No. 84, Original

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALASKA

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

SUR-REPLY BRIEF FOR THE UNITED STATES IN SUPPORT OF EXCEPTION

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INTRODUCTION AND SUMMARY OF ARGUMENT

The United States has excepted from the Special Master's conclusion that the United States does not own the coastal submerged lands within the Arctic National Wildlife Refuge (Question 9). We submit that the United States expressly retained those lands by filing a pre-statehood application that, as a legal matter, set apart as a wildlife refuge all lands within the proposed boundaries of the Arctic Wildlife Range. Alaska's contentions to the contrary are neither persuasive nor on point.

A. The pivotal issue under our exception is whether Section 6(e) of the Alaska Statehood Act, which expressly

excepted from transfer to the State "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife" (Pub. L. No. 85-508, 72 Stat. 340-341), retained in federal ownership coastal submerged lands in what is now the Arctic National Wildlife Refuge. At the time of statehood, the United States had set aside those lands through the regulatory mechanism of an application for withdrawal. That application, which specifically embraced offshore submerged lands, had the legal effect of subjecting the lands to administration as a wildlife refuge. See 43 C.F.R. 295.11 (1958 Supp.). The United States had accordingly "set apart" those lands "as [a] refuge[] * * * for the protection of wildlife." See Brief for the United States in Support of Exception (U.S. Except. Br.) 39-51.

B. Alaska devotes only a small portion of its brief to confronting our construction of Section 6(e) and the Interior Department regulation. See Alaska Reply Br. 39-46. Alaska contends that the application did not "withdraw[] or otherwise set apart" those lands as a wildlife refuge within the meaning of Section 6(e) because the regulation provided that the Bureau of Land Management continued to exercise "administrative jurisdiction over the segregated lands" (43 C.F.R. 295.11(a) (1958 Supp.)) pending formal withdrawal. Alaska Reply Br. 40. The relevant issue under Section 6(e), however, is whether the lands had been "set apart" as a wildlife refuge, and not which agency had jurisdiction over "the segregated lands" pending completion of the formal withdrawal.

Section 6(e), which specifically refers to lands "withdrawn or otherwise set apart" as a wildlife refuge, necessarily extends beyond formal withdrawals and includes federal applications that segregate lands for a wildlife refuge. See U.S. Except. Br. 43. Contrary to Alaska's contentions (Alaska Reply Br. 41-42), there is no need to

consult the legislative history to determine Section 6(e)'s meaning. But in any event, there is nothing in Section 6(e)'s legislative history that undermines the plain import of the statutory language.

Alaska's challenge to the Solicitor of the Interior's interpretation of the Interior Department regulation is without merit. See Alaska Reply Br. 43. The Solicitor has concluded that under the regulation, an application for withdrawal and a formal withdrawal have an "identical" segregative effect. *The Effect of Public Land Order 82 on the Ownership of Coastal Submerged Lands in Northern Alaska*, 86 Interior Dec. 151, 176 (1978), modified and supplemented in other respects, 100 Interior Dec. 103 (1992). Alaska errs in relying (Alaska Reply Br. 43) on a prior memorandum to the contrary by a Deputy Solicitor. The Solicitor repudiated that memorandum, finding that it "contains almost no reasoning to support its conclusion." 86 Interior Dec. at 176.

Alaska is also mistaken in its contention (Alaska Reply Br. 44) that Section 6(e) is ineffective to retain federal ownership of the lands in question because it is phrased in terms of an exception to transfer. The effect of the exception is to retain lands in federal ownership. Contrary to Alaska's suggestion (Alaska Reply Br. 45-46), there was no need for Section 6(e) to make a specific reference to submerged lands. Section 6(e) was written with reference to the federal withdrawal process and, as the Master explained, the description of the retained lands in the withdrawal application clearly included submerged lands. See Report 477-499.

C. Alaska's devotes most of its energy to contentions based on the Equal Footing Doctrine. Alaska Reply Br. 11-15, 25-38, 46-49. Alaska's arguments, however, misdirect the inquiry. The Equal Footing Doctrine establishes a presumption that Congress retains title to submerged

lands beneath inland waters in pre-statehood territories for the benefit of future States. But contrary to Alaska's contentions (*id.* at 11-29), there is no occasion to invoke that presumption in this case, because Congress expressly addressed the ownership of those lands through the Submerged Lands Act and the Alaska Statehood Act. Moreover, the Equal Footing Doctrine applies only to inland waters and has no application to lands beneath the territorial sea. *United States* v. *California*, 332 U.S. 19 (1947) (*California I*).

Alaska is also mistaken in its contention that the Submerged Lands Act extends the Equal Footing Doctrine's presumption to the territorial sea. See Alaska Reply Br. 29-38. As the Master explained, this Court has previously rejected similar contentions that the Act repudiated the Court's decision in *California I*. Report 392-393; see *United States* v. *Maine*, 420 U.S. 515, 524 (1975). Furthermore, because the Submerged Lands Act and the Alaska Statehood Act are grants of federal lands, they must be construed strictly in favor of the United States. See *California ex rel. State Lands Comm'n* v. *United States*, 457 U.S. 273, 287 (1982).

Finally, this Court should not consider Alaska's belated challenge to the Master's recommendation on Question 10, which addressed the location of the coastal boundary. Alaska Reply Br. 16-25. As Alaska concedes (*id.* at 16 n.7), it did not except to that recommendation within the time allowed for filing exceptions. Alaska's justifications for failing to file an exception are without merit, and Alaska has therefore waived its right to challenge the Master's recommendation. In any event, the Master correctly determined that the boundary extends to the extreme low water line on the seaward side of all offshore bars, reefs and islands and includes within the Refuge the

submerged lands encompassed within that line. Report 477-499.

ARGUMENT

The United States agrees with the Special Master's statement of the general principles that control whether the United States or the State owns the coastal submerged lands within the Arctic National Wildlife Refuge. Our exception is limited to a narrow but important point in the Master's statutory analysis. See U.S. Except. Br. 28. By contrast, Alaska's arguments depart from the Master's conceptual framework and create confusion over the proper mode of analysis. We therefore begin by resummarizing the general legal principles relevant to our exception.

A. The United States Has Retained Ownership of the Coastal Submerged Lands Within the Arctic National Wildlife Refuge Through Section 6(e) of the Alaska Statehood Act

The United States and Alaska dispute ownership of coastal submerged lands within the Arctic National Wildlife Refuge. Those lands include both lands beneath the territorial sea and lands beneath coastal inland waters. See Report 461 n.13. The lands beneath the territorial sea extend seaward from the coastline, which follows the low water line and the seaward limits of coastal inland waters. See Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, Arts. 3, 5, 7, 13, 15 U.S.T. 1606-1610 (hereinafter the Convention). The lands beneath coastal inland waters include tidelands (the lands between mean high and low water marks), lands beneath features that qualify as bays, and some of the lands beneath the mouths of rivers. See *ibid.*; see also

United States v. *California*, 381 U.S. 139, 165 (1965) (*California II*).[1]

By virtue of the Property Clause of the Constitution, the United States owns and has plenary power over all of the coastal submerged lands in the pre-statehood territories. See U.S. Const. Art. IV, § 3, Cl. 2. The Court has drawn a distinction, however, between the lands beneath the territorial sea and the lands beneath inland waters. The United States has paramount constitutional power over lands beneath the territorial sea. See *United States* v. *California*, 332 U.S. 19 (1947) (*California I*). The United States also owns the lands beneath coastal inland waters in pre-statehood territories, but it presumptively holds title to those lands in trust for future States. See *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212 (1845). See Report 15-16; U.S. Except. Br. 31-34; Brief for the United States in Opposition to Exceptions of the State of Alaska (U.S. Reply Br.) 51.

Congress has exercised its constitutional powers under the Property Clause through enactment of the Submerged Lands Act, 43 U.S.C. 1301 *et seq.* See *United States* v. *Maine*, 420 U.S. 515, 524 (1975). That Act grants to the States a specified measure of submerged lands, and it confirms continued federal authority over other submerged lands, including the outer continental shelf. See 43 U.S.C. 1302, 1311-1314. The Act also provides exceptions to the grant of submerged lands to the States, specifically excepting, *inter alia*, "all lands expressly retained by * * * the United States when the

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[1] We use the terms "coastal" or "offshore" submerged lands and "coastal" inland waters to distinguish coastal features from non-coastal features, such as lakes and the non-tidal portions of rivers, which are not at issue in this litigation.

State entered the Union." 43 U.S.C. 1313(a). See Report 16 & n.1; U.S. Except. Br. 34-36; U.S. Reply Br. 52.

We submit that Congress "expressly retained" submerged lands within what is now known as the Arctic National Wildlife Refuge through the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958). The Alaska Statehood Act made the Submerged Lands Act applicable to Alaska. § 6(m), 72 Stat. 343. Furthermore, the Alaska Statehood Act expressly excepted from transfer to the State "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." § 6(e), 72 Stat. 340-341. The lands at issue here fall within that exception. At the time of statehood, the United States had set aside a specific tract, through a pre-statehood federal application, to create the Arctic Wildlife Range. That application, which specifically embraced offshore submerged lands, segregated lands within the described boundaries from the operation of the public land laws. See 43 C.F.R. 295.11 (1958 Supp.). It had the legal effect of subjecting the lands to administration as a wildlife refuge, and it accordingly "set apart" those lands "as [a] refuge[] * * * for the protection of wildlife." See U.S. Except. Br. 39-51.

The Master agreed with the United States' analytical approach, but ultimately concluded that the application was ineffective to set apart the lands "as" a wildlife refuge. He stated his "controlling" consideration as follows:

> The proviso to section 6(e) covers lands "withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." 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 temporary 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.

Report 464. We disagree with the Master's analysis, because he erroneously interpreted Section 6(e) to apply only to completed withdrawals that create a permanent "reservation of lands, dedicating them to a specific public purpose." Report 464. The statutory term "otherwise set apart" is not limited to formally completed, permanent reservations, but applies precisely to a segregation like the one involved here. See U.S. Except. Br. 40-46.

In our view, the Master's interpretation of Section 6(e) presents the pivotal issue. We therefore shall first address Alaska's arguments respecting the meaning of that provision. We shall then explain why Alaska's reliance on the Equal Footing Doctrine is neither persuasive nor relevant to the resolution of the issue.

B. Section 6(e) Preserves Federal Ownership of Lands That Have Been Set Apart as a Wildlife Refuge Through A Pre-Statehood Application for Withdrawal

Alaska discusses the meaning of Section 6(e) at pages 39 to 46 of its Reply Brief. Alaska acknowledges that the federal application to create the Arctic Wildlife Range had the legal consequence, under 43 C.F.R. 295.11, of segregating the described lands for the purpose of a wildlife refuge. Alaska contends, however, that the application did not set those lands apart "as" a wildlife refuge. Alaska's five specific arguments, whether viewed individually or collectively, are unpersuasive.

1. Alaska first argues that the federal application was ineffective under Section 6(e) because the Interior Department's regulation describing the effect of a withdrawal application stated that the segregation of the lands identified in the application would "not affect the administrative jurisdiction over the segregated lands." Alaska Reply Br. 40. Alaska's argument is flawed because it fails to read the quoted language in the full context of the regulation.

The Interior Department regulation in effect at the time of the application stated in relevant part as follows:

> *Segregative effect of applications.* (a) The noting of the receipt of the application in the tract books or on the official plats maintained by the Land Office in which the application was properly filed * * * 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 mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal. To that extent, action on all prior applications the allowance of which is discretionary, and on all subsequent applications, respecting such lands will be suspended until final action on the application for withdrawal or reservation has been taken. Such temporary segregation shall not affect the administrative jurisdiction over the segregated lands.

43 C.F.R. 295.11(a) (1958 Supp.); 22 Fed. Reg. 6613, 6614 (1957); see Report 452 n.8. The segregation effected by the regulation remained in effect *unless* the application was denied. 43 C.F.R. 295.13(c) (1958 Supp.).

The regulation is significant because it verifies that the application for withdrawal of the Arctic Wildlife Range

had the legal effect of setting apart the designated lands as a wildlife refuge. See U.S. Except. Br. 41-43. As the regulation indicates, a federal agency's application for withdrawal represented a considered decision by the head of the agency that specific federal lands should be set apart for a governmental use. The regulation treated that decision as presumptively correct pending formal approval, and it segregated the lands for administration in accordance with the proposed purpose immediately upon "noting of the receipt of the application in the tract books or on the official plats maintained by the Land Office." 43 C.F.R. 295.11(a) (1958 Supp.).[2]

The regulation gave the application immediate effect by providing that: (1) the lands were segregated "from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws" to the extent that those actions were inconsistent with the use of the lands as a wildlife refuge; and (2) pending discretionary applications and all subsequent applications for other uses of the land were suspended. See 43 C.F.R. 295.11(a). Hence, as the Solicitor of the Interior Department has authoritatively explained, the legal effect of an application for withdrawal was to set apart the designated lands for their intended purpose. 86 Interior Dec. 151, 175-177 (1978) (discussed *infra*), modified and supple-

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[2] Alaska mistakenly characterizes the federal agency application for withdrawal as if it were merely a private application for some public benefit. The application, however, was a *governmental* act. It could be made only by the head of an agency or his delegate, and it required thorough study and justification. See 43 C.F.R. 295.9 and 295.10 (1958 Supp.). The Department's regulation accordingly treated an application as presumptively warranted and gave it immediately operative effect. Although Alaska suggests the possibility of "frivolous applications" (Alaska Reply Br. 14), it is unable to point to any instance in which the regulation's presumption of validity was not warranted.

mented in other respects, 100 Interior Dec. 103 (1992). The Department of the Interior's public notice of the application for the Arctic Wildlife Range reflected that understanding. It stated that, pending final action, the potential uses of the designated lands—mineral entry, mineral leasing, hunting and fishing—would be administered in accordance with the federal rules governing those activities in wildlife refuges. See Report 447-448 nn.1 & 2; U.S. Except. Br. 41.[3]

Alaska nevertheless argues that the lands were not set apart "as" a wildlife refuge because the regulation did not affect the "administrative jurisdiction" of those lands. 43 C.F.R. 295.11(a). The test under Section 6(e), however, is whether the lands are "set apart" as a wildlife refuge, and not whether they are under the administrative jurisdiction of one particular federal agency or another. Indeed, the "administrative jurisdiction" proviso supports our submission by demonstrating the broad effect of the application on the actual management of the designated lands. The Department's regulation had the practical effect of segregating those lands for administration "as" a wildlife refuge. The change in the way the lands were administered under the regulation was so substantial that the Department found it appropriate to indicate explicitly that, notwithstanding the change, the original Interior Department component would continue to be responsible for the lands on a day-to-day basis until the withdrawal was formally completed.

2. Alaska does not confront Section 6(e)'s language, but argues instead that its legislative history does not

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[3] Alaska incorrectly suggests that there is some meaningful distinction between administering lands "as a refuge" and "in accordance with the limitations that apply to wildlife refuges." Alaska Reply Br. 15 n.6. Those descriptions are one and the same.

adequately demonstrate that an application would be sufficient to set apart lands as a wildlife refuge. Alaska Reply Br. 40-41. As this Court has repeatedly observed, the language of a statute is the primary and most reliable guide to congressional intent. See, *e.g.*, *Metropolitan Stevedore Co.* v. *Rambo*, 115 S. Ct. 2144, 2149 (1995); *Reves* v. *Ernst & Young*, 507 U.S. 170, 177 (1993); *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). As we explain in our brief supporting our exception, the language of Section 6(e) encompasses the situation presented here. See U.S. Except. Br. 40-46. The legislative history that Alaska cites simply paraphrases the statutory language and does not undermine our interpretation.

Alaska's resort to legislative history does, however, highlight that Alaska has no answer to our textual argument respecting Section 6(e). As we pointed out, if Congress had meant for Section 6(e) to retain federal ownership only of lands that had been formally reserved, it could have easily limited Section 6(e) to formal federal reservations. See U.S. Except. Br. 43. Instead, Congress used much broader terminology that retained in federal ownership "lands withdrawn *or* otherwise set apart as refuges *or* reservations for the protection of wildlife." 72 Stat. 341 (emphasis added). As the Master acknowledged, "the words 'otherwise set apart' do describe the effect of an application under the regulation," Report 464. He nevertheless interpreted the phrase to require a completed withdrawal—an interpretation that renders the phrase completely superfluous. See, *e.g.*, *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 & n.11 (1988).

Contrary to Alaska's assertions (Alaska Reply Br. 41-42), it does not matter whether the legislative history contains evidence that Members of Congress subjectively

considered whether the phrase proviso was "broad enough to cover lands segregated by a withdrawal application" (Report 466). *E.g.*, *Moskal* v. *United States*, 498 U.S. 103, 111 (1990).[4] But even if such subjective understandings have a bearing on the meaning of Section 6(e), Alaska is incorrect in asserting that "there is no evidence that Congress even knew that the application at issue had been filed." Alaska Reply Br. 41-42. Members of Congress referred to the Interior Department's highly publicized actions in setting aside those lands. See 104 Cong. Rec. 9410-9411 (Rep. Pelly), 12,257-12,258 (Rep. Saylor) (1958); see also Report 459-460 & nn. 11-2, 466 n.18. In addition, they received a map that showed the area as a federal enclave embracing submerged lands. U.S. Exh. 61.[5]

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[4] As Justice Jackson cautioned, a court should interpret a federal enactment "by analysis of the statute instead of by psychoanalysis of Congress." *United States* v. *Public Util. Comm'n*, 345 U.S. 295, 319 (1945) (Jackson, J. concurring); see also *Bank One Chicago, N.A.* v. *Midwest Bank & Trust Co.*, 116 S. Ct. 637, 645 (1996) (Scalia, J., concurring).

[5] The Master concluded that the map did not accurately depict the boundaries of the Arctic Wildlife Range, but corresponded more closely with the boundaries of a previous and overlapping withdrawal, Public Land Order (PLO) 82. See Report 483 n.34. He stated (*ibid.*) that his view was in accord with the Solicitor's opinion, 86 Interior Dec. 151 (1978). The Solicitor had concluded, however, that PLO 82 did not include coastal submerged lands along the Arctic Ocean. *Id.* at 153. Hence, the map, which was part of a document "[o]bviously prepared in connection with statehood deliberations," *id.* at 162, is best explained as a general depiction of the combined effects of the Arctic Wildlife Range application and the PLO 82 withdrawal. In any event, the map is significant because it was submitted to Congress, and it marked the area encompassing the Range as a federal enclave embracing submerged lands. See First U.S. Post-Trial Memo. 7-8 (Nov. 28, 1980). Hence, Members of Congress who consulted the map would have been placed

3. Alaska also places great weight on an internal memorandum from a Deputy Solicitor to the Under Secretary of the Department of the Interior in 1959. See Alaska Reply Br. 43. That memorandum concluded that, in the case of a different pre-statehood application involving the Aleutian Islands National Wildlife Refuge, the government's action was ineffective in reserving tidelands. See Report 469-470. The memorandum, which was prepared after enactment of the Alaska Statehood Act, has no bearing on the meaning of Section 6(e) of the Alaska Statehood Act or Congress's understanding of the Department's regulations at that time. Cf. *Gustafson* v. *Alloyd Co.*, 115 S. Ct. 1061, 1071 (1995). Moreover, the Solicitor of the Department of the Interior repudiated the Deputy Solicitor's opinion in a published decision that addressed the precise issue involved in this case. 86 Interior Dec. 151, 175-177 (1978), modified and supplemented in other respects, 100 Interior Dec. 103 (1992).

The Solicitor concluded (as we submit here) that the 1958 application to withdraw the Arctic National Wildlife Refuge "operated to retain the lands in federal ownership, where they remain." 86 Interior Dec. at 176-177. He stated:

> Under the regulations then in existence, 43 C.F.R. 295.11(a) (1959 Supplement), the application operated by itself to segregate the land from all forms of disposal under the public land laws, to the extent that the withdrawal applied for would, if finally executed, prevent such forms of disposal. This segregative effect remained until final action was taken on the application. This fact was noted and given added

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on notice that the United States had set apart the submerged lands at issue in this case.

> momentum in PLO 1621 signed Apr. 18, 1958, eight months before statehood.

Id. at 175.[6] In repudiating the Deputy Solicitor's memorandum, the Solicitor noted that "it contains almost no reasoning to support its conclusion" and "it does not even consider the effect of sec. 5(a) of the Submerged Lands Act, excepting from transfer to the State those lands expressly retained by the United States." *Id.* at 176. He also noted that the Deputy Solicitor's memorandum did not consider that Section 6(e) applied to "lands withdrawn *or otherwise set apart as* refuges." *Id.* at 176 n.35.

The Solicitor's decision expresses the United States' longstanding position respecting the Arctic National Wildlife Refuge. Contrary to Alaska's suggestion (Alaska Reply Br. 43 & n.21), the Solicitor's decision, which is the sole authoritative opinion expressing the Interior Department's views, is entitled to deference with respect to the meaning and effect of the Department's regulations and the scope of the Department's public land orders. See, *e.g.*, *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989). The Solicitor determined that

> the application for a withdrawal for [wildlife] purposes under then-existing regulations operated in fact to set the lands apart and reserve them for possible use for the protection of wildlife until the application could be ruled on.

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[6] As the Solicitor explained, 86 Interior Dec. at 169, PLO 1621 modified PLO 82 by opening specified lands to mineral entry and leasing, but it expressly disclaimed any effect on specified areas, including the proposed Arctic Wildlife Range. See 23 Fed. Reg. 2637 (1958). PLO 1621 accordingly confirmed the Department's understanding that those lands had been set apart for administration as a wildlife refuge.

86 Interior Dec. at 176 n.35. The Court should give "controlling" weight (*Robertson*, 490 U.S. at 359) to his determination that, in this respect, "the Department regulations in effect at that time gave an identical effect" to "an application" and "a completed withdrawal." 86 Interior Dec. at 176.

4. Alaska next argues that Section 6(e) of the Alaska Statehood Act could not result in an express retention within the meaning of Section 5(a) of the Submerged Lands Act, because Section 6(e) provides for an exception from "transfer," rather than for a retention of the designated lands. Alaska Reply Br. 44. Alaska posits a distinction without a difference. Section 6(m) of the Alaska Statehood Act provides that the Submerged Lands Act "shall be applicable to the State of Alaska." 72 Stat. 343. Section 5(a) of the Submerged Lands Act states that the States are not entitled to "lands expressly retained by or otherwise ceded to the United States when the State entered the Union." 43 U.S.C. 1313(a). As Alaska concedes (Alaska Reply Br. 44), Section 6(e) of the Alaska Statehood Act withheld from transfer to Alaska "lands withdrawn or otherwise set apart as refuges or reservations." 72 Stat. 341. The United States accordingly has "expressly retained" those lands within the meaning of Section 5(a), 43 U.S.C. 1313(a).

5. Finally, Alaska seems to contend that the United States is not entitled to submerged lands that fall within Section 6(e)'s exception because that Section and its legislative history make no specific mention of submerged lands. Alaska Reply Br. 44-45. Section 6(e), however, uses the unqualified word "lands," which under normal definition encompasses both uplands and submerged lands. The normal definition is particularly appropriate in the case of Section 6(e), because that Section addresses lands set apart for the protection of

wildlife, which frequently utilize and depend upon submerged lands for shelter, nesting, foraging, and protection from predation. Moreover, Section 6(e) was written with reference to the federal withdrawal process and, as the Master explained, the description of the retained lands in the withdrawal application in this case clearly did include submerged lands. See Report 477-499. The application for the Arctic Wildlife Range specifically described the designated parcel by a boundary that extended to "the line of extreme low water of the Arctic Ocean * * * including all offshore bars, reefs, and islands." *Id.* at 478-479. There was no reason to describe the boundary in that manner except to include both tidelands and portions of the territorial sea. See *id.* at 481-482. See discussion at pp. 29-30, *infra*.

C. Alaska's Arguments Based on the Equal Footing Doctrine are not Persuasive

Alaska responds to our position primarily by invoking the Equal Footing Doctrine. But Alaska's reliance on equal footing principles misconceives the issue and misdirects the inquiry. The question here is whether Congress intended to retain the coastal submerged lands within the Arctic National Wildlife Refuge. That question should be resolved on the basis of the two statutes that directly address that issue—the Submerged Lands Act and the Alaska Statehood Act. This Court's cases under the Equal Footing Doctrine, which all involved conveyances that predate the Submerged Lands Act, lay out only a presumption—and not a strict rule—respecting ownership of *inland* waters in those cases in which Congress has not directly addressed the issue. As we explain below, where Congress has addressed the issue through positive legislation, the Act of Congress controls. Furthermore, as we also explain below, to the extent that

Alaska is challenging the Master's ruling on Question 10, which resolves the geographic scope of the Arctic National Wildlife Refuge, its challenge is untimely and should not be allowed.

1. Alaska claims that it is entitled to the submerged lands within the Arctic National Wildlife Refuge based on the Equal Footing Doctrine. Alaska Reply Br. 11-14. The Court developed that Doctrine in recognition that the original thirteen colonies owned the land beneath navigable inland waters within their boundaries and that new States should be admitted to the Union on the same understanding. See *Utah Div. of State Lands* v. *United States*, 482 U.S. 193, 195-196 (1987). The Court stated that by virtue of that understanding, the United States is presumed to hold lands beneath inland navigable waters in trust for future States. *Id.* at 196.

The Court also recognized, however, that notwithstanding the Equal Footing Doctrine, the Property Clause of the Constitution gives the United States plenary power over all land in pre-statehood territories. *Utah*, 482 U.S. at 196-197. Hence, the United States is not *required* to retain submerged lands for future States. The United States can "defeat a prospective State's title to land under navigable waters by a pre-statehood conveyance of the land to a private party for a public purpose appropriate to the Territory." *Id.* at 197. By the same reasoning, the United States can also retain those lands in federal ownership for its own use in support of an appropriate public purpose. See U.S. Reply Br. 53-55.

Because Congress "had never undertaken by general land laws to dispose of land under navigable waters," the Court has "inferred a congressional policy (although not a constitutional obligation) to grant away land under navigable waters *only* 'in case of some international duty

or public exigency." *Utah*, 482 U.S. at 197. The Court has additionally stated that "[i]n recognition of this policy, we do not lightly infer a congressional intent to defeat a State's title to land under navigable waters," and "a court deciding a question of title to the bed of a navigable water must . . . begin with a strong presumption against conveyance by the United States." *Ibid.* The Court in *Utah* specifically rejected the United States' claim that it had retained title to the bed of Utah Lake because "Congress did not definitely declare or otherwise make very plain either its intention to reserve the bed of Utah Lake or to defeat Utah's title to the bed under the equal footing doctrine." *Id.* at 209.

This Court's decision in *Utah*, like its other equal footing cases, involved a title dispute in which the federal action in question predated the Submerged Lands Act. See, *e.g.*, *Utah*, 482 U.S. at 199 (1889 selection of federal reservoir site did not implicitly reserve the bed of Utah Lake); *Montana* v. *United States*, 450 U.S. 544, 553-555 (1981) (1851 and 1868 Indian treaties did not reserve the bed of the Big Horn River); *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 628-636 (1970) (1830 and 1835 Indian treaties did reserve the bed of the Arkansas River).

This case, by contrast, involves a title dispute in which the federal action—the federal withdrawal application and congressional enactment of Section 6(e) of the Alaska Statehood Act—occurred after enactment of the Submerged Lands Act. As we have explained, the Submerged Lands Act specifically addresses the question posed here: Section 5(a) provides that a new State is not entitled to "lands expressly retained by * * * the United States." 43 U.S.C. 1313(a). That test controls, and there is no need or occasion to call upon the presumptions that this Court developed in its equal footing cases, which were based on what the Court "inferred"

was the "congressional policy" before enactment of the Submerged Lands Act. *Utah*, 482 U.S. at 197.

Alaska's invocation of equal footing cases is particularly inappropriate here, because much—and perhaps most—of the submerged lands at issue in the Arctic National Wildlife Refuge are not inland waters, but lands beneath the territorial sea. This Court squarely ruled in *California I* that the original thirteen colonies had no entitlement, and the Equal Footing Doctrine accordingly does not extend, to lands beneath the territorial sea. See 332 U.S. at 30-36. At bottom, what Alaska seeks here is an extension of the Equal Footing Doctrine beyond the Doctrine's historic limits and in direct contravention of this Court's decisions. This Court has rejected that argument "time and again." *United States* v. *Maine*, 420 U.S. 515, 524 (1975); see *id.* at 518-525; *United States* v. *Texas*, 339 U.S. 707, 719 (1950); *United States* v. *Louisiana*, 339 U.S. 699, 704-706 (1950).

2. Alaska argues that the Equal Footing Doctrine's presumption should be applied here, notwithstanding Congress's enactment of the Submerged Lands Act, because "Congress intended the same presumption of State ownership to apply to lands granted by the Submerged Lands Act and lands subject to the equal [footing] doctrine." Alaska Reply Br. 30; see *id.* at 29-38. That argument demonstrates Alaska's misconception of the Submerged Lands Act. As we have explained, the Submerged Lands Act granted the States title to certain submerged lands, and it retained federal ownership of others. See, *e.g.*, *California ex rel. State Lands Comm'n* v. *United States*, 457 U.S. 273, 287 (1982); *Maine*, 420 U.S. at 525-526. Alaska has no need for a "presumption" respecting "lands granted by the Submerged Lands Act," and Alaska has no right to a "presumption" respecting lands that the Act retains in federal ownership.

The specific language of the Submerged Lands Act likewise demonstrates that Alaska's contention is meritless. The Act makes no mention of "presumptions." Instead, it supplies specific statutory language conveying federal title to certain lands. Section 3(a) of the Act grants the States "title and ownership" of a specified measure of submerged lands, "subject to the provisions" of that Act. 43 U.S.C. 1311(a). Section 5(a) excepts from the operation of Section 3(a), *inter alia*, "all lands expressly retained by or ceded to the United States when the State entered the Union." 43 U.S.C. 1313(a). And Section 9 specifically 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]." 43 U.S.C. 1302. The Act does not rely on, modify, or extend the judicial presumptions that would apply in the absence of those statutory terms.

Alaska's argument is also inconsistent with this Court's decisions construing the Submerged Lands Act. As the Master pointed out, the Court has previously rejected virtually identical contentions that the Act had annulled the Court's decision in *California I*. See Report 392-393. For example, the States in the *Maine* litigation contended that the Submerged Lands Act had "repudiated" the Court's holding that the Equal Footing Doctrine does not extend beyond the coastline. 420 U.S. at 524. The Court disagreed, stating that the Act's grant of a specific portion of the territorial sea "was in no way inconsistent with paramount national power but was merely an exercise of that authority." *Ibid.* See also *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 371 n.4 (1977) ("the Submerged Lands Act did not alter the scope or effect of the equal-footing doctrine"). Indeed, Congress cannot "overrule"

this Court's constitutional decisions, and hence could not repudiate or annul this Court's decision in *California I*.[7]

Alaska also relies on this Court's decision in *United States* v. *California*, 436 U.S. 32 (1978), which involved a dispute between the United States and California over title to submerged land surrounding the Channel Islands. See Alaska Reply Br. 30, 37. The Court concluded that, under the Court's decision in *California I*, the President "had power under the Antiquities Act to reserve the submerged lands and waters." 436 U.S. at 36. The Court ruled, however, that even if the President had reserved those submerged lands and waters through a 1949 Proclamation, the Submerged Lands Act "subsequently transferred dominion over them to California." *Id.* at 37.

Alaska places special reliance on the Court's statement in that case that the "purpose of the Submerged Lands Act was to undo the effect of this Court's decision in [*California I*]." 436 U.S. at 37. But contrary to Alaska's contention, when the Court referred to the "effect" of *California I*, it was not referring to its rejection of the State's legal argument respecting the Equal Footing Doctrine. See Alaska Reply Br. 30. Instead, the Court was referring to its specific holding that the States had not acquired *title* to any land beneath the territorial sea.[8]

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[7] Alaska relies at length on legislative history in which certain Members of Congress criticized the Court's *California I* decision as a departure from prior law. See Alaska Reply Br. 30-36. Those statements, however, are not law, and they cannot enlarge the Submerged Lands Act beyond what its precise terms provide. As this Court recognized in *Maine*, the meaning and operative effect of the Submerged Lands Act are determined by its language, which "embraced rather than repudiated" the Court's decision in *California I*." 420 U.S. at 524; see *id.* at 524-528.

[8] There accordingly is no merit to Alaska's argument that the "purpose" of the Submerged Land Act was "to rewrite the law as found

As the Court explained in the next two sentences, the Act granted "title" to specified submerged lands, and the submerged lands at issue "plainly fall within this general grant." 436 U.S. at 37; see Report 401-402 & n.42.[9]

Alaska simply fails to recognize the Submerged Lands Act for what it is—a substantial but nevertheless limited grant of federal lands. Congress specifically limited that grant through Section 5(a) of the Act, which withholds from the States "lands expressly retained by or ceded to the United States when the State entered the Union." 43 U.S.C. 1313(a). That phrase retains in federal ownership those lands that the United States expressly identifies as remaining in federal ownership when the State enters the Union. There is no need to look beyond the text to determine the meaning of that phrase. As the Senate Committee that drafted the provision stated, the language is "self-explanatory." S. Rep. No. 133, 83d Cong., 1st Sess. 16, 20 & n. 61 (1953). See *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear").[10]

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by the Court in the 1947 *California* decision and *apply* the *Pollard* equal footing doctrine rule of State ownership to offshore submerged lands within State boundaries" (Alaska Reply Br. 30). See Report 392-393. Furthermore, Alaska is wrong in suggesting here (and elsewhere) that the Submerged Lands Act grants States title to *all* lands within their general geographic boundaries. See Submerged Lands Act 43 U.S.C. 1301(b) (providing a specialized definition of the term "boundaries" for purposes of the Act).

[9] The Court's observation also distinguishes that case from the situation presented here. In this case, the United States has a valid claim under Section 5(a) of the Submerged Lands Act that the United States "expressly retained" the submerged lands at issue at the time of Alaska's statehood. See 43 U.S.C. 1313(a). See pp. 7-8, *supra*.

[10] Alaska asserts that the phrase "expressly retained" should be read synonymously with language that this Court used in *Utah* to

3. As we have explained (U.S. Except. Br. 37-46; pp. 7-8, *supra*), the Alaska Statehood Act incorporates the Submerged Lands Act and expressly retains in federal ownership "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." 72 Stat. 341. The issue here reduces to a purely statutory question of whether the application for withdrawal of the Arctic Wildlife Range—which specifically included submerged lands—"set apart" those lands as a wildlife refuge. We think the answer is unambiguously yes. See U.S. Except. Br. 46. But even if the Court were to conclude that Section 6(e) is ambiguous, the settled presumptions respecting federal grants dictate a ruling in the United States' favor. See U.S. Except. Br. 46-51.

This Court has adopted and consistently followed "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).[11] As Alaska acknowledges (Alaska Reply Br. 36 n.20), this Court has stated that it "adheres" to that rule in

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describe the equal footing doctrine. It is difficult to imagine an interpretive approach that is more contrary to the fundamental rules of statutory construction. The legislators who voted for enactment of the Submerged Lands Act agreed to the Act's "self-explanatory" text, and not to the language of a yet-to-be written decision of this Court on the Equal Footing Doctrine.

[11] See, *e.g.*, *Andrus* v. *Charlestone Stone Prods. Co.*, 436 U.S. 604, 617 (1978); *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 235 (1960); *United States* v. *Union Pac. R.R.*, 353 U.S. 112, 116 (1957); *Caldwell* v. *United States*, 250 U.S. 14, 20 (1919); *Northern Pac. Ry.* v. *Soderberg*, 188 U.S. 526, 534 (1903).

construing Submerged Lands Act grants. *California ex rel. State Lands Comm'n*, 457 U.S. at 287.[12]

There is no reason why that rule of construction should not apply to the Submerged Lands Act grant involved here. That rule carries particular force with respect to lands beneath the territorial sea. Under *California I*, the United States has paramount constitutional power over those lands. As the Master recognized in the case of the National Petroleum Reserve, Alaska is entitled to submerged lands beneath the territorial sea only to the extent that the Submerged Lands Act (as incorporated in the Alaska Statehood Act) affirmatively conveyed them. Report 393. And as the Master additionally recognized, if there are doubts about whether the United States has conveyed or retained the lands beneath the territorial sea, those doubts must be resolved in favor of the United States. See *id.* at 393-394. The Master correctly recognized those principles in the case of the National Petroleum Reserve, but he neglected to apply them to the submerged lands within the Arctic National Wildlife Refuge. U.S. Except. Br. 46-51.

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[12] Alaska mistakenly dismisses the statement in *California ex rel. State lands Comm'n* as dictum. Alaska Reply Br. 36 n.20. The issue in that case was whether the United States or California was entitled to accretions to the shore caused by an artificial jetty. California argued that it was entitled to the accretions under Section 2(a)(3) of the Submerged Lands Act, 43 U.S.C. 1301(a)(3), which grants the States filled lands. The Court refused to "read this provision of the Act as applying to the gradual process by which sand is accumulated along the shore," stating, among its reasons, that the Court's "reading of the Act adheres to the principle that federal grants are to be construed strictly in favor of the United States." 457 U.S. at 287. That statement was not dictum. The Court rejected California's doubtful interpretation of Section 2(a)(3) based in significant part on the established rule that doubts concerning federal conveyances are resolved in favor of the United States.

Under our view, Section 6(e) of the Alaska Statehood Act "expressly retained" in federal ownership lands that were "set apart" through an application for withdrawal. But even if the Court finds Section 6(e) unclear on that precise issue, it should be construed "strictly in favor of the United States." *California ex rel. State Lands Comm'n*, 457 U.S. at 287. Congress enacted Section 6(e) against the backdrop of that longstanding rule of construction, which is as old as the Union itself. See *United States* v. *Arredondo*, 31 U.S. (6 Pet.) 691, 738-739 (1832). Hence, Congress understood that the United States would be entitled to an interpretation of Section 6(e) in which ambiguities "are resolved for the Government, not against it" (*Watt*, 462 U.S. at 59). See *North Star Steel Co.* v. *Thomas*, 115 S. Ct. 1927, 1930 (1995). As that rule of construction contemplates, if Congress disagrees with the outcome, it can always expressly convey the lands in question to Alaska under the terms it deems appropriate. See U.S. Except. Br. 51.[13]

4. As we explain in our opening brief, if the Court construes Section 6(e) as the United States urges, then the United States is entitled to all of the coastal submerged lands within the boundary set out in the application for withdrawal of the Arctic Wildlife Range, including both land beneath inland waters and land beneath the territorial sea. U.S. Except. Br. 51-53. That result follows from the Master's ruling on Question 10, in which he determined that the United States had demonstrated

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[13] There is no merit to Alaska's contentions that Congress could not withhold submerged lands through a statehood act (Alaska Reply Br. 46-47) and that the Court should limit the United States' rights to something less than fee title (*id.* at 47-48). We have addressed those issues in our reply to Alaska's exceptions. See U.S. Reply Br. 72-73; see also Report 497-499.

that the boundary, even when analyzed under equal footing principles, enclosed all coastal submerged lands and was drawn with an affirmative intent to defeat the State's title to these lands. Report 477-499. Alaska contends that our discussion of this point "is so cursory * * * that it should be deemed waived." Alaska Reply Br. 5 n.3. Our discussion of that point is relatively brief, however, because the Master decided the issue in the United States' favor. Alaska did not except to the Master's recommendation concerning the boundary of the Arctic Wildlife Range or the submerged lands within it. It is Alaska that has waived the right to contest the issue.

The United States and Alaska tendered to the Special Master a joint statement identifying 15 issues for decision. See Report 509-511 (App. A). The Master organized his report on the basis of those issues, and he provided a specific recommendation on each of the questions presented. See *id.* at 503-505. This Court set a specific deadline for filing exceptions. See *United States* v. *Alaska*, 116 S. Ct. 1823 (1996). Alaska recognizes that the Master made a recommendation adverse to the State's interest on Question 10, and it concedes that "Alaska did not except to this recommendation." Alaska Reply Br. 16 n.7. Alaska nevertheless seeks to excuse that lapse on the ground that "the Court has indicated that subsidiary matters 'need not be dealt with separately, as they are merged in the ultimate question.'" *Ibid.*, citing *New Mexico* v. *Texas*, 275 U.S. 279, 286 (1927). That simply is not so in this case. The parties and the Master dealt separately with the question of the effect of the application on the withholding of submerged land from the State (Question 9) and the question of what submerged lands were included in the application if it did

withhold such lands from the State (Question 10). Alaska's exception to the Master's recommendation on Question 10 is concededly out-of-time and should not be permitted.[14]

Alaska's belated exception is not only inappropriate under the framework of this case and this Court's decisions and practice, but it works to the detriment of all. The Court sets a specific deadline for filing exceptions so that the Court, the parties, and potential amici will be on notice of what issues will be contested. The need for such notice is especially great in the instance of original actions, because of the complexity of those suits. In this case, the Master organized his 505-page report on the basis of 15 specific recommendations. The United States filed an exception indicating precisely which recommendation it challenged (Question 9). See U.S. Exception. There is no reason why Alaska could not do the same.[15]

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[14] Contrary to Alaska's contention, the Court's decision in *New Mexico* does not justify Alaska's untimely exception. In that case, "New Mexico, while not excepting specifically to the ultimate finding of the master as to the location of the [Rio Grande] in 1850, ha[d] filed various exceptions to matters leading to this general finding." 275 U.S. at 285-286. The Court concluded that those individual exceptions need not "be dealt with separately, as they are merged in the ultimate question whether, upon competent evidence, viewed in its entirety, the master's finding as to the location of the river in 1850 is correct." *Id.* at 286. Thus, the *New Mexico* case deals with the converse of the situation presented here. New Mexico filed *timely*, albeit overly specific, objections on issues "leading to [the master's] general finding," which the Court treated as "merged in the ultimate question." *Ibid.* That case does not support Alaska's filing of an *untimely* exception to one of Special Master Mann's distinct and specific recommendations.

[15] Alaska's proposed rule of practice would invite parties to ignore the Court-imposed deadlines for exceptions to obtain a tactical advantage. For example, by postponing its exception on Question 10, Alaska avoided the page and time limitations on briefs supporting exceptions,

In any event, there is no merit to Alaska's belated exception (see Alaska Reply Br. 16-25). As the Master explained, the boundary description of the Arctic Wildlife Range expressly included submerged lands, including *coastal inland waters*. Report 478-482. The boundary follows the "line of extreme low water of the Arctic Ocean," which by definition includes tidelands (i.e. the lands between mean high and mean low water) as well as a portion of the territorial sea (the area between mean and extreme low water). Furthermore, the boundary description includes "all offshore bars, reefs, and islands." See Report 481. The other evidence bearing on the boundary description, including pre-statehood maps (*id.* at 483), the development of the boundary description (*id.* at 484-485), and the purpose of the Range in protecting wildlife (*id.* at 485-490), all support the Master's determination that the prescribed boundary is "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).[16]

As the Master further explained, the clear purpose of drawing the boundary line to include submerged lands was to place them within the Arctic Wildlife Range and to divest the future State of title to those lands. Report 495-499. The boundary was consciously drawn to ensure that the United States could preserve and protect the national interest in the Arctic's unique fish and wildlife resources. See *ibid.* Contrary to Alaska's contention

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and it disadvantaged any potential amici that may wish to address the issue.

[16] Alaska objects to the Master's determination primarily on the basis that other federal boundary descriptions in Alaska were more explicit in including submerged lands. Alaska Reply Br. 20-23. The Master fully explained why those descriptions were phrased differently. See Report 491-495.

(Alaska Reply Br. 23), the boundary, which follows the line of "extreme low water" and includes "bars" and "reefs", "expressly referred" to lands beneath inland waters. See *Montana*, 450 U.S. at 554. The boundary description reflects a considered judgment that the United States could not adequately protect fish and wildlife resources of substantial importance to the Nation without ownership of the submerged lands that supported and sustained the species.[17]

5. Finally, the Court should not lose sight of what is ultimately at stake here. The Arctic National Wildlife Refuge is, in the words of Justice Douglas, the "last American wilderness." See Presidential Proclamation No. 4729, 45 Fed. Reg. 14,003 (1980) (designating the lands within the original boundaries as the William O. Douglas Arctic Wildlife Range). The lands and their wildlife, which have remained virtually untouched by human encroachment and commercial development, are a national treasure of "inestimable value." Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, § 101(b), 94 Stat. 2374. Congress retained those lands, including the coastal submerged lands, at the time of Alaska's statehood. To conclude otherwise would not only be contrary to congressional intent, but would also deprive the national government of the power to determine, on behalf of all future generations, whether that extraordinary region will retain its unique and irreplaceable character.

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[17] Compare *Montana*, 450 U.S. at 556 (stating that the United States did not need to retain submerged lands within the Crow Reservation because "the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life"); see also *United States* v. *Finch*, 548 F.2d 822, 831-832 (9th Cir. 1976) (Kennedy, J.), vacated, 433 U.S. 676 (1977).

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 coastal submerged lands with the Range from Alaska.

Respectfully submitted.

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