No. 84, Original

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALASKA

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

EXCEPTION OF THE UNITED STATES AND BRIEF FOR THE UNITED STATES IN SUPPORT OF EXCEPTION

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EXCEPTION OF THE UNITED STATES

The United States excepts to the recommendation of the Special Master that the application for withdrawal and creation of the Arctic Wildlife Range did not effectively withhold offshore submerged lands from the State of Alaska (Question 9).

Respectfully submitted.

WALTER DELLINGER
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BRIEF FOR THE UNITED STATES IN SUPPORT OF EXCEPTION

JURISDICTION

The Court granted the United States' motion for leave to file a complaint on June 18, 1979. 442 U.S. 937. The Court received the Report of the Special Master and ordered it filed on May 20, 1996. 116 S. Ct. 1823. The jurisdiction of this Court rests on Article III, Section 2, Clause 2, of the Constitution and 28 U.S.C. 1251(b)(2).

TREATY AND STATUTES INVOLVED

Relevant provisions of the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), and the Submerged Lands Act,

43 U.S.C. 1301 *et seq.*, are set out in the appendix to this brief.

STATEMENT

This original action presents a dispute between the United States and the State of Alaska over the ownership of lands beneath the tidal waters along the Arctic coast of Alaska. The action involves a matter of great practical importance, because its resolution will determine, among other things: (1) whether the Court will adhere to its past decisions in determining the location of coastlines; (2) whether the United States or Alaska owns the coastal submerged lands that are integral parts of the National Petroleum Reserve and the Arctic National Wildlife Refuge, the two major federal reservations along Alaska's North Slope; and (3) whether more than $1.4 billion in oil and gas revenues from the disputed lands will be shared by the citizens of the United States as a whole or by the citizens exclusively of the State of Alaska.

The Court's Special Master, J. Keith Mann, has prepared a Report that comprehensively describes the dispute. The Special Master's Report includes his recommended resolution of fifteen issues that were put forward by the parties. As the Master explains, the rights of the United States and the State of Alaska depend primarily on the application of the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, which, as a general matter, grants Alaska unreserved lands beneath tidal waters to a distance of three miles from the State's coastline, but retains for the United States the rights over resources of the continental shelf beyond the three-mile limit. The United States and Alaska are in disagreement over a number of

specific issues that fall into two general categories: (1) the location of the coastline from which the three-mile belt is measured; and (2) the extent to which the United States has reserved submerged lands from the operation of the Act. See Report 3.

A. Procedural History

The United States commenced this action on May 30, 1979, by filing a motion with this Court requesting leave to file a bill of complaint against the State of Alaska. Alaska did not oppose the United States' motion, and the Court granted the United States leave to file its complaint. See 442 U.S. 937 (1979). Alaska submitted an answer and filed a motion for leave to file a counterclaim. The Court appointed a Special Master, 444 U.S. 1065 (1980), and referred the State's motion to him, 445 U.S. 914 (1980). Report 3-4.

Through a series of hearings, the Master identified fifteen specific questions for his resolution. See Master's Report 7-8, 509-511. He resolved the first of those questions—whether Alaska should be allowed to file its unopposed counterclaim—by concluding, in accordance with the joint wishes of the parties, that he should resolve the matters raised in the counterclaim, "subject, of course, to this Court's ultimate ruling." *Id.* at 5-7. He divided the remaining fourteen questions into three groups for purposes of trial and decision. See *id.* at 10-11. Those groups are: (a) the Alaska coastline issues (Questions 2, 3, 4, 5, 6, 12, 13, 14, and 15); (b) the National Petroleum Reserve issues (Questions 7, 8, and 11); and (c) the Arctic National Wildlife Refuge issues (Questions 9 and 10). See *id.* at 503-504.

During the proceedings, the Inupiat Community of the Arctic Slope and the Ukpeagvik Inupiat Corpora-

tion sought to intervene in the case, claiming rights in some of the geographic areas in dispute. The Master concluded that they should be allowed to intervene, subject to several restrictions, including a requirement that they credibly demonstrate an interest in the areas. As a result of the outcome of other litigation, the intervenors ceased to satisfy that requirement, and the Master issued an order dismissing them from further participation. See Report 8-9.

The Master conducted evidentiary hearings in July 1980, July through August 1984, and May through June 1985. Report 10-11. He received extensive post-trial briefing on the issues, including the relevance of certain recent decisions of this Court. *Ibid.* Beginning in 1989, as the Master completed sections of his Report, he submitted them to counsel, under an order of confidentiality, for technical review and comment. *Id.* at 11-12. The Master submitted his final Report to the Court in March 1996.

B. Overview of the Special Master's Recommendations

The Special Master's Report comprehensively addresses the issues under three general topic headings: (1) the Alaska Coastline (Report 13-340); (2) Federal Reservations (*id.* at 341-499); and (3) Summary of Recommendations (*id.* at 501-505) The United States excepts from one of the Master's recommendations. Specifically, the United States contends that the Master is mistaken in concluding that the application of the Department of the Interior's Bureau of Sport Fisheries and Wildlife for withdrawal and creation of the Arctic Wildlife Range did not effectively withhold offshore submerged lands therein from the State of Alaska. To place the overall case

and the United States' exception in context, we provide the following overview of the Special Master's recommendations.

1. ***The Alaska Coastline***

The largest portion of the Special Master's Report is devoted to disputes involving the location of Alaska's coastline. The Report provides a summary of the relevant legal principles (Report 15-18) and then explains how those principles apply to the issues (*id.* at 19-340). Those issues are:

> Whether or to what extent should the existence of barrier islands affect the location of the coastline. Report 19-175 (Questions 2, 3, 4, 12, 13).
>
> Whether Southern Harrison Bay is a "juridical bay." Report 176-226 (Question 15).
>
> Whether a formation known as Dinkum Sands is an island. Report 227-310 (Question 5).
>
> Whether the ARCO pier (an extension of an existing dock facility at the west side of Prudhoe Bay) is a part of the mainland for purposes of the Submerged Lands Act. Report 311-337 (Question 6).
>
> Whether certain physical features should be deemed low-tide elevations. Report 338-340 (Question 14).

a. *Legal Background (Report 15-18).* The Constitution provides for the admission of new States to the Union. U.S. Const. Art. IV, § 3, Cl. 1. This Court has held that new States are admitted on an "equal footing" with the original thirteen colonies. *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212, 228-229 (1845). Under the Equal Footing Doctrine, a newly admitted

State presumptively succeeds to the United States' ownership of tidelands (viz., coastal lands between high and low tide) and lands beneath inland navigable waters within the State's boundaries. *Ibid.*; see *Phillips Petroleum Co.* v. *Mississippi*, 484 U.S. 469 (1988); *Shively* v. *Bowlby*, 152 U.S. 1, 26-31 (1894).

The Equal Footing Doctrine does not extend, however, beyond a State's coastline. *United States* v. *California*, 332 U.S. 19 (1947). As this Court has explained, the original thirteen colonies had no right to lands seaward of the coastline, and the newly created States accordingly cannot claim them on an "equal footing" rationale. *Id.* at 30-33. The United States, through the exercise of its national powers, acquired paramount sovereign rights in the coastal lands seaward of the low-water line. *Id.* at 33-36. Hence, the United States presumptively retains title to the lands beneath an internationally recognized belt of coastal waters, which is known as the marginal or territorial sea. *Ibid.*

Congress has exercised the United States' paramount power over the territorial sea by, among other things, enacting legislation known as the Submerged Lands Act, ch. 65, 67 Stat. 29 (1953), 43 U.S.C. 1301 *et seq.* The Submerged Lands Act grants the coastal States title to a specified measure of submerged land seaward of the coastline, subject to certain important exceptions. See 43 U.S.C. 1311-1314. The Alaska Statehood Act expressly provides that the Submerged Lands Act applies to Alaska. See Pub. L. No. 85-508, § 6(m), 72 Stat. 343 (1958). Accordingly, Alaska is generally entitled to submerged lands extending three miles seaward of its coastline. 43 U.S.C. 1301(a)(2) and (b). The Act defines the term "coast line" 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).

The Submerged Lands Act does not expressly address all of the questions that might arise in locating a coastline, including, for example, the definition of "inland waters." In those cases in which the Submerged Lands Act does not provide explicit guidance, this Court has relied on the definitions and principles contained in the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606 (hereinafter the Convention). See *United States* v. *California*, 381 U.S. 139, 165 (1965). Hence, the Master considered both the Submerged Lands Act and the Convention in formulating his recommendations. See Report 15-18.

b. *The Effect of Islands on the Coastline (Report 19-175).* A State's rights to submerged lands may be affected by the presence of islands near the mainland. The United States and Alaska disagree as to the precise effect. The issue has primary practical importance in the so-called "Leased Area," which is located between two federal reservations that are currently known as the National Petroleum Reserve in Alaska and the Arctic National Wildlife Refuge. See Report 19; see also *id.* at 2-3 (Fig. 1.1, showing the location of the Leased Area).

As the Master explained, the United States offered a "single theory" about how the Submerged Lands Act and the Convention should be applied to the northern coast of Alaska. Report 20. Under that theory, the seaward limit of Alaska's submerged lands is defined by a line that is at every point three miles from the coastline of the Alaskan mainland and barrier islands. See *id.* at 21-23 & Fig. 3.1. That approach

relies directly on the application of Articles 3, 5, 6, and 10 of the Convention. *Ibid.* See 15 U.S.T. 1608-1610. Figure 3.2 of the Master's Report shows the result that is produced in the "Leased Area." See Report 24.

Alaska argued for the application of several different theories in determining the seaward limit of its submerged lands in the vicinity of barrier islands. But as its principal argument, Alaska contended that the coastline should be constructed by drawing imaginary lines, known as "straight baselines," up to ten miles long, between the barrier islands. Report 25-28 & Fig. 3.3. Article 4 of the Convention identifies the "straight baseline" approach as an optional method that is available under certain circumstances for constructing a coastline. *Ibid.* See 15 U.S.T. 1608. Figure 3.4 of the Master's Report shows the result that Alaska's approach would produce in the "Leased Area." See Report 28. Alaska suggested two alternative approaches, which would define specified areas as inland or assimilated waters, in the event that its "straight baseline" approach was rejected. See *id.* at 29-32.

The Special Master exhaustively examined the competing arguments of the United States and Alaska and ultimately ruled in favor of the United States on all of the questions concerning the effect of islands on the coastline. Report 32-175. He stated:

> I conclude that the general rules are much as the United States claims. Under these rules, the normal baseline provisions of the Convention would be controlling, with results as shown in figures 3.1 and 3.2.

Id. at 34. See *id.* at 34-44. The Master then examined "whether any exception to the general rules applies." *Id.* at 34. He specifically concluded that the use of straight baselines would be impermissible unless Alaska were able to show, at a minimum, that "the United States' present position represents a contraction of territory, compared to its position at the relevant time or times in the past." *Id.* at 49. See *id.* at 46-48; *United States* v. *Louisiana*, 394 U.S. 11, 72-74 & n.97 (1969); *California*, 381 U.S. at 167-169.

The Master comprehensively evaluated the past delimitation practice of the United States, Report 52-170, and concluded that "[t]his is not a situation in which the United States has created a contraction of Alaska's recognized territory in the Arctic," *id.* at 169. In addition, the Master stated that "Alaska's position is again hard to justify in terms of fairness," *id.* at 173, noting that Alaska sought to be put "on a better than equal footing with the older states," *id.* at 174. The Master accordingly ruled against Alaska on its straight baseline arguments, as well as its alternative claims. *Id.* at 174-175.

c. *Southern Harrison Bay (Report 176-226).* The Submerged Lands Act recognizes that a State is generally entitled to submerged lands beneath inland waters, including what are known as "juridical bays." Report 176; see 43 U.S.C. 1311(a). Under the Act, the seaward limit or "closing line" of a bay is treated as a part of the coastline for purposes of determining the grant to a State of submerged lands beneath the adjoining territorial sea. See Report 176; 43 U.S.C. 1301(c). Article 7 of the Convention provides criteria for drawing the closing lines of juridical bays. See 15 U.S.T. 1609.

The United States and Alaska agreed that portions of Harrison Bay, which lies west of the Leased Area and adjacent to the National Petroleum Reserve, are juridical bays that embrace inland waters. They also agreed that closing lines for Harrison Bay must be drawn in accordance with Article 7 of the Convention, 15 U.S.T. 1609. Report 176-177. They further agreed to a closing line for the northern portion of Harrison Bay. But they disagreed over the proper interpretation of Article 7 and its application to the southern portion of Harrison Bay. *Id.* at 176-180.

The United States contended that paragraph 2 of Article 7 does not recognize a coastal indentation as a juridical bay unless it both is "a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters" and has an area "as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation." Art. 7(2), 15 U.S.T. 1609. See Report 181-182. The United States submitted that, under those tests, a separate closing line should be drawn across each of the mouths of the two heads of southern Harrison Bay. See *id.* at 179 (Fig. 4.2). Alaska argued that the former test is simply a description of the latter and that a bay satisfies paragraph 2 if it satisfies the semi-circle test. *Id.* at 182. Alaska claimed that, under that test, all of southern Harrison Bay should be encompassed within a single closing line. See *id.* at 179 (Fig. 4.2).

The Master concluded, based on decisions of this Court and the drafting history of the Convention, that a coastal indentation does not qualify as a bay unless it satisfies both tests set out in Article 7(2) of the Convention. Report 182-199. See *United States* v. *Maine*, 469 U.S. 504, 514 (1985); *Louisiana*, 394 U.S.

at 48 n.64, 54. The Master nevertheless determined that all of southern Harrison Bay satisfied those tests. He rejected the United States' view that two closing lines should be drawn across the separate mouths of southern Harrison Bay and recommended instead that the Court adopt a single closing in accordance with Alaska's position. Report 199-226. See *id.* at 179 (Fig. 4.2).

d. *Dinkum Sands (Report 227-310).* As explained above, under the Submerged Lands Act, the grant to Alaska of offshore submerged lands includes those lands within three miles of the coastline of either the mainland or offshore islands. See pages 5-8, *supra.* The United States and Alaska agreed that the question whether a formation is an island is controlled by Article 10(1) of the Convention, which defines an island as "a naturally-formed area of land, surrounded by water, which is above water at high-tide." 15 U.S.T. 1609. The United States and Alaska disagreed over whether a small formation known as Dinkum Sands, which lies within the Leased Area between the Midway and McClure Islands, is an island constituting part of Alaska's coastline for purposes of delimiting Alaska's offshore submerged lands. Report 227-230.

The Master conducted a thorough review of all evidence relevant to the question whether Dinkum Sands is an island. Report 230-310. He analyzed historic hydrographic and cartographic evidence (*id.* at 234-248), the results of a joint monitoring project conducted by the parties to determine the level of mean high water at Dinkum Sands and the elevation of Dinkum Sands itself (*id.* at 248-269), and additional observations conducted after the completion of the joint monitoring project (*id.* at 276-283). He also con-

sidered the physical composition of Dinkum Sands (*id.* at 269-275), its creation through coastal processes (*id.* at 283-287), and the permanence or impermanence of its physical features (*id.* at 287-307).

The Special Master ultimately concluded that Article 10 "requires an island to be 'above water at high tide' at least 'generally,' 'normally,' or 'usually,'" and that "a feature does not meet the standard if it frequently slumps below the high-water datum." Report 309. The Master found that "Dinkum Sands is frequently below mean high water and therefore does not meet the standard for an island." *Ibid.*

e. *The Arco Pier Extension (Report 311-337).* The Submerged Lands Act's grant of offshore submerged land may be affected by the construction of permanent harbor works. Article 3 of the Convention provides that "the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast." 15 U.S.T. 1608. Article 8 of the Convention additionally states that "the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast." 15 U.S.T. 1609. See *Louisiana*, 394 U.S. at 40 n.48; *California*, 381 U.S. at 176-177. The United States and Alaska disputed whether the private extension of the so-called ARCO pier at the west side of Prudhoe Bay should be treated as part of the coastline for purposes of determining Alaska's submerged lands grant. Report 311-313.

The United States has recognized that permanent harborworks possessing a low-water line may extend a State's coastline. The United States, through the Army Corps of Engineers, pervasively regulates construction in navigable waters, see Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 401 *et seq.*

The United States may prevent an extension such as the ARCO pier by declining to issue a construction permit unless the State disclaims any change in its rights under the Submerged Lands Act as a consequence of the extension. See *United States* v. *Alaska*, 503 U.S. 569 (1992). The United States did not obtain such a waiver when, in 1976, it authorized a private oil company to construct a 5605-foot extension of the existing ARCO pier. The United States nevertheless urged that the extension should not be treated as a part of the mainland because of exceptional circumstances surrounding its construction. Report 311-313.

The Master rejected the United States' arguments. He concluded that the pier extension is a permanent harbor work possessing a low-water line. Report 316-323. He also concluded that the Army Corps of Engineers' grant of the construction permit under "an emergency situation" did not excuse its failure to obtain a state disclaimer. *Id.* at 323-329. He similarly concluded that the Corps' alleged failure to adhere to its own regulations did not prevent the extension of the coastline. *Id.* at 329-337. The Master noted that "the lands in question are not irrevocably lost to the United States, for all agree that the Corps of Engineers can restore the coastline by ordering removal of the pier extension." *Id.* at 337.

f. *Low-Tide Elevations (Report 338-340).* Article 11(1) of the Convention provides that a "low-tide elevation"—viz., "a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high tide"—creates a belt of territorial sea if it is within a prescribed distance of "the mainland or an island." 15 U.S.T. 1610. This Court has applied Article 11 in determining a State's

entitlement to submerged lands under the Submerged Lands Act. *Louisiana*, 394 U.S. at 40-47. Alaska argued that six features in the Beaufort Sea qualified as low-tide elevations that extended the grant of submerged lands to Alaska. The United States and Alaska resolved that issue by conducting a joint survey and entering into a stipulation. The stipulation stated that the six features identified by Alaska do not exist, but that twelve other features discovered by the survey do qualify as low-tide elevations. The Special Master concluded that the stipulation resolved the issue. Report 338-340.

2. *Federal Reservations*

For some parts of Alaska's Arctic coast, the federal and state rights in submerged lands cannot be determined by simply applying the Submerged Lands Act's basic formula of locating the coastline and identifying the three-mile grant. Report 343. In particular, Section 5(a) of the Submerged Lands Act excludes from the grant under that formula submerged lands "expressly retained by * * * the United States when the State entered the Union." 43 U.S.C. 1313(a). Section 5(a) comes into play in evaluating the scope and effect of two federal reservations that are currently known as: (a) the National Petroleum Reserve; and (b) the Arctic National Wildlife Refuge. See Report 2 (Fig. 1.1).

a. *The National Petroleum Reserve (Report 343-446).* The National Petroleum Reserve is a 23 million acre area that extends from Icy Cape to the mouth of the Colville River. See Report 343-348. President Harding created that reservation in 1923 through Executive Order No. 3797-A, which designated the pertinent lands as Naval Petroleum Reserve No. 4.

Report 343-344. The Executive Order explicitly recognized that "there are large seepages of petroleum along the Arctic Coast of Alaska and conditions favorable to the occurrence of valuable petroleum fields on the Arctic Coast." *Id.* at 343 n.1. The Executive Order set apart the designated area specifically to preserve a "future supply of oil for the Navy." *Ibid.* Congress later transferred the area to the Secretary of the Interior and renamed it the National Petroleum Reserve in Alaska. See Naval Petroleum Reserves Production Act of 1976, Pub. L. No. 94-258, § 102, 90 Stat. 303.

In the initial proceedings before the Special Master, the State of Alaska explicitly conceded that the United States "expressly retained" the submerged lands associated with the National Petroleum Reserve, and it raised only issues respecting the scope of the reservation. Report 344-346. But in 1981, after this Court's decision in *Montana* v. *United States*, 450 U.S. 544 (1981), Alaska sought relief from its concession and raised an additional claim that it owned the submerged lands underlying tidal lagoons within the exterior boundaries of the National Petroleum Reserve. Alaska also relied on this Court's later decision in *Utah Division of State Lands* v. *United States*, 482 U.S. 193 (1987). Report 346-348.

The Master's Report accordingly addresses four issues respecting the National Petroleum Reserve:

> Whether Harrison Bay and Smith Bay are part of the National Petroleum Reserve. Report 349-352 (Question 7).
>
> Whether Peard Bay is part of the National Petroleum Reserve. Report 352-364 (Question 8).

Whether Wainwright Inlet and the Kuk River, Kugrua Bay and River, and other small inlets, bays and river estuaries are within the boundary of the National Petroleum Reserve. Report 364-381 (Question 11).

Whether this Court's decisions in *Montana* and *Utah* affect the scope of the National Petroleum Reserve's reservation of submerged lands. Report 381-446.

i. *Harrison Bay and Smith Bay (Report 349-352).* Harrison Bay and Smith Bay are coastal features located east of Point Barrow. See Report 2 (Fig. 1.1). In 1972, the Department of the Navy issued a notice purporting to place those features within the seaward boundary of the Reserve. See 37 Fed. Reg. 10,088. The United States and Alaska agreed, however, that the reservation boundary set out in the 1923 Executive Order creating the Reserve does not encompass the area between the headlands creating Harrison Bay and Smith Bay, but instead follows the high-water line along the physical coastline. The United States and Alaska also agreed that the Navy's 1972 notice could not expand the boundary of the Reserve. The Master accordingly recommended, in accordance with the joint submission of the parties, that the National Petroleum Reserve does not include the seaward limits of Harrison Bay and Smith Bay. Report 349-352.

ii. *Peard Bay (Report 352-364).* Peard Bay is a coastal feature located west of Point Barrow. See Report 2 (Fig. 1.1). The United States and Alaska agreed that the question whether Peard Bay is within the boundary of the Reserve turns on the description

contained in the 1923 Executive Order, which provides in relevant part:

> The coast line to be followed shall be that of the ocean side of the sandspits and islands forming the barrier reefs and extending across small lagoons from point to point, where such barrier reefs are not over three miles off shore.

See Report 344 n.1; *id.* at 352. Under that definition, Peard Bay is inside the National Petroleum Reserve if it qualifies as a small lagoon with appropriate barrier reefs. The United States and Alaska disputed whether it so qualifies. *Ibid.*

The Special Master concluded that "the Reserve boundary at Peard Bay should be determined using only the language of the Executive Order and the most recent charts." Report 357. Applying that test, he found that (1) "the islands in the mouth of Peard Bay meet the test of being 'not over three miles off shore,'" *id.* at 360; (2) and "Peard Bay, being seventy to eighty percent enclosed, is adequately cut off from the sea to be a lagoon," *id.* at 363. The Master accordingly recommended that Peard Bay is within the exterior boundary of the Reserve. *Id.* at 364.

iii. *Wainwright Inlet and Kuk River, Kugrua Bay and River, and other small inlets, bays and river estuaries (Report 364-381).* The National Petroleum Reserve includes a number of small inlets on, and rivers that drain into, the Arctic Ocean. The United States and Alaska disagreed over whether the National Petroleum Reserve's northern boundary includes submerged lands associated with those features. Alaska argued that the boundary of the Reserve follows the sinuosities of the shore, extending into bays, inlets, and river estuaries. The United

States argued, by contrast, that the boundary follows the coastline of the Arctic Ocean and includes short water crossings across inlets, river mouths, and narrow mouthed bays. Report 364-366; *id.* at 348 (Figs. 8.1-8.3).

The Master determined that the Reserve boundary should be determined on the basis of the 1923 Executive Order, taking into account "what the drafters would have meant to include in the Reserve given their language, their purposes, and the particular geography." Report 367, 372. He concluded that Wainwright Inlet, as well as other small indentations, qualifies as "a small lagoon with barrier reefs." *Id.* at 373, 375. He also concluded, based on the "ordinary meaning of 'coast' as excluding river banks, the difficulties in defining and locating the place where a tidal datum intersects a river, and the views expressed by the Court in [*Knight* v. *United States Land Ass'n*, 142 U.S. 161 (1891)]," that the Reserve boundary does not extend up rivers. *Id.* at 380.

The Master noted that his interpretation is consistent with the likely intention of the drafters. He observed, "[f]or the policy purpose of conserving underground petroleum resources, the relatively smooth boundary defined by small water crossings is also more appropriate than one that would follow the sinuosities of the shore into small inlets and go part way up rivers." Report 380. The Master accordingly recommended that the Reserve boundary includes the areas in dispute. *Id.* at 380-381.

iv. *The Equal Footing Doctrine and issues stemming from* Montana *and* Utah *(Report 381-446).* As the Special Master noted, the fact that submerged lands lie inside the boundary of the National Petroleum Reserve does not necessarily establish that the

United States retains title to those lands. Report 381-382. Under the Equal Footing Doctrine, the United States holds title to tidelands and lands beneath inland navigable waters within a pre-statehood territory in trust for the future State, and there is a "strong presumption" that those lands pass to the State upon admission to the Union. See *Utah Division of State Lands*, 482 U.S. at 196; *Montana*, 450 U.S. at 551; Report 382. But as the Special Master also noted, there are two important qualifications to that general rule that are relevant here.

First, the Equal Footing Doctrine applies only to land beneath tidelands and inland navigable waters; it does not reach land beneath the territorial sea. *United States* v. *California*, 332 U.S. 19 (1947). As the Court explained, there is no conceptual or historical justification for extending the Equal Footing Doctrine to the territorial sea, because the original thirteen colonies had no claim to such lands. *Id.* at 31-33. As the Court additionally noted, the Doctrine rests on the theory that the States have paramount sovereign interests "in inland waters to the shoreward of the low water mark," and "the same rationale leads to the conclusion that national interests, responsibilities, and therefore national rights are paramount in waters lying to the seaward in the three-mile belt." *Id.* at 36. Hence, the State's right to submerged land beneath the territorial sea is governed strictly by the Submerged Lands Act. Report 390-394.

Second, even where the Equal Footing Doctrine does apply, "Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order 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 the objects for which the United States holds the Territory." *Shively* v. *Bowlby*, 152 U.S. at 48; see U.S. Const. Art. IV, § 3, Cl. 2 (Property Clause). By the same token, Congress may reserve such lands in federal ownership, rather than convey them, to carry out appropriate public purposes. See Report 395-404.

The Master concluded that the United States had reserved the submerged lands within the boundary of the National Petroleum Reserve and thereby prevented title from passing to the State of Alaska at statehood. Report 404-446. The Master first determined that Congress, through the Pickett Act, ch. 421, § 1, 36 Stat. 847, had authorized the President to reserve those lands. Report 404-416. The Master next determined that the 1923 Executive Order identified an appropriate public purpose for a reservation—namely, to preserve petroleum resources for national defense—and expressed a clear intent to reserve all lands under tidally influenced waters inside the boundary of the Reserve. *Id.* at 416-430. He also determined, based on specific provisions of the Alaska Statehood Act, that the reservation was intended to defeat the State's title. *Id.* at 430-445.

The Master summarized his findings respecting the submerged lands within the boundary of the National Petroleum Reserve as follows:

> To the extent that these lands underlie inland waters, I found * * * that the circumstances of the Reserve were sufficient to overcome the strong presumption, as spelled out in *Montana* and *Utah*, that title passed to Alaska at statehood.

> To the extent that the lands underlie territorial waters, I found that the presumption of *Montana* and *Utah* does not apply. As to these lands, the result therefore follows a fortiori.

Report 445. He accordingly concluded that Peard Bay, Wainwright Inlet, and other submerged lands within the Reserve's boundaries belong to the United States. *Id.* at 445-446.

b. *The Arctic National Wildlife Refuge (Report 447-499).* The Arctic National Wildlife Refuge is a federal reservation of approximately 18.1 million acres in northeastern Alaska that has been set aside for protection of the unique wildlife habitat in that region. See Report 2 (Fig. 1.1). The Department of the Interior's Bureau of Sport Fisheries and Wildlife submitted an application to the Secretary of the Interior for withdrawal of 8.9 million acres of land in that area on November 18, 1957. See 23 Fed. Reg. 364 (1958). See Report 447-450 & n.4. The Secretary of the Interior formally withdrew those lands and established the Arctic National Wildlife Range on December 6, 1960. Public Land Order 2214, 25 Fed. Reg. 12,598 (1960). Congress later expanded the Range to include an additional 9.2 million acres and renamed it the Arctic National Wildlife Refuge. See Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, § 303(2)(A), 94 Stat. 2390 (1980). See Report 450-451.

The Master's Report addresses two points of contention between the United States and Alaska with respect to the Arctic National Wildlife Refuge:

> Whether the application for withdrawal and creation of the Arctic Wildlife Range, which was filed before but confirmed after Alaska's admission to

> the Union, effectively withheld from Alaska any offshore submerged lands included within the application. Report 455-477 (Question 9).
>
> If so, whether the Range embraced the submerged lands between the mainland and the barrier islands in the area between the Canadian border and Brownlow Point. Report 477-499 (Question 10).

i. *The effectiveness of the withdrawal application (Report 455-477).* The United States' assertion that it retained submerged lands in the Arctic Wildlife Range rested in substantial part on the legal consequences of a withdrawal application under the Department of the Interior's regulations in effect in 1957. The Department regulations in force at that time provided that the filing of an application

> shall temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including the mining and the mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal.

See Report 452 n.8 (quoting 22 Fed. Reg. 6613, 6614 (1957)); 43 C.F.R. 295.11(a) (1958 Supp.). The United States argued that the filing of the application segregating those lands prevented them from passing to Alaska.

The United States took the position that this result followed as a matter of congressional retention. The Alaska Statehood Act explicitly withheld from Alaska various lands, including "lands withdrawn or *otherwise set apart* as refuges or reservations for the protection of wildlife." Pub. L. No. 85-

508, § 6(e), 72 Stat. 340-341 (1958) (emphasis added). The United States argued that, because the application had the legal effect of segregating the designated lands for creation of the Arctic Wildlife Range, it "set apart" those lands as a refuge for wildlife within the meaning of Section 6(e) of the Statehood Act. The United States also argued that, even apart from the provisions of the Alaska Statehood Act itself that withheld from the State lands set apart as a wildlife refuge, the segregative effect of the application under the facts presented here was sufficient to establish an "express retention" of those lands under Section 5(a) of the Submerged Lands Act, 43 U.S.C. 1313(a), thereby withholding them from that Act's grant of submerged lands to the State.

The Special Master rejected those arguments. Report 455-477. He reiterated the general principles governing reservations of submerged lands, set out the relevant statutes, and made several general observations concerning those arguments. *Id.* at 455-462. He then turned to the United States' argument under Section 6(e) of the Alaska Statehood Act. *Id.* at 462-467. The Master reasoned that, "[a]though the application and the regulation together caused land to be set apart for the purpose of a wildlife reservation, it was not yet set apart *as* a refuge or reservation." *Id.* at 464. He concluded that Section 6(e) was therefore insufficient to defeat Alaska's title to submerged lands within the Range. *Id.* at 467.

The Master also concluded that the application had not resulted in an express executive retention of submerged lands under Section 5(a) of the Submerged Lands Act. Report 467-477. He concluded that the mere filing of an application, by itself, was insuffi-

cient to result in an express retention. *Id.* at 467-472. While not reaching the issue, the Master expressed "doubt" whether the Secretary of the Interior would have had authority to retain those submerged lands under the precise circumstances presented here. *Id.* at 473-477.

ii. *The interpretation of the withdrawal application (Report 477-499).* The Master recognized that his determination that the withdrawal application for the Arctic Wildlife Range was ineffective to reserve submerged lands therein, if accepted by the Court, would moot the question of what submerged lands, if any, the application covered. He nevertheless addressed that issue in the event that the Court does not accept his recommendation. Report 477-478. After examining the application's boundary description and other indicia of intent, the Master determined that "the disputed lands—including lagoons, tidelands, and the tidal parts of rivers—are inside the boundary of the Range." *Id.* at 499; see *id.* at 478-495. He also determined that the United States had established an intent to retain those lands for a proper public purpose and to defeat the State's title, see *id.* at 495-499, finding it "clear that the reservation was meant to have permanent effect," *id.* at 496. The Master accordingly concluded that, "if the acreage included in the application was effectively withheld from Alaska, the Range does embrace the disputed lands." *Id.* at 499.

3. *Summary of Recommendations*

The Special Master recapitulated his conclusions in a brief summary. See Report 503-505. His recom-

mendations (placed in the original order of the questions presented, see *id.* at 509-511) are as follows:

Question 1. The Court should grant Alaska's motion for leave to file a counterclaim. Report 5-7.

Question 2. The extent of Alaska's submerged lands in the leased area should not be determined on the basis of straight baselines. Report 19-175.

Question 3. The submerged lands between the mainland and the barrier islands in the leased area do not underlie inland waters and accordingly do not belong to Alaska. Report 19-175.

Question 4. The submerged lands between the mainland and the barrier islands in the leased area that are more than three miles from any upland, but are totally surrounded submerged lands owned by Alaska, do not belong to Alaska on the theory that they lie within Alaska's most seaward contiguous boundary. Report 19-175.

Question 5. The formation known as Dinkum Sands is not an island constituting part of Alaska's coastline for purposes of delimiting Alaska's offshore lands. Report 227-310.

Question 6. The 1976 extension of the ARCO pier is a part of the mainland for purposes of the Submerged Lands Act. Report 311-337.

Question 7. Harrison Bay and Smith Bay are not part of the National Petroleum Reserve. Report 349-352.

Question 8. Peard Bay is part of the National Petroleum Reserve. Report 352-364.

Question 9. The application for withdrawal and creation of the Arctic Wildlife Range did not effectively withhold offshore submerged lands from Alaska. Report 455-477.

Question 10. Assuming that the acreage included in the application for withdrawal and creation of the Arctic Wildlife Range was effectively withheld from Alaska, the Range embraced the submerged lands between the mainland and the barrier islands in the area between the Canadian boundary and Brownlow Point. Report 477-499.

Question 11. The submerged lands within Wainwright Inlet and the Kuk River, Kugrua Bay and River are within the boundary of the National Petroleum Reserve. Other small inlets, bays, and river estuaries, between Icy Cape and Point Barrow and between Point Tangent and the Colville River, are within the boundary of the National Petroleum Reserve to the extent that they constitute either small lagoons with barrier reefs less than three miles offshore or rivers. In addition, the lands under tidally influenced waters within the boundary of the Reserve are part of the Reserve. Report 364-445.

Question 12. The extent of Alaska's offshore submerged lands between Icy Cape and the Canadian border, not included within the Leased Area, should not be determined on the basis of straight baselines. Report 19-175.

Question 13. The extent of Alaska's offshore submerged lands between Icy Cape and the Canadian border, not included within the Leased Area, should not be determined on the basis that the waters between mainland and the barrier islands are inland waters. Report 19-175.

Question 14. The specified geographic features within Beaufort Sea are not low-tide elevations, but twelve other features whose existence as low-tide elevations has been stipulated may be used in measuring Alaska's submerged lands. Report 338-340.

Question 15. The southern portion of Harrison Bay, as shown on NOS chart 16064, is a juridical bay as contended by Alaska and its closing line should be that agreed on by the parties. Report 176-226.

The Master's recommendations on Questions 1, 7, and 14 reflect what were, or ultimately became, uncontested issues. The Master's recommendations on Questions 2, 3, 4, 5, 8, 10, 11, 12, and 13 are in accord with the United States' position at trial. The Master's recommendations on Questions 6, 9, and 15 are in accord with Alaska's position at trial.

C. The Exception of the United States

The Special Master's Report provides a comprehensive and well reasoned analysis of the issues presented by this case. The Master exhaustively examined and cogently evaluated the factual and legal bases of the parties' arguments. The United States submits that the Master's recommendations provide a fair and satisfactory resolution of all the issues

except one. We disagree with his conclusion that the application for withdrawal and creation of the Arctic Wildlife Range did not effectively withhold offshore submerged lands from Alaska. That recommendation, which would divest the United States of a portion of the Arctic National Wildlife Refuge, could greatly impair the federal government's ability to manage the wildlife resources therein.

Our exception is a narrow one. We agree with the Master's articulation of the general principles that govern whether the United States has reserved offshore submerged lands from passage into state ownership. See Report 455-457. And although we do not agree with the Master's conclusion on the point, we have elected not to include in our exception a challenge to his subsidiary determination that, under the specific facts presented here, the Department of the Interior's actions by themselves—including the submission of an application for withdrawal of what would become the National Wildlife Range and the temporary segregation of those lands under the Department's regulations—were insufficient standing alone to establish an express retention of submerged lands by executive action, pursuant to Section 5(a) of the Submerged Lands Act. *Id.* at 467-472.

We do except, however, to the Special Master's conclusion that Congress did not retain the submerged lands within the Arctic Wildlife Range in federal ownership. Report 462-467. We submit that Congress preserved federal title to those lands through Section 6(e) of the Alaska Statehood Act, which expressly retained in federal ownership all lands within the proposed boundaries of the Arctic Wildlife Range.

SUMMARY OF ARGUMENT

The Special Master has thoroughly addressed the contentions of the United States and the State of Alaska concerning their respective rights to submerged lands along Alaska's Arctic coast. We submit that the Master has proposed a proper resolution of every issue except one. We disagree with his recommendation respecting Question 9, in which he proposes that Congress did not retain offshore submerged lands within the proposed boundaries of the Arctic Wildlife Range.

A. This Court has ruled that the United States has paramount constitutional power over lands beneath the territorial sea, which extends seaward from the low-water line. *United States* v. *California*, 332 U.S. 19 (1947). Those lands are not subject to the Equal Footing Doctrine, which applies only to tidelands and inland navigable waters. See *id.* at 31-39. The territorial sea "is a national, not a state concern. National interests, national responsibilities, national concerns are involved." *United States* v. *Louisiana*, 339 U.S. 699, 704 (1950). There is accordingly a strong presumption that the United States retains that property on behalf of the Nation's citizenry. See *Montana* v. *United States*, 450 U.S. 544, 551-552 (1981).

B. Congress, in the exercise of its paramount powers, has enacted the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, which grants the States a specified measure of submerged land seaward of the coastline. See 43 U.S.C. 1311-1314. The Submerged Lands Act also contains, however, significant exceptions, including Section 5(a), which withholds from a State "all lands expressly retained by * * * the

United States when the State entered the Union." 43 U.S.C. 1313(a). Because the Submerged Lands Act is an "exercise of Congress' power to dispose of federal property," it must be interpreted in light of "the principle that federal grants are to be construed strictly in favor of the United States." *California ex rel. State Lands Comm'n* v. *United States*, 457 U.S. 273, 285, 287 (1982).

C. Congress "expressly retained" submerged lands within the Arctic Wildlife Range through the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958). Section 6(e) of the Statehood Act relinquished to Alaska the United States' title to federal property that is used solely for wildlife conservation, but it expressly excepted and retained in federal ownership "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." 72 Stat. 340-341. At the time of statehood, the Arctic Wildlife Range, including the submerged lands within its boundaries, had been "set apart" as a future wildlife refuge. Accordingly, Section 6(e) expressly retained the submerged lands beneath the territorial sea in federal ownership. Even if there were doubts respecting whether Congress retained the lands, those doubts must be resolved in favor of the United States. See, *e.g.*, *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 59 (1983).

D. Congress also retained tidelands within the boundaries of the Arctic Wildlife Range. The Master concluded that, if Section 6(e) retained the Arctic Wildlife Range in federal ownership, then under this Court's decisions in *Utah Division of State Lands* v. *United States*, 482 U.S. 193 (1987), and *Montana* v. *United States*, *supra*, it also retained the periodically submerged lands between low and high tide. Hence,

if this Court concludes that the United States is entitled to the lands beneath the territorial sea, it is entitled to the tidelands as well.

ARGUMENT

CONGRESS RETAINED FEDERAL OWNERSHIP OF ALL OFFSHORE SUBMERGED LANDS WITHIN THE BOUNDARIES OF THE ARCTIC WILDLIFE RANGE

The Special Master correctly articulated the general legal principles that govern whether the United States retains ownership of offshore submerged lands. See Report 15-18, 381-404, 455-457. The Master erred, however, in applying those principles to the particular question of whether Congress retained offshore submerged lands within the Arctic Wildlife Range. See *id.* at 462-467. We summarize the general principles in Parts A and B below. We then explain in Parts C and D the basis for our disagreement with the Master's determination that Congress failed to retain federal ownership of offshore submerged lands in the Range.

A. The United States Has Paramount Constitutional Power Over Lands Beneath The Territorial Sea

This Court's landmark decision in *United States* v. *California*, 332 U.S. 19 (1947), addressed the question whether the United States or the various individual coastal States have "paramount right and power to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered, may be exploited." *Id.* at 29. The Court categorically ruled that the Nation, rather than the individual States, "has paramount rights in and power over that belt, an incident to which is full

dominion over the resources of the soil under that water area, including oil." *Id.* at 38-39. Accord *United States* v. *Maine*, 420 U.S. 515, 519-525 (1975); *United States* v. *Texas*, 339 U.S. 707, 719 (1950); *United States* v. *Louisiana*, 339 U.S. 699, 704 (1950).

The Court specifically rejected California's argument that the individual States acquired ownership of lands beneath the territorial sea under the Equal Footing Doctrine set out in *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212 (1845). See *California*, 332 U.S. at 29-39. The Court did not question *Pollard*'s basic tenets that a new State is admitted on an equal footing with the original thirteen colonies, that the United States holds title to tidelands and lands beneath inland navigable waters within pre-statehood territories in trust for the future States, and that a new State generally succeeds to the United States' ownership of such lands (44 U.S. (3 How.) at 228-229). See 332 U.S. at 31-32. The Court concluded, however, that the so-called Equal Footing Doctrine does not extend beyond a State's coastline. *Id.* at 31-39. See also pages 5-7, *supra*.

The Court explained that the original thirteen colonies had no right to lands below the low-water line. *California*, 332 U.S. at 30-33. To the contrary, through the exercise of its national powers, the United States acquired sovereign rights in the coastal lands seaward of the low-water line. *Id.* at 33-36. Newly created States have no conceptual or historical justification for claiming those lands on an "equal footing" rationale. The Court accordingly refused "to transplant the *Pollard* rule of ownership as an incident of state sovereignty in relation to inland waters out into the soil beneath the ocean, so much more a matter of national concern." *Id.* at 36.

The Court additionally recognized that *Pollard*'s rationale of sovereign entitlement actually supports the United States' claim of title. As the Court explained:

> If this rationale of the *Pollard* case is a valid basis for a conclusion that paramount rights run to the states in inland waters to the shoreward of the low water mark, the same rationale leads to the conclusion that national interests, responsibilities, and therefore national rights are paramount in waters lying to the seaward in the three-mile belt.

California, 332 U.S. at 36. Accord *Maine*, 420 U.S. at 520-522; *Louisiana*, 339 U.S. at 704; *Texas*, 339 U.S. at 719. See *Louisiana*, 339 U.S. at 704 ("The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved.").

The Court's ruling that the United States and the individual States have symmetrical sovereign interests on the opposing sides of the low-water mark confirms an important rule of construction governing grants of submerged lands. The United States may convey lands beneath navigable waters, but there is a "strong presumption against conveyance by the United States." *Montana* v. *United States*, 450 U.S. 544, 551-552 (1981). As the Court has explained:

> [B]ecause control over the property underlying navigable waters is so strongly identified with the sovereign power of government, it will not be held that the United States has conveyed such land except because of "some international duty or public exigency." A court deciding a question of title to the bed of a navigable water must, therefore, 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 waters of the stream."

Id. at 552 (internal citations omitted); accord *Utah Division of State Lands* v. *United States*, 482 U.S. 193, 197-198 (1987). That rule of construction applies both to tidelands, which are held by the United States in trust for future States, and to lands beneath the territorial sea, which are held by the United States for its own use. The terms and logic of the rule draw no distinction between submerged lands that are above and those that are below the low-water line. In either instance, there is a strong presumption that the United States retains the property so that the sovereign that possesses paramount rights may determine the appropriate public use. See generally Report 390-394, 456.

B. Congress Has Exercised The United States' Paramount Power Through The Submerged Lands Act

Congress has exercised the United States' paramount power over the territorial sea by, among other things, enacting the Submerged Lands Act, 43 U.S.C. 1301 *et seq.* See *Maine*, 420 U.S. at 524-525. As this Court has explained, the Submerged Lands Act "embraced" the premise that "paramount rights to the offshore seabed inhere in the Federal Government as an incident of national sovereignty." *Id.* at 524. The Act "concededly did not impair the validity of the *California*, *Louisiana*, and *Texas* cases, which are admittedly applicable to all coastal States." *Id.* at 526

(quoting *United States* v. *Louisiana*, 363 U.S. 1, 7 (1960)).

The Submerged Lands Act grants the coastal States title to a specified measure of submerged land seaward of the coastline, subject to certain important exceptions. See 43 U.S.C. 1311-1314. Section 3(a) of the Act provides in pertinent part that

> title to and ownership of the lands beneath navigable waters within the boundaries of the respective States * * * be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States.

43 U.S.C. 1311(a). As a general matter, Section 3(a) confirms an individual State's title to tidelands and additionally grants the States title to submerged lands beneath a three-mile belt of the territorial sea. See § 2(a), 43 U.S.C. 1301(a) (defining "lands beneath navigable waters"). The Act also confirms the United States' rights to all submerged lands "lying seaward and outside of the area of lands beneath navigable waters, as defined in [Section 2]." § 9, 43 U.S.C. 1302. See Report 16 n.1.

The Submerged Lands Act's grant of submerged lands to the States is subject to important exceptions. Of particular interest here, Section 5(a) of the Act states in pertinent part:

> There is excepted from the operation of [Section 3(a)] —
>
> (a) * * * 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).

43 U.S.C. 1313(a). That provision prevents the Submerged Lands Act from divesting the United States of specific lands that the United States has expressly reserved for federal use at the time of statehood. See S. Rep. No. 133, 83d Cong., 1st Sess. 16, 20 (1953) (describing the language as "self-explanatory"); 99 Cong. Rec. 2619 (1953) ("The purpose of the language is to reserve to the United States those facilities and those areas which are used by the Government in its governmental capacity for one or more of its governmental purposes.") (Sen. Cordon).

This Court has held that the Submerged Lands Act is "a constitutional exercise of Congress' power to dispose of federal property." *California ex rel. State Lands Comm'n* v. *United States*, 457 U.S. 273, 285 (1982); *United States* v. *Louisiana*, 446 U.S. 253, 256 (1980). See *Alabama* v. *Texas*, 347 U.S. 272 (1954) (per curiam). The Court has accordingly stated that its provisions and limitations must be interpreted in light of "the principle that federal grants are to be construed strictly in favor of the United States." *California ex rel. State Lands Comm'n*, 457 U.S. at 287 (citing *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 235 (1960), and *United States* v. *Union Pac. R.R.*, 353 U.S. 112, 116 (1957)). Under that principle, if there are doubts concerning what the Act grants to the States, "they are resolved for the Government, not against it." *Union Pac. R.R.*, 353 U.S. at 116. See pages 46-51, *infra*.

C. Congress Retained Submerged Lands Beneath The Territorial Sea Within The Boundaries Of The Arctic Wildlife Range

The question whether the United States has retained its interest in submerged lands beneath the territorial sea turns on the application of the forego-

ing general principles to the circumstances of this case. We submit that Congress expressly retained submerged lands within the Arctic Wildlife Range through the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958).

1. ***The Alaska Statehood Act sets out the principles for the retention of the United States' title to real property***

The Alaska Statehood Act explicitly addresses the retention and division of the United States' title in the former Territory of Alaska. Section 5 sets out the principle that generally controls:

> Except as provided in section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title, including public lands.

72 Stat. 340. Section 6 contains a series of subsections that address property issues of special interest. Two provisions are particularly pertinent to the Arctic Wildlife Range.

First, Section 6(e) addresses the question whether the United States should retain title to property that is used for conservation and protection of Alaskan fisheries and wildlife. See 72 Stat. 340-341. Section 6(e) answers that question as follows:

> All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of [specific federal statutes], shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency: * * * *Provided*, That *such transfer shall not include lands withdrawn or*

> *otherwise set apart as refuges or reservations for the protection of wildlife* nor facilities utilized in connection therewith, or in connection with general research activities relating to fisheries or wildlife.

72 Stat. 340-341 (emphasis added); see Report 462-463. Hence, Section 6(e) relinquished to Alaska the United States' title to federal property that is used solely for wildlife conservation, but expressly excepted and retained in federal ownership "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." *Ibid.*

Second, Section 6(m) addresses the question of Alaska's entitlement to submerged lands. Under this Court's decision in *California*, *supra*, the United States held pre-statehood title to submerged lands beneath the territorial sea surrounding the Territory of Alaska. Section 6(m) conveyed a substantial portion of those lands to Alaska by providing as follows:

> The Submerged Lands Act of 1953 shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

72 Stat. 343 (citation omitted). Hence, Alaska is entitled to submerged lands beneath the territorial sea in accordance with the provisions, and subject to the exceptions, contained in the Submerged Lands Act. As noted above, Section 5(a) of the Submerged Lands Act excepts from conveyance "all lands expressly retained by * * * the United States when the State entered the Union." 43 U.S.C. 1313(a).

2. *Section 6(e) of the Alaska Statehood Act "expressly retained" submerged lands beneath the territorial sea within the boundaries of the Arctic Wildlife Range*

As the Special Master recognized, the question whether the United States retained title to the submerged lands beneath the Arctic Wildlife Range turns on the construction of Section 6(e) of the Alaska Statehood Act. Report 462-467. We submit that Section 6(e) "expressly retained" the United States' title to all lands within the boundaries of the Arctic Wildlife Range, and it therefore prevented the passage of the submerged lands therein to the State of Alaska under Section 5(a) of the Submerged Lands Act, 43 U.S.C. 1313(a).

Our argument rests on three basic propositions: (a) The application to create the Arctic Wildlife Range encompassed offshore submerged lands; (b) that application had the legal effect of designating "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife" for purposes of Section 6(e) of the Alaska Statehood Act; and (c) if there is any doubt as to whether Section 6(e) "expressly retained" those lands, the doubt must be resolved in favor of the United States. The Master agreed with the United States on the first issue, partially agreed on the second, and overlooked the third.

a. *The Range boundary included submerged lands.* As the Master explained, the Interior Department's Bureau of Sport Fisheries and Wildlife filed an application with the Secretary of the Interior for withdrawal of public lands to create the Arctic Wildlife Range. See Report 447 & n.1. The Department published notice of the application, which included a

description of the proposed boundary. *Id.* at 448 & n.2. See 23 Fed. Reg. 364 (1958). That boundary enclosed the lands in the coastal area as follows:

> Beginning at the Intersection of the International Boundary line between Alaska and Yukon Territory, Canada, *with the line of extreme low water of the Arctic Ocean* in the vicinity of Monument 1 of said International Boundary line;
>
> Thence westerly *along the said line of extreme low water, including all offshore bars, reefs, and islands* to a point of land on the Arctic Seacoast known as Brownlow Point.

Ibid. (emphasis added); see also Report 478-479. The Master carefully examined the precise formulation of the boundary description, as well as other evidence of the intent. *Id.* at 479-495. He correctly concluded that the proposed boundary establishes "a single continuous line, following the seaward side of offshore bars, reefs, and islands and, where it meets rivers, crossing such rivers at their mouths." *Id.* at 495; see *id.* at 479-495. The application for creation of the Arctic Wildlife Range accordingly embraces portions of the territorial sea, including lagoons between the mainland and barrier islands. See *id.* at 450 (Figs. 9.1 & 9.2).

b. *The application served to "set apart" the designated lands as a wildlife refuge.* As the Master recognized, the application for creation of the Arctic Wildlife Range preserved the United States' title to the submerged lands designated therein if the application fell within the scope of Section 6(e) of the Alaska Statehood Act, which expressly retained in federal ownership "lands withdrawn or otherwise set apart as

refuges or reservations for the protection of wildlife." 72 Stat. 341. See Report 464.

The application fell within the reach of that language because it was the legal mechanism by which the Interior Department at that time "set apart" public lands for the creation of a wildlife refuge. Under the Department's regulations, the purpose and legal effect of the application was to

> temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including the mining and the mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal.

43 C.F.R. 295.11(a) (1958 Supp.); see 22 Fed. Reg. 6614 (1957); Report 452 n.8. Hence, the application, as a matter of law, set apart the described lands for administration in accordance with the limitations that apply to wildlife refuges. 43 C.F.R. 295.11(a) (1958 Supp.); see Report 447 n.1 (segregation allowed mineral leasing in accordance with regulations that apply to "Federal wildlife lands"); *id.* at 448 n.2 (accord); see also Public Land Order 1621, 23 Fed. Reg. 2637 (1958) (excepting the area included in the application from mineral location and leasing).

The Master acknowledged that "the words 'otherwise set apart' do describe the effect of an application under the regulation." Report 464. He concluded, however, as follows:

> Although the application and the regulation together caused land to be set apart for the purpose of a wildlife reservation, it was not yet set apart *as* a refuge or reservation. It may be that the tempo-

> rary segregation had essentially the same effect as a withdrawal of lands, in that both prevented disposition under the public land laws. But the segregation did not have the same effect as a reservation of lands, dedicating them to a specific public purpose.

Ibid. We disagree with that analysis. The Master's formalistic distinction between setting apart land "as" a refuge, as opposed to "for the purpose of" a refuge, is inconsistent with the established use of the terminology at issue.

Under the Master's interpretation, Section 6(e) would apply only to withdrawals that create a permanent "reservation of lands, dedicating them to a specific public purpose." Report 464. But as the Master notes elsewhere in his Report, there is a distinction between withdrawing and reserving lands. The Master quotes approvingly from the Public Land Law Review Commission's authoritative work, *One Third of the Nation's Land*, which states:

> To "withdraw" public lands means to withhold them from settlement, sale, or entry under some or all of the general land laws for the purpose of maintaining the status quo because of some exigency or emergency, to prevent fraud, to correct surveys or boundaries, to dedicate the lands to an immediate or prospective public use, or to hold the land for certain future action by the executive or legislative branch of government.

Report 395 n.40 (quoting U.S. Public Land Law Review Comm'n, *One Third of the Nation's Land: A Report to the President and to the Congress* 42 n.1 (1970)). The Commission specifically noted that the term "withdrawal" is not synonymous with the term

"reservation," which "is the immediate dedication of lands to a predetermined purpose and includes, in effect, a withdrawal." *Ibid.*

If Congress had intended Section 6(e) to apply only to lands that had been conclusively "dedicat[ed] * * * to a specific public purpose" (Report 464), it would have used the word "reservation." Congress did not do so, nor did it stop at the use of the broader term "withdrawal," which could be sufficient in itself to describe the temporary segregation at issue here. See 104 Cong. Rec. 12,257-12,258 (1958) (Rep. Saylor) (noting that the Interior Department "withdrew temporarily some 9 million acres of lands along the Canada-Alaska border as the proposed Arctic Wildlife Range"). Instead, Congress used still broader terminology, retaining title to "lands withdrawn or otherwise set apart as refuges." 72 Stat. 341.

Under ordinary canons of statutory construction, Congress's formulation cannot be limited to lands that have been formally "withdrawn" as refuges. See, *e.g.*, *Gustafson* v. *Alloyd Co.*, 115 S. Ct. 1061, 1069 (1995) ("the Court will avoid a reading which renders some words altogether redundant"); *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2413 (1995) (accord). The additional operative phrase "otherwise set apart" aptly describes lands, like those designated for the Arctic Wildlife Range, that have been administratively segregated for future use "as refuges" pending final executive or legislative action.

Long before Congress enacted Section 6(e), this Court had recognized "the right of the Executive to make temporary withdrawals of public land in the public interest." *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 479 (1915). The Court specifically re-

jected the notion that the Executive could make only permanent reservations, stating:

> It is only necessary to point out that, as the greater includes the lesser, the power to make permanent reservations includes the power to make temporary withdrawals. For there is no distinction in principle between the two. The character of the power exerted is the same in both cases. In both, the order is made to serve the public interest and in both the effect on the intending settler or miner is the same.

Id. at 476. Congress, which is presumed to be aware of this Court's decisions, *e.g.*, *North Star Steel Co.* v. *Thomas*, 115 S. Ct. 1927, 1930 (1995), enacted the precise terminology of Section 6(e) to ensure that it would reach both lands that had been formally withdrawn as wildlife reservations and lands, like the proposed Arctic Wildlife Range, that had been temporarily "set apart" for such future use. That interpretation gives meaning to all of the words Congress used, and at the same time yields a sensible construction. It recognizes the government's long-standing and familiar practice, codified in Department regulations, of setting apart land for a conditional future use. See, *e.g.*, *Midwest Oil Co.*, 236 U.S. at 469-472, 475-481; *Grisar* v. *McDowell*, 73 U.S. (6 Wall.) 363, 381 (1868).

The Master suggested an additional reason why Section 6(e) should not apply to the Arctic Wildlife Range. He noted that the Interior Department had proposed the language of Section 6(e) in 1950, before the Interior Department had promulgated the particular regulation that provided for administrative segregation of the lands in question. See Report 464-

466 & n.17. The Master concluded on that basis that the "the words 'otherwise set apart' cannot have been intended originally to take in lands applied for but not yet withdrawn." *Id.* at 466. The Master's conclusion is mistaken and, moreover, beside the point.

As *Midwest Oil* indicates, for many years the Executive Branch had followed the practice of temporarily segregating public lands for proposed future uses. See 236 U.S. at 475-481. And even before the Interior Department's 1952 promulgation of 43 C.F.R. 295.11(a), the Department had followed the practice of segregating lands upon a request for withdrawal. For example, the March 16, 1948, version of the Bureau of Land Management (BLM) Manual provided that, upon receipt of a request for withdrawal, the BLM would "suspend all applications to enter or lease the lands, the allowance of which is discretionary." BLM Manual § 57.130(b) (Mar. 16, 1948). In any event, that Master's concern respecting the historical relationship between Section 6(e) and the Interior regulation is largely inapposite. This Court construes the words of a statute, and not the subjective intent of those who first proposed them. The pertinent fact is that the plain text of Section 6(e) would have been reasonably understood at the time of statehood to reach lands segregated under the Interior Department's regulation, which had been in effect for more than five years.

The Special Master also expressed concern that the United States' interpretation of Section 6(e) would leave uncertain who held title in the event that the Secretary ultimately denied the application. Report 467 (referencing his discussion at pages 459-462). His concerns on that score, however, are misplaced. Under the United States' construction of Section

6(e), the administrative segregation of the Arctic Wildlife Range was sufficient to retain the United States' title to all lands within the proposed boundaries, including the submerged lands beneath the territorial sea. If the Secretary had ultimately denied the application, the United States would have continued to own those submerged lands—just as it had during the territorial period—unless and until Congress elected to convey them to Alaska.

There is nothing anomalous in the possibility that the United States might have retained submerged lands underlying the territorial sea that were originally intended for a wildlife refuge, pending a decision how the lands might best be put to an alternative use. After all, the United States has always had "paramount rights" over those lands. *Maine*, 420 U.S. at 524. In all likelihood, Alaska could have persuaded Congress to convey those lands to the State if the proposed Arctic Wildlife Range had not come into fruition. Congress, which is composed of Representatives of the individual States, routinely provides for the conveyance of particular lands to individual States when such conveyances are in the public interest. See, *e.g.*, Federal Land Policy and Management Act of 1976, § 211, 43 U.S.C. 1721.

c. *Any doubts must be resolved in favor of the United States.* We submit that Section 6(e) of the Alaska Statehood Act is unambiguous. By its terms, it retained the United States' title to lands within the Arctic Wildlife Range, including submerged land beneath the territorial sea. Accordingly, Section 6(m) of the Alaska Statehood Act, which declares that the Submerged Lands Act applies to Alaska, does not grant those submerged lands to the State. They remain in federal ownership pursuant to Section 5(a)

of the Submerged Lands Act, which excepts "all lands expressly retained by * * * the United States when the State entered the Union." 43 U.S.C. 1313(a). But if the Court concludes that there are doubts about whether Section 6(e) of the Alaska Statehood Act and Section 5(a) of the Submerged Lands Act apply to the lands in question, those doubts must be resolved in favor of the United States.

Alaska's claim to ownership of submerged lands beneath the territorial sea ultimately rests on the federal land grants contained in the Alaska Statehood Act and (by reference) the Submerged Lands Act. See pages 37-38, *supra*. Under firmly established law, those Acts must be construed in favor of the federal sovereign. This Court has adopted and uniformly adhered to

> the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.

Watt v. *Western Nuclear, Inc.*, 462 U.S. 36, 59 (1983); see, *e.g.*, *Andrus* v. *Charlestone Stone Prods. Co.*, 436 U.S. 604, 617 (1978); *Grand River Dam Authority*, 363 U.S. at 235; *Union Pac. R.R.*, 353 U.S. at 116; *Caldwell* v. *United States*, 250 U.S. 14, 20 (1919); *Northern Pac. Ry.* v. *Soderberg*, 188 U.S. 526, 534 (1903); *United States* v. *Arredondo*, 31 U.S. (6 Pet.) 691, 738-739 (1832). There is no question that the foregoing rule of construction applies here. The Court expressly stated in *California ex rel. State Lands Commission* that the Submerged Lands Act should be interpreted in light of "the principle that federal grants are to be construed strictly in favor of

the United States." 457 U.S. at 287 (citing *Grand River Dam Authority*, *supra*, and *Union Pac. R.R.*, *supra*). See page 36, *supra*.

That rule of construction takes on special significance in the case of submerged lands. As this Court has explained, the United States has a compelling *national* interest in lands beneath the territorial or so-called marginal sea:

> The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved.

Louisiana, 339 U.S. at 704. Accord *Maine*, 420 U.S. at 520-522; *Texas*, 339 U.S. at 719; *California*, 332 U.S. at 36. Since the time of this Court's decision in *California*, Congress has "embraced rather than repudiated" the premise that the United States has a paramount sovereign interest in those waters. *Maine*, 420 U.S. at 524. Hence, the associated submerged lands continue to be "strongly identified with the sovereign power of government." *Montana*, 450 U.S. at 552. Consequently, all federal land grants, including those set out in statehood Acts and the Submerged Lands Act, remain subject to a "strong presumption" that the United States has retained its title to the submerged lands. See *ibid.* See pages 33-34, *supra*.

The presumption favoring federal retention of submerged lands arises as a matter of constitutional principle, but it is also sound under principles of federalism. If Congress leaves any substantial doubt respecting its intention to convey lands that are strongly imbued with a national interest, then this Court should presume that Congress has retained those lands for the benefit of the general citizenry. If

Congress did in fact intend to convey those lands, it can always do so at a later time through clear and unambiguous language. But if this Court mistakenly construes a conveyance as disposing of lands that Congress did not in fact intend to convey, the lands are lost to the Nation's citizens.

The Special Master recognized the rule of construction that we urge, stating that, "[f]or lands under territorial waters, * * * the applicable presumption is in favor of the United States." Report 456; see *id.* at 390-394. But the Master overlooked the relevance of that presumption in his analysis of Section 6(e) of the Alaska Statehood Act. He acknowledged that his construction of the text of that statutory provision did not dispositively resolve the issue in favor of Alaska, stating:

> One might still question whether this reading is the best one, since the words "otherwise set apart" do describe the effect of an application under the regulation.

Report 464. He nevertheless ultimately resolved the question against the interest of the United States without considering the presumption favoring federal retention of the submerged lands. *Id.* at 467. Even if the Master had thought that Section 6(e) is less than clear, he should have recognized that, at the very least, it raised sufficient doubts respecting conveyance to prevent transfer of the lands out of federal ownership. Indeed, there is substantial evidence of congressional intent, beyond the language of Section 6(e), to justify a holding of federal retention of the submerged lands at issue.

The Secretary's administrative segregation of lands for the Arctic Wildlife Range received wide

publicity. See Report 483 (citing U.S. Exh. 12 (press release and map)). During Congress's consideration of Alaska's admission to the Union, the Secretary of the Interior informed Congress of the pending application, and he submitted maps showing the area as a federal enclave embracing submerged lands. See U.S. Exh. 61. Hence, Members of Congress understood that the Interior Department had "withdr[awn] temporarily some 9 million acres of lands along the Canada-Alaska border as the proposed Arctic Wildlife Range." See 104 Cong. Rec. 12,257-12,258 (1958) (Rep. Saylor). It is reasonable to conclude that Congress expected that Section 6(e) would retain in federal ownership the lands contained within the Range boundaries. As the Master acknowledged, Members of Congress "might have considered the proviso broad enough to cover lands segregated by a withdrawal application." Report 466.

The presumption in favor of federal retention has added force in this case because of the strong federal interest in retaining those submerged lands in federal ownership for their intended use. As the Master found, the Arctic Wildlife Range was proposed and created to protect that region's unique wildlife habitat, Report 485-490, including "the lagoons and the mouths of rivers," *id.* at 490. The application included documentation that specifically recognized the importance of lagoon and river habitat, stating in pertinent part:

> The river bottoms with their willow thickets furnish habitat for moose. This section of the seacoast provides habitat for polar bears, Arctic foxes, seals, and whales.

Id. at 487; see also *id.* at 489 (citing "undisputed evidence that polar bears use the lagoon areas for feeding and that seals have been seen in both lagoons and rivers"). Accordingly, it is reasonable to presume that Congress did not intend to convey those lands to the States for uses that would be potentially inconsistent with the planned federal wildlife refuge.

In light of the foregoing considerations, even if this Court shares the Master's concern that Section 6(e) —despite its directly pertinent language—might not have reached the Arctic Wildlife Range, the Court should nevertheless hold that the presumption in favor of federal retention has not been overcome. Congress can always expressly convey those lands to Alaska in the future, under whatever conditions Congress deems appropriate, if Congress should conclude that its previous intentions were misunderstood. As the enactment of the Submerged Lands Act demonstrates, Congress manifests great solicitude for legitimate state interests in offshore resources. There is no reason to expect that Congress "will execute its powers in such way as to bring about injustices to states, their subdivisions, or persons acting pursuant to their permission." *California*, 332 U.S. at 40.

D. Congress Also Retained Tidelands And Other Lands Beneath Inland Waters Within The Arctic Wildlife Range

The foregoing discussion has addressed the question of submerged lands beneath the territorial sea, which extend seaward from the low-water line along the coast. *California*, 332 U.S. at 30-31. Those lands do not include tidelands, which encompass the periodically submerged area between the high- and low-water lines. See *ibid.*; see also *Phillips Petroleum*

Co. v. *Mississippi*, 484 U.S. 469 (1988). Tidelands and other lands beneath inland waters involve an additional consideration.

The United States typically holds title to all submerged lands associated with the pre-statehood territories, including tidelands, lands beneath inland navigable waters, and lands beneath the territorial sea. But under the Equal Footing Doctrine, the United States holds title to the tidelands and land beneath inland navigable waters in trust for future States. *Pollard*, 44 U.S. (3 How.) at 228-229. Although the United States has the power to divest a State of such lands before statehood by conveying them away or otherwise preventing the passage of title, this Court does not "lightly infer" such action. *Utah Division of State Lands*, 482 U.S. at 197. The Court applies a "strong presumption" that Congress intends to retain tidelands for a future State; Congress must "definitely declare or otherwise make very plain" its intention to defeat the State's title. *Id.* at 197-198, 202, 209. In effect, the State receives the benefit of the same presumption favoring retention that applies to submerged lands that the United States' retains for its own sovereign use. See pages 32-34, *supra*.

The United States argued before the Special Master that the United States had divested the State of Alaska of title to tidelands and other lands beneath coastal inland waters within the proposed Arctic Wildlife Range by reserving them for the Range. The Master found that, if Section 6(e) had retained the Range in federal ownership, then the lands embraced by that retention included all of the submerged lands at issue. Report 495-499. Applying this Court's reasoning in *Utah Division of State Lands*, *supra*, and *Montana* v. *United States*, *supra*, the Master con-

cluded that the United States had carried its burden of putting forward "strong evidence of intent to make the lands part of the federal reservation" and had demonstrated an "affirmative intent to defeat the State's title to the lands." Report 496. Hence, if the Court concludes, as we urge, that Section 6(e) "expressly retained" the Arctic Wildlife Range in federal ownership, it should rule that the United States also retains title to the tidelands and other coastal inland waters within the boundary of the Arctic Wildlife Range. *Id.* at 499.

CONCLUSION

The Court should reject the Special Master's recommendation that the application for withdrawal and creation of the Arctic Wildlife Range did not withhold submerged lands from Alaska.

Respectfully submitted.

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APPENDIX

1. The Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, provides in relevant part:

The State Parties to this Convention Have agreed as follows:

Part I

TERRITORIAL SEA

Section I. General

Article 1

1. The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.

2. This sovereignty is exercised subject to the provisions of these articles and to other rules of international law.

* * * * *

Section II. Limits of the Territorial Sea

Article 3

Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

Article 4

1. In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method

of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

3. Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.

4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.

5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.

6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given.

Article 5

1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

2. Where the establishment of a straight baseline in accordance with article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the

high seas, a right of innocent passage, as provided in articles 14 to 23, shall exist in those waters.

Article 6

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

Article 7

1. This article relates only to bays the coasts of which belong to a single State.

2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn be-

tween these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

Article 8

For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast.

* * * * *

Article 10

1. An island is a naturally-formed area of land, surrounded by water, which is above water at high-tide.

2. The territorial sea of an island is measured in accordance with the provisions of these articles.

Article 11

1. A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that ele-

vation may be used as the baseline for measuring the breadth of the territorial sea.

2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

* * * * *

Article 13

If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-tide line of its banks.

* * * * *

2. The Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), provides in pertinent part:

* * * * *

Sec. 5. The State of Alaska and its political subdivisions, respectively, shall have and retain title to all property, real and personal, title to which is in the Territory of Alaska or any of the subdivisions. Except as provided in section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title, including public lands.

Sec. 6. * * * * *

(e) All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301; 48 U.S.C., secs. 192-211), as amended, and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478; 48

U.S.C., secs. 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U.S.C., secs. 221-228), as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency: * * * *Provided*, That such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife nor facilities utilized in connection therewith, or in connection with general research activities relating to fisheries or wildlife. * * *

* * * * *

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

* * * * *

3. The Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, provides in pertinent part:

SUBCHAPTER I—GENERAL PROVISIONS

§ 1301. Definitions

When used in this subchapter and subchapter II of this chapter—

(a) The term "lands beneath navigable waters" means—

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordi-

nary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

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

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico, except that any boundary between a State and the United States under this subchapter or subchapter II of this chapter which has been or is hereafter fixed by coordinates under a final decree of the United States Supreme Court shall

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* So in original. Probably should be a semicolon.

remain immobilized at the coordinates provided under such decree and shall not be ambulatory;

(c) The term "coast line" means 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;

* * * * *

SUBCHAPTER II—LANDS BENEATH NAVIGABLE WATERS WITHIN STATE BOUNDARIES

§ 1311. Rights of States

(a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use

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

* * * * *

§ 1313. Exceptions from operation of section 1311 of this title

There is excepted from the operation 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, purchase, 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;

* * * * *