

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: UNITED STATES, Petitioner v. ALASKA

CASE NO: 118 ORIGINAL

PLACE: Washington, D.C.

DATE: February 24, 1992

PAGES: 1 - 50

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IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X  
UNITED STATES, :  
Plaintiff, :  
v. : No. 118 Original  
ALASKA :  
- - - - -X

Washington, D.C.  
Monday, February 24, 1992

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:02 a.m.

APPEARANCES:

JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.; on  
behalf of the Plaintiff.

JOHN G. GISSBERG, ESQ., Assistant Attorney General of  
Alaska, Juneau, Alaska; on behalf of the Defendant.

C O N T E N T S

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	PAGE
ORAL ARGUMENT OF JEFFREY P. MINEAR, ESQ. On behalf of the Plaintiff	3
ORAL ARGUMENT OF JOHN G. GISSBERG, ESQ. On behalf of the Defendant	21
REBUTTAL ARGUMENT OF JEFFREY P. MINEAR, ESQ. On behalf of the Plaintiff	45

1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in No. 118 Original, United States  
5 against Alaska. Mr. Minear.

6 ORAL ARGUMENT OF JEFFREY P. MINEAR

7 ON BEHALF OF THE PLAINTIFF

8 MR. MINEAR: Mr. Chief Justice and may it please  
9 the Court:

10 This original action is before the Court on  
11 cross motions for summary judgment. The question  
12 presented is whether the Secretary of the Army acted  
13 within his authority when he refused to issue a permit for  
14 construction of the Nome Port Facility unless Alaska  
15 agreed that the construction would be deemed not to alter  
16 the location of the Federal/State boundary.

17 Some historical background is necessary to  
18 understand this case. This Court ruled in a 1947  
19 decision, California I, that the Federal Government rather  
20 than the individual States owns offshore submerged lands.  
21 6 years later Congress enacted two statutes: the Outer  
22 Continental Shelf Lands Act; and the Submerged Lands Act  
23 which divided the offshore submerged lands between the  
24 Federal and State governments.

25 Congress gave the States those submerged

1 extending, as a general matter, 3 miles from the  
2 coastline. A dispute then arose whether coastal  
3 construction such as port facilities should be treated as  
4 part of the coastline for purposes of the Submerged Lands  
5 Act grant.

6 This Court ruled in California II that harbor  
7 work should be treated as part of the coast. The Court  
8 concludes that there was no inequity in measuring the  
9 coast submerged lands grant based on structures that the  
10 State itself had built, because the United States, through  
11 its control over navigable waters, had the power to  
12 protect its interests from encroachment and quote, the  
13 effect of any future changes could thus be the subject of  
14 agreement between the parties.

15 The Army, which issues permits for offshore  
16 structures under section 10 of the Rivers and Harbors Act  
17 revised its permitting regulations in response to the  
18 California II decision. Those regulations now provide  
19 that the Army will take into account the effect of the  
20 proposed coastal construction on the Federal/State  
21 boundary when determining whether to issue a permit.

22 The Army applied those regulations to the City  
23 of Nome's proposed port facility. The Army refused to  
24 issue the permit unless Alaska disclaimed entitlement to  
25 any additional submerged lands. Alaska argues that the

1 Army had no authority to impose that requirement. We  
2 disagree.

3 Congress has directed the Army to regulate the  
4 placement of structures in navigable waters. The relevant  
5 statute, section 10 of the Rivers and Harbors Act,  
6 contains a complete prohibition on the creation of any  
7 obstruction to navigation.

8 It then gives the Secretary of the Army the  
9 power to allow exceptions on a case-by-case basis where  
10 structure work is recommended by the Corps of Engineers.  
11 Thus, section 10 expresses a legislative policy against  
12 the placement of structures in navigable waters except  
13 where the Secretary affirmatively determines that the  
14 structure should be allowed.

15 Section 10 does not identify specific factors  
16 the Secretary should take into account in authorizing such  
17 structures. The Secretary accordingly takes into account  
18 a whole range of factors relevant to the public interest  
19 in light of the policies Congress has articulated in other  
20 laws.

21 This public interest review process is certainly  
22 reasonable. Nothing in section 10 suggests the Army  
23 should exercise its permitting authority without regard to  
24 the policies that Congress has stated elsewhere. This  
25 Court recognized that point in *United States v.*

1 Pennsylvania Industrial Chemical Corp., and Greathouse v.  
2 Dern, which both indicate that the Rivers and Harbors Act  
3 gives the Secretary broad discretion to grant or deny  
4 permits.

5 QUESTION: Mr. Minear, can I ask, what is the  
6 Government's position under section 10 and under this  
7 waiver or for that matter, under all waivers, with respect  
8 to a natural accretion that is caused by the construction  
9 of the artificial structure?

10 MR. MINEAR: That is a factor that would be  
11 taken into account in building the structure, and I think  
12 that is a very relevant point in this sense, the structure  
13 might cause downstream erosion, shoreline accretion, which  
14 could result in actually bringing the boundary landward  
15 and would affect the State's grant of submerged lands.  
16 That is a factor that the Army will take into account in  
17 determining whether to issue a structure.

18 QUESTION: I am not talking about whether the  
19 Army will take it into account in determining whether to  
20 issue the permit. I am sure it will. But suppose the  
21 permit is issued subject to a waiver such as this; does  
22 the waiver include the State's power over any extension of  
23 the State's boundary caused by natural accretion which is  
24 in turn attributable to the artificial structure?

25 MR. MINEAR: Yes, I think this disclaimer would

1 in fact cover that. Under the specific terms of this  
2 disclaimer, much depends on how the disclaimer is worded.

3 QUESTION: You have to go and figure out how  
4 much natural accretion along the shoreline is caused by  
5 the construction of a jetty that was subject to a waiver  
6 like this? It makes it awful complicated, doesn't it?

7 MR. MINEAR: With all respect, Your Honor, this  
8 is only going to arise in most cases with respect to the  
9 leasing of mineral rights. If the State or the Federal  
10 Government decides to lease mineral rights, it will in  
11 fact issue a notice and the parties will contact the  
12 relevant agencies, any party interested in leasing  
13 property, to locate the boundary.

14 QUESTION: No, but it is the case that I just  
15 can't look at the shoreline and say, well, except for  
16 natural structures, I know that the 3-mile is measured  
17 from the shoreline and you are telling me that if some of  
18 that shoreline may be up-current or down-current, I don't  
19 know how accretion works, has been altered by reason of  
20 the artificial structure, I cannot count that part of the  
21 shoreline for determining the 3-mile limit.

22 MR. MINEAR: Well, Your Honor, that is a  
23 practical consequence of the way this particular  
24 disclaimer is worded. A disclaimer could eliminate that  
25 problem. The likelihood of the problem arising is also

1 minimized by the fact that one aspect of this project is a  
2 littoral drift monitoring program which was designed to  
3 assure that there would be no accretion or erosion as a  
4 result of the construction of this structure.

5 The party that has the permit here, the City of  
6 Nome, is under an obligation to monitor any such changes,  
7 and if they do occur, it is under an obligation to prevent  
8 them from occurring.

9 So although this raises a theoretical difficulty  
10 under this particular disclaimer, I don't think it has a  
11 great deal of practical consequence in light of other  
12 factors relevant to the --

13 QUESTION: Does the Corps exact similar waivers  
14 in connection with structures on a river?

15 MR. MINEAR: In those cases it is likely not to  
16 because it does not affect offshore mineral rights.

17 QUESTION: That could very much affect the  
18 boundary between one State and another on a river.

19 MR. MINEAR: That's right, and that is a factor  
20 that the Corps could take into account. I am not sure --

21 QUESTION: What do you mean when you say the factor, a  
22 factor the Corps could take into account? Take into  
23 account in doing what?

24 MR. MINEAR: In determining whether to issue the  
25 permit or not and what are the appropriate conditions for

1 issuance of the permit.

2 QUESTION: But you say that the Corps does not  
3 generally exact waivers in connection with streams or  
4 rivers within the United States.

5 MR. MINEAR: Well, frankly, I am just not  
6 certain about that practice. The structure of the Corps'  
7 permitting process is to take into account any factor, any  
8 consequence, both physical or legal, that might result  
9 from the addition of a structure in navigable waters.

10 QUESTION: But supposing that a State applies to  
11 build a dam on a river and the river is on an interstate  
12 boundary and the prospectus or study says there is a  
13 chance that there will be some erosion on one side of the  
14 river, accretion on the other and it might alter the  
15 boundary of the State some, how would the Court take that  
16 into consideration? Would that be a negative or a  
17 positive effect?

18 MR. MINEAR: As a general matter, the Corps  
19 attempts to preserve the status quo, exactly as in this  
20 case. There is a need for stability with respect to  
21 boundaries, particularly boundaries for submerged lands  
22 that can be subject to accretion or erosion. So the  
23 Corps' basic perspective on this is that we don't want the  
24 structure to be altering settled expectations with respect  
25 to property rights.

1           QUESTION: So the structure -- the point of my  
2 earlier question, Mr. Minear, is that I am inclined to  
3 agree with the Government that section 10 allows you to  
4 take into account whether it will alter the ownership of  
5 submerged lands, but to say that you can take it into  
6 account is not to say that can condition the permission  
7 upon this kind of waiver. The greater does not  
8 necessarily include the lesser.

9           And if indeed one of the consequences of having  
10 these waivers is that the shoreline is always going to be  
11 subject to debate as to whether some natural accretion has  
12 occurred by reason of an artificial structure under such a  
13 waiver, I am more inclined to think that your choice is  
14 either to let it go forward in which case the coast is  
15 altered as the structure causes, or else, not let it go  
16 forward.

17           Why isn't that a conceivable version of section  
18 10?

19           MR. MINEAR: Well, with all respect, Your Honor,  
20 the Corps, what the Corps is attempting to do here is to  
21 stabilize and provide definiteness with respect to title.  
22 That is what the disclaimer did in this particular case.  
23 That is what the littoral drift monitoring program also  
24 did with respect to this case. Much depends on how the  
25 disclaimer might be crafted and in fact, the Army allows

1 the State to draft a disclaimer and then determines  
2 whether or not the disclaimer would appropriately protect  
3 Federal interests.

4 But the ultimate interest that the Federal  
5 Government is asserting here is in fact the stability of  
6 title, the fact that we do want to have certainty.

7 QUESTION: Now, Mr. Minear, I take it that if  
8 there is accretion or erosion through natural causes, the  
9 boundary is ambulatory?

10 MR. MINEAR: That is generally true, although  
11 this is a matter that is changing, as this Court issues  
12 particular decrees with respect to --

13 QUESTION: But absent the decree, the Government  
14 agrees that the land would be ambulatory in that case?

15 MR. MINEAR: The land would be ambulatory except  
16 that where disclaimers are in effect or where this Court  
17 has entered a decree fixing a boundary. Now that is  
18 always one alternative to ensure that there is a stable  
19 Federal/State boundary.

20 QUESTION: Would you have authority, would the  
21 Government have authority to tell Alaska that it's going  
22 to condition the permit for construction of this structure  
23 on making the entire boundary of Alaska fixed as of this  
24 time?

25 MR. MINEAR: I think that might run into

1 problems, two types of problems at the outset. It could  
2 be an arbitrary exercise of the Corps' power. As a  
3 general matter it seems, we would think that this  
4 disclaimer should be tied to specific governmental  
5 interests that are identified --

6 QUESTION: But I thought you said you had a  
7 governmental interest in having stable boundaries.

8 MR. MINEAR: Oh, we do, we do, and we exercise  
9 that on a case-by-case basis with respect to these  
10 individual projects. At a broader sense, this seems  
11 inconsistent with the notion that was expressed in Nollan  
12 that a permit condition should be closely related to the  
13 reason why the Government could deny the permit.

14 Now here we submit that there is no question,  
15 that the Government could deny the permit based on the  
16 affect that it would have on the change in Federal  
17 property rights. If it can deny the permit on that basis,  
18 it ought to be able to impose conditions that protect  
19 those interests; in other words, provide a less drastic  
20 alternative.

21 QUESTION: Mr. Minear, the Submerged Land Act  
22 expressly states that it is in the public interest for the  
23 States to have title to submerged lands within 3 miles of  
24 their coastline. Does that statutory articulation of  
25 public interest affect the resolution of this case, do you

1 think?

2 MR. MINEAR: We think as a general matter that  
3 is a policy that is also of interest to the Army, but what  
4 the Army does here is that it looks to the consequences of  
5 the building of the structure. As it stands now, the  
6 State has received exactly those lands that were granted  
7 under the Submerged Lands Act.

8 The building of a structure would in fact reduce  
9 the United States' grant of lands under the Outer  
10 Continental Shelf Lands Act; that is a factor that the  
11 Corps should be allowed to take into account.

12 If the structure actually went the in other  
13 direction, if it actually diminished the lands that the  
14 State presently owns with respect to the Submerged Lands  
15 Act, then the Army would take that factor into account,  
16 and the basis for that would be the policy that is set  
17 forth in the Submerged Lands Act.

18 QUESTION: The Government doesn't end up with  
19 any net loss, right? It loses the length of the structure  
20 at one end and picks it up at the other end.

21 MR. MINEAR: No, with all respect, Your Honor,  
22 it does not. The United States would not gain any  
23 property in this particular case. First of all, the  
24 United States grant or the Outer Continental Shelf Lands  
25 Act extends to the end of the outer continental shelf, so

1 it is fixed -- it is a geographic matter.

2 In this case, all of the land up around Norton  
3 Sound is continental shelf, it is all less than 200 meters  
4 deep. And this particular location is on Norton Sound.  
5 If you went south from Nome through Norton Sound, you  
6 would eventually hit Alaska again. Nome is located on the  
7 Seward Peninsula.

8 As a more general matter, even if you had a  
9 straight boundary and you were extending the line, I think  
10 it is helpful to look at the map we have, the last page of  
11 the joint appendix. The effect of adding a point on the  
12 coastline is to create an arc of additional land that is  
13 created, that is encompassed within the boundary.

14 So although the causeway only occupies 5 acres,  
15 it ends up transferring, if there were no disclaimer, over  
16 700 acres of land. Now in the case of a straight  
17 boundary, where we would be concerned perhaps with the  
18 200-mile exclusive economic zone limit, this is another  
19 boundary that we have that is apart from what we have  
20 discussed here, using the causeway to extend the exclusive  
21 economic zone could extend that, but it would only be if  
22 it was an absolutely straight coastline.

23 If there was some other point upstream or  
24 downstream that also goes out, the drawing of the arc  
25 would in fact eliminate the factor that you get from the

1 causeway.

2 Now the Secretary's consideration of the effect  
3 of the proposed structure and the location of the causeway  
4 is simply one part of its public interest review process.  
5 As the Secretary's regulations recognize, the location of  
6 the coastline has great significance because it can  
7 determine the location of international and Federal/State  
8 boundaries, and even where foreign relations concerns are  
9 absent, a shift in the location of the coastline can, as  
10 in this case, divest the United States of its interests in  
11 the outer continental shelf.

12 Congress has stated that the outer continental  
13 shelf is a vital national resource reserve, held by the  
14 Federal Government for the public. Thus, it is entirely  
15 proper for the Secretary to consider, as one element of  
16 the public interest review, the effect of a proposed  
17 structure on the location of the coastline.

18 In the absence of such a review, portions of a  
19 vital national resource reserve would be transferred  
20 without any formal Government consideration from Federal  
21 to State hands.

22 The Secretary's public interest review process,  
23 including his consideration of the effects of the proposed  
24 structure on the location of the coastline, reflects a  
25 commitment to faithful execution of the law. It ensures

1 the Secretary takes full account of all of Congress'  
2 policies before he authorizes construction that can impact  
3 on a wide variety of public concerns.

4 It is also consistent with this Court's decision  
5 in California II, which recognized that the United States  
6 has the ability to protect itself from artificial changes  
7 in the coastline through its power over navigable waters.

8 Furthermore, it produces a sensible result. In  
9 this instance, the City of Nome applied for a permit to  
10 construct port facilities projecting more than 1/2 mile  
11 into Norton Sound. The Army learned through consultation  
12 with the Solicitor of the Interior Department that the  
13 resulting change in the coastline would divest the United  
14 States of potentially valuable mineral resources.

15 The Army therefore reasonably insisted that a  
16 permit would not be issued unless Alaska entered into an  
17 agreement preserving the existing Federal/State boundary.  
18 The Army was entitled to deny the permit because of the  
19 adverse affect that the construction would have on the  
20 location for the boundary.

21 QUESTION: As a matter of curiosity, Mr, Minear,  
22 what kind of minerals are possible there?

23 MR. MINEAR: The mineral -- the leasing program  
24 that is ongoing at this point, and in fact, request for  
25 leases were submitted, no bids were received, but the

1 primary mineral of interest in the case of those leases  
2 was gold. There is also a possibility in Norton Sound of  
3 oil and gas, I think oil primarily.

4           However, there is no active leasing program.  
5 There might be such a program in 1996. I also understand  
6 that a permit has been issued for gold prospecting as  
7 opposed to simple leasing for exploration in the Norton  
8 Sound area as well, and that is for gold.

9           I would like to note some of Alaska's arguments  
10 here. Alaska mistakenly argues that section 10 limits the  
11 Army's inquiry to navigational and environmental concerns.  
12 Section 10 contains no such limitation and indeed,  
13 suggests a far broader inquiry. Virtually any structure  
14 placed in navigable waters obstructs navigation, and  
15 section 10 authorizes the Secretary to allow such a  
16 structure, despite the adverse impact.

17           So obviously the Secretary must look to factors  
18 other than navigation in determining whether to issue a  
19 permit. As Alaska concedes, there is no dispute that the  
20 Army can take into account the public interest, including  
21 Congress' environmental policies, in determining whether  
22 to issue a permit.

23           There is no principle basis for distinguishing  
24 between Congress' policies articulated in environmental  
25 laws and those articulated in other statutes such as the

1 Outer Continental Shelf Lands Act.

2 Alaska is also mistaken in arguing that the  
3 result we urge here will detract from this Court's  
4 supposed goal of a single coastline for international and  
5 domestic purposes.

6 This Court has never stated that it has an  
7 overriding goal of establishing a single coastline. The  
8 Court adopted the coastline definitions --

9 QUESTION: Upholding a what kind of --

10 MR. MINEAR: A single coastline.

11 QUESTION: As opposed to what, a double  
12 coastline?

13 MR. MINEAR: Alaska's theory here is that there  
14 should be, the same coastline should be used for measuring  
15 both the Federal/State boundary and international  
16 boundaries. And in fact, there are divergences that exist  
17 in any event. As the Court adopted the definitions in the  
18 international conventions because they provided  
19 definiteness and stability with respect to offshore  
20 property rights and not to produce a single coastline.

21 And as this Court noted in California II, a  
22 change in the international conventions would not change  
23 the definitions for purposes of the Submerged Lands Act.

24 QUESTION: What are the divergences that occur  
25 anyway?

1 MR. MINEAR: They occur in several respects.  
2 The clearest example is in the case of the Gulf side coast  
3 of Florida and the coast of Texas. In the case of both of  
4 those States, they received a grant of 3 marine leagues  
5 rather than 3 miles of submerged lands.

6 This Court determined in United States  
7 v. Louisiana that the coastline for the purpose of that  
8 grant would be determined on the basis of the coastline at  
9 the time of admission and would not include any subsequent  
10 artificial structures.

11 More recently, we stipulated to a coastline, a  
12 baseline for the purposes of closing the Chandeleur Sound  
13 off the coast of the State of Mississippi and that  
14 baseline also was not necessarily the same as the baseline  
15 that would be established for international purposes.

16 Alaska is also mistaken in arguing that  
17 California II's discussion of the United States' control  
18 over navigable waters was made in reference to Congress'  
19 constitutional power over navigation rather than the  
20 Army's permitting authority.

21 The Court's reference to the Government's power  
22 to resolve future disputes by agreement can refer only to  
23 an executive power. Congress enacts laws. It does not  
24 enter into agreements.

25 And the Special Master's statements, which this

1 Court cited with approval, expressly refer to the  
2 Government's permitting process and the need for  
3 governmental approval.

4 In sum, we believe that the Army has the  
5 authority to require this sort of disclaimer in these  
6 circumstances, and we therefore request that the Court  
7 grant the United States motion for summary judgment.

8 QUESTION: The problem is that if you don't have  
9 the power to condition, that you wouldn't have the power  
10 to refuse this permit?

11 Mr. MINEAR: I don't think it would necessarily  
12 follow. I suppose -- under our theory it would, it seems  
13 to me, to us, that if we have the power to deny the  
14 permit, we have the power to condition it. I think it  
15 would be unusual if we had the power to condition it, but  
16 not --

17 QUESTION: If you don't have the power to  
18 condition, you don't have the power to refuse it --

19 MR. MINEAR: Yes, that would be --

20 QUESTION: -- if it otherwise satisfies  
21 the -- if the only objection you would have is because it  
22 extends the coastline, you couldn't refuse it under your  
23 theory?

24 MR. MINEAR: I believe that is a last -- maybe I  
25 am getting confused here, but our theory is that we can

1 deny the permit based on its coastline --

2 QUESTION: I know, I know. But what if you  
3 can't?

4 MR. MINEAR: And if we can't, then I believe  
5 that the logic of our position would be that we would have  
6 to grant the permit.

7 QUESTION: Yes. Isn't it Alaska's position that  
8 you have no power here to refuse the permit?

9 MR. MINEAR: That's correct, Your Honor. Thank  
10 you, I would like to reserve the remainder of my time.

11 QUESTION: Very well, Mr. Minear.

12 Mr. Gissberg, we will hear from you.

13 ORAL ARGUMENT OF JOHN G. GISSBERG

14 ON BEHALF OF THE DEFENDANT

15 MR. GISSBERG: Mr. Chief Justice, and may it  
16 please the Court:

17 We believe that the Army Corps' disclaimer  
18 practice is open-ended and mandatory and missing the  
19 essence of the Submerged Lands Act and also some  
20 fundamental principles of Government in this country.  
21 This causes them to badly misjudge the public interest in  
22 both law and in fact.

23 We don't believe that the Outer Continental  
24 Shelf Lands Act or the Rivers and Harbors Appropriation  
25 Act of 1899 causes any other result.

1           In essence, this is simply a case of statutory  
2 construction, whether the Army has the statutory authority  
3 to require a disclaimer that fixes a State's seaward  
4 boundary at a line that is different from the 3 miles from  
5 the coastline that was granted to the States by Congress  
6 in the Submerged Lands Act.

7           QUESTION: I thought your position went farther  
8 than that, that whether or not it extends the coastline or  
9 extends a State line, the boundary, whether or not it does  
10 it not a proper consideration in determining whether to  
11 issue the permit or not.

12           MR. GISSBERG: This is correct. My next  
13 sentence is getting to that point.

14           QUESTION: All right. Go ahead.

15           MR. GISSBERG: But we start with the coastline  
16 and I also want to emphasize that Alaska, although we were  
17 not a State when the Submerged Lands Act was passed, under  
18 our statehood compact we did become a State, specifically  
19 that compact provides us the benefits of the Submerged  
20 Lands Act.

21           Congress, in enacting that Submerged Lands Act,  
22 spoke directly and clearly and couldn't have spoken more  
23 plainly that the States own submerged lands to 3 miles  
24 from the coastline. They knew then, as has been known  
25 from the beginning of time, that coastlines are not

1 stable. They change through all sorts of natural forces  
2 and manmade modifications.

3 Under acts of Congress and international law  
4 that has been adopted by this Court, the rule is that  
5 those abulations of the coastline result in corresponding  
6 changes to the seaward boundary, wherever that is and  
7 whatever seaward boundary it happens to be. In this case,  
8 we are talking about the 3-mile limit, but the same  
9 consequence happens on the 12-mile Federal territorial sea  
10 and on the 200-mile exclusive economic zone that the  
11 Federal Government has.

12 This is a fact of life on the ocean and the Army  
13 Corps of Engineers cannot change that by administrative  
14 fiat. By doing this administratively and venting their  
15 own exception to this rule that Congress laid down, they  
16 are absolutely ignoring the Submerged Lands Act, which is  
17 the one single act that directly, squarely addresses the  
18 States' rights to submerged lands.

19 QUESTION: Mr. Gissberg, could the Corps of  
20 Engineers have said when you applied for a permit, it  
21 looks to us as if this is going to extend the State's  
22 seaward boundary, therefore we are going to turn it down.  
23 We are going to say no.

24 MR. GISSBERG: Mr. Chief Justice, absolutely  
25 not. And in this case, of course, the State didn't apply

1 for the permit, and about a year later we got a letter  
2 saying that Nome wasn't going to get the permit unless the  
3 State waived it.

4 No, they do not have that authority. Congress  
5 spoke clearly that this is an ambulatory formula. We have  
6 a fixed formula.

7 QUESTION: So it isn't -- let's assume you are  
8 correct about the formula, why can't the United States or  
9 the Corps of Engineers simply say, we don't want to risk  
10 any changes in the outer boundary, we are not going to let  
11 you build it?

12 MR. GISSBERG: Because the Army Corps is a  
13 creature of Congress, Mr. Chief Justice --

14 QUESTION: Well, of course it is, but that  
15 doesn't answer it.

16 MR. GISSBERG: My answer is that they only have  
17 the power that Congress gave them and that power starts  
18 from the Rivers and Harbors Act.

19 QUESTION: But the Rivers and Harbors Act says  
20 you can't build any structure in navigable waters except  
21 on plans recommended by the Chief of Engineers and  
22 authorized by the Secretary of the Army.

23 MR. GISSBERG: Mr. Chief Justice, the Government  
24 compares section 10, which the Court has just read, to  
25 section 13, which they reference in Pennsylvania Chemical

1 case, and we think -- and Pennsylvania Chemical said that  
2 regarding putting pollutants into navigable waters, the  
3 Army Corps had discretion to say no, they will not allow  
4 those pollutants to go in. We don't believe they have  
5 that same discretion under Article 10 and here is why.

6 Article 10 was developed for completely  
7 different reasons than Article 13. Article 13 is to  
8 protect those waters from something that is bad,  
9 pollution. Article 10 is to do something good to those  
10 waters, to enhance the navigable capacity. In 1888 in the  
11 Willamette case, the courts of the United States said that  
12 there is no prohibition of putting any single obstruction  
13 in navigable waters in the United States.

14 So in 1890 the Congress enacted the precursor of  
15 this Rivers and Harbors Appropriation Act of 1899. They  
16 purpose of that act was to enhance navigation. As a part  
17 of that, they told the Army Corps of Engineers that there  
18 will be no obstructions to the navigable capacity of the  
19 navigable waters of the United States.

20 When the Army Corps of Engineers takes that  
21 authority and says this means that from 1899 to the  
22 present day, we could say that nobody will build a pier,  
23 nobody will build a wharf, nobody will build a causeway,  
24 nobody can do anything in the waters of the United States.  
25 We don't think that that is what Article 10 says.

1 QUESTION: What factors can the Secretary take  
2 into consideration in refusing to authorize a construction  
3 project?

4 MR. GISSBERG: Yes, Mr. Chief Justice, from 1899  
5 until 1968, the Army Corps of Engineers, by their own  
6 admission in the Federal Register cite that the Government  
7 has put in, took into account one factor, and that was  
8 navigation, enhancing navigation. If a project enhanced  
9 navigation they accounted for that.

10 In the 1960s and '70s, there is a series of  
11 cases saying that the Army Corps of Engineers is allowing  
12 things to happen that are destructive of the waters of the  
13 United States. The Army Corps of Engineers can only  
14 consider public interest that is articulated by Congress.  
15 The first time this happened was in 1956 in the Fish and  
16 Wildlife Coordination Act.

17 In the Fish and Wildlife Coordination Act, the  
18 Army Corps could say, this project is good for navigation,  
19 but it is not good for anadromous fish, so therefore we  
20 are not going to put it in. Then in 1969, the National  
21 Environmental Protection Act was passed. Before that  
22 though, the most important one was that in 1953, the  
23 Congress looked at the ownership of submerged lands  
24 offshore and they said the States are going to have it to  
25 3 miles from the coastline.

1           QUESTION: You don't think that preserving the  
2 property of the United States is one of the public  
3 interests of the United States? Does that mean the  
4 Department of the Interior does not? I don't know that  
5 there is a special statute that says the Secretary shall  
6 evict people who poach on United States lands, but I am  
7 sure it is part of the public interest of the United  
8 States to preserve territory owned by the United States.

9           Isn't that self-evident?

10          MR. GISSBERG: Justice Scalia, I think it would  
11 be if it were not for the Submerged Lands Act. The  
12 Submerged Lands Act is the only act that Congress has  
13 directed specifically to tell us what happens with  
14 submerged lands.

15          QUESTION: But the Submerged Lands Act doesn't  
16 say that the effect of structures can be to decrease the  
17 territory owned by the United States.

18          MR. GISSBERG: The Submerged Lands Act, Justice  
19 Scalia, says that the States will own the lands to 3 miles  
20 from the coastline, that coastline is ambulatory.  
21 Everybody knows it changes. So the Federal --

22          QUESTION: We are not talking now about the  
23 waiver. We are talking about the right to refuse. I  
24 agree that if the Government gives a waiver, you can argue  
25 that that contradicts the Submerged Lands Act because it

1 causes the State to own less than the 3 miles. But I am  
2 just now talking about the Government's simple right to  
3 refuse.

4 You want to build a structure, the Government  
5 says -- I am not contravening the Submerged Lands Act. I  
6 am not saying you can build it, but you can't have your 3  
7 miles, I am just saying, you can't build it because it  
8 will take away territory of the United States. What is  
9 the matter with that?

10 MR. GISSBERG: The problem with that, Justice  
11 Scalia, is that Congress addressed those Federal interests  
12 in the outer continental shelf in May of 1953 when they  
13 enacted the Submerged Lands Act and then in August when  
14 they enacted the Outer Continental Shelf Lands Act, and  
15 they realized there would be some changes in that  
16 baseline.

17 Actually, when they enacted the Submerged Lands  
18 Act, they took all of the Federal lands and all 36,000  
19 square miles of the 3-mile limit and gave it to the  
20 States. There was an immense national interest in those  
21 lands. We are talking about 730 acres that doesn't have  
22 anything on it to the best of our knowledge, and we are  
23 saying that that is going to be subverted by an Army Corps  
24 decision that that is in the public interest. I don't  
25 think we can do it.

1           QUESTION: I just find it hard to believe that  
2 once you acknowledge that all interests, all governmental  
3 interests and not just the interest in navigation can be  
4 taken into account in determining whether to deny the  
5 permit, I cannot imagine that one of those interests  
6 cannot be whether the Federal Government will lose  
7 territory. I mean, that seems to me an obvious  
8 governmental interest.

9           MR. GISSBERG: Justice Scalia, it somehow isn't  
10 as obvious to me because I have looked exactly at what  
11 Congress has said, and in our briefs we have gone  
12 through, there are probably 20 different laws of Congress  
13 that have been enacted that the Army Corps of Engineers  
14 has to look at.

15           One of those says that that coastline is  
16 ambulatory, natural or artificial causes, it moves in and  
17 out. Now the hypothetical that the Court is raising is  
18 one where we are not talking about a waiver. We are just  
19 saying that they can't issue that permit. I believe that  
20 once they accept the permit application, once the permit  
21 application is given to them, that they are bound to act  
22 on that permit application in accordance with the laws.

23           If I go to the Federal Government for a fishing  
24 license and I am qualified for the fishing license or a  
25 driver's license or to be admitted to the bar, they

1 can't -- of course, they have authority to issue those  
2 permits, but it is not in their discretion. Look at  
3 Article --

4 QUESTION: No one is disputing that, I don't  
5 think, Mr. Gissberg. The question is, what factors can  
6 they take into consideration under the laws that exist?

7 MR. GISSBERG: Yes, Mr. Chief Justice, I believe  
8 that in the 1968 cite to the Federal Register, the Corps  
9 admits there that we are now going to take into account  
10 more factors than just navigation. They list a long  
11 variety of laws there that they can take into account.

12 Every single one of those factors in their  
13 public interest review, if the Court will compare their  
14 regulations at 33 CFR 320 to the statutory authority that  
15 they list, every single one of those regulatory criteria  
16 that they compare with is related to an act of Congress  
17 except this one, and except the ownership one.

18 And the only thing that is related to the  
19 ownership one is the Submerged Lands Act. In fact, in  
20 their own law, the Outer Continental Shelf Lands Act and  
21 Submerged Lands Act, in their own regulations in 320, it  
22 says property interests will not be a factor.

23 QUESTION: Suppose we don't agree with you in  
24 that regard, Mr. Attorney General; suppose the Government  
25 just turns you down? We say that the Government has the

1 power and the Government just turns you down. Do you  
2 think that if you then went to the Government and said,  
3 look, we want this pier. We offer to waive any change in  
4 the coastline if you grant this permit.

5 And the Government says, well, we don't  
6 condition it on that, but we will just make a contract  
7 about it. Do you think that would be enforceable?

8 MR. GISSBERG: No, I don't. I think the Army  
9 Corps has to have the authority to do that from Congress,  
10 and that is what this Court was talking about in --

11 QUESTION: I know, but we say that they have  
12 authority to turn -- say that they have the authority to  
13 turn the permit down and you think then that there is no  
14 way that the State and the Federal Government could make  
15 an agreement that would permit the building of the pier  
16 without extending the coastline.

17 MR. GISSBERG: I see. From my point of view, I  
18 would require an act of Congress that said that there will  
19 be no -- nothing done to the coastline that affects the  
20 State seaward boundary, and then I would say, yes, that is  
21 giving them that as some authority.

22 Now I would think that Congress would definitely  
23 not do that. They would give the Court some formula to  
24 weigh the public interest, maybe the \$25 million causeway  
25 and 17 acres that are covered up and the boats that come

1 in and the good that is done for the City of Nome and  
2 Northwest Alaska would be a part of that. I think it  
3 would be if Congress did it.

4 QUESTION: You don't question then the authority  
5 of Congress to explicitly adopt a regime such as the Corps  
6 has adopted in this case?

7 MR. GISSBERG: This is, Mr. Chief Justice, the  
8 job of Congress to do --

9 QUESTION: And you concede that Congress does  
10 have that authority had it chosen to do so, you say it  
11 has.

12 MR. GISSBERG: Absolutely, and in fact, we  
13 interpret the Court's suggestion that is being taken as a  
14 mandatory direction now because this is happening on every  
15 single causeway and every single beach project -- we only  
16 could find 17 through 1991, but every one that is coming  
17 up now, the Corps requires these disclaimers.

18 In this Court in 1965, in the second California  
19 case said that there could be legislation and agreements  
20 to do this. That is what has to be done before the Court  
21 has this authority. They can't substitute their judgment  
22 for Congress.

23 QUESTION: You think that that statement in one  
24 of the California cases that the United States could  
25 protect itself was just misguided?

1 MR. GISSBERG: Not at all, I think that it has  
2 to be read --

3 QUESTION: How can it protect itself if it must  
4 issue the permit?

5 MR. GISSBERG: Justice White, that statement in  
6 the California case specifically says it can protect  
7 itself through its authority -- powers over navigation.  
8 That is the navigational servitude, plus its authority  
9 under the Rivers and Harbors Appropriation Act to allow or  
10 disallow projects that interfere with the navigable  
11 capacity --

12 QUESTION: But the logic of your position, Mr.  
13 Gissberg, is that assuming a particular project does not  
14 interfere with navigation, that the Federal Government is  
15 powerless to prevent a State from artificially extending  
16 its coastline for the very purpose of gaining title to  
17 submerged lands in some valuable area.

18 I mean, that is the logic of your position.

19 MR. GISSBERG: This Court has actually said, I  
20 have been looking at the second half of that sentence in  
21 California II, but this Court in California II said  
22 that -- they directly addressed that to unwarranted  
23 structures, and an unwarranted structure would be one that  
24 doesn't have any navigational benefit or any other benefit  
25 under the laws of Congress.

1           QUESTION: Yes, but may I interrupt there. I  
2 don't see why under your theory that the State must have a  
3 navigational purpose. Why couldn't the State under your  
4 theory decide, as Justice O'Connor suggested, they would  
5 like a little more territory and if they found an area in  
6 which there is no navigational problem and no  
7 environmental problem, would just build a jetty out for 2  
8 miles for the express and sole purpose of getting more  
9 territory.

10           It seems to me under your theory they could do  
11 that.

12           MR. GISSBERG: Well, I think actually under what  
13 this Court may have said, that they can do that.

14           QUESTION: That is a correct summary of your  
15 theory? They could do that, couldn't they?

16           MR. GISSBERG: Let me clarify that, Justice  
17 Stevens, because this Court has said that unwarranted  
18 structures may be suspect, and unwarranted though in terms  
19 of navigation. So if a structure is being put up just for  
20 the sole purpose to extend the State's land, I believe  
21 that the laws that we are now operating under do not allow  
22 the Army Corps of Engineers to turn that down if it has  
23 any navigational purpose. But the --

24           QUESTION: Well, this particular jetty could  
25 have been twice as long.

1 MR. GISSBERG: It was supposed to be, but it  
2 took too long to finish. Yes, of course, it could have  
3 been. It could have been 10 miles long.

4 QUESTION: And you would say that the Federal  
5 Government would have to issue the permit.

6 MR. GISSBERG: I would say that the Federal  
7 Government would not be able to deny the permit on the  
8 basis of changes in the ambulatory boundary. If a 20-mile  
9 long causeway serves 1 percent more of the navigational  
10 benefit than a 2 mile causeway and the interference to  
11 navigation because of the extra 8 miles is substantial,  
12 that is the judgment call that they have to make.

13 QUESTION: But my hypothetical is that it is  
14 neutral on navigation, it is either high enough so the  
15 ships can go under or something, but assuming my  
16 hypothetical has absolutely no impact on either navigation  
17 or environment, it is just a way of acquiring territory,  
18 sticking a 10-mile jetty out into the ocean, that you  
19 could do, I think under your theory because Congress  
20 hasn't thought about the problem and --

21 MR. GISSBERG: They haven't --

22 QUESTION: -- and hasn't legislated against it.

23 MR. GISSBERG: Justice Stevens, they haven't  
24 thought about the problem, but this Court has thought  
25 about the problem in two cases. One of them is the

1 California II case in '65, where this Court said that  
2 unwarranted structures could be addressed by the parties.

3 The second one, though, is the Texas Boundary  
4 case which is cited in the Plaintiff's reply brief at page  
5 11 and it is not cited for that proposition, but in that  
6 case, the Court, this Court said that -- they were talking  
7 about a change that would let the State of Texas have  
8 a -- would get some extra mineral land.

9 And this Court said that, quote, any alleged  
10 inequitable treatment and detriment to the orderly mineral  
11 development by allowing ambulations must be resolved by  
12 looking to Congress for relief.

13 And we believe that is exactly what is done  
14 here. The Corps of Engineers is not going to Congress for  
15 this authority. They are inventing this authority on  
16 their own and they don't -- Congress hasn't given them the  
17 statutory authority to do that.

18 QUESTION: Mr. Gissberg, has Congress given you  
19 or given the State of Alaska the statutory authority to  
20 alienate what it might get under this theory of 3 miles  
21 ambulatory boundary?

22 MR. GISSBERG: Justice Souter, our State's  
23 3-mile limit lands are subject to a public trust doctrine,  
24 and under our State constitution and State law, we may not  
25 alienate those properties except to another governmental

1 entity, for example, the City of Nome. We did in fact  
2 give 17 acres to the City of Nome to build the causeway.

3 QUESTION: If State law allowed you to do it, is  
4 there anything in the Submerged Lands Act which precludes  
5 your alienation for some other purpose?

6 MR. GISSBERG: No, Justice Souter, because the  
7 Submerged Lands Act in opposition to the Outer Continental  
8 Shelf Lands Act states that it is in the public interest  
9 to grant to the States title to and ownership of the  
10 submerged lands.

11 QUESTION: So your argument is strictly that the  
12 Corps does not have the power to require and not that you  
13 do not have the power under Federal law to alienate?

14 MR. GISSBERG: Oh, yes, Your Honor.

15 QUESTION: Okay.

16 MR. GISSBERG: The Federal law does not affect  
17 the State's right to alienate.

18 QUESTION: Does any governmental entity which is  
19 the restriction you mentioned in your anti-alienation  
20 statutes include a grant to the Government of the United  
21 States?

22 MR. GISSBERG: Justice Kennedy, we could grant  
23 to the United States, to a city, a municipality, any  
24 governmental agency.

25 QUESTION: So if that is true, if your counsel

1 had said, you know, this is a difficult area of  
2 interpretation and you had offered initially to waive, the  
3 Government could have entered a contract with you to waive  
4 the extension of the boundary, I take it?

5 MR. GISSBERG: It would have been our property  
6 and we would have had title and ownership to it and I  
7 think we could have entered into an agreement with them.  
8 Let's say for some reason the Government did need that  
9 property, the Navy is going to build a base or there is  
10 some fish spotting device out there run by the National  
11 Marine Fisheries Service, and they need it.

12 I think it becomes our property, the 730 acres,  
13 we could trade it for property someplace down the beach  
14 or --

15 QUESTION: Then if the rights of the parties are  
16 in doubt, I can't see why that isn't also a ground for the  
17 Government to insist on the contract, simply to avoid  
18 litigation.

19 MR. GISSBERG: I think that is probably true,  
20 Justice Kennedy, but we do not believe that the rights of  
21 the parties are in any doubt at all. We believe the  
22 Submerged Lands Act squarely this addresses this issue and  
23 is absolutely clear. It says that the States get 3 miles  
24 from an ambulatory baseline --

25 QUESTION: You don't think reasonable people

1 could disagree on that proposition?

2 MR. GISSBERG: Well, I certainly do not disagree  
3 with what Justice Kennedy has said. We have talked about  
4 this in some detail. This is not just affecting the State  
5 of Alaska. It is not just affecting the Nome causeway.  
6 The City of Nome happened to apply for this particular  
7 coastal construction project.

8 The Corps of Engineers permits projects on the  
9 coasts of the United States all over the country. We  
10 found 12 with disclaimers so far. We now have evidence  
11 from their -- they have an internal guidance that has just  
12 come out in which they say that the district engineer,  
13 whenever there is a project that may effect the baseline  
14 will request a waiver from the affected State. So this is  
15 not going to be subject to any kind of an agreement  
16 anymore.

17 And that is one of the problems with the Courts  
18 suggestion to us in California II. They said we could  
19 talk about this through legislation or agreement. But the  
20 State of Alaska is over here, the City of Nome applies for  
21 the permit to the Army. A year later the Army writes the  
22 city of Nome and the State of Alaska a letter in July of  
23 1983 saying we are not going to give this permit unless  
24 the State waives its claims out here. That is not an  
25 agreement.

1                   QUESTION: Let's say however that we say that  
2 the Corps may turn down the permit because of boundary  
3 considerations, but that it cannot condition -- impose the  
4 condition. Let's assume that that is logically consistent  
5 and legally consistent. Is that the end of the matter?  
6 You don't think there is any way that the State then may  
7 arrange with the Government to build the causeway and not  
8 change the boundary?

9                   MR. GISSBERG: Justice White, is the example  
10 that they can, they can turn down -- they don't have to  
11 give the permit, but they can condition --

12                   QUESTION: They may turn down the permit, but  
13 they can't it and condition it.

14                   MR. GISSBERG: Okay, I understand. In that  
15 case, and if Congress gave them that authority --

16                   QUESTION: No, no, let's forget about Congress.  
17 There wouldn't be any way for the Government and the State  
18 to issue the permit and not have the boundary changed?

19                   MR. GISSBERG: Justice White, I think if the  
20 Government would recognize that maybe for an instant that  
21 becomes our property then we can clearly enter into an  
22 agreement with it, but that would take a fundamental step  
23 for them to take that they haven't taken yet. So we would  
24 not enter into an agreement about something that they  
25 won't let us own.

1           QUESTION: Do you claim that if you entered into  
2 the agreement, if for example you and the Federal  
3 Government said, look, we will agree to disagree as to  
4 whether we get this for an instant or not, and you simply  
5 entered into an agreement which you requested, not a  
6 condition of the approval, you requested to enter into  
7 this agreement.

8           Do you claim that the agreement would not be a  
9 valid agreement and a binding alienation, in light of your  
10 answer to Justice Kennedy?

11           MR. GISSBERG: I think that it would be. We  
12 would have to interpret the rights to the 730 acres in one  
13 way, even though they would disagree.

14           QUESTION: So all you are really saying is, we  
15 just wouldn't do it unless they will salve our lust for  
16 title by agreeing that we get it for at least an instant,  
17 we simply wouldn't agree, but you admit you could agree  
18 and that the answer to Justice White's question is, it is  
19 not the end of the matter, and Nome could end up building  
20 its causeway anyway after we had agreed voluntarily to  
21 alienate what we claim we had.

22           MR. GISSBERG: Well, we sure wouldn't do it  
23 voluntarily. Nome would have to pay us something for  
24 giving them -- it would be kind of complicated.

25           QUESTION: It would depend on how much you want

1 the jetty.

2 MR. GISSBERG: We don't want it -- yes, it  
3 would, and that is the problem, there are a lot of  
4 projects in the State of Alaska, this isn't just the City  
5 of Nome that is doing it. It is private people that have  
6 things they might want to put out there and the State of  
7 Alaska now has a veto power over it. Let the Army Corps  
8 of Engineers get a permit from the Navy to build a  
9 causeway down in Adak and ask us for a waiver and maybe we  
10 will balance that off against the Nome waiver.

11 But this is the problem in this kind of a case.  
12 It is open-ended. There is no rhyme or reason to it. It  
13 is something that the Corps of Engineers has invented --

14 QUESTION: The State of Alaska can always say to  
15 Nome, if they really don't approve of the project, Nome,  
16 we won't grant any waiver.

17 MR. GISSBERG: The State of Alaska, under what  
18 the Army Corps of Engineers is doing, could do that. We  
19 don't think that is what Congress thought any of the  
20 States could do. This Court has said that those grants  
21 are unconditional and --

22 QUESTION: But at any rate, the State of Alaska  
23 is not the prisoner of Nome's desires for a long causeway.

24 MR. GISSBERG: No, Nome is who is being held  
25 hostage here by the State of Alaska and the Army Corps of

1 Engineers, actually. We think that what the Army Corps  
2 here is doing is not only misinterpreting, they are  
3 ignoring the one act that addresses submerged lands, and  
4 they have to rely on the Rivers and Harbors Appropriation  
5 Act because that brings the Secretary of the Army  
6 into -- gives him some authority to issue exceptions to  
7 these permits.

8 But under statutory construction rules, the only  
9 governmental agency that is allowed to interpret statutes  
10 is the one that has the power, and so they can't interpret  
11 the Submerged Lands Act. If they did, they would find  
12 there are no gaps in it. It is absolutely clear and that  
13 is why they have to go all the way back to 1899 and try to  
14 create this authority.

15 They shouldn't be doing that. They should be  
16 going to Congress for this authority. There are two  
17 things that they also miss in addition to the statutory  
18 interpretation problem. One is the separation of powers.  
19 They are pretending like they are Congress. Congress has  
20 said that they should do this.

21 This Court in the Texas Boundary case said that  
22 anything that changes the ambulations should be resolved  
23 by looking to Congress. They have also upset the balance  
24 of federalism because the people that decide what the  
25 States' rights are are the duly elected representatives of

1 Congress, of which the State of Alaska happens at this  
2 time to have three. We have nobody sitting on the Army  
3 Corps of Engineers.

4 And the Solicitor General's Office has said to  
5 this Court that the status quo is to be maintained and so  
6 we have to have a fixed boundary. Alaska now has a 3-mile  
7 limit that becomes 2-1/2 miles off Nome. That is not the  
8 status quo. The status quo is an ambulatory baseline. It  
9 is a functional formula that this Court laid down in 1965  
10 based on the law of the Sea Convention.

11 The formula is what is stable. Everybody can  
12 figure out where the 3-mile limit is and where the State's  
13 lands are. Under the Government's formula you have to be  
14 able to know whether or not -- right above the Nome  
15 causeway is another causeway. Right below it is the Cape  
16 Nome causeway. Neither of them have disclaimers on it.  
17 The 3-mile limit pops out in those places, as it pops out  
18 at the 12-mile Federal territorial sea.

19 So we totally disagree with the implications of  
20 what is happening here. It is not creating -- what they  
21 are doing is not creating any stability. It is causing  
22 additional confusion, and we think this Court ought to  
23 correct it.

24 QUESTION: Thank you, Mr. Gissberg.

25 Mr. Minear, do you have rebuttal? You have 8

1 minutes remaining.

2 REBUTTAL ARGUMENT OF JEFFREY D. MINEAR

3 ON BEHALF OF THE PLAINTIFF

4 MR. MINEAR: Yes, Your Honor, there are a few  
5 points I would like to make.

6 First, I think it is important to focus on what  
7 the Army Corps of Engineers is faced with in these  
8 circumstances, and it is a very practical problem.

9 Structures are built or parties apply to build  
10 structures in navigable waters, and what the Army Corps of  
11 Engineers does is attempt to evaluate all of the  
12 consequences of placing that structure in the water, both  
13 the physical and legal.

14 One of the consequences can be a change in the  
15 boundary and what the Army attempts to do is to maintain  
16 the status quo. Now by keeping the boundary at the same  
17 location, that really serves the purposes of both acts  
18 here, both the Submerged Lands Act and the Outer  
19 Continental Shelf Lands Act.

20 If gives effect to both of those statutes  
21 because both parties get what they had originally planned  
22 on receiving.

23 QUESTION: But if stability isn't the law of the  
24 boundary, I don't really see much to that point, Mr.  
25 Minear. If the law says that the boundary changes when

1 the land form changes, to say that we are going to exact  
2 waivers so that that principle doesn't come into  
3 operation, I don't see it as much of a principle.

4 MR. MINEAR: Your Honor, first, with respect to  
5 the notion, the questions concerning the ambulatory nature  
6 of the boundary. Congress has never stated in the  
7 Submerged Lands Act that the boundary is ambulatory. That  
8 was this Court's interpretation in California II, the same  
9 decision in which this Court recognized that the United  
10 States could reach agreement about these matters.

11 QUESTION: United States could what?

12 MR. MINEAR: This is the same case in which the  
13 Court recognized that the United States could reach  
14 agreements about these matters, California II.

15 QUESTION: Pull the lectern up a little bit. I  
16 have a hard time hearing you.

17 MR. MINEAR: With respect to the question of  
18 whether the boundary is ambulatory, the Congress did not  
19 state that policy; rather, the Court adopted that policy  
20 in California II.

21 Subsequently, Congress provided an avenue for  
22 fixing the boundaries in the Submerged Lands Act in  
23 section 1301(b). It provides that boundaries can now be  
24 fixed by decree of this Court. But more importantly, I  
25 think --

1 QUESTION: In which event, it would not change  
2 thereafter?

3 MR. MINEAR: That is right.

4 QUESTION: No matter how much erosion?

5 MR. MINEAR: That is correct. It will be fixed.  
6 Now, I think it is important to recall that the question  
7 at stake here really is title to these submerged lands and  
8 to the mineral resources. As far as the uncertainty that  
9 might exist because of disclaimers, that is rectified  
10 simply by a party who is interested in obtaining a lease,  
11 checking with the appropriate governmental authority for  
12 the location of the boundary. You perform a title search  
13 in the same way that you would assert in any other type of  
14 real estate, and there is nothing unusual about that.

15 With respect to the question that Justice Scalia  
16 raised at the outset about the accretion from the natural  
17 structure or from the artificial structure, I have been  
18 informed there is case law in the States that indicates  
19 that once an artificial structure is built in a navigable  
20 river, the subsequent accretion and erosion does not  
21 change the boundary if it is a consequence of the building  
22 of the structure.

23 Perhaps that same principle would apply in the  
24 outer continental shelf and the boundary, the coastline  
25 situation. I don't think we have any cases on that with

1 respect to Federal --

2 QUESTION: Mr. Minear, do I understand that the  
3 policy of the Corps of Engineers now would be that even if  
4 a private landowner wanted to repair or construct a dock  
5 on the shoreline, that permission would be given only if  
6 the State in which it is located executes some kind of  
7 waiver?

8 MR. MINEAR: Not necessarily.

9 QUESTION: Is that the universal policy to be  
10 followed now by the Corps?

11 MR. MINEAR: This refers to harbor works. A  
12 dock that does not have a low water mark would not affect  
13 a change in the coastline for purposes of the Submerged  
14 Lands Act. That was decided in California III.

15 So we are talking about primarily very large  
16 structures, causeways, other major buildings that will  
17 have a significant effect, and in fact, our records  
18 indicate there have been about 17 instances since 1970  
19 where this problem has arisen.

20 Now with respect to Justice Stevens' observation  
21 that the State could build a structure simply to obtain  
22 offshore lands, imagine that consequence in the case of  
23 Prudhoe Bay for instance, where there are very valuable  
24 known mineral resources that are located there. This could  
25 result, and again, without any formal Government

1 consideration, of a massive transfer of valuable mineral  
2 resources.

3 QUESTION: Congress can pass a statute -- I  
4 mean, if that happens -- that is not something that the  
5 Federal Government is disempowered from preventing. You  
6 are just saying that under the current statute it couldn't  
7 be prevented, but as soon as somebody tried it, you would  
8 get a statute pretty quickly, don't you think?

9 MR. MINEAR: Perhaps, but I don't think Congress  
10 should be forced to act on these matters when we have an  
11 expert agency that can in fact deal with these problems.

12 Also take into account the situation, if there  
13 were leases in effect offshore of Nome, if we had actually  
14 leased that property, the extension of the boundary would  
15 make those leaseholders good faith trespassers and could  
16 put their interests at risk.

17 There is a very strong interest here in  
18 maintaining a Federal/State boundary and not having it  
19 change by artificial structures. That serves both the  
20 Federal Government's interests and the States'  
21 government's interests, and we think this Court should  
22 recognize and uphold that principle and grant our motion  
23 for summary judgment.

24 QUESTION: Do you want to change your answer to  
25 my question, just before you saw down before or not?

1 Whether if you don't have the power to condition, you  
2 don't have the power to turn the permit down.

3 MR. MINEAR: I believe we should have the power  
4 to turn down the permit, yes. It seems to me --

5 QUESTION: Even if you can't condition it?

6 MR. MINEAR: Even if we can't condition it. It  
7 seems illogical to say that we couldn't condition it, I  
8 suppose that is where the problem really is. As long as  
9 the condition applies with the rationale in Nollan, we  
10 should be able to impose conditions that offer a less  
11 drastic alternative to outright prohibition. If there are  
12 no further questions --

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Minear.  
14 The case is submitted.

15 (Whereupon, at 11:00 a.m., the case in the  
16 above-entitled matter was submitted.)

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## **CERTIFICATION**

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: **No. 118 Original UNITED STATES, Plaintiff v. ALASKA** and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

**BY** Michelle Sanders

**(REPORTER)**