pursue criminals and serve civil process within reserved areas. Proviso (ii) establishes that the reserved lands are still considered a part of the State of Alaska.

of the State of Alaska into the Union" means that the impact of statehood and the equal footing doctrine are not to be considered with land subject to section 11(b).

Additionally, the Sansonetti Opinion stated that PLO 82 was a withdrawal for prosecution of World War II, was in effect at statehood, and held land for military purposes. "Therefore, the submerged lands within PLO 82 meet the requirements of section 11(b) that (1) immediately prior to admission of the State they were owned by the United States and (2) immediately prior to the admission of the State they were held for military purposes." Sansonetti Opinion at 72.[36]

The Sansonetti Opinion indicated that the third proviso of section 11(b) was "exceedingly important." Sansonetti Opinion at 75. As noted above, proviso (iii) terminates exclusive jurisdiction of section 11(b) lands only when the lands are no longer owned by the United States and used for military purposes. The Sansonetti Opinion reasoned that proviso (iii) "makes plain Congress' intent to defeat state title to submerged lands within lands held for military purposes." *Id.* at 75-76. According to the Sansonetti Opinion, the first sentence of section 11(b) includes submerged lands because it refers to land held for military purposes, such as PLO 82. Therefore, submerged lands must be included in proviso (iii) if the military purpose of proviso (iii) is to be read consistently with the rest of section 11(b).[37]

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[36] Additionally, according to the Sansonetti Opinion, the lands of PLO 82 were acquired by cession and transfer to the United States by Russia and set aside by Executive order, as specified by section 11(b).

[37] A "basic rule of statutory construction is that one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless." *Hughes Air Corp. v. Pub. Util. Comm'n.*, 644 F.2d 1334, 1338 (9th Cir. 1981) (citations omitted).

The Sansonetti opinion offered other reasons why section 11(b) defeated state title to submerged lands at statehood: (1) Congress did not want state laws, such as state leasing requirements, to interfere with the military purposes of reserved lands; (2) exclusive jurisdiction under section 11(b) lands attaches only as long as the land is owned by the United States and used for military purposes; therefore, section 11(b) must have defeated state title at statehood or exclusive jurisdiction would have been impossible on submerged land held for military purposes; and (3) if section 11(b) did not defeat state title to submerged lands, then the United States would have had to compensate the State of Alaska to use the submerged lands for military purposes.[38]

The Sansonetti Opinion also considered the impact of ASA section 10 on section 11(b). Section 10 authorizes the President to make post-statehood national defense withdrawals north and west of the PYK Line. Section 11(b), on the other hand, reserved the power of exclusive jurisdiction in the United States over lands held for military purposes immediately prior to statehood. Section 10 did not address submerged lands and, according to the Sansonetti Opinion, was not intended to "restore" title to the United States to submerged lands. The Sansonetti Opinion reasoned that Congress defeated state title to submerged lands in section 11(b) so that it would not have to compensate the state for use of submerged lands in the event of a section 10(b) special defense withdrawal (PYK Line withdrawal).[39]

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[38]The Sansonetti Opinion stated that "[f]loor discussions demonstrate that Congress had no intention of paying for the acquisition of lands in northern Alaska for military purposes." Sansonetti Opinion at 77 (footnote omitted).

[39]The Sansonetti Opinion also reasoned that if section 11(b) did not defeat state title to submerged land reserved for military purposes north and west of the PYK Line, it would not have defeated state title to submerged land reserved for military purposes south and east of the

Finally, the Sansonetti Opinion considered the relationship between the SLA and ASA section 11(b). Section 5(a) of the SLA prohibits granting submerged land title to states if those lands were expressly retained by the United states when the state entered the Union. According to the Sansonetti Opinion, section 11(b) of the ASA constituted an express retention of submerged lands within the meaning of SLA section 5(a). Therefore, such land would not have passed to Alaska under the land grant provisions of the SLA. For all the above reasons, the Sansonetti Opinion concluded that:

> [T]he federal withdrawal and retention of lands under inland navigable waters within the boundaries of PLO 82 in northern Alaska met the two-pronged test set out in *Utah Lake:* (1) Inland submerged lands were included in the withdrawal at its creation in 1943 and remained in the withdrawal through the moment of Alaska statehood; and (2) Congress affirmatively intended in the Alaska Statehood Act to defeat Alaska's title to the submerged lands within PLO 82.

Sansonetti Opinion at 81.

The Cross-Motions for Summary Judgment

The background of this case having been discussed, the court will now consider the arguments raised in the cross-motions for summary judgment. Before reaching the *Utah Lake* test, the court will first consider whether the equal footing doctrine prevents Congress or the Executive from reserving submerged land to the United States, thereby defeating a prospective state's title to that land.

PYK Line. According to the Sansonetti Opinion, this would result in severe constraints on military activity centered in military bases located south and east of the PYK Line. "This awkward result makes very plain that Congress intended in section 11(b) to defeat state title to submerged lands in areas held for military purposes, including PLO 82." Sansonetti Opinion at 79.

No court has specifically addressed whether a congressional or executive reservation of submerged land may defeat state title to that land. *Utah Lake* only assumed, *arguendo*, that a congressional reservation of land could overcome the strong presumption against defeat of state title. *Utah Lake*, 482 U.S. at 202.

As previously noted, the equal footing doctrine provides that "[u]pon admission of a state to the Union, the title of the United States to lands underlying navigable waters within the state passes to it, as incident to the transfer to the state of local sovereignty, and is subject only to the paramount power of the United States to control such waters for the purposes of navigation in interstate and foreign commerce." *United States v. Oregon,* 295 U.S. 1, 14 (1935); *Shively,* 152 U.S. at 26-28; *Holt,* 270 U.S. at 55. At statehood, title passes automatically from the United States, as trustee, to the new state. *Arizona v. California,* 373 U.S. 546, 597 (1963).

The automatic transfer of title to submerged lands will not occur where Congress has made a conveyance to a third party prior to statehood. *Utah Lake,* 482 U.S. at 196-97. Although a conveyance of land to a third party necessarily defeats State title, a reservation of land to the United States does not necessarily evince an intent to defeat State title. The land could still be held for the future state.

The State of Alaska argues that the United States cannot constitutionally reserve land to itself, as this would violate the equal footing doctrine. The United States argues that the Supreme Court did address the question in two cases known as the *Annette Island* cases. In 1891 Congress created the Annette Islands reservation for the Metlakatla Indians. The pertinent act set aside "the body of land known as the Annette Islands" for the Indians. *Alaska Pac. Fisheries,* 248 U.S. 78, 87 (1918) (citation omitted). In 1916, Alaska Pacific Fisheries erected a fish trap on the sub-

merged lands surrounding the island 600 feet from the high tide land. The United States sued to remove the fish trap.

> The principal question for decision (was) whether the reservation created by the Act of 1891 embrace(d) only the upland of the islands or include[d] as well the adjacent waters and submerged land. The question [was] one of construction — of determining what Congress intended by the words "the body of lands known as Annette Islands."

Id. at 87.

The Court determined that:

> Congress had power to make the reservation inclusive of the adjacent waters and submerged land. . . . All were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority. The reservation was not in the nature of a private grant, but simply a setting apart . . . of designated public property for a recognized public purpose . . . .

Id. at 87-88 (citations omitted).

The Court concluded by stating that the reservation included the surrounding waters as well as the uplands and that the Metlakatla were "the only persons to whom permits may be issued for erecting salmon traps at these islands." *Id.* at 90.

Subsequent to statehood, the Supreme Court considered the Annette Islands reservation again in *Metlakatla Indian Community v. Egan,* 369 U.S. 45 (1962). In *Metlakatla,* the Indians filed for an injunction against interference by the State of Alaska with the Indian's use of fish traps in water surrounding Annette Island. Neither title to submerged land nor the equal footing doctrine were mentioned in *Metlakatla.* Rather, the case was decided on the basis of

whether the State of Alaska or the DOI, pursuant to the 1891 Act which set apart the reservation, controlled fishing adjacent to Annette Island.[40] The case was remanded to the Alaska Supreme Court where the DOI could determine what authority it would exercise regarding fishing rights. Although *Alaska Pac. Fisheries* discussed federal reservations of submerged lands, that case, along with Metlakatla, were ultimately fishing rights cases. This court concludes that in the *Annette Island* cases the Supreme Court did not decide whether Congress could reserve land to itself without violating the equal footing doctrine.

The United States argues that even if the Supreme Court has not decided whether Congress can reserve submerged lands to itself, the Ninth Circuit has decided the issue. In *United States v. State of Alaska,* 423 F.2d 764 (9th Cir.), *cert. denied,* 400 U.S. 967 (1970), the court considered an action to quiet title to lands under Tustumena Lake, located in the Kenai Moose Range in Alaska.

The Kenai Moose Range was established by Executive order in 1941 to protect the Kenai moose. After oil was discovered on the Kenai Peninsula, the southern half of the Kenai Moose Range was closed to leasing. The court stated that upon considering the "factual atmosphere in which the Kenai Moose Range was created", the withdrawal order clearly included land under navigable water. *Id.* at 766-67. Moose are semi-aquatic; therefore, water and submerged lands are essential to the continued existence of the "bulls and cows of this noble group . . . ." *Id.* at 767. The court held that the equal footing doctrine notwithstanding, the United States, while holding Alaska as a territory, had sovereign power to reserve land to itself which might otherwise go to a state on its admission to the Union. *Id.* at 767-68, (citing

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[40]The 1891 Act stated that the Metlakatla Indians could use the Annette Islands pursuant to rules and regulations prescribed by the Secretary of Interior. *Metlakatla,* 369 U.S. at 44.

United States v. Holt State Bank, 270 U.S. 49 (1926); *Shively v. Bowlby,* 152 U.S. 1 (1894)).

Similarly, in *United States v. City of Anchorage,* 437 F.2d 1081 (9th Cir. 1971), the court considered an action to quiet title to certain tidelands and submerged lands near the Alaska Railroad's terminal reserve land in Anchorage. The Alaska Railroad was created pursuant to congressional authorization by Executive order in 1915. In quieting title, the court considered issues similar to those at issue here:

> (1) [W]hether the Alaska Railroad Act, as implemented by the Presidential Order of August 31, 1915, reserved for use of the Alaska Railroad as a terminal, by necessary implication, the tide and submerged lands immediately adjacent to and contiguous with the ordinary highwater mark on the eastern shore of Knik Arm and also the tidelands and bed of Ship Creek within the exterior boundaries of the terminal reserve; and (2) whether title to these lands remained in the United States after the admission of Alaska into the Union on January 3, 1959.

Id. at 1083.

The court held that both Congress and the President intended to reserve the land in question because construction of docks, wharves, and harbor facilities on the submerged land was essential to connect ocean-going transportation to the railhead and, therefore, essential to the development of Alaska. The court held that the second question was "of necessity, resolved against [the state] in our disposition of the first point and by our decision in *United States v. State of Alaska. . . .*" *Id.* at 1085. The court stated further:

> The establishment of the Alaska Railroad was one of those "exceptional circumstances" falling within the exception to the general rule stated in *United States v. Holt State Bank,* 270 U.S. 49, 55 . . . (1926) and

> *Shively v. Bowlby,* 152 U.S. 1, 49-50 . . . (1894). Beyond question, the establishment of the railroad was a "public exigency", as that phrase was used in those cases.

437 F.2d at 1085.

Accordingly, the court quieted title in the United States to the tidelands and submerged lands. *See also Alaska v. Ahtna, Inc.,* 891 F.2d 1401, 1406 (9th Cir. 1989), *cert. denied,* 495 U.S. 919 (1990) ("The federal government has the power to convey a Territory's lands underlying navigable waters prior to that Territory becoming a State, thereby defeating the future State's right to the lands. The Government could probably likewise reserve unto itself the same lands prior to statehood.") (citations omitted).

The *Utah Lake* dissent[41] expressed "confiden[ce] that Congress has the power to prevent ownership of land underlying a navigable water from passing to a new State by reserving the land to itself for an appropriate public purpose . . . ." 482 U.S. at 209. The dissent stated further that "there is no reason to distinguish between a conveyance to a third party required for can appropriate public] purpose and a reservation unto the United States for the same purpose." *Id.* at 210. The dissent regarded reservations to be more constitutionally permissible than conveyances because "if Congress later determines that the lands are no longer needed by the Federal Government for a public purpose, it can at that time transfer title to the State." *Id.* at 210.

Although the Supreme Court has not specifically held that Congress may defeat a state's claim to title by a federal reservation or withdrawal under navigable waters, such reservations were at least contemplated in *Utah Lake.* The court holds that Congress may reserve submerged land to itself and defeat a future state's title to such land, pursuant

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[41] Utah Lake was a 5-4 decision. The dissent was made up of Justices White, Brennan, Marshall, and Stevens.

to the Property Clause of the Constitution, so long as the reservation meets the two-part *Utah Lake* test. Having so decided, the court must now apply *Utah Lake* to PLO 82.

The court begins this portion of its analysis with the strong presumption that the State of Alaska, pursuant to the equal footing doctrine and the SLA, took title to submerged lands in Alaska.

The first question for resolution is whether Congress clearly intended to reserve the submerged lands in PLO 82. *Utah Lake,* 482 U.S. at 202. Clear intent is established upon a showing that Congress "definitely declared or otherwise made very plain" an intent to reserve the submerged lands. *Id.* at 207 (citations and internal quotations omitted).

As previously noted, PLO 82 withdrew "all public lands" in northern Alaska "from sale, location, selection, and entry under the public land laws of the United States, including the mining laws, and from leasing under the mineral-leasing laws . . . ." PLO 82; 8 Fed. Reg. 1599. Additionally, the minerals of PLO 82 were reserved "for use in connection with the prosecution of the war." *Id.*

The meaning of "public lands" as referenced in PLO 82 is disputed by the parties. The State of Alaska argues that "public lands" has been consistently defined as lands subject to sale or other disposal under general laws, unless other meaning is clear from the legislation. See *Utah Lake*, 482 U.S. at 206 ("Most enduringly, the *public lands* have been defined as those lands subject to sale or other disposal under the general land laws.") (citation omitted); *Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 17 (1935) ("the term 'public lands' [does] not include tidelands") (citation omitted); *Minnesota v. Hitchcock*, 185 U.S. 373 (1902); *Barker v. Hardey*, 181 U.S. 481 (1901); *Mann v. Tacoma Land Co.*, 153 U.S. 273, 284 (1894) ("It is settled that the general legislation of Congress in respect to public lands does not extend to tide lands."); *Newhall v. Sanger*, 92 U.S. 761, 763 (1875) ("The words 'public lands' are habitually used in our

legislation to describe such as are subject to sale or other disposal under general laws.").[42] The State of Alaska argues that tidelands and inland submerged lands are not subject to sale or other disposal under the general laws and, therefore, are not "public lands." Accordingly, the State of Alaska argues that to interpret "public lands" as including submerged land, absent clearly expressed intent to do so, would violate the equal footing doctrine.

The United States argues that the technical meaning of "public lands" is irrelevant. Rather, the United States argues, the meaning of "public lands" must be determined by reference to the context within which the term is used. According to the United States, the important consideration is the meaning of "public lands" as used in PLO 82. The United States refers to *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949), in which the Supreme Court held that the statutory authority of the Secretary of the Interior to withdraw "public lands" as reservations for Alaska Natives included the authority to reserve adjacent submerged lands. Similarly, in *Alaska Pac. Fisheries*, 248 U.S. at 89, the court, in considering whether "the body of lands known as the Annette Islands" included submerged lands, stated:

> As an appreciation of the circumstances in which words are used usually is conducive and at times is essential to a right understanding of them, it is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reservation was created — the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians and the object to be attained.

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[42] In addition to the cited cases, the State of Alaska refers to various decisions by the DOI and the Department of Agriculture, and legal briefs filed by the United States in other litigation which state that tidelands are not public lands belonging to the United States. *See* State of Alaska's brief in support of motion at 32-35 (Clerk's Docket No. 94).

Id. 87. As noted above, the court concluded that, given the circumstances, the "body of lands" included submerged lands.

Finally, in *United States v. Alaska*, the court, in considering submerged lands within the Kenai Moose Range, stated:

> In construing the pertinent Alaskan statutes, the courts have consistently held that the words "public domain", and public lands" and "land", include land under water. *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827 [ ]; *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 . . . (1918); *Hynes v. Grimes Packing Co.*, 337 U.S. 86 . . . (1949).

United States v. Alaska, 423 F.2d at 766.

The court stated further that "one of the most important factors in resolving the meaning of the pertinent language is to place ourselves, insofar as possible, in the posture of the President and surround ourselves with the factual atmosphere in which the Kenai Moose Range was created." *Id.* at 766-67.

The court concludes that the meaning of the term "public lands" should be drawn from the context of the language of PLO 82 and the factual circumstances in existence at the time PLO 82 issued.[43]

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[43]The dissent in *Utah Lake* contains a pertinent discussion on the meaning of "public lands."

> The majority . . . alights on the phrase "public lands." That phrase, according to the majority, means "lands subject to sale or other disposal under the general land laws." . . . This interpretive approach is inconsistent with our recent opinion in *Amoco Production Co. v. Gambell*, 480 U.S. 531, 549, n.15 . . . (1987), where we "reject[ed] the assertion that the phrase 'public lands,' in and of itself, has a precise meaning, without reference to a definitional section or its context in a statute." The most natural interpretation of "public lands" in this context is simply lands to which the Federal Government holds title. In *Choctaw Nation v. Oklahoma*,

The court will next consider whether "public lands," as used in PLO 82, included submerged lands.

The meaning of "public lands" in PLO 82 is dependent, in part, upon the purpose of PLO 82. The parties do not dispute that the purpose of PLO 82 was to preserve minerals for the prosecution of World War II. The sheer magnitude of that global conflict required all of the resources which the United States could muster. Moreover, at the time PLO 82 was issued in January of 1943, the war's duration was in doubt. Thus, a steady supply of oil was essential if the United States was to fight across two oceans and supply war resources to her allies. In short, a more extraordinary case of "international duty or public exigency" has never existed in American history. *Utah Lake*, 482 U.S. at 197.

PLO 82 did not need to specify "submerged lands" to make its intent clear. The lands were specifically withdrawn and "minerals in such lands" were specifically reserved "for use in connection with the prosecution of the war." 8 Fed Reg. 1599 (1943). Had PLO 82 not intended to include submerged lands, the reservation would have been nearly worthless. Water covers millions of acres of the North Slope, yet in 1943 it was unknown which water bodies were navigable and constituted submerged lands. Failure to withdraw submerged lands would have led to uncertainty regarding the withdrawal status of large portions of the North Slope.

Additionally, "oil is a fugacious mineral, the movements of which are not confined by the artificial boundaries of surface tracts [thus a] gap [exists] between the geological nature of the oil pool and the formal surface rights of the lessees . . ." *Railroad Comm'n of Texas v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 579 (1940). Pursuant to the "rule of

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397 U.S. 620, 633 . . . (1970), for example, we stated that "the United States can dispose of lands underlying navigable waters just as it can dispose of *other Public lands.*"

Utah Lake, 482 U.S. at 212 n.4 (White, J., dissenting).

capture" a lessee's interest is subject to "his neighbors' power to drain his oil away." *Id.* PLO 82's clear intent to reserve submerged land was established, in part, by the need for the United States to protect itself from another's capture rights.

The purpose of PLO 82 provides clear evidence that submerged lands were reserved. The manner in which the PLO 82 boundaries were drawn provides additional evidence that PLO 82 clearly intended to reserve submerged lands. The United States argues that PLO 82 was carefully drawn to include submerged lands within its boundaries, leaving no doubt as to the intention to include submerged lands. The Alaska Peninsula portion of the withdrawal, for example, specifically included Iliamna Lake, but excluded Lake Clark. Similar water boundaries mark the Katalla-Yakataga portion of the withdrawal. The United States argues that the care with which water boundaries were drawn leaves no doubt that PLO 82 was intended to include all submerged lands within its boundaries. The State of Alaska does not refute this argument. The fact that PLO 82 expressly included some water bodies and expressly excluded others is not instructive as to DOI intent with respect to all of the unnamed water bodies.

The parties dispute the significance of the Mineral Leasing Act (MLA), 41 Stat. 437 (1920), on PLO 82. The MLA was in effect in 1943 and permitted oil and gas leasing of:

> [L]lands containing such deposits owned by the United States, including those in national forests, but excluding lands . . . known as the Appalachian Forest Act, and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes. . . .

41 Stat. 437; 30 U.S.C. § 181 (1920).

The United States argues that because the statute allowed leasing of lands owned by the United States, but did not

allow leasing on lands withdrawn for military and naval uses, considerable confusion existed as to the applicability of the MLA to submerged lands in territories. The State of Alaska argues that submerged lands were subject to the MLA, and that the Secretary of the Interior had discretion under the MLA to refuse to issue permits to prospect for oil. Thus, according to the State, PLO 82 did not need to protect submerged lands which the Secretary on Interior could protect by refusing to issue exploration permits. In response, the United States argues that in 1943 issuance of MLA leases was delegated to local land offices and local officials had issued leases to submerged lands.[44] Consequently, the United States argues, PLO 82 necessarily withdrew submerged lands to eliminate any confusion which may have existed regarding the propriety of leasing such lands.

The arguments regarding the MLA underscores the court's earlier discussion of the purpose of PLO 82 in protecting oil resources for the prosecution of World War II. At a minimum, there was uncertainty regarding the effect of the MLA on the submerged land of PLO 82. Given that the extent of the submerged lands in PLO 82 was unknown and the United States needed to protect vast oil resources for the war effort, it makes sense that PLO 82 would end the confusion and protect the resources by reserving all of the submerged lands of PLO 82.[45]

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[44] In the 1920s, permits were issued in the vicinity of Smith Bay. 86 Interior Dec. at 167. By 1938, all tidelands throughout the Alaska territory had been opened for precious mineral mining. 52 Stat. 588 (1938).

[45] In a November 20, 1942 memorandum, the commissioner of the General Land Office, Department of Interior, described the private interest in the PLO 82 regions:

> There are in the areas described in the proposed order approximately 360 patented entries embracing about 3,000 acres, 64 oil and gas leases embracing approximately 137,006 acres, and about 105 oil and gas lease applications embracing approximately 84,000

The court concludes that the term "public lands" in PLO 82 can be defined according to context and factual circumstances. Here, the context and factual circumstances, as discussed above, indicate that "public lands" in PLO 82 included submerged lands. In plain and simple terms, there was a war on, and the United States had an extraordinary need to protect all resources within its power. The stated purpose of PLO 82 alone "made [it] very plain" that PLO 82 "clearly intended" to include submerged land. *Utah Lake,* 482 U.S. at 202. The purpose, combined with the other issues discussed above, establishes that PLO 82 clearly intended to include navigable water.

Since the court has found that the Secretary of the Department of the Interior issued PLO 82 with the intent to include submerged lands, the court must still determine whether the Secretary may be considered to have spoken for Congress in expressing the intent of PLO 82. *Utah Lake,* 482 U.S. at 202. PLO 82 was an Executive withdrawal issued by the Secretary of the Interior pursuant to a delegation of authority by President Franklin D. Roosevelt. The *Utah Lake* test, however, refers to the intent of Congress,[46] not the Executive.

In *United States v. Midwest Oil Co.* 236 U.S. 459 (1915), the Supreme Court recognized that Congress "has a legislative power over the public domain" and that the Executive Branch, as Congress' agent "was in charge of the public domain". *Id.* at 474, 475. Thus, the Executive Branch acts as the agent for Congress in exercising constitutional authority over the public domain. *Id.* at 475. *Midwest Oil* held that

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acres. If and when this order is signed the lease applications will be rejected.

Attached as Exhibit B to the Krulitz opinion, 86 Interior Dec. 151.

[46] The Supreme Court so says in *Utah Lake,* even though Utah Lake was in fact withdrawn from public domain by the United States Geological Service, *albeit* pursuant to an express act of Congress. PLO 82 was not authorized by a specific congressional enabling act.

the Executive Branch had authority to withdraw land as an oil and gas reserve because Congress had acquiesced in the long history of Executive management of public lands.

The State of Alaska argues, without definitive supporting case law, that Congress has never acquiesced in the withdrawal of *submerged* lands. Yet, in *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 80 (1918), the Supreme Court rejected the appellant's attempt to distinguish *Midwest Oil* and appellant's argument that the President lacked authority to reserve submerged lands.[47] *Alaska Pac. Fisheries* affirmed the lower court's decision which specifically recognized that the President may "reserve public lands and *adjacent waters* for useful purposes without being authorized to do so by express statute. 240 F. 274, 280 (9th Cir. 1917) (emphasis added).[48] *See also United States v. Alaska,* 423 F.2d 764 (9th Cir.), 400 U.S. 967 (1970), which recognized that the Executive had the authority "prior to Alaskan statehood to withhold, withdraw or convey the land and water for any valid purpose." *Id.* at 766. In *United States v. Alaska,* the court recognized the validity of a withdrawal by President

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[47] Appellant in *Alaska Pac. Fisheries* argued:

> This [situation] is quite different from a withdrawal from entry of public land. *United States v. Midwest oil Co.* 236 U.S. 459. The Constitution nowhere confers upon the President any special power respecting navigable waters or fisheries; and the common law, in the light of which the Constitution must be considered, recognized no such right in the King. The fisheries in the navigable waters belong to the people at large. The Government has no interest therein which it can reserve for the use of any individual or class. The President cannot include such waters in an Indian reservation. *United States v. Ashton*, 170 Fed. Rep. 509.

Alaska Pac. Fisheries 248 U.S. at 80.

[48] The Ninth Circuit followed this proposition with a discussion of *Midwest Oil. Hynes v. Grimes Packing Co.,* 337 U.S. 86 (1949), referenced both *Alaska Pac. Fisheries* and *Midwest Oil* in discussing the Secretary's authority to withdraw submerged land pursuant to an Executive order.

Roosevelt of lands underlying inland navigable water in the Kenai National Moose Range as a wildlife refuge in Executive Order 8979 pursuant to "the authority vested in me as President of the United States . . ." *Id.* at 765 (citation omitted). Accordingly, the Secretary of the Interior had the power to withdraw submerged lands of PLO 82.[49]

For the above stated reasons, the court concludes that Congress acquiesced in the withdrawal of the submerged lands in PLO 82. Furthermore, Congress, through the Executive Branch as its agent, expressed a clear intent to reserve the submerged lands of PLO 82 as a matter of international duty and public exigency. Accordingly, the court concludes that the United States has satisfied the first prong of the *Utah Lake* test. The court will next consider the second prong, whether Congress affirmatively intended to defeat Alaska's title to the submerged land of PLO 82.

At this point, it is worthwhile to quote at length a conclusion reached in the Sansonetti Opinion:

> Applying the second prong of the *Utah Lake* test to the withdrawal in 1943, had statehood been imminent, I would conclude as a necessary inference flowing from the purpose of the withdrawal, that inland submerged

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[49]The State of Alaska states that in 1983, the Ninth Circuit found that *Midwest Oil's* theory that a long and continuous practice is entitled to a presumption of validity, no longer represents the thinking of the Supreme Court. *United States v. Woodley*, 726 F.2d 1337 (9th Cir. 1983). The *Woodley* opinion, however, was withdrawn (732 F.2d 111 (9th Cir. 1984)), and a second *Woodley* opinion stated "[t]he United States Supreme Court has made clear that considerable weight is to be given to an unbroken practice, which has prevailed since the inception of our nation and was acquiesced in by the Framers of the Constitution when they were participating in public affairs." *United States v. Woodley*, 751 F.2d 1008, 1012 (9th Cir. 1985). The Ninth Circuit stated that the above principle was reaffirmed in *INS v. Chada*, 462 U.S. 919 (1983), and *Marsh v. Chambers*, 463 U.S. 783 (1983). In any event, congressional reservation of submerged land, so long as it satisfies the *Utah Lake* test, is not contrary to the Constitution.

> lands were intended to be retained in federal ownership. However, no petitions seeking statehood were pending before Congress when PLO 82 was issued on January 3, 1943. In fact, only one statehood bill had even been introduced in Congress up to that time — in 1916, some twenty-seven years before the issuance of PLO 82. A thorough review of the Departmental files from this period found at the National Archives has been conducted. The review has produced no evidence to suggest that Acting Secretary Fortas had even considered the effect of this withdrawal on the title to submerged lands upon future statehood, let alone formulated an intent to defeat the future state's title to submerged lands located therein. Thus, the second prong of the *Utah Lake* test had not been met as of the date of the original withdrawal.
>
> Because the second prong of this test was not met at the time PLO 82 was issued, and with the termintion of World War II upon which the original withdrawal was grounded, it is necessary to determine whether the Executive, Congress, or both, subsequently formulated a clear intent to withhold the submerged landds within this withdrawal from a future state.

Sansonetti Opinion at 34-35 (footnotes omitted).

The parties do not dispute that intent to defeat state title to the submerged lands in PLO 82 cannot be established at the time of the PLO 82 withdrawal. The court concludes that when PLO 82 issued in 1943, neither Congress nor the Executive expressed an intent to defeat State title to submerged land within PLO 82. Congress' failure to express intent to defeat State title in 1943 raises an issue which neither the Sansonetti Opinion nor the parties discussed: whether Congress' intent to defeat State title must be expressed contemporaneously with congressional intent to reserve submerged lands.

Utah Lake does not specifically address this issue, but did consider events, such as the 1890 Act, which occurred subsequent to the initial "reservation" of the bed of Utah Lake. Moreover, in *Choctaw,* the only case in which the Supreme Court has "concluded that Congress intended to grant sovereign lands to a private party" (*Utah Lake,* 482 U.S. at 198), the Court considered events which ranged from the end of the Revolutionary War through Oklahoma statehood in 1906. *Choctaw,* 397 U.S. at 622-627. This court concludes that congressional intent to defeat state title to submerged lands may be determined from events occurring subsequent to the issuance of PLO 82.

The subsequent events in question center around the Alaska Statehood Act through which the United States argues Congress expressed clear intent to defeat state title to the submerged lands of PLO 82. As an initial matter, the State of Alaska argues that Congress cannot retain submerged land as a condition of statehood, as this would violate the equal footing doctrine.

Section 4 of the ASA provides in part:

> As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States . . . .

According to the Sansonetti Opinion, section 4 of the ASA makes clear that Alaska statehood was conditioned upon disclaiming right and title to lands not granted or confirmed in the ASA. Sansonetti Opinion at 57. The State of Alaska argues that Congress cannot use a statehood compact to grant a state less than full sovereign rights.

In support of its argument, the State of Alaska refers to *Pollard's Lessee v. Hagan,* 44 U.S. 212 (1845), in which the issue was whether a federal patent, issued after Alabama's admission to the Union, could validly convey submerged

lands within Alabama's boundaries. The plaintiff argued that Alabama did not take title to submerged lands at statehood because the statehood act provided that all navigable waters shall forever "remain public highways, free to the citizens of the said State, and of the United States . . . ." *Id.* at 229. The Court rejected plaintiff's argument, stating that "Alabama has been admitted into the union on an equal footing with the original states, the constitution, laws, and compact, to the contrary notwithstanding." *Id.* The Court concluded, pursuant to the equal footing doctrine, that:

> [T]o Alabama belong the navigable waters, and soils under them . . . and no compact that might be made between her and the United States could diminish or enlarge these rights.

Id.

In *Corvallis Sand & Gravel,* 429 U.S. 363 (1977), the Supreme Court stated that *Pollard's Lessee* "established the absolute title of the States to the beds of navigable waters, a title which neither a provision in the Act admitting the State to the Union nor a grant from Congress to a third party [after statehood] was capable of defeating." *Corvallis Sand & Gravel,* 429 U.S. at 374 (footnote omitted).

Pollard's Lessee and *Corvallis Sand & Gravel* are not applicable to the case at bar because they did not involve a congressional conveyance or reservation of land prior to statehood.[50] Choctaw, however, is applicable. In Choctaw,

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[50]Pollard's Lessee was premised on the now faulty principle that the equal footing doctrine absolutely prohibited Congress from taking any steps to defeat a prospective State's title to submerged land. *Shively* "disavowed the dicta in *Pollard's Lessee,* and held that the Federal Government had the power, under the Property Clause, to convey such land to third parties . . ." *Utah Lake,* 482 U.S. at 196. *Pollard's Lessee* remains viable to the extent recognized in *Corvallis Sand & Gravel* that Congress cannot defeat state title to submerged land after statehood, because "title . . . *acquired* by the State is absolute so far as any federal

the Supreme Court noted that Oklahoma was admitted to the Union "'on an equal footing with the original States,' conditioned on its disclaimer of all right and title to lands 'owned or held by any Indian, tribe, nation.'" *Choctaw*, 397 U.S. at 627 (quoting Act of June 16, 1906, §§ 3, 4, 34 Stat. 270, 271). According to *Choctaw*, and contrary to the State of Alaska's argument, admission of a state into the Union can hinge upon the state's disclaimer of certain submerged land.

The State of Alaska cites *Coyle v. Oklahoma*, 221 U.S. 559 (1911), for the proposition that Congress may not impose conditions upon the entry of a state into the Union, if those conditions would be invalid and ineffective if enacted after the state was admitted. In *Coyle*, the Court addressed a provision in the Oklahoma Enabling Act which required that the state capital be temporarily located in Guthrie, Oklahoma. The Court held that the provision violated the equal footing doctrine because:

> The power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers.

Coyle, 221 U.S. at 565. *Coyle* further found that the power to locate a state capital was neither referable to any power granted to Congress nor implicit in the congressional power to admit new states. *Id.* at 574. Pursuant to the equal footing doctrine, the Oklahoma state legislature had the power to locate its own seat of government notwithstanding any contrary provisions in the state's enabling act.[51]

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principle of land titles is concerned." *Corvallis Sand & Gravel*, 429 U.S. at 374 (emphasis added) (referring to the "rule laid down in *Pollard's Lessee*").

[51] Coyle noted, however, that Congress probably had the power to enact Statehood acts with "regulations touching the sole care and

Coyle, like *Pollard's Lessee*, is inapplicable to the case at bar. Oklahoma was able to locate its state capital where it chose because selecting the location is "essentially and peculiarly [a] state power[]", *Coyle*, 221 U.S. at 565, and "referable to no power granted to Congress", *id.* at 574. Ownership of submerged lands, however, is not "essentially and peculiarly" a state power. Congress has the power to defeat state title to submerged lands, and that power is derived from the Constitution and not from any agreement or compact with a prospective state. The force of *Shively*, *Holt State Bank*, *Choctaw*, *Montana*, and *Utah Lake*, would be greatly diminished if Congress could not use statehood acts as a means to express clear intent to defeat state title to submerged lands. Congress has the power to defeat state title to submerged land, and that power may be exercised in the statehood act.

The next question is whether Congress did in fact clearly express its intent in the ASA to defeat state title to the submerged lands of PLO 82.

The United States argues that Congress adopted sections 10 and 11 of the ASA to alleviate concerns that statehood would negatively impact military activity in Alaska. The United States argues that because submerged lands pass to the new state *at the moment of statehood*, Congress used the phrase "immediately prior to the admission of said State" to clarify its intent to defeat state title to submerged lands held for military purposes. ASA § 11(b). The United States argues that the third proviso of section 11(b) is "exceedingly important" because "it ties exclusive jurisdiction to parcels owned by the United States." United States memorandum in support of cross-motion at 50.[52] The United States also argues that sections 11(b) and 11(b)

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disposition of the public lands or reservations therein ..." *Coyle*, 221 U.S. at 574.

[52] Clerk's Docket No. 96.

(iii) cannot be read consistently with one another unless Congress intended to defeat state title to PLO 82 submerged lands. The United States argues further that if section 11(b) did not defeat state title to submerged lands for military purposes, then the submerged lands in every military facility in Alaska passed to Alaska at statehood. If that were the case, the United States argues, then Congress would have been required to compensate Alaska for military use of state-owned submerged lands within section 11(b) areas. However, the United States argues, Congress had no intention of paying such compensation and, therefore, defeated state title to the land.[53]

The State of Alaska argues that section 11(b) addresses legislative jurisdiction, not title to submerged lands. The State of Alaska argues that the purpose of section 11(b) was to assure that the state would not impose laws inconsistent with the military functions of PLO 82. Thus, the State of Alaska argues, ASA section 11(b)(ii) provided that the State of Alaska and the United States would exercise concurrent jurisdiction over PLO 82. Regarding section 11(b)(iii), the State of Alaska argues that it was designed to limit section 11(b), not broaden it beyond the power of exclusive legislation.

Next, the State of Alaska argues that Congress did not defeat state title to submerged lands at statehood because such was not absolutely necessary to the purpose of PLO 82. The State of Alaska argues that if the United States were concerned about state interference in any military purpose

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[53] In further support of its argument, the United States references the comments of several individuals during hearings leading up to statehood. Senator Cordon stated "the petroleum reserve is a good reason not to grant the land in the area to the State of Alaska" and "[t]he reservation there is absolute." United States memorandum in support of cross-motion at 52 (Clerk's Docket No. 96)(citations omitted). Senator Smathers stated that "no company or individual can go in there." *Id.* at 51 (citation omitted).

for which PLO 82 was retained, those purposes were protected by SLA section 6(a). The United States argues, however, that section 6(a) merely restates the traditional rights the United States has in controlling navigation. Additionally, SLA section 6(b) requires Congress to pay for submerged lands if needed "[i]n time of war or when necessary for national defense . . . ." 43 U.S.C. § 1314(b), but the United States argues that Congress had no intention of condemning the submerged lands of PLO 82 for military use.

The impact of the SLA on the ASA is interwoven throughout the parties' arguments and warrants further discussion. The SLA is made applicable to the ASA pursuant to section 6(m) of the ASA. The United States argues that section 11(b) of the ASA demonstrates that Congress intended to defeat state title to PLO 82 submerged lands and, therefore, demonstrates an express retention of submerged lands within the meaning of section 5(a) of the SLA. SLA section 5(a) provides an exception to the general principle of the SLA that title to submerged lands is to vest in the respective states.

The United States argues that section 11(b) of the ASA and section 5(a) of the SLA operate together in expressing Congress' intent to defeat state title to the submerged lands of PLO 82. The United States also argues that section 5(a) of the SLA operates in conjunction with section 4 of the ASA in establishing congressional intent on PLO 82 submerged lands. ASA section 4 states:

> As a compact with the United States said State . . . forever disclaim[s] all right and title to *any lands or other property not granted or confirmed to the State under authority of this Act*, the right or title to which is held by the United States. . . . ASA § 4 (emphasis added).

The United States argues that the PLO 82 submerged lands were "expressly retained" under SLA section 5(a)

and not granted to the State of Alaska under ASA section 4. The State of Alaska argues that the SLA did not supersede the equal footing doctrine and that PLO 82 submerged lands passed to Alaska regardless of exceptions in the SLA. Therefore, the State of Alaska argues that congressional intent, whether stated in the ASA or the SLA, must still meet the *Utah Lake* test.

Section 5(a) of the SLA protects the United States' ownership of all lands expressly retained by the United States when a state enters the Union. The SLA, however, did not disturb the equal footing doctrine. In *Corvallis Sand & Gravel*, the Court stated:

> [T]he Submerged Lands Act did not alter the scope or effect of the equal-footing doctrine, nor did it alter state property law regarding riparian ownership. The effect of the Act was merely to confirm the States' title to the beds of navigable waters within their boundaries as against any claim of the United States Government.

Corvallis Sand & Gravel, 429 U.S. at 371 n.4. Therefore, even land which is "expressly retained" under section 5(a) of the SLA is subject to the strong presumption against defeating state title to submerged land. Submerged lands subject to the "expressly retained" standard of section 5(a) are also subject to analysis under the "clearly intended" standard of *Utah Lake.*

The court concludes that the United States has not established that Congress "definitely declared or otherwise made very plain" its intent to defeat state title to PLO 82 submerged lands. *Utah Lake*, 482 U.S. at 197 (citation omitted). The undisputed fact that Congress, when promulgating PLO 82 in 1943, did not intend to defeat state title to submerged lands is convincing evidence that Congress *never* intended to defeat state title to such lands.

In 1958 when the ASA was under consideration (as well as in 1943 when PLO 82 was issued), Congress was aware

of both *Shively* and *Holt State Bank*, and the requirement of the equal footing doctrine that territorial submerged lands are held for the ultimate benefit of the future states. Congress was also aware that, in order to defeat state title, it must make such intent very plain. To avoid the equal footing doctrine, Congress must use "clear and especial words" (*Martin v. Waddell's Lessee*, 41 U.S. 367, 411 (1842)) which "embrace[] the lands under the waters of the stream" (*Packer v. Bird*, 137 U. S. 661, 672 (1891)). Section 6(m) of the ASA extends the SLA to the State of Alaska. The ASA does not expressly identify PLO 82 as an exception to the operation of section 6(m). This is the single most important piece of evidence that Congress never intended the ASA to defeat State title to PLO 82 submerged lands.[54] Like the 1888 Act in *Utah Lake*, "the broad sweep of [the ASA] cannot be reconciled with an intent to defeat the states' title to the land under navigable waters." *Utah Lake*, 482 U.S. at 208.

More generally, the court concludes that neither PLO 82, the ASA, nor the SLA, whether considered separately or together, contain the type of specific language which the Supreme Court requires if Congress is to overcome the equal footing doctrine and the strong presumption against defeating state title to submerged land. The single case in which the Supreme Court concluded that Congress intended to defeat State title to submerged land was *Choctaw*. In *Choctaw*, one of the treaties specifically stated that "no part of the land granted to them shall ever be embraced in any Territory or State." *Choctaw*, 397 U.S. at 635. *Choctaw*

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[54] In *Utah Lake*, the Court noted that the: "structure and history of the 1888 Act strongly suggests that Congress had no . . . intention [to defeat state title to submerged land]. On its face, the 1888 Act does not purport to defeat the entitlement of future States to any land reserved. [The] Act *makes no mention of the State' entitlement to the beds of navigable rivers and lakes upon entry into statehood." Utah Lake*, 482 U.S. at 208 (emphasis added).

demonstrates the type of specific language necessary to overcome the strong presumption against defeating state title to submerged lands. Here, it is undisputed that PLO 82 as promulgated was not intended to defeat State title to submerged lands in PLO 82. To draw the opposite conclusion from either the ASA or the SLA would be antithetical to the equal footing doctrine. Congress simply did not clearly state in the ASA that it intended to defeat the State of Alaska's title to PLO 82 submerged lands.[55]

The court also notes that in 1958 PLO 1621, which opened the area west of NPR-4 (where the Kukpowruk River flows) to entries under the mining laws and issuance of mineral leases, and SLA section 6(b), which gives the United States the right of first refusal to purchase natural resources or to acquire submerged lands, emasculate the original purpose and need for PLO 82. PLO 1621 authorized leasing and development of some of these submerged lands, but the United States still had the right to acquire the oil under the SLA.

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[55]Neither the PYK line (section 10 of the ASA) nor section 11(b) can fairly be read as a congressional reservation of title to any particular submerged land. Section 10 does not mention PLO 82 or submerged land, but merely establishes the potential that, someday, the President may order a special national defense withdrawal. The language of section 10 does not establish "clear intent" on the part of Congress to defeat state title to PLO 82 submerged land. Likewise, section 11(b) makes no mention of title to PLO 82 submerged lands. Rather, section 11(b) reserved exclusive *legislative* authority in the United States for military lands. The ASA must be read as a whole, in a fashion to give effect to all of its terms. The ASA provides that the principles of the equal footing doctrine and the terms of the SLA apply to the State of Alaska. Neither the equal footing doctrine nor the SLA may be defeated without a clear expression of intent on the part of Congress. ASA sections 10 and 11(b) do not provide clear statements of congressional intent that PLO 82 submerged lands should be exempted from the provisions of the equal footing doctrine or the SLA.

The United States argues that comments by certain senators and other individuals during the Alaska statehood debate provide evidence that Congress clearly intended to defeat state title to the submerged lands of PLO 82. Senator Cordon, for example, stated that "[t]he reservation there is absolute." United States' memorandum in support of cross-motion at 52[56] (citations omitted). Those portions of the statehood debate referenced by the United States very likely involved Congress' concerns regarding state selections from public lands in Alaska. As long as PLO 82 remained in force, the lands within that reservation could not be selected by the state under the land grant provision of the ASA.[57] The court finds nothing in the portions of the statehood debates referenced by the United States which suggests that Congress definitely declared an intent to defeat state title to submerged lands. The individuals engaged in the Alaska statehood debate simply did not mention the equal footing doctrine or congressional intent to defeat state title to the submerged lands of PLO 82.

The failure of Congress to make its intentions clear ends the court's inquiry. It is inappropriate for the court to engage in the type of speculation and conjecture advocated by the United States in attempting to explain the intent of Congress. The United States' speculative arguments if credited at all prove only one thing, that the ASA is subject to varying interpretations. As noted by the State of Alaska, in quoting *The Binghampton Bridge*, 70 U.S. at 51, 83 (1865):

> [T]he fact that it required so ingenious and labored an argument by my learned brother, to vindicate such

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[56] Clerk's Docket No. 96.

[57] The ASA, sections 6(a) and 6(b), authorized the State of Alaska to select over 100 million acres "from the public lands of the United States in Alaska which are vacant, unappropriated and unreserved at the time of their selection."

> construction of the act [is], of itself, conclusive evidence that the construction should not be given to it.

Id.

The same is true in the case at bar. The United States' arguments are ingenious and labored, but they simply do not demonstrate a plain congressional intent to defeat state title to PLO 82 submerged lands. The United States' arguments require the court to work through layers of conjecture and draw numerous inferences, yet the court cannot "lightly infer a congressional intent to defeat a State's title to land under navigable waters . . . ." Utah Lake, 82 U.S. at 197.[58]

The United States attaches talismanic significance to sections 11(b) and 11(b)(iii) of the ASA, yet these sections simply make no reference to lands beneath navigable waters in PLO 82. When considered in light of Congress' definite intent not to defeat state title to PLO 82 submerged lands in 1943, it is extraordinary to suggest that Congress expressed the opposite intent through the broad terms of section 11(b) and 11(b)(iii). This court concludes that the United States' concession that PLO 82 did not evince an intent to defeat state title to the submerged lands in question is the single most important piece of evidence for purposes of resolving this case. This evidence is dispositive of the case given the absence of a congressional act (or act of the DOI as agent for Congress), subsequent to PLO 82 but prior to

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[58] For example, the United States argues that "Congressional intent to retain in federal ownership the submerged lands within defense withdrawals is very plain because the State's contrary interpretation would so clearly and seriously frustrate congressional intent in § 11(b)." United States' reply at 23. This argument, of course, begs the question of what precisely was Congress' intent, and underscores the United States inability to point to "clear and especial" words which make very plain Congress' intent regarding PLO 82.

statehood, evincing the affirmative intent to defeat the future state's title to submerged lands.[59]

The parties have devoted a substantial portion of their arguments to events which occurred after statehood. Particular significance is attached to PLO 2214, 25 Fed. Reg. 12,598 (Dec. 9, 1960), which established the Arctic National Wildlife Range, PLO 2213, 25 Fed. Reg. 12,597 (Dec. 9, 1960), which established the Kuskokwim National Wildlife Range, and PLO 2216, 25 Fed. Reg. 12,599 (Dec. 9, 1960), which established the Izembek National

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[59]The parties dispute whether the court should give deference to the Krulitz and Sansonetti Opinions. When faced with the issue of statutory interpretation, such as the ASA or the SLA, the district court generally grants substantial deference to the interpretation of the agency charged with the statute's administration. Udall v. Tallman, 380 U.S. 1, 16 (1965). "When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *Id.*

The court declines to grant deference to the solicitors' opinions. Ultimately, both opinions purport to interpret the Alaska Statehood Act, yet the DOI is not charged with implementing or administering the ASA. Additionally, both opinions were issued years subsequent to the issue of PLO 82 in 1943, and neither opinion "involve[d] a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Id.* (internal quotation marks and citation omitted). Moreover, the Sansonetti Opinion was rendered in the course of this litigation, and must therefore be regarded as potentially an advocate's view.

The opinions are also not entitled to deference because they reached unreasonable conclusions based upon misapplication of the law regarding the equal footing doctrine. Finally, as argued by the State of Alaska and undisputed by the United States, the Supreme Court in *Utah Lake* applied a *de novo* standard of review in determining whether Congress clearly intended to reserve the bed of Utah Lake and defeat state title thereto. Deference to the Interior's position in *Utah Lake* would have resulted in a distinctly different conclusion. Granting deference to the solicitors' unreasonable opinions would eviscerate the equal footing doctrine.

Wildlife Range. Each of these land orders were filed on December 8, 1960. The public land orders establishing the Kuskokwim and Izembek National Wildlife Ranges expressly excluded "lands beneath navigable waters". However, the Public Land Order establishing ANWR contained no such exclusion. The United States argues that the differences between the language establishing the Kuskokwim and Izembek Wildlife Ranges on the one hand, and ANWR on the other, establish congressional intent to defeat state title to submerged lands in PLO 82. Yet none of the three public land orders mention the equal footing doctrine or state title to submerged lands. Even if the United States' argument were plausible, the State of Alaska offers the equally plausible argument that the public land orders establishing the Izembek and Kuskokwim Wildlife Ranges specifically excluded submerged lands because those wildlife ranges include ocean areas within their boundaries which are not managed by the United States. The boundaries of ANWR, however, do not include ocean boundaries. The above public land orders cannot change the original intent of PLO 82 and are unpersuasive with respect to the intent of the ASA. They do not evince a clear and unambiguous congressional intent to defeat state title to PLO 82 submerged lands.

If congressional intent regarding PLO 82 can be drawn from post-statehood events, perhaps the most critical event was Public Land Order 2215, 25 Fed. Reg. 12,599 (Dec. 9, 1960). PLO 2215, filed on the same date as the above three public land orders, revoked PLO 82. The fact that PLO 2215 made no mention of state title to submerged land is evidence that Congress never intended, either in 1943 or in 1960, to defeat state title to that land. In bringing Alaska into the Union "on an equal footing with the other states", ASA § 1, Congress complied with the "longstanding policy of holding land under navigable waters for the ultimate benefit of the State[.]" *Utah Lake*, 482 U.S. at 202.

Revocation of PLO 82 was a natural consequence of statehood, because title to the submerged land had already passed to the State of Alaska under the equal footing doctrine.[60] PLO 1621 had already opened some PLO 82 lands to mineral leasing, and the State of Alaska was entitled to make huge land selections under section 6(a) and (b) of the ASA from federal lands. The United States suggests that the totality of the circumstances provides sufficient evidence of congressional intent to defeat state title to PLO 82 submerged land. The United States' argument, however, ignores the requirements of *Shively, Holt State Bank, Choctaw, Montana,* and *Utah Lake.* Those cases establish the strong presumption against defeating the equal footing doctrine and require that the United States put forth clear and unambiguous evidence that Congress definitely declared or otherwise made very plain its intent to defeat state title to submerged land. Congressional defeat of state title to submerged lands *"should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." Utah Lake,* 482 U.S. at 197 (citation omitted) (emphasis added). Here, the United States has weaved together numerous public land orders and acts of Congress, but none of them, taken separately or

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[60]Uncertainty regarding the meaning of post-statehood events is exemplified in a memorandum from the associate solicitor, Division of Public Lands, to the director of the Bureau of Land Management (attached as an exhibit, numbered 3122, to the State's reply brief; Clerk Is Docket No. 102). The memorandum states: "As you are aware, upon the admission of Alaska *title to the beds of all navigable waters* within the State vested in it and *are held by virtue of its sovereignty."* M-36596, March 15, 1960 (emphasis added). The United States argues that this definitive statement should be discounted because the deputy solicitor, who outranks the associate solicitor, had left open the possibility that pre-statehood withdrawals might defeat state title. If the United States is correct, a mere "possibility" that pre-statehood withdrawals acted to defeat state title to submerged lands in PLO 82 hardly establishes that Congress affirmatively intended to defeat state title to such land.

together, meet the level of specificity required by *Utah Lake.* The United States has made a conjectural case for what Congress might have intended. Yet nowhere in the enormous record can the court find the "clear and especial words", such as those found in *Choctaw,* which make very plain a congressional intent to defeat state title to PLO 82 submerged lands. *Id.* at 198 (citation omitted). At best, the United States' arguments establish confusion, not certainty, regarding the status of PLO 82 submerged lands. The court simply "must not infer" without definite, clear, and plain terms that "embrace[ ] the land under waters" that Congress intended to defeat state title to submerged lands. *Id.* at 198 (citation omitted). The evidence is insufficient for the court to make such an inference here.

As stated in *Montana*:

> The mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance.

Montana, 450 U.S. at 554. Here, as in *Montana,* there is no express reference in PLO 82, the ASA, or the SLA, that Congress intended to defeat title to PLO 82 submerged land.[61] In *Choctaw,* the Court "placed special emphasis on the Government's promise that the reserved lands would never become part of any State." *Id.* at 555 n.5. Here, not only is the record devoid of the clear evidence of intent to defeat state title, it is also undisputed that in 1943, when PLO 82 issued, there was absolutely no intent on the part of

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[61] This case is also similar to *Holt State Bank,* in that there is nothing in the evidence which evinces "a purpose to depart from the established policy . . . of treating such lands as held for the benefit of the future State." *Holt State Bank,* 270 U.S. at 58-59.

Congress to defeat the future state's title to PLO 82 submerged lands.

Even if the court had concluded that Congress did intend to defeat title to the submerged lands of PLO 82, the court believes that revocation of PLO 82 resulted in the submerged lands passing to the State of Alaska. The single most important reason why it is constitutional for the United States to reserve land to itself is so that it can hold the land for the ultimate benefit of the future state. Simply because the event of statehood may pass without automatic transfer of title of submerged lands to the state does not mean that the land is no longer held for the ultimate benefit of the state. As stated in the dissent in *Utah Lake,* "submerged lands retain their sovereign status . . . [a]nd if Congress later determines that the lands are no longer needed by the Federal Government for a public purpose, it can at that time transfer title to the State." *Utah Lake,* 482 U.S. at 210 (White, J. dissenting) (citation omitted). The United States cannot, however, transfer title to the submerged lands to private entities or individuals. *Shively* concluded that submerged lands held in trust by the United States "shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State . . . ." *Shively,* 152 U.S. at 50. Thus, with revocation of PLO 82, section 3 of the SLA effected transfer of title to the released submerged lands to the state. 43 U.S.C. § 1311. The principles of the equal footing doctrine did not end at statehood, but were held in abeyance until the United States determined that it no longer needed the PLO 82 lands. At that point the submerged lands, which could then only be held for the ultimate benefit of the State of Alaska, passed to the state. For the above stated reasons, the court finds that title to the lands beneath the waters of the Kukpowruk River, if navigable, passed to the State of Alaska at statehood pursuant to the equal footing doctrine.

Alternatively, title so passed upon revocation of PLO 82 in 1960. The State of Alaska's motion for partial summary judgment is granted. The United States' cross-motion for partial summary judgment is denied.[62]

DATED at Anchorage, Alaska, this 29 day of March, 1996.

/S/

H. Russel Holland, Judge
District of Alaska

[62] The court has considered the briefs filed by the ASRC and Cully Corporation. Where relevant, their arguments have been incorporated into the court's consideration of the cross-motions for summary judgment. The ASRC argues that the State of Alaska has, over the years, conceded the United States' position that the State did not own submerged lands in PLO 82. The argument is irrelevant and was effectively rebutted by the State of Alaska with reference to several documents entitled "Notice of State of Alaska's Ownership of Submerged Lands." (*See* documents numbered 3015-33, attached as an exhibit to the State's reply brief; Clerk's Docket No. 102). These notices, dated in the late 1970s, contained language clearly cautioning the ASRC that the State of Alaska did not believe that the United States had title to convey.