United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

April 20, 1992

M-36911 (Supp. I)

Memorandum

To: Secretary

From: Solicitor

Subject: Ownership of Submerged Lands in Northern Alaska in Light of Utah Division of State Lands v. United States

I. INTRODUCTION AND BACKGROUND

You have asked me to determine the impact of the United States Supreme Court's decision in Utah Division of State Lands v. United States, 482 U.S. 193 (1987) (Utah Lake), on the conclusions reached in Solicitor's Opinion M-36911, issued by former Solicitor Leo Krulitz in 1978, entitled "The Effect of Public Land Order 82 on the Ownership of Coastal Submerged Lands in Northern Alaska," 86 I.D. 151 (1979) (the Krulitz Opinion).

Public Land Order 82 (January 22, 1943) (PLO 82), was issued by Acting Secretary of the Interior Abe Fortas at the height of World War II. The order withdrew public lands in three areas of the Territory of Alaska from operation of the public land laws, including the mining and mineral-leasing laws, "for use in connection with the prosecution of the war."[1] The three areas were northern Alaska (also commonly referred to as the "North Slope"), the Alaska Peninsula and the Katalla-Yakataga region.[2] Only the northern Alaska withdrawal is at issue in this Opinion. PLO 82 was revoked in 1960[3], nearly two years after Alaska was admitted to the Union.[4]

On December 12, 1978, Solicitor Krulitz addressed, in M-36911,

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[1] 8 Fed. Reg. 1599 (1943) (Appendix 1).

[2] See map of Alaska (Appendix 2).

[3] PLO 2215, 25 Fed. Reg. 12599 (1960).

[4] Alaska was admitted to the Union on January 3, 1959, Proc. No. 3269, 24 Fed. Reg. 81-82 (1959).

two issues arising from the withdrawal made by PLO 82 in northern Alaska: (1) the extent of the withdrawal and (2) its effect on state ownership of inland and offshore submerged lands[5] in northern Alaska. 86 I.D. 151, 152. The Solicitor concluded that "PLO 82 expressly reserved the submerged lands underlying the inland navigable waters within the area it withdrew in northern Alaska." Id. at 174-75. He further held that title to the inland submerged lands did not pass to Alaska upon statehood, nor upon revocation of PLO 82 in 1960. Id. at 175. In contrast to the inland submerged lands, the Solicitor found that PLO 82 did not withdraw the coastal submerged lands, which passed to Alaska upon statehood. Id. Former Secretary of the Interior Cecil Andrus concurred in the 1978 Opinion.[6]

In 1987, nine years after the Krulitz Opinion was issued, the Supreme Court considered, in Utah Lake, a claim by the United States that it had reserved to itself the bed of an inland navigable lake while Utah was a territory, and that the lakebed remained in federal ownership when Utah became a state in 1896.[7] In a 5-4 decision, the Court rejected the United States' claim and held that the bed of Utah Lake had not been included in the federal reservation in question. The Court further concluded that even if the lakebed had been reserved, the evidence was insufficient to establish that the United States intended to defeat Utah's title to the bed when Utah was admitted to the Union.

In December 1988, then Secretary of the Interior Donald P. Hodel asked the Solicitor to review the Krulitz Opinion in light of Utah Lake and to advise him whether the Supreme Court's decision required the Department to reconsider its position as to the

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[5] Although the title of the Krulitz Opinion refers only to "coastal" submerged lands, the Opinion addressed ownership of both coastal and inland submerged lands. The Krulitz Opinion uses the terms "coastal submerged lands" and "offshore submerged lands" interchangeably.

[6] By letter dated February 23, 1979, Secretary Andrus notified the Alaska Native Claims Appeal Board (ANCAB) of the Opinion and directed ANCAB to apply the Opinion to all cases posing similar legal and policy issues. See Appeal of State of Alaska (Kuugpik Corporation), ANCAB No. VLS 78-32, 3 ANCAB 297, 303-04 (1979). Following Secretary Andrus' direction, ANCAB applied the Krulitz Opinion and held that the State does not own inland submerged lands under navigable waters within the area withdrawn by PLO 82 (in this case, the bed of the Nachelik Channel of the Colville River).

[7] 482 U.S. 193, 208-09.

effect of PLO 82 on title to submerged lands.[8] Secretary Hodel also asked the Solicitor to consider the effect of the Utah Lake decision on Executive Order No. 908, withdrawing the Chugach National Forest in Alaska.[9] The Secretary then assumed jurisdiction of two cases before the Interior Board of Land Appeals (IBLA) pending guidance from the Solicitor on the effect of the PLO 82 and Chugach National Forest withdrawals in light of the Utah Lake decision.[10] In June 1991, you renewed Secretary Hodel's request and asked me to review the 1978 Krulitz Opinion to determine whether it should be modified in light of the 1987 Supreme Court decision.

Matters related to land status within PLO 82 and other pre-statehood withdrawals in Alaska are now under litigation in the

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[8] Memorandum, dated December 20, 1988, from Secretary of the Interior Donald P. Hodel to Solicitor, captioned "Appeal of State of Alaska v. Morgan Coal Company." See also memorandum, dated December 20, 1988, from Secretary Hodel to Director, Office of Hearings and Appeals, under the identical caption.

[9] Exec. Order No. 908 (1908) (unpublished).

[10] The Secretary's assumption of jurisdiction was pursuant to 43 C.F.R. § 4.5. First, Secretary Hodel directed the IBLA to stay Morgan Coal Co., IBLA 86-1234, a challenge by Alaska to the Department's position on PLO 82. Second, he directed the IBLA to reopen and stay State of Alaska (Katalla River), IBLA 85-768, 102 IBLA 357 (1988), a dispute over rights to oil and gas in the bed of the Katalla River. The IBLA held that Utah Lake compelled the conclusion that Executive Order No. 908, the withdrawal for the Chugach National Forest, did not include the lands underlying navigable waters (specifically, the Katalla River). Thus, IBLA concluded title to the bed of the Katalla River passed to Alaska upon statehood.

In addition to these two IBLA cases, the IBLA itself has stayed at least four proceedings pending Departmental review of the Krulitz Opinion. These cases include: (1) State of Alaska, IBLA 86-1498, concerning the Jago River in the Arctic National Wildlife Refuge; (2) State of Alaska, IBLA Nos. 86-1262 and 86-1397 (Consol.), involving State selections of the Kasegarluk Lagoon and Chukchi Sea; (3) State of Alaska, IBLA 86-1500, Seldovia Lighthouse, an appeal by the State of a BLM conveyance of submerged lands to a Native corporation relying on Executive Order 3406; and (4) State of Alaska, IBLA 87-116, Haida Lighthouse, an appeal by the State of BLM's conveyance of submerged lands to a Native corporation under Executive Order No. 3406.

United States Supreme Court[11] and in the federal district court in Alaska.[12] While this Opinion considers only the applicability of the Utah Lake principles to the PLO 82 withdrawal, it is anticipated that the State of Alaska and other interested parties will raise future questions on other pre-statehood withdrawals and reservations.[13] Therefore, this Opinion devotes considerable

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[11] In United States v. Alaska, No. 84, Original, (filed May 1979), pending before a Special Master in the Supreme Court, Alaska has argued, inter alia, that Utah Lake compels a finding that the United States did not retain submerged lands in connection with the withdrawals for the Arctic National Wildlife Refuge and the National Petroleum Reserve Numbered 4 (NPR-4) (NPR-4 was renamed National Petroleum Reserve--Alaska (NPR-A) in 1976, 42 U.S.C. § 6501). Both of these areas were also withdrawn by PLO 82. The Special Master has not yet issued a final decision in this case. See Briefs of State of Alaska, dated September 23, 1987 and October 9, 1987.

[12] Since 1980, the State has filed three lawsuits (now consolidated) claiming that 25 percent of the area within NPR-A that was opened by Congress to oil and gas leasing in 1980 was land beneath inland navigable waters. The State claims that title to these lands passed to Alaska upon statehood. Alaska v. United States, Civil No. A-83-343 (filed July 5, 1983), consolidated with Case Nos. A-84-435 (filed October 11, 1984) and A-86-181 (filed March 27, 1986). See also Alaska v. United States, Civil No. A-87-450 (filed September 18, 1987) (title to bed of the Kowparuk River within the PLO 82 reservation).

[13] At the time of Alaska Statehood, there were 90-95 million acres of federal reservations in Alaska. Many of these reservations still exist for a variety of purposes, including parks, refuges and military reservations. According to Departmental figures the total acreage of public lands in withdrawal status as of October 1956 amounted to 92,310,000 acres. See Alaska Statehood: Hearings before the Committee on Interior and Insular Affairs, United States Senate on S. 49 and S. 35, 85th Cong., 1st Sess. 197 (1957) (1957 Senate Hearings); see also Statehood for Alaska: Hearings before the Subcommittee on Territorial and Insular Affairs of the Committee on Interior and Insular Affairs, House of Representatives on [Misc. Statehood Bills], 85th Cong., 1st Sess. 235 (1957) (1957 House Hearings).

A "withdrawal" of land refers to a statute, executive order, or an administrative order that removes federal lands from the operation of specified public land laws, including use, disposition and mining laws, that otherwise might apply. A "reservation" is a withdrawal of land for a particular federal

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attention to the analysis of the Utah Lake decision before determining its specific application to the PLO 82 withdrawal.

I have reconsidered the 1978 Krulitz Opinion; examined the language, history and purpose of PLO 82; construed the Alaska Statehood Act of 1958 (Statehood Act or ASA)[14] and the Submerged Lands Act of 1953;[15] and analyzed the Utah Lake decision and its two-part standard for federal retention of inland submerged lands in pre-statehood reservations to determine its applicability to the PLO 82 withdrawal. I conclude that the principles articulated by the Supreme Court in Utah Lake apply to PLO 82. I further conclude that, pursuant to those principles and the Alaska Statehood Act, the lands underlying inland navigable waters in the area withdrawn by PLO 82 in northern Alaska were: (1) part of the withdrawal in the first instance, and (2) retained by the United States upon Alaska's admission to the Union with an intent to defeat state title.[16] Therefore, the Utah Lake decision does not require that I reverse the conclusions of the Krulitz Opinion, although significant additional analysis has been performed.[17] This Opinion supplements the Krulitz Opinion and supersedes it to the extent of any inconsistencies.[18]

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[13](...continued)
purpose or purposes, such as for national parks or military uses. See generally, Baynard, E. Public Land Law and Procedure § 5.36 (1986); see also Coggins, George and Wilkinson, Charles Federal Public Land and Natural Resources Law 239-40 (2d ed. 1987).

[14] 72 Stat. 339, 48 U.S.C. note prec. § 21.

[15] 43 U.S.C. §§ 1301-1315.

[16] After PLO 82 was revoked in 1960, Alaska was entitled to select lands in the area formerly withdrawn by PLO 82, and not otherwise reserved, subject to the President's approval. Alaska Statehood Act, § 6(b), 72 Stat. 339, 340. See infra n. 43.

[17] The analysis in this Opinion is controlling in the disposition of those cases before the Department pertaining to the area withdrawn by PLO 82, e.g., the Morgan Coal case, see supra n. 10. This Opinion does not determine the effect of the Utah Lake decision on the Chugach National Forest withdrawal (Katalla River case).

[18] As previously noted, the Krulitz Opinion considered the effect of PLO 82 on both offshore and inland submerged lands on the North Slope. This review of the Krulitz Opinion is limited to its discussion and conclusions regarding lands under inland navigable waters within the area withdrawn by PLO 82.

My research has led me to conclude that Congress had a number of concerns before it at the time of the Alaska Statehood Act. In the area of PLO 82, I believe they were conflicting. In reaching my conclusions, I am compelled to highlight the significant level of Executive Branch activity immediately prior to Alaska Statehood which evinces an intent to rescind PLO 82. Statements of Secretary Seaton and modification of PLO 82 in 1958 raise an argument that at least for part of the area within PLO 82, the federal intent to reserve submerged lands and to defeat state title to those lands was less than clear.

Nonetheless, my review of the history of executive and congressional activity leading to passage of the Alaska Statehood Act discloses no formal revocation of PLO 82. The record also discloses a contemporaneous concern on the part of the Executive Branch and Congress to preserve withdrawals made for military purposes in northern Alaska. It appears that the intent to preserve withdrawals was clear and affirmative. The competing interest in making lands available to the State - including submerged lands - appeared to be of lesser priority to Congress in northern Alaska than issues of national defense.

This review sets out the historical documents I relied upon in reaching this decision. These materials were obtained from a variety of archival sources. These documents, I believe, best set out the competing concerns Congress had before it at the time of Alaska Statehood, and which lead me to this difficult conclusion. If other materials exist, I would be delighted to review them.

A. History of Public Land Order 82

Public Land Order 82 was issued by Acting Secretary of the Interior Abe Fortas on January 22, 1943. PLO 82 provided in pertinent part:

> WITHDRAWING PUBLIC LANDS FOR USE IN CONNECTION WITH THE PROSECUTION OF THE WAR
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> By virtue of the authority vested in the President and pursuant to Executive Order No. 9146 of April 24, 1942, It is ordered as follows:
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> Subject to valid existing rights, (1) all public lands, including all public lands in the Chugach National Forest, within the following-described areas are hereby withdrawn from sale, location, selection, and entry under the public-land laws of the United States, including the mining laws, and from leasing under the mineral-leasing laws, and (2) the minerals in such lands are hereby reserved under the jurisdiction of the Secretary of the Interior, for use in connection with

the prosecution of the war. . . .

8 Fed. Reg. 1599 (1943).

As established in 1943, PLO 82 withdrew three tracts of land in distinct regions of Alaska: Northern Alaska, the Alaska Peninsula and Katalla-Yakataga. PLO 82 provided legal descriptions of the lands withdrawn within each of the areas and provided estimates of affected acreage as follows: 15,600,000 acres in the Alaska Peninsula, 3,040,000 acres in Katalla-Yakataga and 48,800,000 acres in Northern Alaska.[19]

The PLO 82 description of the Northern Alaska withdrawal is as follows:

> NORTHERN ALASKA
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> All that part of Alaska lying north of a line beginning at a point on the boundary between the United States and Canada, on the divide between the north and south forks of the Firth River, approximate latitude 68°52' N., longitude 141°00' W., thence westerly, along this divide, and the periphery of the watershed northward to the Arctic Ocean, along the crest of portions of the Brooks Range and the De Long Mountains, to Cape Lisburne.

8 Fed. Reg. 1599 (1943). This area encompassed the area of the pre-existing Naval Petroleum Reserve Numbered 4 (NPR-4) and much of the area later withdrawn for the Arctic National Wildlife Range (ANWR).[20]

It is useful to examine PLO 82 in its historical context. Alaska was purchased from Russia under the terms of a treaty signed March 30, 1867. 15 Stat. 539. The Senate approved this treaty

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[19] Solicitor Krulitz noted that the acreage figures did not correlate with any existing map of the areas. 86 I.D. 151, 161-64. The acreages do not correspond to any independent measurements made since 1943 using planimeter or other technology not available then. The survey methods available in 1943 to estimate acreage in this type of remote, partially mountainous terrain would not be expected to produce accurate figures. Accordingly, the acreages recited provide no reliable evidence as to whether the drafters of PLO 82 believed they were including or excluding submerged lands. Id.

[20] PLO 2214, 25 Fed. Reg. 12598-99 (1960). ANWR consisted of approximately 9 million acres when established in 1960. Of that amount, approximately 5 million of the 9 million acres were included within PLO 82. This Opinion will deal with only those lands originally withdrawn by PLO 82.

April 9, 1867, and President Andrew Johnson signed it May 28, 1867. Id. By the Act of May 17, 1884, Congress established Alaska as a civil and judicial district with a civil government, a governor and a district court system. 23 Stat. 24. This statute applied the general laws of Oregon to Alaska. Id. Congress established the Territory of Alaska by the Act of August 24, 1912. 37 Stat. 512. This Act extended the Constitution and the laws of the United States to Alaska and provided for an elected Territorial legislature. Id.

By letter of February 8, 1923, to the Secretary of the Interior, Acting Secretary of the Navy Theodore Roosevelt suggested that certain lands in northern Alaska be withdrawn and designated as NPR-4 "in view [of] the future needs of the American Navy for an adequate supply of fuel oil and other petroleum products" and for other purposes. The letter stated, "[c]onsiderable evidence of the existence of petroleum in large quantities is already available." President Warren G. Harding signed Executive Order No. 3797-A establishing NPR-4 on February 27, 1923.[21] The Executive Order was amended by PLO 289, July 20, 1945 (signed by Abe Fortas, Acting Secretary of the Interior) (10 Fed. Reg. 9479 (1945)) to delete the penultimate paragraph, which read as follows: "Said lands to be so reserved for six years for classification, examination, and preparation of plans for development and until otherwise ordered by the Congress or the President." The effect of this modification was to remove any time limitation from the withdrawal.

As previously noted, PLO 82 was issued on January 22, 1943, during World War II. The United States had entered the war approximately thirteen months earlier after the bombing of Pearl

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[21] The President's authority to make withdrawals derives from two sources: (1) express congressional delegations, such as the Act of June 25, 1910, 36 Stat. 847 (Pickett Act), which was an express delegation by Congress of its power over the public lands; and (2) implied authority granted by Congress to the Executive. The implied withdrawal authority of the President was the focus of the decision in United States v. Midwest Oil Co., 236 U.S. 459 (1915). There, the Supreme Court held that Congress had, by acquiescence over a long period of time, impliedly granted to the President the power to withdraw public lands as the agent for Congress. See also 40 Op. Atty. Gen. 73 (1941); Portland General Electric Co. v. Kleppe, 441 F. Supp. 859 (D. Wyo. 1977). In 1976, Congress repealed the President's implied withdrawal authority in the Federal Land Policy and Management Act, Pub. L. No. 94-579, title VII, § 704(a), 90 Stat. 2744, 2793.

Harbor on December 7, 1941.[22] When PLO 82 was signed in 1943, Japan had actually invaded North America and occupied three islands in the Aleutian chain -- Kiska, Attu and Agattu.[23]

Contemporaneous documents generated by the Commissioner of the General Land Office and the Director of the United States Geological Survey reveal the views of key Interior Department officials about the withdrawal. They show that a major focus of PLO 82 was the oil and gas resources of northern Alaska. They also show that there was disagreement as to whether the withdrawal was needed.[24] After PLO 82 was established, the

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[22] World War II began with Germany's invasion of Poland on September 1, 1939. The United States declared war on Japan December 8, 1941, the day after the Japanese attacked Pearl Harbor. World War II ended September 2, 1945, with the formal surrender of Japan to the United States and its allies.

[23] Vol. 23 Collier's Encyclopedia 606, 617 (1983).

[24] Memoranda of November 20, 1942, from Fred W. Johnson, Commissioner of the General Land Office, and November 16, 1942, from W.C. Mendenhall, Director of the U.S. Geological Survey, discuss the strategic military position of Alaska and the possibility of oil and gas resources in the three reserved tracts. 86 I.D. 151, 178-80. Commissioner Johnson stated: "[t]he strategic position of Alaska with relation to the war effort has multiplied many fold the need for exploration for the purpose of locating and developing a supply of oil and gas within the territory." Id. Commissioner Johnson went on to note that despite favorable oil and gas leasing terms available to private operators under the oil and gas leasing laws:

> there is no commercial oil or gas well in Alaska at this time. Furthermore, the possibility of immediate operations in the areas is slight . . . . This withdrawal is proposed as an effective means of reserving the land to permit of the perfection of the necessary arrangements and of completion of any exploration program that may be undertaken.

Id. With regard to the North Slope withdrawal, Mr. Mendenhall expressed the view that the most promising oil lands were already embraced within NPR-4. He stated:

> The boundaries of Naval Reserve No. 4 include not only the lands that are most hopeful for exploration in this part of Alaska, but far more land than can conceivably be explored for oil, by drilling, during the present emergency. I see no present necessity for enlarging

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Department of the Navy participated with the Department of the Interior in administering northern Alaska.[25]

The area encompassed by PLO 82 in northern Alaska is a virtually treeless area, physically cut off from the rest of the State by the Brooks Range, an east to west mountain chain. North of the range, the Arctic Slope is a flat plain marked by thousands of water bodies. The physical geography and the geology of the area, particularly NPR-4, is described in a joint United States Geological Survey/United States Navy publication prepared in 1953.[26] The United States Geological Survey conducted broad studies in the area of NPR-4 from 1923 to 1926 and published the results in 1930 as United States Geological Survey Bulletin 815.[27] The Navy along with Geological Survey personnel conducted extensive exploration of NPR-4 and adjacent areas from 1945 to 1953. USGS Bulletin 301.

Between January 1943 and December 6, 1960, when PLO 82 was revoked, the Interior Department issued twenty-four public land orders modifying PLO 82 or otherwise applying to the withdrawal

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[24](...continued)
Naval Reserve No. 4 and therefore, do not advise the withdrawal that you describe under the caption "Northern Alaska."

Id. A handwritten note dated November 18, 1942 and signed "Wolfsohn" was appended at the bottom of this memorandum as follows: "Note: I discussed with Secretary Ickes and he instructed that we proceed with the withdrawal of the three (3) areas." 86 I.D. at 180.

[25] See, e.g., Memorandum of Agreement between the Bureau of Land Management, U.S. Department of the Interior and the Office of Naval Petroleum Reserves, Department of the Navy, April 2, 1957, which, among other provisions, assigned exclusive jurisdiction over oil and gas deposits in Naval Petroleum Reserve No. 4 to the Navy and required consent of the Navy for activities permitted or administered by the Bureau of Land Management.

[26] Reed, John C., CDR, USNR, Exploration of Naval Petroleum Reserve No. 4 and Adjacent Areas Northern Alaska, 1944-53 Part 1. History of the Exploration, United States Geological Survey Professional Paper 301 (1958) (USGS Bulletin 301) at 7-13.

[27] Smith, Philip S. and Mertie, J.B., Jr., Geology and Mineral Resources of Northwestern Alaska, United States Geological Survey Bulletin 815 (1930) (USGS Bulletin 815).

area.[28] A number of these orders set aside sites for specific military uses for the Navy and the United States Air Force. Others accomplished diverse purposes, such as reservation of a school or weather station sites. Three of the early modifications to PLO 82 pertained to oil, gas and coal.[29]

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[28] The following public land orders affected PLO 82:

PLO #	Federal Register Reference	
151	12 Fed. Reg. 495	(1947)*
233	9 Fed. Reg. 6570	(1944)
250	9 Fed. Reg. 14072	(1944)
254	9 Fed. Reg. 14784	(1944)
289	10 Fed. Reg. 9479	(1945)
299	10 Fed. Reg. 13077	(1945)
323	11 Fed. Reg. 9141-42	(1946)
394	12 Fed. Reg. 5731	(1947)
715	16 Fed. Reg. 3586	(1951)
806	17 Fed. Reg. 1650	(1952)
1288	21 Fed. Reg. 2686	(1956)
1313	21 Fed. Reg. 5416	(1956)
1457	22 Fed. Reg. 6300-01	(1957)
1571	23 Fed. Reg. 54	(1958)
1587	23 Fed. Reg. 1031	(1958)
1600	23 Fed. Reg. 1828	(1958)
1621	23 Fed. Reg. 2637	(1958)
1624	23 Fed. Reg. 2987	(1958)
1851	24 Fed. Reg. 4054-55	(1959)
1932	24 Fed. Reg. 6316-17	(1959)
1950	24 Fed. Reg. 6872	(1959)
1965	24 Fed. Reg. 7200	(1959)
2188	25 Fed. Reg. 8146	(1960)
2214	25 Fed. Reg. 12598-99	(1960)
2215	25 Fed. Reg. 12599	(1960)

* Though PLO 151 was issued on July 19, 1943, it was classified secret and was released from this status by letter of the Secretary of Commerce dated October 31, 1946 and published at 12 Fed. Reg. 495 (1947). There is a misprint in 43 C.F.R. Appendix-Table of Public Land Orders, 1942-1991 at 129.

[29] These modifications are as follows: (1) PLO 250, November 20, 1944 (signed by Abe Fortas, Acting Secretary of the Interior) - to permit the issuance of free coal mining permits and the mining and removal, under the supervision of the Secretary of the Interior, of coal deposits necessary for fuel in Indian and other federal institutions (9 Fed. Reg. 14072 (1944)); (2) PLO 254, December 15, 1944 (signed by Harold Ickes, Secretary of the Interior) - to permit the issuance of new oil and gas leases

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On August 14, 1946, Acting Secretary of the Interior Oscar L. Chapman issued PLO 323 (11 Fed. Reg. 9141 (1946)), which revoked the withdrawals of the Alaska Peninsula and Katalla-Yakataga tracts formerly withdrawn under PLO 82. Accordingly, after this date PLO 82 applied only to northern Alaska lands.

In 1958, PLO 82 was further modified to permit mining locations and mineral leasing on lands within the boundaries of PLO 82, except for the area of NPR-4, and except for an area included in an application for withdrawal filed by the Bureau of Sport Fisheries and Wildlife for use as the Arctic National Wildlife Range.[30] PLO 1621, April 18, 1958 (signed by Fred A. Seaton, Secretary of the Interior) (23 Fed. Reg. 2637 (1958)), provided these latter lands (i.e., the lands requested for wildlife purposes) would remain segregated from leasing under the mineral leasing laws, and from location under the mining laws.[31] PLO 1621 stated that approximately 16,000 acres of lands to be opened to mineral development lay within the known geologic structure of the Gubik gas field and that the area would be offered for oil and gas leasing through competitive bidding. PLO 1965, August 29, 1959, (also signed by Secretary Seaton) (24 Fed. Reg. 7200 (1959)) amended PLO 1621:

> to the extent necessary to permit the preparation and filing of leasing maps affecting all lands situated within the known geologic structure of the Gubik gas field, and lying within the two-mile buffer zone adjacent to Naval Petroleum Reserve No. 4, established by Public Land Order No. 1621 . . . . This action was taken upon recommendation of the Department of the Navy

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[29] (...continued)
pursuant to preference right applications under section 1 of the act of July 29, 1942 (56 Stat. 726, 30 U.S.C. § 226b) (9 Fed. Reg. 14784 (1944)); (3) PLO 299, October 9, 1945 (signed by Harold Ickes, Secretary of the Interior) - to permit the issuance of coal permits and leases (10 Fed. 13077 (1945)).

[30] The Arctic National Wildlife Range was redesignated as the Arctic National Wildlife Refuge by Title III of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 668dd note.

[31] In connection with the opening of PLO 82 to mineral development, it is worth noting that in 1954 an important change occurred in the mining laws. A mining claimant who went to patent no longer obtained the oil and gas within the subsurface estate. 30 U.S.C. §§ 521-524 (1958). Accordingly, in 1958 the United States could open the area to mineral development without losing control over the oil and gas resources.

> that leasing of the lands involved go forward in order to protect against loss of revenues to the United States through drainage of adjacent lands located within Naval Petroleum Reserve No. 4.

24 Fed. Reg. 7200 (1959).

Throughout the post-war period in the 1950s, Interior, in consultation with the Navy, considered terminating PLO 82 and the NPR-4 reservation. By 1954, the Navy had concluded PLO 82 could be relinquished. However, the Navy advocated retention of the NPR-4 withdrawal. See discussion in Section IV, infra.

PLO 2214, establishing the Arctic National Wildlife Range, was issued by Secretary Seaton on December 6, 1960 (25 Fed. Reg. 12598-99 (1960)). Immediately upon establishing the range, which kept the area in a reserved status, Secretary Seaton revoked PLO 82 by means of PLO 2215 (25 Fed. Reg. 12599 (1960)).[32]

B. The Krulitz Opinion

The history of PLO 82 played an important role in the Opinion prepared by Solicitor Krulitz in 1978. He observed at the outset of his Opinion that ownership of submerged lands in the area of northern Alaska described in PLO 82 depended on three factors: (1) whether PLO 82 withdrew submerged lands; (2) if so, whether PLO 82 prevented transfer of title to these lands from the United States to Alaska upon statehood in 1959; and (3) if so, whether revocation of PLO 82 two years after statehood vested ownership of the submerged lands in Alaska. 86 I.D. 151, 152.

After an extensive review of the history, text, and purpose of PLO 82 and an analysis of the applicable statutes and legal principles, Solicitor Krulitz summarized his findings regarding inland submerged lands as follows:

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

Id. at 174-75.

In reaching these conclusions, the Solicitor reasoned that: (1) the United States had full sovereign power over lands in the

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[32] PLO 2215 was issued on the same day as PLO 2214, December 6, 1960. See also 86 I.D. 151, 170.

territories, including the power to reserve lands under navigable waters to itself or convey them to third parties, id. at 154-55; (2) the term "public lands" appearing in the title and body of PLO 82 could be construed to encompass submerged lands in light of judicial precedent and Departmental interpretation in 1943, id. at 156-57; (3) the "sweeping language" employed in PLO 82 to describe the area withdrawn on the North Slope implied the order withdrew everything within the exterior boundaries of the withdrawal, including submerged lands, id. at 164; (4) the purpose of PLO 82 to protect critical regions of Alaska from private interference with the federal oil and gas program needed for the war effort evinced a secretarial intent to withdraw submerged lands as well as uplands on the North Slope, id. at 164-169; (5) PLO 82 "expressly retained" inland submerged lands when Alaska entered the Union, pursuant to the Submerged Lands Act of 1953, made applicable to Alaska by the Alaska Statehood Act of 1958, id. at 172; (6) the withdrawal of inland submerged lands by PLO 82 fell within the "public exigency" exception to the judicial inference against disposals of lands under navigable waters during the territorial period, id. at 173-74, citing United States v. Holt State Bank, 270 U.S. 49 (1926); and (7) the revocation of PLO 82 after Alaska Statehood did not transfer title to the inland submerged lands to the State because the Submerged Lands Act grant operated only at the moment of Alaska statehood, not two years later, id. at 174. Each of these factors is discussed more fully below.

1. Authority of the United States Over Submerged Lands in the Territories

Solicitor Krulitz began his analysis with a review of the Federal Government's power to regulate and dispose of lands beneath navigable waters during the territorial period. He noted that, under the common law, the United States held title to lands beneath navigable waters as the territorial sovereign. 86 I.D. 151, 154. However, once a state entered the Union, title to the beds of navigable waters passed to the state. Id., citing Shively v. Bowlby, 152 U.S. 1, 49-50 (1894). The concept of a state acquiring title to lands under navigable waters within its boundaries upon statehood, known as the equal footing doctrine, is not mentioned in the Krulitz Opinion by name. Nevertheless, the Solicitor stated its fundamental principle and discussed the major Supreme Court decisions enunciating and reaffirming the doctrine. Id. at 154-55.[13]

As early as 1850, in Goodtitle v. Kibbe, 50 U.S. (9 How.) 471,

[13] See infra Section II.B, for discussion of equal footing doctrine.

478 (1850),[34] the Supreme Court recognized that the United States had the authority to convey lands under navigable waters in the territories to private parties. Almost half a century later, in Shively v. Bowlby, 152 U.S. 1 (1894), the Supreme Court established that the Federal Government had the power under the Constitution to convey lands under navigable waters to third parties during the territorial period. Id. at 48.[35] Solicitor Krulitz summarized his review of the relevant cases as follows: "Thus, it was well-settled that the submerged land during the territorial period was property of the United States, subject to retention or disposal by Congress." 86 I.D. 151, 155, citing U.S. Const. Art. IV, Sec. 3, Cl. 2.[36]

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[34] Goodtitle involved a congressional grant of lands beneath a navigable river. The grant was made after Alabama's admission into the Union. The Court held that no title passed to the patentee because title to the submerged lands had passed to Alabama upon statehood. However, Chief Justice Taney, writing for the whole Court, stated: "Undoubtedly Congress might have granted this land to the patentee, or confirmed his Spanish grant, before Alabama became a State. But this was not done." 50 U.S. (9 How.) 471, 478 (emphasis added).

[35] Shively concerned a private party's claim that he had been granted a portion of the bed of the (navigable) Columbia River by the United States while Oregon was a territory. The Court held that the pre-statehood grant from the United States passed no title to the submerged lands to the grantee. Rather, title to the submerged lands passed to Oregon at statehood. See also United States v. Holt State Bank, 270 U.S. 49 (1926), where the Court held the United States did not intend to include the bed of a navigable lake within the Red Lake Indian Reservation for the benefit of the Chippewa Indians before Minnesota became a state. Title to the lakebed thus passed to Minnesota upon statehood. Id. at 58. In Montana Power Co. v. Rochester, 127 F.2d 189 (9th Cir. 1942), the court held the United States had power to hold lands under inland navigable waters in the Flathead Indian Reservation in trust for the Indians, as against the claims of a subsequently created state. Because the federal reservation at issue there was an Indian reservation created by treaty, it was treated as a grant to third parties, as opposed to a federal retention of submerged lands. See infra n. 44 and accompanying text.

[36] Article IV, Section 3, Clause 2 provides: "Congress shall have Power to dispose of and make all needful rules and regulations respecting the Territory or other Property belonging to the United States." As explained in n. 37 infra, Congress has at times delegated its constitutional power to withdraw public lands to the Executive, either expressly or by implication.

2. Meaning of the Phrase "Public Lands" in the Territory of Alaska

Having established that the United States had the authority to withdraw submerged lands in the Territory of Alaska by means of PLO 82, Solicitor Krulitz next examined the text of the order to determine if the Secretary had intended to do so. He observed that PLO 82 expressly withdrew "all public lands" in the areas of Alaska described in the order. Id. at 154. However, the order does not define "public lands." PLO 82 reads in relevant part:

> WITHDRAWING PUBLIC LANDS FOR USE IN CONNECTION WITH THE PROSECUTION OF THE WAR
>
> By virtue of the authority vested in the President and pursuant to Executive Order No. 9146 of April 24, 1942, It is ordered as follows:
>
> Subject to valid existing rights, (1) all public lands, including all public lands in the Chugach National Forest, within the following described areas are hereby withdrawn . . . .

8 Fed. Reg. 1599 (emphasis added). Executive Order No. 9146, which in the opening paragraph of PLO 82 declares to be the legal basis for the withdrawal, likewise contains no definition of "public lands." In the Executive Order, President Franklin D. Roosevelt delegated his authority to withdraw or reserve the "public lands of the United States" to the Secretary of the Interior.[37] 86 I.D. 151, 165 n. 15. However, the Executive Order does not specify whether submerged lands are embraced within the term "public lands."

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[37] Executive Order No. 9146 reads:

> By virtue of the authority vested in me by the act of June 25, 1910, c. 421, 36 Stat. 847, and as President of the United States, I hereby authorize the Secretary of the Interior to sign all orders withdrawing or reserving public lands of the United States, and all orders revoking or modifying such orders . . . .

Exec. Order No. 9146, 3 C.F.R. 1149-50 (1938-43). PLO 82 was issued pursuant to the presidential delegation of authority contained in Executive Order No. 9146. In 1943, the President's withdrawal power derived, in turn, from both express congressional acts, such as the Pickett Act, 36 Stat. 847, and implied executive powers. See United States v. Midwest Oil, 236 U.S. 459 (1915); 40 Op. Atty. Gen. 73 (1941); Portland General Electric Co. v. Kleppe, 441 F. Supp. 859 (D. Wyo. 1977).

To determine what the drafters of PLO 82 meant by the words "public lands" in 1942-43, Solicitor Krulitz looked to "the contemporaneous intent of the Department in withdrawing and reserving 'public lands.'" 86 I.D. 151, 154, citing Udall v. Oelochlager, 389 F.2d 974 (D.C. Cir. 1968) and Hynes v. Grimes Packing Co., 337 U.S. 86 (1949). He concluded that PLO 82 could be construed to include submerged lands according to legal precedent existing at the time of PLO 82's creation and "the common Departmental understanding in 1943 regarding Alaska." 86 I.D. 151, 157.

In making this determination, Solicitor Krulitz considered two opinions to be of particular relevance. First, the United States Supreme Court decision in Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918), indicated that public lands in Alaska may include submerged lands. In that decision, the Court considered whether an 1891 Act of Congress setting aside "the body of lands known as Annette Islands" in Alaska as a reservation for the Metlakahtla Indians embraced only the upland areas of the islands or also included adjacent waters and submerged lands. Id. at 86-87 (emphasis added). The Court found that Congress' purpose in creating the reservation was to assist and encourage the Metlakahtlans to become self-sustaining. Noting that the Indians, who were largely fishermen and hunters, could not sustain themselves from the use of the uplands alone, the Court held that the reservation in the 1891 Act embraced "the whole of what is known as Annette Islands," including the surrounding waters and submerged lands. Id. at 89.

Second, Solicitor Krulitz relied on a Solicitor's Opinion, signed by Acting Solicitor Kirgis on April 19, 1937 (six years before PLO 82 was signed) on "the authority of the Secretary of the Interior to reserve waters in connection with . . . land reservations for Alaskan Natives under the Act of May 1, 1936." 86 I.D. 151, 156-57, citing 56 I.D. 110 (1937). The 1936 Act had extended the Indian Reorganization Act to Alaska and authorized the Secretary to reserve "public lands" adjacent to lands previously reserved for Alaska Natives, or other "public lands" occupied by them. The Kirgis Opinion concluded that "public lands" in Alaska, under the 1936 Act, included waters adjacent to any lands already reserved or being reserved for the Natives. 56 I.D. 110, 115. In reaching this decision, the Acting Solicitor reasoned:

> The term "public lands" is synonymous with the term "public domain," and the tidewaters of the territories of the United States and the lands under them have been classified as part of the public domain since they belong exclusively to the United States Government and are subject to its disposition.

Id. at 114, citing Alaska Pacific Fisheries, 248 U.S. at 87.

Twelve years later, the United States Supreme Court construed the identical statute that was at issue in the 1937 Solicitor's Opinion--the Act of May 1, 1936, 49 Stat. 1250-51 --in Hynes v. Grimes Packing Co., 337 U.S. 86 (1949). The Court held that both the 1936 Act and Executive Order No. 9146 (the same Executive order under which PLO 82 was issued) authorized the Secretary of the Interior to include lands beneath navigable waters in the withdrawal of "public lands" under section 2 of the statute.[38] The Court cited with approval the 1937 Solicitor's Opinion and applied a similar analysis. Id. at 114. Although Hynes v. Grimes, was decided six years after PLO 82 was issued, Solicitor Krulitz emphasized the importance of that case:

> Overall, this case is significant in manifesting a continuing attitude by the Supreme Court not to accord talismanic significance to the words "public lands," but instead to recognize in some instances that the term "public lands" as used in Executive Order 9146 (the legal basis for PLO 82) can include submerged lands.

86 I.D. 151, 158. Thus, the meaning of "public lands" in Alaska, the Krulitz Opinion concluded, "turn[s] on the language and purpose of the specific withdrawal at issue." Id. at 159.

3. PLO 82's Description of the North Slope Withdrawal

Turning to the specific language of the withdrawal order, Solicitor Krulitz noted that PLO 82 withdrew "all public lands" in "Northern Alaska," consisting of "[a]ll that part of Alaska lying north of a line" described in the order. 86 I.D. 151, 160 (emphasis added). The "sweeping language" employed in PLO 82 to describe the area withdrawn in northern Alaska implied that inland submerged lands were included within the boundaries of the withdrawal. Id. at 164. Any lands intended to be excluded from the withdrawal, Solicitor Krulitz reasoned, would have required a "specifically-worded exception to that effect." Id.[39] No such

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[38] The Supreme Court was unanimous on the point that "public lands," within the meaning of section 2 of the Act of May 1, 1936, included adjacent tidelands and coastal waters in the reservation for the Karluk Indians. 337 U.S. at 127-28, 136.

[39] This conclusion follows from the rule of construction for federal reservations that, in general, all lands within the metes and bounds of the reservation perimeter (including lands

(continued...)

exceptions were made in the order either express or implied. In fact, the only limitation that PLO 82 imposed on the vast withdrawals it made in Alaska is the order's concession to "valid existing rights." Id.[40]

4. Purpose of PLO 82

Because the inclusion of submerged lands in a withdrawal of "public lands" in Alaska depends largely on the withdrawal's purpose, the Krulitz Opinion next focused on the intent and purpose of PLO 82. Public land orders, the Solicitor observed, should be construed to effectuate the purpose of the withdrawals. Id. at 164, citing Hynes v. Grimaa Packing Co., 337 U.S. 86, 116 (1949); United States v. Alaska, 423 F.2d 764, 767 (9th Cir. 1970) cert. denied, 400 U.S. 967 (1970); see also Alaska Pacific Fisheries v. United States, 248 U.S. 78, 87 (1918). If the withdrawal's purpose requires the inclusion of areas of navigable water, then the navigable water body and the submerged lands beneath it will be assumed to be included. 423 F.2d at 767.

The principal purpose of PLO 82, Solicitor Krulitz determined, was to preclude interference by private claimants and lessees with the federal oil and gas development program on the North Slope needed for the war effort. This purpose supported a construction of PLO 82 that withdrew inland submerged lands. 86 I.D. 151, 164-69. As the Solicitor explained:

> [T]he drafters of PLO 82 need not have foreseen federal development efforts directly on or over the submerged lands in question in order to withdraw them. Rather, the purpose [of PLO 82] was to prevent private activity anywhere in the general area from interfering with proposed federal activity . . . . Such private activity on or near inland submerged lands might well have posed complications to proposed federal activity on the submerged lands or on adjacent uplands. It would have been unwise to stop the withdrawal at the boundaries of inland waters.

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[39](...continued)
underlying navigable waters) are intended to be included in the reservation. 86 I.D. 151, 164 n. 13, citing Choctaw Nation v. Oklahoma, 397 U.S. 620, 634 (1970). In Choctaw, the Supreme Court held the United States conveyed title to the bed of the navigable portion of the Arkansas River within Oklahoma in the federal grants made to the Choctaw and Cherokee Nations under various treaties.

[40] See supra n. 19 and accompanying text.

Id. at 168.

Solicitor Krulitz noted that the Secretary had reason to fear private interference with the federal oil and gas program in the areas withdrawn by PLO 82 in 1943, including in and around the beds of inland waters. Id. at 168. It was not until after 1947, four years after PLO 82 was issued, that the Interior Department determined that the Mineral Leasing Act of 1920, as amended, 30 U.S.C. §§ 181 et seq., did not authorize the issuance of oil and gas leases on submerged lands off the coasts of the United States.[41] In fact, permits had been issued under the Mineral Leasing Act for submerged lands in the Arctic Ocean, in bays, swamps, and bayous in Texas and Louisiana, and in the Gulf of Mexico offshore of those two states. Id. at 167-68. Furthermore, in the statutes extending the mining laws to Alaska and the amendments to those laws, Congress expressly authorized mining for gold and other precious metals in submerged lands.[42] Id. at 168. Such activities would certainly have justified including submerged lands in the PLO 82 reservation to prevent the possibility that total federal control over them might be frustrated.

5. Submerged Lands Act of 1953 and Alaska Statehood Act of 1958

After determining that lands under inland navigable waters were included in the PLO 82 withdrawal, Solicitor Krulitz considered whether the United States "expressly retained" the inland submerged lands, pursuant to the Submerged Lands Act of 1953, when Alaska entered the Union in on January 3, 1959. Id. at 170-72. The Submerged Lands Act, 43 U.S.C. §§ 1301-1315, was enacted ten years after PLO 82 was issued, but before Alaska Statehood. Section 6(m) of the Alaska Statehood Act made the Submerged Lands Act applicable to Alaska. 72 Stat. 339, 343.

The Submerged Lands Act granted and confirmed to the states title to the lands beneath inland navigable waters within the states, and granted to the states the submerged lands within the boundaries of the states lying off their coasts. 43 U.S.C. §§ 1311(a) and 1312. Under these provisions, Solicitor Krulitz reasoned, all coastal submerged lands as well as lands underlying inland navigable waters in Alaska "would unquestionably have passed to the State upon its admission to the Union." 86 I.D.

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[41] Solicitor's Opinion, 60 I.D. 26 (1947); see Justheim v. McKay, 229 F.2d 29 (D.C. Cir.), cert. denied, 356 U.S. 933 (1956).

[42] Act of June 6, 1900, § 26, 31 Stat. 329, as amended by the Act of May 31, 1938, 52 Stat. 588, and the Act of Aug. 8, 1947, § 1, 61 Stat. 916; see 30 U.S.C. § 49a.

151, 171. However, section 5(a) of the Act exempts certain categories of lands from the general grant of submerged lands to the states including: "all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea) . . . ." 43 U.S.C. § 1313(a) (emphasis added). Solicitor Krulitz concluded that, under the "expressly retained" exception in section 5(a) of the Submerged Lands Act, title to lands under inland navigable waters within PLO 82 did not pass to Alaska at the time of statehood. 86 I.D. 151, 172.

6. The Holt State Bank Standard for Federal Disposals of Lands Under Inland Navigable Waters

After reviewing the history, text and purpose of PLO 82, analyzing the judicial and Departmental legal precedents in 1943 regarding withdrawals of submerged lands, and applying the 1953 Submerged Lands Act to the PLO 82 withdrawal, Solicitor Krulitz finally considered the applicable rule for determining whether inland submerged lands were included in the PLO 82 withdrawal. Id. at 172-74. He acknowledged the two leading Supreme Court cases reiterating the longstanding federal policy of regarding lands under navigable waters in the territories as held for the ultimate benefit of future states. Shively v. Bowlby, 152 U.S. 1 (1894); United States v. Holt State Bank, 270 U.S. 49 (1926). Those cases established that the United States has refrained from disposing of such lands except when impelled to do so by some "international duty or public exigency." 152 U.S. at 57-58; 270 U.S. at 55. In Holt State Bank, the Court announced a frequently-quoted formula for determining if a conveyance by the United States includes submerged lands: "[D]isposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." 270 U.S. at 55 (emphasis added).

Solicitor Krulitz initially distinguished the Holt State Bank and Shively v. Bowlby line of cases because they involved federal "disposals," as opposed to reservations or withdrawals, of submerged lands. 86 I.D. 151, 173. However, even if the PLO 82 withdrawal were regarded as a "disposal" of public lands, PLO 82 fell clearly within the "international duty or public exigency" exception to the presumption in favor of state ownership of lands beneath navigable waters. Id. at 173-74. The Solicitor noted "PLO 82's direct relationship to the prosecution of World War II -- a 'public exigency' beyond challenge." Id. Federal retention of this area of high oil and gas potential to facilitate national defense and to protect national supplies of valuable fuel thus constituted a "public exigency" sufficient to meet the strict test for defeating state ownership established by Holt State Bank and Shively v. Bowlby. Id.

7. Revocation of PLO 82 in 1960

Finally, Solicitor Krulitz examined the effect of the revocation of PLO 82 by PLO 2215 in December 1960 (25 Fed. Reg. 12599 (1960)) on Alaska's title to the inland submerged lands in the former PLO 82 withdrawal. 86 I.D. 151, 174. He concluded that with respect to states admitted after its enactment, the Submerged Lands Act grant operates only at the time of statehood. Therefore, the revocation of PLO 82 two years after Alaska Statehood did not transfer title to the inland submerged lands within the former PLO 82 withdrawal to the State. Id. at 174-75. On the contrary, because the Solicitor found the United States had "expressly retained" the inland submerged lands on the North Slope at the time of Alaska Statehood, pursuant to section 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a), this constituted a "permanent retention by the United States of those submerged lands." Id. at 174.[43]

II. THE UTAH LAKE DECISION AND ITS EFFECT ON THE KRULITZ OPINION

A. Introduction

The Utah Lake case is the latest decision in line of cases defining the equal footing doctrine as it applies to state title to lands underlying inland navigable waters. This section will

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[43] See 86 I.D. 151, 174 n. 34, quoting section 4 of the Alaska Statehood Act, which provides that the State "forever disclaims all right and title to any lands not granted or confirmed to the State . . . ." Solicitor Krulitz explained that inland submerged lands remained in federal ownership despite the revocation of PLO 82 in 1960 "except where the State of Alaska has selected the submerged lands in question and the Federal Government has approved these selections." 86 I.D. 151, 153. In 1971, under the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 et seq., Congress authorized selections by eight Native village corporations and a Native regional corporation within the boundaries of the former PLO 82 withdrawal. In 1983, Solicitor Coldiron clarified the State's right to select submerged lands within the former PLO 82 withdrawal in Solicitor's Opinion M-36949, entitled "State Selections of Onshore Lands Underlying Navigable Waters in the Geographic Area of Revoked Public Land Order 82," 91 I.D. 67 (1984). He held that PLO 2215, which revoked PLO 82, returned formerly reserved submerged lands to the status of "public lands" and made them available for selection by the State. Id. at 67, 69. In section 901 of ANILCA, 43 U.S.C. § 1631, as amended in 1988, Congress authorized conveyances of lands under inland navigable waters in Alaska to Alaska Native corporations and the State of Alaska if the submerged lands had been retained by the Federal Government at the time of statehood.

review the history of the equal footing doctrine and analyze the application of it in Utah Lake. Since the 1978 Solicitor's Opinion was issued, the Supreme Court of the United States has decided two cases that directly applied the equal footing doctrine to determine whether the Federal Government or a state owns lands beneath particular inland navigable waters. See Utah Division of State Lands v. United States, 482 U.S. 193 (1987) (Utah Lake); Montana v. United States, 450 U.S. 544 (1981) (Montana). Neither case changed existing law concerning the equal footing doctrine, but as I will discuss, in Utah Lake, the Supreme Court articulated a specific two-part pronged inquiry applicable to equal footing cases involving federal reservations and withdrawals.

In Montana, the Court considered whether the United States had recognized and conveyed beneficial title to the bed of the Big Horn River to the Crow Tribe or whether the United States had, at the time of the treaties, retained full ownership of the submerged lands, which then passed to the State of Montana when it was admitted to the Union.[44] The Court concluded that the specific treaty language and the historical circumstances under which the Crow Reservation was created were not sufficient to overcome the strong presumption against conveyance, and therefore title to the bed of the river passed to the State of Montana upon its admission to the Union. The Montana decision reaffirmed and relied on well-established equal footing doctrine principles, and did nothing to alter the law as it existed in 1978, when Solicitor Krulitz issued his Opinion.

In Utah Lake, however, the Supreme Court considered for the first time a claim by the United States that it had reserved to itself--rather than conveyed to a third party--submerged lands beneath inland navigable waters, and thereby defeated the title a future state otherwise would have obtained under the equal footing doctrine. In deciding the case, the Court provided specific guidance concerning what is required for a pre-statehood federal reservation of lands beneath inland navigable waters to overcome the equal footing doctrine and defeat state title.

B. The Equal Footing Doctrine

Under the equal footing doctrine a new state is admitted to the

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[44] The Big Horn River was within the aboriginal territory of the Crow Tribe. While generally treaties are viewed as a reservation of rights by tribes and not a grant of rights to them, United States v. Winans, 198 U.S. 371, 381 (1905), the Court in Montana, for purposes of the equal footing doctrine, viewed the treaties as conveyances by the United States of recognized beneficial title to the Tribe, rather than a "reservation" of title by the United States for itself, as trustee of the Tribe.

Union on an "equal footing" with the Thirteen Original States. As a general matter, ownership of lands beneath inland navigable waters is considered an incident of sovereignty.[45] When the United States was formed, the Original States "claimed title to the lands under navigable waters within their boundaries as the sovereign successors to the English Crown." Utah Lake, 482 U.S. at 196. Because new states are admitted to the United States on an "equal footing," the doctrine provides that "[a]s a general principle, the Federal Government holds such lands in trust [during the territorial period] for future States, to be granted to such States when they enter the Union and assume sovereignty." Montana, 450 U.S. at 551 (citing Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 222-23, 229 (1845)).

Although the Federal Government is considered to hold lands beneath inland navigable waters in trust for future states, it is by now well-established that Congress has the power to convey such lands prior to statehood and thereby defeat the title a new state would otherwise acquire under the equal footing doctrine. Montana, 450 U.S. at 551. However, "because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, . . . it will not be held that the United States has conveyed such land except because of 'some international duty or public exigency.'" Id. at 552 (quoting United States v. Holt State Bank, 270 U.S. 49, 55 (1926) (Holt State Bank)). Thus, the Supreme Court has inferred a "congressional policy to dispose of [lands under navigable waters] only in the most unusual circumstances." Utah Lake, 482 U.S. at 197.

> A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, . . . and must not infer such a conveyance 'unless the intention was definitely declared or otherwise made plain,' United States v. Holt State Bank, [270 U.S.] at 55, or was rendered 'in clear and especial words,' Martin v. Waddell, [41 U.S. (16 Pet.) 367,] 411 [(1842)], or 'unless the claim confirmed in terms embraces the land under the waters of the stream,' Packer v. Bird, [137 U.S. 661,] 672 [(1891)].

Montana, 450 U.S. at 552.

C. Utah Lake Decision

The dispute in Utah Lake arose over ownership to the bed of Utah Lake, a navigable freshwater lake covering 150 square miles. The

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[45] See Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 229 (1845).

Department of the Interior issued oil and gas leases for the lands underlying the lake, and the State of Utah brought suit, claiming ownership of the bed under the equal footing doctrine. The United States asserted ownership based on pre-statehood statutes and Executive Branch actions selecting and reserving the site of the lake for reservoir purposes.

In 1888, eight years before Utah's admission to the Union, Congress authorized the United States Geological Survey to select sites for reservoirs and other irrigation facilities, and provided that all such lands "which may hereafter be designated or selected" as such, were reserved as property of the United States and withdrawn from entry, settlement or occupation. Sundry Appropriations Act of 1888, 25 Stat. 505, 527 (1888 Act) (emphasis added). The law was passed in response to concerns that homesteaders on public lands in the West might claim lands suitable for reservoir sites or irrigation works, and in doing so, interfere with future reclamation efforts. Utah Lake, 482 U.S. at 198-99.

In 1889, Major John Wesley Powell, Director of the United States Geological Survey, submitted a report stating that the "site of Utah Lake in Utah County in the Territory of Utah is hereby selected as a reservoir site, together with all lands situate within two statute miles of the border of said lake at high water." Id. at 199. The next year, because of the unintended expansive effect of the 1888 Act, which by statute had reserved all lands that "may" be designated under the Act, Congress repealed the Act, but provided "that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by [the 1888 Act]." Id.

In the Utah Lake litigation, the United States contended that Major Powell's selection of the lake site pursuant to the 1888 Act, and the 1890 Act confirming sites that had been located and selected, reserved title to the bed of Utah Lake in the United States, and that the bed remained in federal ownership upon Utah's admission to the Union. Id. at 200. The State of Utah contended that although the Federal Government had the authority to defeat a future state's title under the equal footing doctrine by a conveyance of submerged lands to a third party, the Federal Government lacked any authority to defeat a state's title by a federal reservation of submerged lands beneath navigable waters. In addition, the State argued that even if the Federal Government had such authority, it had not accomplished that result with respect to the bed of Utah Lake.

The Supreme Court rejected the United States' claim of ownership of the bed of Utah Lake, concluding that under the facts of the case, the United States had not intended to reserve the bed of

the lake within the reservoir site.[46] The Court further concluded that even if such a reservation had been accomplished, the evidence did not establish an intent by the United States to defeat the future state's title.

In deciding the Utah Lake case, the Court reiterated the strength of the equal footing doctrine, the strong "congressional policy to dispose of sovereign lands only in the most unusual circumstances," id. at 197, and the fact that a congressional intent to defeat a state's title to land under navigable waters is not lightly inferred, and "should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." Id. (quoting Holt State Bank, 270 U.S. at 55.). The Court repeated the high standard of proof applicable to the equal footing inquiry, which must "begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance unless the intention was definitely declared or otherwise made plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the waters of the stream." Id. at 198 (quoting Montana, 450 U.S. at 552 (omitting internal quotations and citations)).

In addition to reiterating the standard of proof necessary to defeat a state's acquisition of title under the equal footing doctrine, the Court in Utah Lake articulated two distinct inquiries to which that standard of proof applies:

> Given the longstanding policy of holding land under navigable waters for the ultimate benefit of the States,. . . we would not infer an intent to defeat a State's equal footing entitlement from the mere act of reservation itself. Assuming, arguendo,[47] that a [federal] reservation of land could be effective to overcome the strong presumption against the defeat of a state title, the United States would not merely be

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[46] The Court expressed some skepticism about Utah's argument that the United States completely lacked the power to reserve submerged lands to itself, even though it could convey such lands to third parties and thereby defeat a future state's title. Because the Court held, under the facts of the case, that no reservation was accomplished, it did not decide the question. See Utah Lake, 482 U.S. at 200-01. The dissent in Utah Lake expressly concluded that Congress does have the power under the Constitution "to prevent ownership of land underlying a navigable water from passing to a new state by reserving the land to itself for an appropriate public purpose." Id. at 209 (White, J., dissenting).

[47] See supra n. 46 and accompanying text.

> required to establish that Congress clearly intended to include land under navigable waters within the federal reservation; the United States would additionally have to establish that Congress affirmatively intended to defeat the future State's title to such land.

Id. at 202 (emphasis and bracketed material added).

The Court explained the two-pronged inquiry not as a new principle of law,[48] but as the logical corollary to the usual inquiry applied in cases involving a conveyance by the United States to a third party. The Court pointed out that "[w]hen Congress intends to convey land under navigable waters to a private party, of necessity it must also intend to defeat the future State's [title]," id., because once ownership has been conveyed away by the United States to a private party, the United States no longer has ownership to pass to the State at the time of statehood. A reservation of such lands to the Federal Government, however, does not automatically carry with it the necessary implication of defeating the future state's title, because continued federal ownership and control of reserved submerged lands during the territorial period is not "of necessity" inconsistent with permitting the future state to take title. Id. Therefore, the Court announced that when the United States seeks to establish its continued ownership based on a reservation, it must also establish, by the same standard of proof required for showing the initial reservation, that the reservation was intended to defeat state title.

In applying the above principles to the facts of the Utah Lake case, the Court first examined the language of the 1888 Act. It concluded that the general reservation accomplished by the statute did not expressly refer to and did not necessarily include lands under navigable waters. The Court reiterated the principle that "'Congress has never undertaken by general laws to dispose of' land under navigable waters." Id. at 203 (quoting Shively v. Bowlby, 152 U.S. 1, 48 (1894)). The Court also

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[48] In 1971, in United States v. City of Anchorage, 437 F.2d 1081, 1083 (9th Cir. 1971), the court of appeals similarly suggested a two-part inquiry in a case involving the Alaska Railroad Act. The court distinguished between the federal reservation of submerged lands and the retention of such lands after the admission of Alaska to the Union. The court held that the submerged lands by necessary implication had been reserved by the Federal Government and of necessity had been retained by the Federal Government at statehood. Id. at 1084-85; see United States v. Alaska, 423 F.2d 764 (9th Cir. 1970) (federal reservation and retention of submerged lands in Kenai Moose Range).

examined the purposes, goals, and structure of the Act, and concluded that it could not be construed to reserve lands beneath navigable waters. Id. at 207.

In addition, although the Geological Survey's statements concerning the Utah Lake site possibly suggested an intent to segregate and reserve the bed of the lake, the Court concluded that such statements "cannot be taken as unambiguous statements" and "need not be taken as a statement" of intent to include the lakebed within the 1889 reservation. Id. at 205 n.* & 206. Nor did the Court find in the 1890 Act of Congress, ratifying site selections, a "clear demonstration" of intent to ratify reservation of the bed of Utah Lake. Id. at 207. Thus, in light of the strong presumption against disposals or reservations of lands beneath navigable waters, the Court concluded that the evidence was insufficient to demonstrate such intent by the United States. Consequently, the Utah Lake site failed the first prong of the two-pronged test.

While this finding was sufficient to dispose of the case, the Court in Utah Lake also discussed the second prong of the inquiry for cases involving federal reservations. It concluded that even if a federal reservation of the lakebed had been effected, "Congress did not clearly express an intention to defeat Utah's claim to the lakebed under the equal footing doctrine upon entry into statehood." Id. at 208. The United States had offered no evidence of congressional intent to defeat Utah's entitlement. Id. Furthermore, based on the structure, history, and purpose of the 1888 Act, the Court concluded that the statute strongly suggested that Congress had no such intention. Id. The Court noted that "[t]he transfer of title of the bed of Utah Lake to Utah . . . would not necessarily prevent the Federal Government from subsequently developing a reservoir or water reclamation project." Id. (emphasis added). In other words, the federal purpose for reserving the submerged lands could be fully satisfied without the necessity of continued federal ownership at statehood.

Repeating the Holt State Bank standard as applied to both prongs of the inquiry, the Court concluded that "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.

I conclude that the Utah Lake decision did not change existing law concerning the equal footing doctrine. Both the strong presumption that lands beneath inland navigable waters are held in trust for future states, and the standard of proof required to overcome that presumption, are reaffirmed, but not changed by the Court. The Court reiterates the strong showing that must be made to defeat a state's title, citing most frequently the Holt State Bank summary that such intent is "not lightly to be inferred, and

should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." Utah Lake, 482 U.S. at 197, 198, 201-02, 207, 209.[49]

However, I also conclude that the Court has for the first time clearly identified the two-pronged nature of the inquiry to be undertaken when the United States claims continued federal ownership of title to lands beneath inland navigable waters after a state has been admitted to the Union. I think it critical to this analysis that while Utah Lake did not purport to change existing law or overturn the legal principles relied upon by Solicitor Krulitz, the Court has provided a clear articulation of the two-pronged inquiry with which to examine the conclusions reached by Solicitor Krulitz concerning federal reservation and retention of lands beneath inland navigable waters within the PLO 82 withdrawal area in northern Alaska.

Quite apart from the conclusions reached, the Krulitz Opinion employs an analytical framework which does not fully track with the equal footing approach contained in Utah Lake. Both the Krulitz Opinion and Utah Lake generally rely on the same well-established equal footing doctrine principles, but there is a disjuncture between the two. Certainly, while Solicitor Krulitz discussed extensively the Federal Government's intent to include lands beneath navigable waters within the lands reserved by PLO 82, he did not utilize the two-pronged inquiry articulated in Utah Lake, i.e., did the United States establish that Congress (1) clearly intended to include land under navigable waters within the reservation and (2) affirmatively intended to defeat future state title to such land. In addition, although Solicitor Krulitz analyzed and discussed the Alaska Statehood Act and the Submerged Lands Act, he did not distinguish clearly between the Submerged Lands Act and the equal footing doctrine, and did not address the relationship between the two. 86 I.D. 151, 172. Many of the facts and circumstances discussed by Solicitor Krulitz remain relevant to applying the Utah Lake inquiry to PLO 82 and the Statehood Act. Nevertheless, in light of the more precise guidance provided by Utah Lake, I believe the issues examined and conclusions reached by Solicitor Krulitz warrant reexamination.

III. APPLICATION OF THE UTAH LAKE TEST TO THE CREATION OF THE PLO 82 WITHDRAWAL IN 1943

In Section II., supra, I determined that the Utah Lake test applies to PLO 82. In this section, I will determine whether the

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[49] The standard of proof can also be satisfied, of course, if the intent "was rendered in clear and especial words, or . . . the claim confirmed in terms embraces the land under the waters of the stream." Utah Lake, 482 U.S. at 198.

executive withdrawal in 1943 satisfied the two-part test. In Section IV., infra, I will examine congressional and executive actions through the revocation of PLO 82 to determine whether Congress or the Executive Branch affirmatively intended to defeat Alaska's title to lands underlying inland navigable waters within PLO 82. In Section V., infra, I will apply the Utah Lake test to the Alaska Statehood Act.

I believe it is necessary to examine the withdrawal at its inception, subsequent congressional and executive actions, and relevant statutory language at the time of statehood to ensure that Congress' intent in this matter is known. To the degree an executive withdrawal encompassed submerged lands and was intended to defeat state title, congressional ratification of a withdrawal without submerged lands would indicate that title to the submerged lands passed to the state at the time of statehood.

It has been argued by the State of Alaska that an executive withdrawal -- rather than a congressional act of reservation -- cannot alone defeat state title to the submerged lands.[50] That proposition is not at issue in this Opinion because I have determined that Congress, in the Alaska Statehood Act, did address the disposition of the entire area encompassed by PLO 82 in northern Alaska. As noted above, the Statehood Act will be discussed in detail in Section V., infra.

A. Application of the Utah Lake Decision to Executive, as Well as Congressional, Withdrawals

The two-part test in Utah Lake referred specifically to the intent of Congress -- not the Executive Branch -- to reserve and retain submerged lands. The Court in Utah Lake did not address the question whether the Executive, as well as Congress, may withdraw or reserve submerged lands so as to defeat a future state's title. Utah Lake involved a purported congressional withdrawal of lands under the Sundry Appropriations Act of 1888, 25 Stat. 505 and ratification of executive action in the 1890 Act. PLO 82 was an executive withdrawal issued by Acting Secretary of the Interior Fortas pursuant to a delegation of authority by President Franklin D. Roosevelt. The delegation was accomplished by Executive Order No. 9146, which, in turn, was issued under the authority of the Pickett Act, 36 Stat. 847, and the powers of the President. The Supreme Court has long recognized that the Executive Branch acts as the agent for Congress in exercising its constitutional authority over the public domain. United States v. Midwest Oil Co., 236 U.S. 459,

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[50] See Alaska's Second Supplemental Brief on Questions 8, 9, 10 and 11 of the Joint Statement of Questions Presented and Contentions of the Parties, at 22-23, United States v. Alaska, No. 84, Original (brief filed September 23, 1987).

471-475 (1915).[51] To the degree an executive withdrawal has been ratified by Congress, the authority for defeasance of state title is clear. Thus, in this case, it is important to examine the Executive's intent at the time of withdrawal and Congress' intent at the time of statehood. This analysis focuses on the PLO 82 withdrawal to adduce intent.

B. Intent to Withdraw Lands under Inland Navigable Waters

The text and purpose of PLO 82 demonstrate that the Secretary clearly intended to include lands underlying inland navigable waters in the withdrawal in 1943. Many of the legal and evidentiary considerations discussed in the Krulitz Opinion are relevant to the Utah Lake inquiry even though Solicitor Krulitz did not explicitly apply the strong presumption in favor of state title to lands beneath inland navigable waters within pre-statehood reservations. His exhaustive analysis of the Secretary's intent to withdraw inland submerged lands, including an examination of the history, language and purpose of PLO 82, comports fully with the equal footing inquiry of Holt State Bank, supra, reaffirmed in Utah Lake. The most compelling evidence of secretarial intent to include inland submerged lands within the PLO 82 withdrawal follows.

First, the all-inclusive language of PLO 82, withdrawing "all that part of Alaska" north of the Brooks Range and the De Long Mountains, including "the watershed northward to the Arctic Ocean," evinced a clear intent by the Secretary to include inland submerged lands within the areas withdrawn on the North Slope. 86 I.D. 151, 160. This intent was reinforced by a contemporaneous map of the withdrawal outlining the vast area, without excluding any bodies of waters or lands beneath them. Id. at 161-62, 164.

Second, PLO 82's reference to "public lands" was consistent with an intent to withdraw submerged lands under contemporaneous judicial and Departmental precedents construing various statutory land withdrawals in Alaska. Id. at 155-57. These precedents established that a construction of "public lands" to embrace submerged lands was essential if it furthered the purpose of the withdrawal. Alaska Pacific Fisheries Co. v. United States, 248 U.S. 78, 87 (1918) (intent to reserve submerged lands may be determined by necessary inference from the purposes of the

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[51] See supra n. 21. See also U.S. Const. Art. IV, § 3, cl. 2 (Property Clause) and Art. I, § 8, cl. 18 (Necessary and Proper Clause).

reservation);[52] Hynes v. Grimes Packing Co., 337 U.S. 86, 116 (1949) (1936 statute authorizing Secretary of the Interior to withdraw "public lands" in Alaska included submerged lands in light of the withdrawal's purpose).

Third, the purpose of PLO 82 supports a finding that Secretary Ickes intended to withdraw inland submerged lands in his 1942 direction to Departmental officials to proceed with the PLO 82 withdrawal. Background documents demonstrate the order was primarily aimed at protecting the oil and gas resources of the three regions designated in PLO 82 for possible federal development in support of World War II.[53] Submerged lands in Alaska in 1943 were subject to entry and location under the mining laws and mineral leasing laws. 86 I.D. 151, 159, 168. Not including submerged lands within PLO 82 would have frustrated its purpose.

This situation contrasts sharply with that in Utah Lake, where the Court found the lakebed was not subject to settlement, location, or entry under the public land laws applicable in Utah. Further, by virtue of the navigational servitude ownership of the lakebed was not necessary to carry out the purposes of the withdrawal, i.e., reservoir protection. Thus, the Supreme Court found no need to infer a reservation of the bed of Utah Lake in connection with the federal reservation at issue there.[54]

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[52] The Supreme Court stated in Alaska Pacific Fisheries Co. v. United States, 248 U.S. 78, 87 (1918):

> The principal question for decision is whether the reservation created by the Act of 1891 embraces only the upland of the islands or includes as well the adjacent waters and submerged land. The question is one of construction -- of determining what Congress intended by the words "the body of lands known as Annette Islands."
>
> As an appreciation of the circumstances in which words are used usually is conducive and at times is essential to a right understanding of them, it is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reservation was created -- the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians and the object to be attained.

[53] See supra n. 24 and accompanying text.

[54] The Court noted that "[t]he transfer of title of the bed of Utah Lake to Utah . . . would not necessarily prevent the Federal (continued...)

In this case, excluding lands under inland navigable waters from the PLO 82 withdrawal would have been incompatible with the Secretarial intent to withdraw all the petroliferous areas of the North Slope for use in the war effort. Such an exclusion might have left as much as 25 percent of the potentially most productive areas on the North Slope outside of the withdrawal and available for private entry or leasing.[55] It would have been highly illogical indeed for Secretary Ickes to have directed the withdrawal of the uplands for federal oil and gas development, but to have permitted the potential draining of the federal petroleum reserves by third party leasing of submerged lands within the withdrawn area.

For the foregoing reasons, I agree with Solicitor Krulitz that the Secretary in 1943 clearly intended to include the lands under inland navigable waters within the PLO 82 withdrawal on the North Slope.

C. Intent to Defeat the Future State's Title

Even if inland submerged lands on the North Slope of the Territory of Alaska were included in the PLO 82 withdrawal in the first instance, Utah Lake additionally requires a determination of affirmative intent on the part of the Federal Government to defeat the future State of Alaska's title to the submerged lands upon Alaska's admission to the Union. This is the second prong of the Supreme Court's analysis in Utah Lake. As the Court explained, the Federal Government may intend to reserve lands under inland navigable waters for a particular purpose but also intend to let the state obtain title to those lands at statehood. 482 U.S. at 202. Although the Court did not specify the time period to which the second part of the Utah Lake inquiry applies, I will focus in this section on the intent of the Federal Government at the time of PLO 82's creation in 1943.

Under the test outlined in Utah Lake, the United States must establish that the withdrawal of inland submerged lands within PLO 82 was intended to defeat Alaska's title by the same standard of proof that is required for showing that submerged lands were included in the initial withdrawal. This is a rigorous standard, which the United States failed to meet in Utah Lake. The Supreme

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[54](...continued)
Government from subsequently developing a reservoir or water reclamation project at the lake." 482 U.S. at 208 (emphasis added).

[55] See claims made by the State of Alaska in Alaska v. United States, Civ. No. A-83-343, pending in the federal district court in Alaska.

Court reasoned that the United States had presented no evidence of a congressional intent to defeat Utah's claim to the bed of Utah Lake under the equal footing doctrine, "and the structure and the history of the 1888 Act strongly suggest that Congress had no such intention." 482 U.S. at 208. The Court noted that the Act, on its face, did not purport to defeat the entitlement of future states to any land reserved under the Act. Id. It further noted that the broad scope of the 1888 Act, which effectively reserved all public lands in the western United States, id., was inconsistent with an intent to defeat a future state's title to the land under navigable waters within the reservation, in light of the congressional policy of defeating state's title to such lands only "in exceptional instances" involving "international duty or public exigency." Id., quoting United States v. Holt State Bank, 270 U.S. at 55.

Applying the above principles to the PLO 82 withdrawal in 1943, I find that many of the same considerations in Utah Lake are present here. Like the 1888 Act in Utah Lake, PLO 82, on its face, did not purport to defeat for all time the future State of Alaska's equal footing entitlement to inland submerged lands withdrawn by PLO 82. Moreover, the broad language of PLO 82 is similarly difficult to reconcile with an intent to defeat Alaska's title to the lands under navigable water within the withdrawal area. Under the Court's reasoning in Utah Lake, these factors alone strongly suggest that Acting Secretary Fortas did not manifest an intention to defeat permanently any future state's entitlement to the inland submerged lands within the PLO 82 withdrawal in 1943.

On the other hand, as the caption of the order indicates, PLO 82 withdrew public lands "for use in connection with the prosecution of the war." Solicitor Krulitz aptly described PLO 82's relationship to the prosecution of World War II as "a 'public exigency' beyond challenge." 86 I.D. 151, 174. I agree. The North Slope of Alaska was of critical strategic importance during World War II, given its petroleum reserves and proximity to the Pacific theater. Applying the second prong of the Utah Lake test to the withdrawal in 1943, had statehood been imminent, I would conclude as a necessary inference flowing from the purpose of the withdrawal, that inland submerged lands were intended to be retained in federal ownership. However, no petitions seeking statehood were pending before Congress when PLO 82 was issued on January 3, 1943. In fact, only one statehood bill had even been introduced in Congress up to that time--in 1916, some twenty-seven years before the issuance of PLO 82.[56] A thorough review

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[56] The second statehood bill was introduced by Delegate Anthony Dimond in December 1943, almost one year after PLO 82 was signed. See "Alaska's Struggle for Statehood," 39 Neb. L. Rev. 253, 256-
(continued...)

of the Departmental files from this period found at the National Archives has been conducted.[57] The review has produced no evidence to suggest that Acting Secretary Fortas had even considered the effect of this withdrawal on the title to submerged lands upon future statehood, let alone formulated an intent to defeat the future state's title to submerged lands located therein. Thus, the second prong of the Utah Lake test had not been met as of the date of the original withdrawal.

Because the second prong of this test was not met at the time PLO 82 was issued, and with the termination of World War II upon which the original withdrawal was grounded, it is necessary to determine whether the Executive, Congress, or both, subsequently formulated a clear intent to withhold the submerged lands within this withdrawal from a future state.

IV. CONGRESSIONAL AND EXECUTIVE ACTIONS THROUGH REVOCATION OF PLO 82 IN 1960

Because I have concluded that in 1943 PLO 82 only met the first prong of the Utah Lake test but did not meet the second prong, I will now look to congressional and executive actions between 1943 and 1960 to determine whether Congress or the Executive Branch affirmatively intended to defeat Alaska's title to the lands beneath inland navigable waters within PLO 82.

A. Pre-Statehood Congressional Policy Concerning Submerged Lands in Alaska

In 1898, a congressional policy was articulated to hold submerged lands underlying navigable waters in trust for any future state or states created out of the Territory of Alaska. Alaska Right-of-Way Act, 30 Stat. 409. In pertinent part, the Act reads:

> Provided, That nothing in this Act contained shall be construed as impairing in any degree the title of any State that may hereafter be created out of said

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[56](...continued)
57 (1960). Former Secretary of the Interior Seaton stated in his article that "although a small but increasing number of Alaskans had considered and discussed statehood for several preceding years, 1945 can be noted as the beginning of the active statehood movement." Id. at 257.

[57] These files are located within Record Group 48, Central Classified Files, Civil Division, U.S. Department of the Interior, United States National Archives and within Record Group 80, Military Records, U.S. Department of the Navy, United States National Archives. In addition, records of Secretary Seaton contained at the Eisenhower Library were reviewed.

> District, or any part thereof, to tide lands and beds of any its navigable waters, or the right of such State to regulate the use thereof, nor the right of the United States to resume possession of such lands, it being declared that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said District.

30 Stat. 409.[58] The 1898 Act, read as a whole and giving meaning to each of its various provisions, demonstrates a congressional policy and goal that lands be held "in trust for the people" of any state or states created out of the District, later Territory, of Alaska.[59]

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[58] The Alaska Right-of-Way Act is codified at 43 U.S.C. §§ 687a, 687a-2 - 687a-5, and 942-1 - 942-9 and 16 U.S.C. §§ 607a and 615a.

[59] The Alaska Right-of-Way Act appears to be a statement that the equal footing doctrine would apply to Alaska. The proviso was enacted by Congress following the decision by the United States Supreme Court in Shively v. Bowlby, 152 U.S. 1 (1893), which held that during territorial administration Congress might grant title or exclusive rights to land in a case of international duty or public exigency. During Alaska Statehood deliberations Congress discussed the significance of the equal footing doctrine and the Alaska Right-of-Way Act:

> SENATOR CORDON. Another question that we have to determine is that of land beneath navigable waters above high tide. Again my understanding of the law is that the title to lands beneath the navigable waters goes to the State by virtue of its admission as a State.
>
> SENATOR JACKSON. That is my understanding.
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> * * *
>
> SENATOR JACKSON. . . . The Supreme Court has passed on the question in a number of decisions, and has held that the beds of navigable streams belong to the State.
>
> MR. SLAUGHTER [Chief, Reference Division, Office of Legislative Counsel, Department of Interior]. That is correct.
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> * * *

(continued...)

[59](...continued)

SENATOR JACKSON. . . . It is a rule of law that the Court has adopted, based on State sovereignty, that the beds of the streams themselves belong to the States; that all 48 States have that property right.

MR. BENNETT [Assistant Solicitor of the Department of the Interior and Legislative Counsel]. I think the Supreme Court has discussed it also in terms of the lands having been federal prior to the admission of the State and then the "equal-footing" clause gives a newly admitted State the same right that the Original Thirteen had; and the Original Thirteen had that title by virtue of sovereignty. So you have the new States coming in on the same footing due to the "equal-footing" clause.

* * *

MR. SLAUGHTER. Furthermore, in the case of Alaska, in the 1898 statute [the Alaska Right-of-Way Act], the Congress specifically included a provision which was referred to in the committee the other day, looking forward to ultimate transfer to the State.

SENATOR CORDON. What is that provision?

MR. SLAUGHTER. It says:

> Provided, That nothing in this act shall be construed as impairing in any degree the title of any State that may hereafter be erected out of the Territory of Alaska any part thereof, to tidelands and beds of any of its navigable waters, nor the rights of such State to regulate the use thereof, nor the right of the United States to resume possession of such lands, it being declared that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said Territory.
>
> The term "navigable waters" as herein used shall be held to include all tidewater up to the line of ordinary high tide and all nontidal waters of navigable streams up to the line of ordinary high water mark.

(continued...)

The same Congress that passed the ASA considered and enacted two laws that acknowledged continued vitality of the Alaska Right-of-Way Act of 1898. Oil and gas leasing legislation was enacted to allow federal leases to include all lands within the described boundaries of a lease, including any water bottoms under inland navigable waters. 72 Stat. 322 (1958 Alaska Oil and Gas Act). Since there was no authority to lease the lands beneath the waters themselves,[60] in most instances the Bureau of Land Management affixed a statement by rubber stamp to exclude lands within the described boundary which may be beneath navigable waters. See S. Rep. No. 1720, 85th Cong., 2d Sess. 4 (1958).

As a result, development of oil resources was impeded because most developers were reluctant to proceed if "later legislation might open up water bottoms to leasing by others who . . . could come in and acquire lands in any oil structure which might be

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[59](...continued)
Admission of Alaska in the Union: Hearings on S. 50 before the Senate Committee on Interior and Insular Affairs, 83d Cong., 2d Sess. 223-24 (1954) (bracketed material added).

A memorandum to the same effect was prepared for the Committee and included in the printed hearings. In pertinent part the memorandum states, "As to the submerged lands inland from the low-tide mark, a new State would become vested with title thereto upon admission, under the Pollard and equal footing rules." Id. at 225.

[60] As stated in the Senate Report for H.R. 8054 (1958 Alaska Oil and Gas Act):

> Under existing law, no person or agency has the power to grant oil or gas leases in areas beneath navigable waters. Such authority is precluded by the act of May 14, 1898 . . . which declares that tidelands and the beds of navigable waters within the Territory are held in trust for the State or States which may be erected out of the Territory.

S. Rep. No. 1720, 85th Cong., 2d Sess. 3 (1958).

In his letter to Congress transmitting proposed legislation Hatfield Chilson, Under Secretary of the Interior, noted that the Federal Government only had authority to lease lands bordering inland navigable waters. "At the present time neither the Federal Government nor the Territory has authority to lease these water-covered areas, which are held in trust for the benefit of a future State or States." Id. at 9.

discovered . . . ." Id. Conceivably the "later legislation" referenced in the Senate Report could be eventual statehood for Alaska resulting in a state leasing program for lands underlying inland navigable waters.[61]

As a result of this dilemma, on July 3, 1958, four days before enactment of the recently passed Alaska Statehood Act, the 1958 Alaska Oil and Gas Act was enacted, providing for leasing of oil and gas deposits in lands beneath nontidal waters in the Territory of Alaska:

> Sec. 2. All deposits of oil and gas owned or hereafter acquired by the United States in lands beneath nontidal navigable waters in the Territory of Alaska . . . may be leased . . . by the Secretary under and pursuant to the provisions of the Mineral Leasing Act. . . .
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> * * *
>
> Sec. 7. Upon the transfer to the Territory of Alaska or to any future State or States erected out of the Territory of Alaska of title to any of the lands beneath nontidal navigable waters . . . the provisions of this Act shall cease to apply to any lands which are so transferred . . . but all the right, title, and interest of the United States under such lease (or application or offer for lease) . . . shall vest in the Territory of Alaska or the State to which title to those lands beneath nontidal navigable waters . . . is transferred.

72 Stat. 322, 323-24. The 1958 Alaska Oil and Gas Act clearly

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[61] Review of the House Interior and Insular Affairs Committee Report for H.R. 8054 (1958 Alaska Oil and Gas Act) illustrates that the House Committee had Alaska Statehood in mind at the time it considered the bill:

> The committee reiterates that title to the water-covered lands involved in H.R. 8054, under the terms of Alaska statehood legislation now pending in the House--and indeed as contained in earlier bills which in the past were approved at different times by both Houses of the Congress--would pass to Alaska upon her admission into the Union. It is believed that, pending favorable action on statehood legislation, enactment of H.R. 8054 will serve to stimulate prospecting and development of the oil and gas resources in the inland underwater and abutting areas of the Territory of Alaska.

H.R. Rep. No. 774, 85th Cong., 1st Sess. 2 (1957).

anticipated Alaska Statehood by requiring that the preference leasing right established by the Act would cease to apply to lands beneath nontidal navigable waters upon transfer of such lands to the Territory of Alaska or to any future state created out of the Territory of Alaska. Id. at 324. However, for any lease issued pursuant to the 1958 Alaska Oil and Gas Act (or application or offer for such a lease) and existing at the time of statehood, Congress provided that the new State of Alaska would take title to the lands subject to the existing lease or application or offer for such a lease which might later become effective. Id.

The Alaska Right-of-Way Act of 1898 was also cited during consideration of the legislation which granted title to the Territory of Alaska to all lands offshore surveyed townsites between the line of mean high tide and the pierhead line. 71 Stat. 623 (1957 Alaska Tidal Waters Act) Reference to the Alaska Right-of-Way Act appeared in the Senate and House Committee Reports for the 1957 Alaska Tidal Waters Act as well as the Interior Department letter transmitting the proposed legislation.[42] Further, while the 1957 Alaska Tidal Waters Act granted title to the Territory to tidal lands including oil and gas deposits offshore surveyed townsites, it excepted all oil and gas deposits located between the line of mean high tide and the pierhead line along the Arctic Coast of NPR-4. 71 Stat. 623, 624.

Other Alaska legislation from this period is not so illuminating. For example, legislation which provided for selection by the territorial government of 1 million acres from vacant, unappropriated, and unreserved public lands. 70 Stat. 709 (1956 Alaska Mental Health Act) Section 202(c) of the Act affirmatively stated that mineral deposits within selected lands were to be included in the grant, except that: "mineral deposits in lands which on January 1, 1956, were subject to public land order numbered 82 of January 22, 1943, shall not be included in

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[42] The letter states in part:

> The tidelands in Alaska . . . are reserved for the future State by section 2 of the act of May 14, 1898 (citations omitted). Consequently, these tidelands may be disposed of only as Congress provides in the future. In the meantime this Department has the responsibility of administering these lands, without the authority to dispose of them, to lease them, or to grant, in any permanent form, permission to use them.

H.R. Rep. No. 950, 85th Cong., 1st Sess. 3 (1957), transmittal letter to Congressman Sam Rayburn, February 20, 1957, by Hatfield Chilson, Assistant Secretary of the Interior.

said grants, but shall continue to be reserved to the United States." 70 Stat. 709, 711. This provision indicates that in 1956 Congress recognized the continued viability of PLO 82 and expressed its desire to reserve minerals within PLO 82 from conveyance to the Territory. The 1956 Alaska Mental Health Act also limited selections to vacant and unappropriated lands, which arguably would not include lands within PLO 82 considered withdrawn from application of the public land laws in 1956. Another interpretation was that section 202(c) was needed in case PLO 82 lands were selected around communities in the PLO 82 withdrawal area. Yet another interpretation is that even if PLO 82 were revoked, the state could not get title to minerals in lands which on January 1, 1956 were withdrawn by PLO 82. Legislative history on this provision is minimal, since the language was adopted without debate on the Senate floor. See 102 Cong. Rec. 9760 (1956); see also S. Rep. No. 2053, 84th Cong., 2nd Sess. (1957) (oil and gas lands withdrawn by NPR-4 would not be available for selection, not being in the vacant, unappropriated, unreserved category).

From this brief review of pre-statehood congressional policy concerning submerged lands in Alaska, it is evident that Congress intended to effectuate the equal footing doctrine and understood its legal significance. Contemporaneous with the statehood proceedings, Congress recognized that the Federal Government holds submerged lands in trust for a future state. It is also evident that when Congress burdened the operation of the equal footing doctrine, it did so in clear terms, e.g., the State would take title subject to leases issued under the 1958 Alaska Oil and Gas Act. Congress considered the issues associated with the oil and gas reserves in NPR-4 and the minerals within PLO 82, and unequivocally provided protection for these resources in the 1957 Alaska Tidal Waters Act and 1956 Alaska Mental Health Act, respectively. As demonstrated in Section V., infra, the statehood proceedings also imply an intent to retain under federal administration and management the varied and diverse federal reservations owned by the United States in Alaska, most of which were previously withdrawn public lands.

B. Executive Branch Policy Concerning Federal Withdrawals in Alaska

It is not surprising, considering the large areas withdrawn by the Federal Government prior to statehood, that throughout the Alaska Statehood proceedings, Congress expressed dissatisfaction with large federal withdrawals and reservations in the Territory.[63] See, e.g., S. Rep. No. 1028, 83d Cong., 2d Sess. 2-7 (1954); H.R. Rep. No. 624, 85th Cong., 1st Sess. 5-8 (1957). This congressional concern was recognized by the Department of

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[63] See supra n. 13.

the Interior and the Department of Defense. The Secretary of the Interior's memorandum (signed by Assistant Secretary Orme Lewis) of May 18, 1953, directed the heads of bureaus and offices to review land withdrawals in Alaska to "reduce or revoke withdrawals . . . whenever it is found that the withdrawals are not required for some essential purpose."[64]

In 1954, as a part of the Alaska Statehood hearings, the Senate Interior and Insular Affairs Committee heard testimony from Department of Defense officials on what lands reserved or withdrawn in the Territory of Alaska for the military could be returned to the public domain. Department of Defense testimony indicates that the total amount of acreage owned or controlled by Defense was less than 3.5 million acres at the time.[65] The gross acreage for the Navy was given as 648,000 acres, but it was acknowledged that the figure did not include the petroleum reserves of 48,800,000 acres controlled by the Navy.[66] After questioning by committee members regarding the need for retaining the entire 48,800,000 acres (comprising PLO 82), the Navy witness indicated that a decision to release any of the lands would have to be reached with the approval of the President and the Congress.[67] In response to specific questions, the Department of the Navy submitted a letter for the record that reads in pertinent part:

> (a) Are there plans for future activity at Naval Petroleum Reserve No. 4?
>
> Exploration work in the reserve was suspended last year after consultation with the Senate and House Armed Services Committees . . . . No further exploration nor oil field development is planned for this reserve . . . .
>
> (b) Can the Navy give up either the whole or part of the oil and gas reserve?
>
> The Navy would interpose no objection to returning the reserve to the public domain under the administration of the Interior Department. This, however, is a policy matter for determination by the White House and by Congress through the Senate and House Armed Services

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[64] S. Rep. No. 1028, 83d Cong., 2d Sess. 40 (1954).

[65] Senate Interior and Insular Affairs Committee Hearings on Alaska Statehood, 83d Cong., 2d Sess. 160 (1954) (1954 Senate Hearings).

[66] Id. at 161.

[67] Id. at 166.

Committees. Insofar as the oil potential of this territory is concerned, the Navy's primary interest is in its ultimate economical development whether by private or governmental interests.

(c) Are there security aspects which would prevent the return of the reserves?

There are no security considerations with regard to the area of Naval Petroleum Reserve No. 4, although certain limited portions are utilized by the Air Force.

1954 Senate Hearings, supra at 191.

As the Department of the Interior moved toward eventual revocation of PLO 82, it sought the views of appropriate executive and congressional sources with an interest in the PLO 82 lands.[68] On April 1, 1953, Director of the Bureau of Land Management Marion Clawson wrote a letter to Rear Admiral Joseph F. Jolley, Chief of the Bureau of Yards and Docks, Department of the Navy, asking whether the Navy had "a continuing need for the public lands adjacent to and included within Naval Reserve No. 4 and whether Executive Order No. 3797-A of February 27, 1923, establishing the reserve, and Public Land Order No. 82 be modified or revoked, in whole or in part."[69] This letter

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[68] On November 20, 1957, Secretary Seaton announced plans to open 20 million acres in Alaska to mining and mineral leasing. See "Secretary Seaton Plans to Open 20 Million Acres in Alaska to Mining, Mineral Leasing; Biggest Wildlife Range Sought" Department of Interior, Information Service, November 20, 1957. A summary of the Executive Branch actions associated with PLO 82 appears in the Department of the Interior materials released on November 20, 1957 in conjunction with Secretary Seaton's announcement of plans to open 20 million acres in Alaska to mining and mineral leasing were: (1) Statement of Secretary Fred A. Seaton on "Steps to Open Twenty Million Acres in Northern Alaska to Mining and Mineral Leasing"; (2) "Background Summary of Proposed Modification of Public Land Order No. 82" (Background Summary); (3) "Map of Alaska"; and (4) Statement by the Governor of the Territory of Alaska, Michael A. Stepovich, on "Proposed Modification of Public Land Order No. 82."

[69] In fact, revocation of PLO 82 was contemplated by the Executive in the late 1940's. The Secretary of the Interior wrote to the Department of the Navy on March 31, 1948, asking the Department of Navy's views on revoking PLO 82. In his response Secretary of the Interior J.A. Krug, Acting Secretary to the Navy W. John Kenney opposed revoking PLO 82 until exploration had proceeded to a point where it could be evaluated as a military petroleum reserve.

states that Mr. Clawson had received inquiries on the matter from the Alaska Delegate to Congress, E.L. Bartlett, and from Robert A. Smithson, President of the Anchorage Chamber of Commerce. By May 5, 1954, the Secretary of the Navy clearly articulated the Navy's view that it would have no objection to the revocation of PLO 82 as long as NPR-4 was preserved.[70] To ensure that this occurred, the Assistant Secretary of the Navy requested that any revocation order specifically exempt the lands of NPR-4 from its provisions.[71] On June 4, 1955, the Acting Secretary of the Interior wrote to the Chairmen of the House and Senate Armed Services Committees and the House and Senate Interior and Insular Affairs Committees requesting their views on the revocation of PLO 82.[72] The only response was from the Chairman of the House Armed Services Committee who expressed his satisfaction in a June 7, 1955 letter that Interior would leave intact NPR-4.[73]

A transcript from a conference held on May 17, 1954, further indicates that the Department of the Interior contemplated revocation of PLO 82:

> Land Management proposes to revoke the order within a very short time, perhaps about June 1, 1954, but the revocation will state that the area will not be open for oil and gas leasing until the expiration of a 90-day waiting interval to permit any persons interested to study the available technical data and until such time as a land survey net is projected on paper over the area and announcement is made of the availability of the lands for leasing . . . . [A]bout September 1954, [Land Management] will be able to open at least the Gubik structure for application . . . periodically, from then on, other areas will be opened according to the interest priority.

Comments of Irving Senzel, Assistant to the Chief, Division of Lands, Bureau of Land Management, at Conference on Northern Alaska, May 17, 1954, John C. Reed, Staff Coordinator, U.S. Geological Survey, serving as Chairman (bracketed material added). This passage indicates that in 1954 BLM contemplated a phased opening of northern Alaska, including the Gubik structure, to leasing. These plans for a phased leasing program were eventually set in motion in 1958 with the modification of PLO 82

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[70] See Background Summary at 3.

[71] Id. at 3.

[72] It was mentioned in the letters that some of the lands of PLO 82 might be reserved for defense purposes.

[73] See Background Summary at 4.

by PLO 1621.[74]

C. PLO 1621 Plainly Demonstrates an Executive Intent to Defeat State Title to Submerged Lands within ANWR and NPR-4

PLO 1621 was signed on April 18, 1958. At the time of Alaska Statehood, PLO 82 had been amended or modified eighteen times. In anticipation of what would eventually become PLO 1621, the Department of the Interior publicly announced on November 20, 1957, plans to open 20 million acres of PLO 82 to mineral leasing and mining claims; to set aside a total of 9 million acres, of which 5 million acres were within PLO 82, for the proposed Alaska National Wildlife Range; to continue to bar entry into NPR-4; and, to further protect the 23 million acres of NPR-4 by establishing a two mile buffer along the border of the petroleum reserve which would account for the balance of the acres withdrawn by PLO 82.[75] In part, these plans were eventually made effective with the issuance of PLO 1621 on April 18, 1958.[76]

By specifically citing NPR-4 and the withdrawal application for the Arctic National Wildlife Range in PLO 1621, the Executive Branch enhanced the underlying protection provided by PLO 82 by plainly demonstrating the goal of retaining ANWR and NPR-4 in federal ownership. Furthermore, PLO 1621 did not revoke any

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[74] PLO 1621, 23 Fed. Reg. 2637 (1958).

[75] See supra n. 68.

[76] 23 Fed. Reg. 2637-38 (1958). PLO 1621 stated that approximately 16,000 acres of lands to be opened to mineral development lay within the known geologic structure of the Gubik gas field and that the area would be offered for oil and gas leasing through competitive bidding. On July 25, 1958, the Department announced its plan to lease 16,000 acres of public lands in the Gubik Field on a competitive basis and 4 million adjoining acres on a non-competitive basis. According to a September 4, 1958, New York Times article, bids for Gubik Field were opened September 3, 1958. On July 29, 1958 notice was published (23 Fed. Reg. 5700 (1958) announcing the availability of 4 million acres in the PLO 82 area for noncompetitive leasing. The notice stated that approved leasing maps describing the 4 million acres of land had been prepared. According to testimony by Max Caplan, Minerals Staff Officer, Bureau of Land Management, by 1959 some leasing maps had been prepared and 4 million acres were opened to noncompetitive leasing in October of 1958 as well as 16,000 acres to competitive leasing in the Gubik gas field. Alaska Mineral Leasing, Hearing before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, United States Senate [Misc. Bills], 86th Cong., 1st Sess. 17 (1959).

prior orders, but rather was a modification of PLO 82. Thus the modification left in place prior withdrawals such as PLO 82 and Executive Order No. 3797-A. As a matter of longstanding interpretation of public land orders, PLO 82 could only be terminated by express revocation, as was done in 1960 by PLO 2214.[77] In other words, public land orders are not revoked by "modification" or repealed by implication.

Departmental regulations existing at the time of the Arctic National Wildlife Range application expressly protected the lands from entry until final action was taken on the withdrawal. The Arctic National Wildlife Range application for withdrawal[78] was made pursuant to the provisions of 43 C.F.R. 295.9-295.15 (1959 Supp.). In pertinent part the applicable regulations provided:

> The noting of the receipt of the application . . . shall temporarily segregate such lands from settlement, location, sale, selection, entry, lease and other forms of disposal under the public land laws, including the mining and the mineral leasing laws . . . until final action on the application for withdrawal or reservation has been taken.

43 C.F.R. § 295.11 (1959 Supp.).

Attached to the application was a justification memorandum of November 7, 1957, from the Director, Bureau of Sport Fisheries and Wildlife to the Director, Bureau of Land Management.[79] The memorandum definitely declares that the Arctic National Wildlife Range required both submerged lands and uplands to effectuate the purposes of the withdrawal. The memorandum states in pertinent part:

> The portion of the Arctic plain included in the proposal is a major habitat, particularly in summer, for the great herds of Arctic caribou, and the countless lakes, ponds, and marshes found here are nesting grounds for large numbers of migratory

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[77] Wilbur v. United States, 46 F.2d 217 (1930), aff'd 283 U.S. 414 (1931).

[78] The proposed ANWR withdrawal was modified twice to preclude mining locations until on or after September 1, 1959, and until on or after September 1, 1960. See 23 Fed. Reg. 7592 (1958); 24 Fed. Reg. 7143 (1959).

[79] See letter dated June 16, 1976 from Robert E. Price, Regional Solicitor, U.S. Department of the Interior to Mr. Gordon Watson, Area Director, U.S. Fish and Wildlife Service at 3.

> waterfowl that spend about half of each year in the United States. Thus the production here is important to a great many sportsmen. The river bottoms with their willow thickets furnish habitat for moose. This section of the seacoast provides habitat for polar bears, Arctic foxes, seals, and whales.

The final public land events relevant to PLO 82 occurred after statehood. On December 6, 1960, after Congress failed to enact legislation to establish the Arctic National Wildlife Range with limited mineral entry,[80] the Secretary established the Arctic National Wildlife Range under the authority delegated by Executive Order 10355[81]:

> 1. For the purpose of preserving unique wildlife, wilderness and recreational values, all of the hereinafter described area in northeastern Alaska, containing approximately 8,900,000 acres is hereby, subject to valid existing rights, and the provisions of any existing withdrawals [e.g., PLO 82], withdrawn from all forms of appropriation under the public land laws, including the mining but not the mineral leasing laws. . . ,and reserved for use of the United States Fish and Wildlife Service as the Arctic National Wildlife Range.

25 Fed. Reg. 12598-99 (1960) (emphasis and bracketed material added). That same day, the Secretary revoked PLO 82 by PLO 2215, advising that the area subject to the revocation contained approximately 48,000,000 acres. The order, however, preserved previous NPR-4 withdrawals within the PLO 82 area and further provided:

> 2. The following-described lands lying within the exterior boundaries of the area described in paragraph 1 [PLO 82] are withdrawn by Executive Order No. 3797-A of February 27, 1923 for Naval Petroleum Reserve No. 4, for classification, examination and preparation of plans for development and until otherwise ordered by the Congress or the President.
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> * * *
>
> The area described contains approximately 23,000,000 acres. Jurisdiction over the lands in [NPR-4] is vested in the Department of the Navy [citations omitted]. These lands, therefore, are not affected by

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[80] See H.R Rep. No. 771, 86th Cong., 1st Sess. (1959).

[81] Exec. Order No. 10355, 3 C.F.R. 873-74 (1949-1953).

the opening hereinafter provided by this order.

25 Fed. Reg. 12599 (1960) (emphasis and bracketed material added). The order continues in section 3 by notifying the reader that the PLO 82 lands in paragraph 1 also included the area described in a Bureau of Sport Fisheries and Wildlife withdrawal application and remained "segregated" from all forms of disposal under the public land laws until final action was taken on the withdrawal application. This provision of the order assured that there was no lapse or hiatus between establishing the range and revoking PLO 82.[82] PLO 2215 also provided notice that the prior withdrawal for NPR-4 remained in effect.

Submerged lands were included within ANWR and NPR-4 by "necessary implication." See United States v. State of Alaska, 423 F.2d 764, cert. denied, 400 U.S. 967 (9th Cir. 1970); United States v. City of Anchorage, 437 F.2d 1081 (9th Cir. 1971). In the case of ANWR, one of the stated purposes of the range was the protection not only of the land habitat of certain species but also the water habitat for migratory waterfowl and such mammals as polar bears, seals and whales. Therefore, it is not surprising that the submerged lands along the coastline and inland are specifically included within the perimeter description of the Arctic National Wildlife Range. See also H.R. Rep. No. 771, 86th Cong., 1st Sess. 3 (1959).

As for NPR-4, the Executive's actions clearly intended to have this area reserved at the time of statehood to ensure the military access to needed minerals, oil and gas. To transfer the inland submerged lands to the State would have frustrated any federal oil and gas program. A situation in which the State could also issue leases to adjacent submerged lands would have undermined the purposes of both Executive Order No. 3797-A and PLO 82. The ability to manage for oil and gas development would have been defeated just as moose survival would have been defeated at the Kenai Moose Range if the state could issue oil and gas leases in inland submerged lands.[83]

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[82] If the area had been opened to entry under the public land laws before the establishment of ANWR, mining claims could have been filed after the opening but before the establishment of ANWR.

[83] In United States v. Alaska, supra, the Ninth Circuit Court of Appeals is very instructive on this issue:

> Water, in other words, is just as essential to the continued existence of the moose as it is to any other semi-aquatic animal in Alaska. If the Order failed to withdraw the navigable water in the designated area, it

(continued...)

D. Congress Affirmed Executive Intent to Defeat State Title to Submerged Lands in ANWR and NPR-4

In the ASA, Congress affirmed the intent of the Executive Branch to defeat state title to submerged lands in ANWR and NPR-4. Section 6(e) of the ASA provides for the transfer of all real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, except that such transfer: "[s]hall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife . . . ."
72 Stat. 339, 341 (emphasis added).[84] The ANWR lands were clearly set apart (i.e., segregated) as a refuge or reservation for wildlife. As such the lands were specifically withheld by section 6(e) from being transferred to the State of Alaska under the equal footing doctrine because they were lands "otherwise set apart as reservations for the protection of wildlife." Id. Furthermore, I view the earlier withdrawal status provided by PLO 82, in addition to the segregative effect of PLO 1621 to preserve this area as a wildlife refuge as meeting the second prong of the Utah Lake test.[85] Thus, section 6(e) established the affirmative intent to defeat the equal footing doctrine with respect to the submerged lands for ANWR.

An examination of the legislative history for section 6(e) reveals that the Department originally proposed it in 1950 as an amendment to one of the statehood bills. The Department's explanation of the effect of the provision was as follows:

> Under the language of the proposed amendment, the State of Alaska would obtain title to all real and personal property of the United States primarily used in the administration of the Alaska game law and the Alaska commercial fisheries laws. On the other hand, the United States would retain administrative jurisdiction over the Pribilof Islands, and over all other Federal

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[83](...continued)
> amounted to nothing more than an impotent gesture. If it failed to withdraw the land under the water, it would be just as sterile.

Id. at 767.

[84] The words "set apart" are the precise words used to effectuate the withdrawal of NPR-4. Executive Order 3797-A reads that the public lands will be "set apart" for oil and gas.

[85] See supra n. 20.

> lands and waters in Alaska which have been set aside as wildlife refuges or reservations pursuant to the fur seal and sea otter laws, the migratory bird laws, or other Federal statutes of general application.

S. Rep. No. 1929, 81st Cong., 2d Sess. 14 (1950) (emphasis added). The same interpretation is reflected in the House and Senate Reports accompanying the bill that was enacted as the Statehood Act. See S. Rep. No. 1163, 85th Cong. 1st Sess. 17 (1957) and H.R. Rep. No. 624, 85th Cong., 1st Sess. 19 (1957).

When the Secretary established the 649 square mile Izembek National Wildlife Range by PLO 2216 on December 6, 1960,[86] the Department provided that the described lands excluded "lands beneath navigable waters as defined in section 2 of the Submerged Lands Act of 1953."[87] A Departmental press release further elaborated that "State-owned inland navigable water areas are not included in the Range."[88] Similarly, when the Department established on the same day[89] the 1.8 million acre Kuskokwim National Wildlife Range the same reference to section 2 of the Submerged Lands Act of 1953 appeared in the Federal Register notice.[90] In addition, the accompanying press release made clear that: "State-owned inland navigable water areas are not included in the Range. Furthermore, the Range does not include any lands or waters granted to the State of Alaska by virtue of the Alaska Statehood Act." See "Secretary Seaton Establishes 1.8 Million Acre Kuskokwim National Wildlife Range in Alaska," Department of the Information, Information Service, at 2 (December 7, 1960). The Arctic National Wildlife Range was established the same day, and no such admission or declaration of state ownership of inland submerged lands was conceded. I view this as significant. Again, this demonstrates that the Department considered the underlying withdrawal of PLO 82 on its own as sufficient to withhold the submerged lands within the PLO 82 area from transfer to the State. Furthermore, the segregation of ANWR by the application for withdrawal and PLO 1621 reserved the submerged lands of ANWR under section 6(e) of the ASA as lands "otherwise

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[86] 25 Fed. Reg. 12599-12600 (1960).

[87] Id. at 12600.

[88] See "Secretary Seaton Creates Izembek National Wildlife Range in Alaska," Department of the Interior, Information Service, at 1 (December 7, 1960).

[89] 25 Fed. Reg. 12597-98 (1960).

[90] Id. at 12598.

set apart as reservations for the protection of wildlife."[91] Whether examined independently or jointly, I believe that PLO 82 and the segregation reserved the submerged lands of ANWR from transfer to the State.

Section 11(b) of the ASA provides still further federal protection of the submerged lands within NPR-4:

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

72 Stat. 339, 347. Section 11(b) illustrates that NPR-4 was expressly withheld from the State.

The Senate Report on the Statehood Act, ascribes this meaning to section 11(b):

> This section also reserves the right in Congress to exercise the power of exclusive legislation <u>over lands owned</u>, used, and <u>held by</u> the United States for defense or Coast Guard purposes, immediately <u>prior to admission</u> of the State into the Union, <u>including Naval Petroleum Reserve No. 4</u>. Such power of exclusive legislation is subject only to the right of the State to serve process. However, the State may exercise its full jurisdiction over such areas unless and until Congress supersedes the State actions. The federal power of exclusive legislation will continue only so long as the lands are used for the stated purposes. Thus, the new State will be entitled to exercise its full jurisdiction within military reservations which are in existence at the date of admission, subject to the right of Congress to supersede any and all laws, regardless of their subject matter, for as long as the land is used for the stated purposes, after which time full jurisdiction will revert to the State. The provisions of section 11 do not apply to special national defense withdrawals made pursuant to section

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[91] <u>See</u> page 3 of the Department of the Interior explanatory memorandum, July 4, 1958, to White House on the enrolled Alaska Statehood bill which treated the segregation for ANWR as a withdrawal from public entry.

10.

S. Rep. No. 1163, 85th Cong., 1st Sess. 26 (1957) (emphasis added).

PLO 1621 reaffirmed the intent to include the submerged lands of NPR-4 and ANWR in order to accomplish the purposes of these reservations. When PLO 2215 revoked PLO 82, yet again the submerged lands of the NPR-4 were kept in a withdrawn status. I consider the decisions of the Court of Appeals for the Ninth Circuit in Alaska v. United States, supra, and United States v. City of Anchorage, supra, as instructive in the method of analyzing public land orders to determine the intent to include submerged lands. Neither ANWR nor NPR-4 could be administered and preserved for their primary purposes absent the inclusion of the submerged lands.

The ASA and its legislative history demonstrates that Congress clearly intended to defeat state title to the submerged lands in NPR-4 and ANWR. It can be argued that this conclusion is less certain for the remaining lands in PLO 82 which were opened to mineral entry and mineral leasing by PLO 1621.

E. PLO 1621 Did Not Operate to Exclude Submerged Lands from PLO 82

At the time of Alaska Statehood, PLO 82 had been amended by PLO 1621, to permit mining and mineral leasing in two portions of that part of PLO 82 which withdrew northern Alaska.[92] The Secretary of the Interior's action in PLO 1621 to open certain portions of PLO 82 to both mineral leasing under secretarial supervision and mining is not inconsistent with the land being held for military purposes and with Congress' action in the Statehood Act to reserve exclusive legislative jurisdiction over PLO 82 lands.[93] See discussion in Section V.F., infra.

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[92] 23 Fed. Reg. 2637-38 (1958). PLO 1621 opened two areas on the North Slope to mining and mineral leasing. The first lay between the Canning and Colville Rivers. The second area lay west of NPR-4 and lay between that Reserve and Cape Lisburne. The portions of PLO 82 which withdrew the Katalla-Yakataga area in southern Alaska and the Alaska Peninsula in Southwest Alaska had already been completely revoked by PLO 323. 11 Fed. Reg. 9141-42 (1946).

[93] We are aware of the tension between the holding of ANWR lands for military purposes under PLO 82 and the segregation of ANWR lands under PLO 1621 in order to study them for use as a wildlife refuge. Nonetheless, while the Executive had begun at the time of statehood the necessary steps towards the creation of a

(continued...)

No conflict with military purposes occurs from mineral leasing to private parties under the supervision of the Federal Government. In the Department of the Interior's November 20, 1957 Background Summary,[94] that accompanied Secretary Seaton's announcement to open 20 million acres in northern Alaska to mining and mineral leasing, the Department addressed the benefits of the opening. The document states:

> Also to be taken into consideration is the fact that any program undertaken to find and develop the natural gas reserves has an equally good opportunity of finding oil. If commercial quantities of oil are found and marketed, the benefits to be derived therefrom, both from an economic and military viewpoint, might and probably would exceed by far those to be anticipated from exploitation of the natural gas reserves, including probably, the construction and operation of shipping and storage facilities, and comprehending perhaps even refining and the production of the many products associated with refining.

Background Summary at 4-5 (emphasis added). This shows that the Department believed that mining and mineral leasing were compatible with the military purposes of PLO 82 and that benefit to the military would result therefrom. In fact, in 1958 Congress established the policy in section 6 of the Engle Act, 43 U.S.C. § 158, that all defense withdrawals were to be reviewed, and if possible, opened to mineral leasing under the Mineral Leasing Act. The Engle Act gave the Secretary of Defense authority to determine whether and when mineral leasing would occur in defense withdrawals and what conditions would be included in the leases. 43 U.S.C. § 158. Only then could the Secretary of the Interior issue the mineral leases. Similarly, the Secretary of the Interior could have determined whether and when to lease and what conditions would be included in the leases in areas within PLO 82. These same safeguards are not available when leasing is conducted by the State.

In 1943, when PLO 82 was first promulgated, mining claim locations secured title to the oil and gas beneath the claim to the mining claimant. Upon passage of the Multiple Mineral Development Act of 1954, 30 U.S.C. §§ 521-531, a mining claimant

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[93](...continued)
refuge, the Executive had not yet formalized this change of purpose. Consequently, the lands were still formally held for military purposes at statehood and remained protected under section 11(b).

[94] See supra n. 68.

no longer obtained title to leasable minerals such as oil, gas, and coal within the boundaries of the claim. After 1947, mining claims within the beds of navigable waters in Alaska no longer vested any title at all, but only the right to extract minerals. 30 U.S.C. § 49(a). The Mineral Leasing Act, 30 U.S.C. §§ 181 et seq., had also undergone substantial amendments. Neither mineral leasing activity nor mining carried the threat to federal control over petroleum production that they had in 1943. The modification of PLO 82 did not allow unfettered production of the oil and gas, but development of the oil and gas under federal statutes and regulations. Production could be ordered to be suspended. 30 U.S.C. § 209 (1958). This would preclude federal liability in the event of a military evacuation. Royalty could be taken in kind if needed for military purposes. 30 U.S.C. § 192 (1958). Furthermore, the military could obtain oil and gas from federal lessees in Alaska through purchase without first having to expend considerable exploration, development and production costs. These modifications provided no threat or danger in case of national emergency, nor would there be any financial obligation accruing to the Federal Government in case of increased military activity. In fact, it constituted a financial benefit to the United States not to have to incur the costs associated with bringing oil and gas on line. Further, although the lands had been opened to mining claims since September 1, 1958, there is no indication of any conflict between miners and military users.

Finally, the contemporaneous interpretation of the Department was that PLO 82 was intact at statehood. In a July 4, 1958, explanatory memorandum to the White House, the Department included the following as among the withdrawals already in effect north and west of section 10 line:

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

See Explanatory Memorandum at 2, supra n. 91.

Although I conclude that PLO 82 continued to hold submerged lands after its modification by PLO 1621, still meeting the first prong of the Utah Lake test, when viewed in the best light for the State, the opening of certain areas of PLO 82 to mining and oil and gas development evinces no intent with respect to title of such lands after statehood. That PLO 1621 only modified PLO 82, rather than revoking it, implies that ownership of the lands

subject to it would not change at statehood.[95] Nonetheless, this is not sufficient to meet the second prong of the Utah Lake test. To resolve this issue, it is necessary to examine the Alaska Statehood Act and its legislative history to determine whether there existed an affirmative intent to defeat state title to the remainder of the submerged lands within PLO 82.

V. APPLICATION OF THE UTAH LAKE TEST TO ALASKA STATEHOOD

I have concluded in Section III., supra, that in 1943 PLO 82 only met the first prong of the Utah Lake test. In Section IV., supra, I concluded that those portions of PLO 82 comprising ANWR and NPR-4 met the second prong of the Utah Lake test. I also concluded that PLO 1621 which opened the remaining portions of PLO 82 to mining and mineral leasing did not operate to remove submerged lands from PLO 82, but that there was insufficient evidence of executive intent to defeat state title to submerged lands in those portions of PLO 82. I now turn to the Alaska Statehood Act to determine whether Congress expressed or otherwise made plain an intent to defeat state title for all PLO

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[95] The final statehood debates on the Senate floor after the issuance of PLO 1621, demonstrate a congressional intent to withhold the entire PLO 82 area from the State. For example:

> MR. WATKINS. I do not understand that it would ever become anything but Federal property even though it were within the State of Alaska.
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> * * * *
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> MR. JACKSON. [One of the Floor Managers of the Statehood Bill] . . . The Federal Government is asking to have exclusive jurisdiction reserved to administer this area, if necessary. That is all that is meant.
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> MR. WATKINS. That does not mean that the legal ownership changes at all.
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> MR. JACKSON. Not at all. We are talking principally about two communities, Nome and Kotzebue, in addition to one or two others. In all of Alaska, the Federal Government owns 99.9 percent of the land. One-tenth of 1 percent of the land in Alaska is either privately owned or owned by a city or some other political subdivision of the Territory. In this particular area, I think the percentage is even greater than 99.9, because the particular area involved is the north country, north of the Brooks Range.

104 Cong. Rec. 12626 (1958).

82 lands in northern Alaska.

A. Congress had Authority to Defeat State Title to Submerged Lands at Statehood

Although the Utah Lake test is applicable here, Congress' express treatment in the ASA of certain reservations existing at the time of statehood distinguishes this case from the Utah Lake case. In Utah Lake, Congress did not address the then existing Utah Lake withdrawal in the Utah Statehood Act.[96] Here, Congress expressly addressed in the ASA what lands would pass to the State. The Supreme Court has repeatedly recognized Congress' power to defeat state title to submerged lands prior to statehood. See, e.g., United States v. Holt State Bank, 270 U.S. 49 (1926); Shively v. Bowlby, 152 U.S. 1 (1894); and Goodtitle v. Kibbe, 50 U.S. (9 How.) 471 (1850). In Alabama v. Texas, 347 U.S. 272 (1954), the Supreme Court stated:

> Article 4, § 3, Cl. 2 of the Constitution provides that 'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States.' The power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.' United States v. California, 332 U.S. 19, 27 . . . .

Id. at 273. In fact, the Court acknowledges as much in Utah Lake:

> The Property Clause grants Congress plenary power to regulate and dispose of land within the Territories. . . .
>
> Although arguably there is nothing in the Constitution to prevent the Federal Government from defeating a State's title to land under navigable waters by its own reservation for a particular use, the strong presumption is against finding an intent to defeat the State's title.

482 U.S. at 201.

In the issue at hand, while Congress did address certain

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[96] 28 Stat. 107 (1894).

reservations existing at the time of Alaska Statehood,[97] it by no means addressed all the withdrawals in the Territory of Alaska nor were all the lands in the Territory of Alaska withdrawn at the time of statehood. Thus, for the most part submerged lands underlying navigable bodies of water within Alaska did pass to the State of Alaska at statehood.

B. The ASA Constitutes a Compact Between the Future State of Alaska and the United States by which Alaska Agreed to Receive Only Those Lands Granted or Confirmed to It Under the Statehood Act

Section 1 of the ASA provides in part:

> [T]he State of Alaska is hereby declared to be a State of the United States of America, [and] is declared admitted into the Union on an equal footing with the other States in all respects whatever . . . .

72 Stat. 339 (bracketed material added).

Section 4 of the ASA provides in part:

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

72 Stat. 339. This section makes clear that the United States and Alaska entered a compact by which Alaska became a state on the condition that its people "disclaim all right and title" to the lands not granted or confirmed to it in the ASA.

Section 5 of the ASA establishes Congress' intent to withhold at least some federal land from the new State:

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

72 Stat. 339, 340 (emphasis added).

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[97] See, inter alia, sections 4, 6 and 11 of the ASA, 72 Stat. 339, 340-43, 347-48.

Sections 7 and 8 of the ASA set out the procedures for Alaska to secure statehood. Section 8(b) called for a plebiscite of all voting citizens of Alaska concerning the terms of the compact offered to them in exchange for statehood. Various propositions were put to the voters who had to approve all the propositions to secure statehood. Section 8 provides in part:

> (b) At an election designated by proclamation of the Governor of Alaska, which may be the general election held pursuant to subsection (a) of this section, or a Territorial general election, or a special election, there shall be submitted to the electors qualified to vote in said election, for adoption or rejection, by separate ballot on each, the following propositions: * * * '(3) All provisions of the Act of Congress approved [date of approval of this Act] reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Alaska, are consented to fully by said State and its people.'
>
> In the event each of the foregoing propositions is adopted at said election by a majority of the legal votes cast on said submission, the proposed constitution of the proposed State of Alaska, ratified by the people at the election held on April 24, 1956, shall be deemed amended accordingly. In the event any one of the foregoing propositions is not adopted at said election by a majority of the legal votes cast on said submission, the provisions of this Act shall thereupon cease to be effective. . . .

72 Stat. 339, 343-44 (emphasis added).[98]

The foregoing establishes four important elements in the agreement between Alaska and the United States which resulted in statehood for Alaska. First, Alaska entered the Union on an equal footing with other states. Second, the Statehood Act is a compact. Third, the voters of Alaska reviewed and approved the compact. Fourth, Alaska would only get those lands granted or confirmed to it under the ASA, nothing more. 72 Stat. 339-40, 344.

C. Section 6(m) of the Alaska Statehood Act

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[98] The plebiscite passed on August 26, 1958, and the Acting Governor certified its passage in a letter to the President on December 23, 1958. See also Proc. No. 3269, 24 Fed. Reg. 81-82 (1959).

Applies the Submerged Lands Act to Alaska

Section 6 of the ASA contains thirteen major subdivisions, (a) through (m). 72 Stat. 339, 340-343. Each of these subdivisions contains one or more grants or confirmations of title, and each contains one or more terms, conditions, or limitations on those grants or confirmations. I will discuss in depth section 6(m) because of its relevance to PLO 82.

Section 6(m) of the ASA provides in full:

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

72 Stat. 339, 343.

Unlike the State of Utah, which received its statehood fifty-seven years before the passage of the Submerged Lands Act in 1953, Alaska received statehood five and a half years after the Submerged Lands Act, and section 6(m) made the Submerged Lands Act applicable to Alaska.

The Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (SLA), accomplished two major purposes. First, it made a new grant of submerged lands to all states bounded by the Atlantic Ocean, the Pacific Ocean, the Gulf of Mexico, or the Great Lakes.[99] Second, it statutorily confirmed and codified the judicial decisions embodying the equal footing doctrine that ordinarily states were vested with title to submerged lands beneath inland navigable waters, except in certain circumstances.

Section 3(a) of the SLA states:

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

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[99] Section 4 of the SLA, 43 U.S.C. § 1312.

> land is located, and the respective grantees, lessees, or successors in interest thereof . . . .

43 U.S.C. § 1311(a) (emphasis added).

Given that earlier judicial decisions had eroded the constitutional basis for the presumption that states were vested with title to submerged lands beneath inland navigable waters, Congress feared that the Supreme Court would repudiate state title to inland navigable waters[100] in the same manner it had repudiated state title to the bed of the marginal sea. See, e.g., United States v. California, 332 U.S. 19 (1947), United States v. Louisiana, 339 U.S. 699 (1950), United States v. Texas, 339 U.S. 707 (1950). The Senate Report accompanying the bill that would become the Submerged Lands Act states:

> State officials from every inland state in the Union, except three, testified or submitted statements that in their opinion the decision [United States v. California] had clouded the long asserted titles of the inland States to lands and natural resources below navigable waters within the boundaries of the inland States.

S. Rep. No. 133, 83d Cong., 1st Sess. 62 (1953) (bracketed material added).[101]

Congress had heard testimony that the doctrine of state ownership of the beds of navigable inland waters was an extension of the rule of state ownership of the marginal sea. Hence, Congress assumed that because the Supreme Court had overruled state title to the marginal sea, it might, as a logical extension, overrule state title to inland submerged lands as well. Id. at 62-63.

The Senate Committee on Interior and Insular Affairs stated the purpose of the Submerged Lands Act in reporting the bill out of committee:

> The purpose of this legislation is to write the law for the future as the Supreme Court believed it to be in the past - that the States shall all have proprietary use of all of the lands beneath inland navigable waters within their territorial jurisdiction whether inland or seaward subject to only the governmental powers delegated to the United States by the Constitution.

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[100] See S. Rep. No. 133, 83d Cong., 1st Sess. (1957) and Minority Views, S. Rep. No. 133 (Part 2), 83d Cong., 1st Sess. (1957).

[101] The same Senate Report cites the source of this title as "Pollard v. Hagan (3 How. 212, 229 1845)." Id. at 7.

Id. at 8. The Senate Judiciary Committee had similar language. Id. at 56-57.

While the Submerged Lands Act confirmed and granted to the states title to the submerged lands beneath inland navigable waters and the marginal sea, the Act also listed the circumstances under which title to these lands would not pass to a state. These circumstances are set out in sections 2(f),[102] 5(a), 5(b), and 5(c)[103] of the Submerged Lands Act. The Submerged Lands Act also

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[102] Section 2(f) states:

> The term 'lands beneath navigable waters' does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person; . . .

43 U.S.C. § 1301(f).

[103] Sections 5(a), (b), (c) state:

> There is excepted from the operation of section 1311 of this title------
> (a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and any rights the United States has in lands presently and actually occupied by the United States under claim of right;
> (b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians; and

(continued...)

reasserted the primary right of the United States to the use and control of the waters above such submerged lands in sections 3(d) and 6,[104] and stated that these primary federal powers did not

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[103](...continued)

(c) all structures and improvements constructed by the United States in the exercise of its navigational servitude.

43 U.S.C. §§ 1313(a), (b), (c) (emphasis added).

[104] Section 3(d) states:

> Nothing in this subchapter or subchapter I of this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power; . . .

43 U.S.C. § 1314.

Section 6 states:

> (a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.
>
> (b) In time of war or when necessary for national defense, and the Congress or the President shall so prescribe, the United States shall have the right of first refusal to purchase at the prevailing market price, all or any portion of the said natural resources, or to acquire and use any portion of said lands by proceeding in accordance with due process of law and paying just compensation therefor.

43 U.S.C. § 1314.

include the title to the submerged lands and the natural resources located therein. These primary federal powers include the navigational servitude, regulation of navigation, regulation of commerce, control of floods, generation of power, maintenance of national defense, and supervision of international affairs.

In sum, section 6(m) of the ASA applies the SLA to Alaska. Section 3(a) of the SLA effectively grants to the State title to lands underlying navigable bodies of water, with the exceptions set out in sections 2(f), 5(a), 5(b) and 5(c) of the SLA. The relevant exception is section 5(a) of the SLA which excludes from the grant "all lands expressly retained by or ceded to the United States when the State entered the Union . . . ." 43 U.S.C. § 1313(a).

D. The Relationship Between the Utah Lake Test and the Submerged Lands Act

The State of Alaska has argued that section 1 of the ASA which states that Alaska "is declared admitted into the Union on an equal footing with the other States in all respects whatever . . ." (72 Stat. 339) acts as a grant of lands to the State under the equal footing doctrine. Section 1 cannot be read in isolation, however, and I must look at other sections of the ASA to determine whether Congress intended to pass title to the inland submerged lands in PLO 82.

The language of at least sections 4, 5, 6 and 11 defines the application of section 1.[105] In section 4, the State agreed to "disclaim all right and title to any land or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act . . . ." Section 5 provides that: "Except as provided in section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title, including public lands." 72 Stat. 339, 340. This plain reading of the ASA does not read the reference to equal footing in section 1 out of the ASA.

Even though I have concluded that section 1 of the ASA must be read in context with the other sections of the Act, including

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[105] The 1957 Senate Report recognized that section 1 was defined by other sections of the ASA. "Section 1 declares that . . . the State of Alaska is admitted into the Union on an equal footing with other States, subject to the provisions of the act . . . ." S. Rep. No. 1163, 85th Cong., 1st Sess. at 15 (1957). The House Report contains a similar understanding: "Section 1 provides that subject to the provisions of this act . . . the State of Alaska is recognized and declared admitted into the Union on an equal footing with all other States." H.R. Rep. No. 624, 85th Cong., 1st Sess. 18 (1957).

section 6(m), to my knowledge no court has expressly held that the SLA has completely subsumed the equal footing doctrine as to submerged lands underlying navigable bodies of water so that the doctrine no longer has any vitality apart from the SLA.[106] One could argue that Congress merged the two inquiries because the Utah Lake test asks whether Congress affirmatively intended to defeat a future state's title to such land, and section 5(a) of the SLA affirmatively expresses this congressional intent where lands are "expressly retained by or ceded to the United States" at statehood.[107] The essential distinction between the two analyses is that the Utah Lake test is premised on a strong presumption against defeat of state title,[108] while the SLA is arguably controlled by the rule of construction that grants by the Federal Government be construed favorably to the government, "inferences being resolved not against but for the government."[109] Although an argument exists that Congress subsumed the equal footing doctrine, in whole or in part, into the SLA, it is not necessary to resolve this issue here because I will independently apply both (1) the Utah Lake test to determine whether Congress expressed or otherwise made very plain an intent to defeat state title to submerged lands in PLO 82 and (2) the SLA to determine whether PLO 82 meets the exception for lands expressly retained or ceded to the United States at statehood.

I now turn to the pertinent legislative history of the ASA and, in particular, section 11(b) to determine whether Congress demonstrated an intent to defeat the state title to the submerged lands contained in PLO 82.

E. Congress Expressed in the Alaska Statehood Act Concern

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[106] In Utah Lake, the Court found there was no reservation of the bed of Utah Lake. Therefore, the Court did not need to examine the provisions of the SLA regarding federal retention of submerged lands and any possible conflict between the judicially inferred congressional policy of the equal-footing doctrine and the express statement of congressional policy in the SLA. The Ninth Circuit in United States v. Alaska, 423 F.2d 764 (9th Cir. 1970), suggests that where a specific provision of the Statehood Act addresses a particular withdrawal there is no need to examine the SLA.

[107] This would be true for any of the exceptions to a grant of state title in the SLA. See 43 U.S.C. §§ 1301(f), and 1313(a), (b) and (c).

[108] 482 U.S. at 201.

[109] 86 I.D. 151, 172, citing Great Northern Ry. Co. v. United States, 315 U.S. 262 (1942); Caldwell v. United States, 250 U.S. 14 (1919); and Shively v. Bowlby, 152 U.S. 1, 10 (1893).

Over Certain Petroliferous and Military Areas in Alaska and Gave Them Special Treatment

During the statehood debate, the Congress considered whether to preclude the new State of Alaska from ownership or selection up to ninety-five million acres of federal reservations.[110] These included over forty-eight million acres of lands on the North Slope held under PLO 82. The understanding repeatedly expressed during the Alaska Statehood proceedings was that the State would be excluded from these lands:

> [There] is a naval petroleum reserve which encompasses practically all of northern Alaska, and it is part of the land which the State will not be able to choose under the Saylor bill or any other bill because it is already a Federal withdrawal or reserve.

Hearings on Miscellaneous Statehood Bills Before the House Committee on Interior and Insular Affairs, Subcommittee on Territories and Insular Possessions, 83rd Cong., 1st Sess. 158 (1953) (1953 House Hearings) (emphasis and bracketed material added) (Statement of Mr. George Sundborg, General Manager, Alaska Development Board). The understanding on the Senate side was the same. Senator Barrett, member of the Senate Interior and Insular Affairs Committee, stated: "[T]he Federal Government is keeping all of those reservations, those reserved lands, for itself." Hearings on S. 50 Before the Senate Committee on Interior and Insular Affairs, 83rd Cong., 1st Sess. 91 (1953) (1953 Senate Hearings).

The Senate's 1954 hearings contain the following exchange:

> SENATOR SMATHERS. . . . [T]here is a more valuable part south of the middle line there and [the proponents of statehood] said that would be the profitable area and they would not mind leaving that vast expanse of tundra in the north in the hands of the Federal Government.
>
> * * *
>
> SENATOR JACKSON. George [Senator Smathers], I will say that the northern portion of Alaska, essentially the top tier of area, is now an oil reserve . . . . It runs all the way to Canada . . . the middle area is naval, and the western and eastern portions of the top tier are under Public Land Order No. 82.
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> * * *

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[110] See supra n. 13.

> SENATOR CORDON. It may be that the petroleum reserve is a good reason not to grant the land in that area to the State of Alaska, but that is no reason for not including it within the State boundaries for administrative purposes.

Hearings on S. 50 Before the Senate Committee on Interior and Insular Affairs, 83rd Cong., 2nd Sess. 9-10 (1954) (1954 Senate Hearings) (emphasis and bracketed material added).

Later in those same hearings members of the Senate Interior Committee confirmed that PLO 82 would prevent any non-federal use of the lands withdrawn thereby:

> SENATOR CORDON. I have a note here that Naval Petroleum Reserve No. 4 covers about 28 million acres, and that Public Land Order 82, which is a reservation order, covers about 49 million acres, all north of the Brooks Range, and that the naval reserve is entirely within that public land order. So the total area north of the range which is reserved would be about 49 million acres.
>
> SENATOR SMATHERS. That means that in that reserve, no individual, company or individual can go in there; that the Navy must give them authority to go in?
>
> DR. REED [Staff Coordinator, Office of the Director, Geological Survey]. That is within the pink area [NPR-4], sir; and with the gray area [PLO 82] the same is true, but not because of the Navy.
>
> SENATOR CORDON. The reservation there is absolute.
>
> DR. REED. Yes.

1954 Senate Hearings at 115 (emphasis and bracketed material added).

At the request of the Senate Committee on Interior and Insular Affairs, the Navy prepared an amendment to the proposed statehood act that would have authorized the prospective state to make selections within the PLO 82 withdrawal area.[111] The amendment was never enacted, thus arguably reflecting Congress' intent that PLO 82 continue as a bar to state acquisition of lands in the PLO

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[111] See letter from Thomas S. Gates, Jr., Acting Secretary of the Navy, to Senator Hugh Butler, Chairman of the Senate Committee on Interior and Insular Affairs, dated February 17, 1954, reprinted in 1954 Senate Hearings at 350.

82 withdrawal area.

As the Senate committee's rejection of the PLO 82 amendment demonstrates, Congress understood that, without contrary congressional directives, the many federal administrative withdrawals in Alaska defeated the prospective state's rights to select land therein. That understanding is clear in the following exchange in the 1957 House Hearings:

> DR. MILLER. I have one question. I think it probably should be directed to Mr. Bartlett [Delegate from Alaska]. That is on page 2:
>
> The State of Alaska shall consist of all the Territory, together with the Territorial waters appurtenant thereto, now included in the Territory of Alaska.
>
> That I understand. However, do you later on in the bill then make some exceptions for the withdrawal of lands that have already been established by the Federal Government?
>
> MR. BARTLETT. Yes, all existing reservations are continued in that status, Dr. Miller.
>
> DR. MILLER. Do you know how many acres are now in reservation withdrawals?
>
> MR. BARTLETT. I doubt if anyone even in the Interior Department could answer that specifically. I think a good estimate would be between 90 and 95 million acres.
>
> DR. MILLER. Between 90 and 95 million. I have a map here. It is an old one, I know. I have been looking it over. And I find a lot of the rich mineral lands, the rich oil lands, that have been described in the testimony, apparently are in the withdrawal, the Territorial withdrawal. And in that respect I have a letter dated March 14, [1957] addressed to our chairman, Mr. O'Brien, in which an attempt is made to bring up to date the withdrawals of the Alaska land as of October 1956: oil and gas reservations north of the Brooks Range, including naval petroleum company reserves, 48,800,000 acres [referring to PLO 82].
>
> Now that presumably would not be available for oil development by the new State so that it could become a State.

1957 House Hearings at 235 (emphasis and bracketed material added).

As to military areas, the Department of Defense repeatedly expressed concern about the wisdom of statehood for Alaska due to the strategic location and military commitment to the region.[112] As a result, defense issues received serious consideration during the statehood proceedings.[113] For this reason, consideration was given to a proposal to limit the boundaries of the State to only a portion of the Territory of Alaska for defense reasons.[114]

Later, the boundary issue was addressed by the Administration's proposal of what would become section 10 of the ASA.[115] As embodied in section 10 of the ASA, a line was drawn through the middle of Alaska. South and east of the line, the State could freely select lands; north and west of the line, the State could only select lands with consent of the President, and the President could create at any future time national defense withdrawals and administer the area under exclusive legislative jurisdiction.

The precise delineation of the section 10 line through the State received some modification, but the basic concept remained intact throughout the statehood proceedings. The final line appears in section 10(b) of the ASA and generally follows five miles from the right bank of the Porcupine, Yukon and Kuskokwim Rivers, and then along the shore of Kuskokwim Bay. Thereafter, the line

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[112] Hearings on S. 49 Before the Senate Committee on Interior and Insular Affairs, 85th Cong., 1st Sess. 104 (1957) (1957 Senate Hearings).

[113] President Eisenhower endorsed Alaska Statehood subject to "area limitations and other safeguards for the conduct of defense activities so vitally necessary to our national security . . . ." Annual Budget Message to the Congress for Fiscal Year 1958, Public Papers of the Presidents, Dwight D. Eisenhower at 57 (January 16, 1957). Upon passage of the Alaska Statehood Act the President noted in his signing statement that his defense concerns had been addressed by section 10. Statement by the President Upon Signing Alaska Statehood Bill, Public Papers of the Presidents, Dwight D. Eisenhower at 525 (July 7, 1958).

[114] Hearings on S. 49 Before the Senate Committee on Interior and Insular Affairs, 85th Cong., 1st Sess. 104 (1957) (1957 Senate Hearings).

[115] See Department of Interior transmittal letter of March 22, 1957 Alaska Statehood: Hearings before the Committee on Interior and Insular Affairs, United States Senate on S. 49 and S. 35, 85th Cong., 1st Sess. 2 (1957). Alaska Delegate Bartlett stated: "The proposal [section 10] was acceptable to Alaskans . . . because of the fact that it did not propose to diminish the boundaries of Alaska." Id. at 11.

follows certain longitudes and latitudes to the Pacific Ocean (PYK Line).[116]

In section 6(b) of the ASA, Congress provided that no state selections could be made north or west of the PYK Line unless previously approved by the President or his delegee.[117] Congress

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[116] Section 10(b) of the ASA states:

> (b) Special national defense withdrawals established under subsection (a) of this section shall be confined to those portions of Alaska that are situated to the north or west of the following line: Beginning at the point where the Porcupine River crosses the international boundary between Alaska and Canada; thence along a line parallel to, and five miles from, the right bank of the main channel of the Porcupine River to its confluence with the Yukon River; thence along a line parallel to, and five miles from, the right bank of the main channel of the Yukon River to its most southerly point of intersection with the meridian of longitude 160 degrees west of Greenwich; thence south to the intersection of said meridian with the Kuskokwim River; thence along a line parallel to, and five miles from the right bank of the Kuskokwim River to the mouth of said river; thence along the shoreline of Kuskokwim Bay to its intersection with the meridian with the parallel of latitude 57 degrees 30 minutes north; thence east to the intersection of said parallel with the meridian of longitude 156 degrees west of Greenwich; thence south to the intersection of said meridian with the parallel of latitude 50 degrees north.

72 Stat. 339, 345.

[117] Section 6(b) of the ASA states:

> The State of Alaska, in addition to any other grants made in this section, is hereby granted and shall be entitled to select, within twenty-five years after the admission of Alaska into the Union, not to exceed one hundred and two million five hundred and fifty thousand acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection: Provided, That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, or shall affect the rights of any

(continued...)

reaffirmed the PYK line and the limitation on state selection in section 906(p) of the Alaska National Interest Lands Conservation Act (ANILCA) in 1980. 43 U.S.C. § 1635(p).

F. Section 11(b) Makes Plain Congress' Intent to Defeat State Title to Submerged Lands Which Immediately Prior to Statehood Were Owned by the United States and Held for Military Purposes

In measuring the ASA against the Utah Lake test, I now examine section 11(b) to determine whether the language, purpose, and effect of the section make plain that Congress, at the time of statehood, intended to defeat state title to lands beneath navigable waters on lands described in section 11(b).

Section 11(b) reads in part as follows:

> Notwithstanding the admission of the State of Alaska into the Union, authority is reserved in the United States, subject to the proviso hereinafter set forth, for the exercise by the Congress of the United States of the power of exclusive legislation, as provided by article I, section 8, clause 17 of the Constitution of the United States, in all cases whatsoever over such tracts or parcels of land as, immediately prior to the admission of said State, are owned by the United States and held for military, naval, Air Force, or Coast Guard purposes, including naval petroleum reserve numbered 4, whether such lands were acquired by cession and transfer to the United States by Russia and set aside by Act of Congress or by Executive order or proclamation of the President or the Governor of Alaska for the use of the United States, or were acquired by the United States by purchase, condemnation, donation, exchange, or otherwise . . . .

72 Stat. 339, 347 (emphasis added).

There is no dispute that virtually all the lands within PLO 82 were owned by the United States immediately prior to the

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[117](...continued)
> such owner, claimant, locator, or entryman to the full use and enjoyment of the lands so occupied: And provided further, That no selection hereunder shall be made in the area north and west of the line described in section 10 without approval of the President or his designated representative.

72 Stat. 339, 340 (emphasis added).

admission of the State.[118] Moreover, I believe that the phrase "immediately prior to the admission of said State" makes very plain Congress' intent to include submerged lands in this section. Under the equal-footing doctrine it is land status at the moment of statehood that determines what lands underlying navigable bodies of water pass to the State. Accordingly, the reference in section 11(b) to "immediately prior to the admission of said State" demonstrates congressional intent to exclude the effect of the equal footing doctrine to pass title to the State in determining which lands would be covered by this provision. This view is confirmed by the first phrase of section 11(b): "Notwithstanding the admission of the State of Alaska into the Union . . . ." In other words, in interpreting section 11(b) one may not consider what effect the admission of the State might otherwise have had on the lands subject to section 11(b).

Further, section 11(b) requires lands owned by the United States to be held[119] for "military, naval, Air Force, or Coast Guard purposes, including naval petroleum reserve numbered 4 . . . ."[120]

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[118] 104 Cong. Rec. 12626 (1958). See supra n. 95.

[119] "Held" is a term broader than the term "reservation." Held can in this context also mean "to have authority over" and include lands occupied or appropriated by the military. So "held" as used in section 11(b) expands the scope of lands captured by section 11(b) rather than limiting it. For example, it would include lands outside of a formal reservation, but actually occupied by, or subject to the authority of, the military.

[120] One could argue that because NPR-4 was specifically included in this sentence of section 11(b) Congress meant to exclude PLO 82. I am unpersuaded. I believe the better inference is that because all naval petroleum reserves were excluded from the Engle Act, 43 U.S.C. § 155, addressing defense withdrawals, it was necessary to specifically name NPR-4 in the list of military purpose withdrawals to assure its protection as a pre-existing defense withdrawal. See S. Rep. No. 1163, 85th Cong., 1st Sess. 3 (1957); Hearings on S. 49 Before Senate Interior and Insular Affairs Committee, 85th Cong., 1st Sess. 101 (1957). Moreover, a reading that the reference to the petroleum reserve specifically excluded PLO 82 would raise questions about every other military, naval, Air Force and Coast Guard facility in the State because they, like PLO 82, are not specifically enumerated. Lastly, the third proviso to section 11(b) lists "military, naval, Air Force, and Coast Guard purposes" but does not reference the petroleum reserve. This strongly suggests that Congress intended the more general references to control and that the earlier specific

(continued...)

PLO 82 itself contains the heading: "Withdrawing Public Lands in Connection with the Prosecution of the War." This is plainly a military purpose. Although one motivation for PLO 82 was the search for oil and gas, the United States quickly learned that it needed the area of the withdrawal for other military purposes, especially as military activities shifted from the "hot war" of World War II to the "cold war" with the Soviet Union. Other military uses employed in the PLO 82 area comprised long range radio navigation, the use of electronic surveillance, including radar, and scientific research necessary for future combat in polar regions.

A report prepared by the Office of Naval Research, Department of the Navy, describes research projects sponsored or authorized by the Department of the Navy, which clearly required the use of inland waters and submerged lands, including waters, bays, and lagoons, during the period of PLO 82.[121]

PLO 82 was still in effect at the time of statehood and, therefore, continued to hold lands for military purposes. While the activities permitted within the withdrawal were changed from time to time, the lands, including submerged lands, originally in the northern Alaska portion of PLO 82 had not been altered or deleted in any way at the time of statehood. See discussion in Section IV, supra. It was not until December 6, 1960, almost two years after statehood, that PLO 82 was actually revoked.[122]

Therefore, the submerged lands within PLO 82 meet the requirements of section 11(b) that (1) immediately prior to admission of the State they were owned by the United States and (2) immediately prior to the admission of the State they were held for military purposes.

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[120](...continued)
reference to the petroleum reserve was merely to overcome an inference arising from the Engle Act.

[121] Read, John C. and Ronhovde, Andreas G., Arctic Laboratory at 175-80 (1971) (prepared under Office of Naval Research, Department of the Navy, Contract No. N00014-70-A-0219-001). Further, Mr. Max Brewer, Director of the Naval Arctic Research Laboratory (NARL), from September 1956 through July 1971, prepared the list appearing as Appendix 3 of permanent military facilities that the military had been constructed and used throughout the North Slope during the years leading up to and through the revocation of PLO 82. Numerous other sites were used briefly for military purposes. Mr. Brewer is now an employee of the U.S. Geological Survey in Anchorage, Alaska.

[122] 25 Fed. Reg. 12599 (1960).

Section 11(b) continues:

> whether such lands were acquired by cession and transfer to the United States by Russia and set aside by Act of Congress or by Executive order or proclamation of the President or the Governor of Alaska for the use of the United States, or were acquired by the United States by purchase, condemnation, donation, exchange, or otherwise. . . .

72 Stat. 339, 347.

All lands within PLO 82 were acquired "by cession and transfer to the United States by Russia." A question arises whether the phrase "and set aside by Act of Congress or by Executive order or proclamation of the President" includes a public land order, like PLO 82. As stated earlier, Acting Secretary Fortas issued PLO 82 under a presidential delegation of authority in Executive Order 9146. Executive Order 9146 reads, in part:

> AUTHORIZING THE SECRETARY OF THE INTERIOR TO WITHDRAW AND RESERVE PUBLIC LANDS
>
> By virtue of the authority vested in me by the act of June 25, 1910, c. 421, 36 Stat. 847, and as President of the United States, I hereby authorize the Secretary of the Interior to sign all orders withdrawing or reserving public lands of the United States, and all orders revoking or modifying such orders . . . .

Exec. Order No. 9146, 3 C.F.R. 1149-50 (1938-1943). The courts have held that the action of the Secretary in this context constitutes the action of the President. In Wilbur v. United States, 46 F.2d 217 (1930), aff'd 283 U.S. 414 (1931), the D.C. Circuit addressed the Supreme Court precedent on this issue as follows:

> It is settled law that 'the president speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties' (Wilcox v. Jackson, 13 Pet. 498, 513, 10 L.Ed. 264), and that 'the acts of the heads of departments, within the scope of their powers, are in law the acts of the President' (Wolsey v. Chapman, 101 U.S. 755, 769, 25 L.Ed. 915). . . . If the President himself had signed the order in this case, and sent it to the registers and receivers who were to act under it, as notice to them of what they were to do in respect to the sales of the public lands, we cannot doubt that the lands would have been reserved by proclamation within the meaning of the statute. Such being the case, it follows necessarily from the

> decision in Wilcox v. Jackson that such an order sent out from the appropriate executive department in the regular course of business is the legal equivalent of the President's own order to the same effect. It was, therefore, as we think, such a proclamation by the President reserving the lands from sale as was contemplated by the act.' See, also, United States v. Morrison, 240 U.S. 192, 36 S.Ct. 326, 60 L.Ed. 599; Northern Pacific Railway Co. v. Wismer, 246 U.S. 283, 38 S.Ct. 240, 62 L.Ed. 716; Relation of the President to the Executive Departments, 7 Op. Attys. Gen. 453.

46 F.2d at 219-20.

Consequently, I conclude that Acting Secretary Fortas' action in issuing PLO 82 constituted an "Executive order or proclamation of the President" within the meaning of section 11(b). Moreover, if this were not the case, the same defect would exist under section 11(b) for pre-statehood defense withdrawals in Alaska virtually all of which were established by public land order. The legislative history of the ASA contains nothing to show that Congress thought public land orders would be ineffective under section 11(b). In fact, the legislative history strongly supports my conclusion. See Section V.E., supra.

Section 11(b) continues with three provisos related to my consideration here. The first reads:

> (i) That the State of Alaska shall always have the right to serve civil or criminal process within the said tracts or parcels of land in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed within the said State but outside of the said tracts or parcels of lands . . . .

72 Stat. 339, 347. This proviso allows the State of Alaska to pursue criminals and serve civil process within these reserved areas for actions occurring outside of the reserved areas. This power is recognized as consistent with exclusive legislative jurisdiction in the Federal Government and does not evince an intent either for or against state title.

The second proviso reads:

> (ii) that the reservation of authority in the United States for the exercise by the Congress of the United States of the power of exclusive legislation over the lands aforesaid shall not operate to prevent such lands from being a part of the State of Alaska, or to prevent the said State from exercising over or upon such lands, concurrently with the United States, any jurisdiction whatsoever which it would have in the absence of such

> reservation of authority and which is consistent with the laws hereafter enacted by the Congress pursuant to such reservation of authority . . . .

72 Stat. 339, 347. This makes clear that despite the reservation of authority to exercise exclusive legislative jurisdiction[123] for certain lands, the lands would still be considered to be part of the State of Alaska. This expressly resolved the legal issue whether lands in this status were actually within a state. See Howard v. Commissioners of the Sinking Fund of the City of Louisville, et al., 344 U.S. 624, 626 (1952). It also allows the State to legislate in these areas to the extent consistent with future laws Congress may enact for these areas. This allows state laws consistent with congressional purposes for the military holdings to remain in effect in these areas, but assures that Congress could authorize any federal activities it chose in these areas without state law interference.

The third proviso reads:

> (iii) that such power of exclusive legislation shall rest and remain in the United States only so long as the particular tract or parcel of land involved is owned by the United States and used for military, naval, Air Force, or Coast Guard purposes.

72 Stat. 339, 347. This provides for the termination of exclusive legislative jurisdiction when the lands subject to section 11(b) are no longer owned by the United States and used for military purposes. At that time, jurisdiction would revert to the State. S. Rep. No. 1163, 85th Cong., 1st Sess. 26 (1957).

This proviso is exceedingly important as it makes plain Congress' intent to defeat state title to submerged lands within lands held

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[123] Even though section 11(b) refers to "the power of exclusive legislation," when the State is permitted to exercise some degree of jurisdiction "concurrently with the United States," as in section 11(b), this is commonly referred to as "concurrent jurisdiction." See, e.g., 1964 Op. Att'y. Gen., No. 2. See also letters from Deputy Attorney General William P. Rogers to Committee Chairman, dated May 14, 1957, contained in H.R. Rep. No. 624, 85th Cong., 1st Sess. 31-32 (1957) and S. Rep. No. 1163, 85th Cong., 1st Sess. 48 (1957). Nonetheless, Congress can immediately displace any state law inconsistent with congressional purposes for the areas referenced in section 11(b). In Evans v. Cornman, 398 U.S. 419, 424 (1970), the Supreme Court lists a number of instances of application of state law within areas of exclusive legislative jurisdiction that Congress had unilaterally and voluntarily retroceded.

for military purposes. If submerged lands were not included in the military lands held under section 11(b) and thus passed to the State at statehood, the third proviso would cause the lands to fall outside the ambit of section 11(b). Submerged lands would be both included under the first sentence of section 11(b) and excluded under the third proviso. Statutes should be construed to avoid an inconsistent or meaningless result. Hughes Air Corp. v. Public Utilities Commission of California, 644 F.2d 1334, 1338 (9th Cir. 1981) Moreover, there would be no mechanism in the ASA for Congress to reestablish exclusive legislative jurisdiction over these lands. Further, from a pure statutory construction perspective, excluding submerged lands under proviso three would render meaningless two phrases in the first sentence of the section: "[n]otwithstanding the admission of the State of Alaska into the Union" and "immediately prior to the admission of said State . . . ."

Section 11(b) concludes with the following:

> The provisions of this subsection shall not apply to lands within such special national defense withdrawal or withdrawals as may be established pursuant to section 10 of this Act until such lands cease to be subject to the exclusive jurisdiction reserved to the United States by that section.

72 Stat. 339, 347-48. This language provides that when the President includes section 11(b) lands in an emergency defense withdrawal under the provisions of section 10, section 10 applies until the lands are removed from the emergency defense withdrawal. For example, since the President can exercise section 10 authority anywhere north and west of the PYK Line, it is possible that PLO 82 on the North Slope could have become subject to an emergency defense withdrawal under section 10. In that event, the exclusive legislative jurisdiction provisions of section 10 would have controlled. S. Rep. No. 1163, 85th Cong., 1st Sess. 26 (1957).

G. Congress Must Have Intended to Defeat State Title to Submerged Lands Within Section 11(b) in order to Carry Out the Congressional Reservation of the Power of Exclusive Legislation and Congressional Control of All Land Held for Military Purposes

While exclusive legislative jurisdiction as a concept does not require federal ownership of all lands within the boundary of exclusive legislative jurisdiction, in section 11(b) Congress tied exclusive legislative jurisdiction to lands owned by the United States. Congress did not want state law to interfere with potential military activities on federal lands held for military

purposes within Alaska.[124] Exclusive legislative jurisdiction and defeat of state title to submerged lands would prevent laws and state authorized activities incompatible with federal uses from applying to lands held for military purposes. In this way, the military and any other agencies authorized by Congress to act in section 11(b) areas would not be affected by, for example, state contract law inconsistent with federal contract law or state authorized occupancy of submerged lands, such as state leasing, that could interfere with ongoing military studies and operations and future military options. See, e.g., Humble Pipe Line Co. v. Waggonner, 376 U.S. 369, 373 (1964).

Exclusive legislative jurisdiction under section 11(b) attaches only so long as the lands are owned by the United States and held for military purposes. If section 11(b) did not defeat state title at statehood, then imposition of exclusive legislative jurisdiction under section 11(b) would have been impossible on any lands in Alaska underlying navigable bodies of water within lands held for military, naval, Air Force or Coast Guard purposes, including NPR-4. Though Congress could have authorized exclusive legislative jurisdiction over non-federal property, it did not do so in section 11(b). Compare section 11(b) with sections 10(a) and 10(c) (making exclusive legislative jurisdiction applicable within the "exterior boundaries" of a national defense withdrawal).

Finally, if section 11(b) did not defeat state title to submerged lands within areas held for military purposes throughout Alaska, then a substantial risk exists that the submerged lands in every military facility in Alaska existing at statehood thereupon passed to Alaska. It is inconceivable that Congress intended to make submerged lands available to state leasing or other state-authorized activity within pre-statehood military facilities in Alaska. Military use of state-owned submerged lands within section 11(b) areas would either require compensation to the State as provided in section 6(b) of the Submerged Lands Act, 43 U.S.C. § 1314(b), or condemnation or purchase. Floor discussions demonstrate that Congress had no intention of paying for the acquisition of lands in northern Alaska for military purposes.[125]

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[124] See Section V.E., supra.

[125] As stated by Senator Saltonstall:

> The question is whether the particular section [section 10] of the bill referred to is valid or invalid. If it is invalid, What [sic] are the possibilities of getting the land back by condemnation or purchase? On that question I disagree with the Senator from Vermont, who says that the Federal Government can purchase 102,000 acres.

I believe that this makes very plain Congress' intent in section 11(b) to defeat state title to submerged lands in areas held for military purposes.

H. Section 10 Is Not An Effective Cure to an Interpretation that Section 11(b) did not Defeat State Title to Submerged Lands

Section 11(b) reserves to Congress the power of exclusive legislation for federal lands used immediately prior to statehood for military purposes in Alaska. Section 10(a) authorizes the President to establish after statehood special national defense withdrawals north and west of the PYK Line in Alaska. Under section 10(c) these defense withdrawals would reserve exclusive legislative jurisdiction over all lands within the exterior boundaries of such withdrawals. One could argue that section 10 is available to cure the holes left in lands held for military purposes, if section 11(b) is interpreted not to have defeated state title to submerged lands. This argument is flawed for two reasons.

First, section 10 is not designed to cure a submerged lands problem. Although section 10 may allow the imposition of exclusive legislative jurisdiction over state-owned lands north and west of the PYK line, it cannot be read as answering the question of Congress' intent regarding submerged lands. Moreover, section 10 would do nothing to restore title to the Federal Government to any submerged lands that might have passed to the State. As stated in Section V.G., supra, military use of state-owned submerged lands would require compensation to the State or acquisition by condemnation or purchase, and Congress had no intention of paying for the military use.[126]

Second, even if section 10 arguably is available north and west of the PYK Line to cure section 11(b), it would still leave gaps in exclusive legislative jurisdiction in lands underlying

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104 Cong. Rec. 12626 (1958) (bracketed material added). Senator Saltonstall was talking about the cost of acquiring the few privately owned lands (102,000 acres) north and west of the PYK line, if section 10 were invalid for the purpose of allowing the Federal Government to impose exclusive legislative jurisdiction upon them after statehood. No one in Congress ever contemplated the cost of reacquiring the millions of acres of submerged lands within military withdrawals throughout Alaska because Congress understood that existing withdrawals would prevent submerged lands within these military withdrawals from passage to the State. See Section V.E., supra.

[126] See supra n. 125.

navigable bodies of water south and east of the PYK Line. If section 11(b) is read not to have defeated state title, there is no mechanism at all in the ASA for effecting exclusive legislative jurisdiction on submerged lands held for military purposes south and east of the PYK Line. These are the military bases in closest proximity to urban areas of Alaska. Under this reading, Congress' purpose of holding these section 11(b) lands in readiness for military activity would be severely constrained. This awkward result makes very plain that Congress intended in section 11(b) to defeat state title to submerged lands in areas held for military purposes, including PLO 82.

I. Section 11(b) Constituted an Express Retention of Submerged Lands for Purposes of Section 5(a) of the Submerged Lands Act

Section 6(m) of the ASA expressly applies the SLA to Alaska. 72 Stat. 339, 343. I now examine section 11(b) to determine whether it also constitutes an exception from the operation of section 3(a) of the SLA granting "title to and ownership of the lands beneath navigable waters. . . ." 43 U.S.C. § 1311(a). Section 5(a) of the SLA excepts from the grant under section 3(a) of the SLA "all lands expressly retained by or ceded to the United States when the State entered the Union. . . ." 43 U.S.C. § 1313(a).

As stated in the Section V.G., supra, of this Opinion, PLO 82 lands are included in section 11(b) of the ASA which reserved exclusive legislative jurisdiction "in all cases whatsoever over such tracts or parcels of lands as, immediately prior to the admission of said State, are owned by the United States and held for military . . . purposes . . . ." Under the third proviso of section 11(b), the lands remain in this status "only so long as the particular tract or parcel of land involved is owned by the United States and used for . . . military purposes." 72 Stat. 339, 347-48.

The purpose of section 11(b) is undeniably to retain certain lands owned by the United States prior to statehood and held for military, naval, Air Force or Coast Guard purposes, so as to allow the continued use of the lands for these purposes. If submerged lands were not included in this retention of the lands, the third proviso of section 11(b) would cause the lands to fall outside the ambit of section 11(b). Submerged lands would be both included under the first sentance of section 11(b) and excluded under the third proviso. This statute should be construed to avoid this meaningless or inconsistent result. Hughes Air Corp., 644 F.2d at 1338.

Section 11(b) demonstrated a congressional intent to defeat state title to submerged lands as required by the Utah Lake test. Likewise, section 11(b) also constituted an express retention of

submerged lands within the meaning of section 5(a) of the SLA. Accordingly, the submerged lands did not pass to the State under section 3(a) of the SLA.[127]

VI. CONCLUSION

In summary, I have concluded:

1. The Utah Lake test applies to lands in PLO 82. See Section II, supra.

2. (a) Lands beneath inland navigable waters were included in the PLO 82 withdrawal and reservation of northern Alaska in 1943. See Section III.B., supra.

(b) The Secretary expressed no intent to defeat the title of a future state to inland submerged lands within the PLO 82 withdrawal area in 1943. See Section III.C., supra.

3. (a) In 1957 and 1958, the Executive intended to include submerged lands in the withdrawal of NPR-4 and the proposed withdrawal of the Arctic National Wildlife Range. See Section IV.B., supra.

(b) The Executive intended to defeat the future state's title to submerged lands within the boundaries of NPR-4 and the proposed boundaries of the Arctic National Wildlife Range (see Section IV.C., supra), and Congress affirmed this executive intent in the Alaska Statehood Act. See Section IV.D., supra.

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

(d) The Executive did not expressly address the defeat of state title to those portions of the PLO 82 withdrawal outside of NPR-4 and the proposed Arctic National Wildlife Range. See Section IV.E., supra.

4. Alaska's title to lands under inland navigable waters within the boundaries of PLO-82 was defeated by congressional action in section 11(b) of the Alaska Statehood Act retaining federal lands held for military purposes. See Section V.F., supra.

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[127] Because I determined that section 11(b) constituted an express retention of lands within the meaning of section 5(a) of the SLA, I need not determine whether it also constituted a cession of lands by the State under the same section.

(a) Congress intended to include lands underlying navigable bodies of water within areas subject to section 11(b) in order to carry out congressional purposes for those lands. See Section V.G., supra.

(b) The submerged lands within the boundaries of PLO-82 were expressly retained by the United States under the Submerged Lands Act at the time of Alaska Statehood. See Section V.I, supra.

Based on the foregoing conclusions, I find that the federal withdrawal and retention of lands under inland navigable waters within the boundaries of PLO 82 in northern Alaska met the two-pronged test set out in Utah Lake: (1) Inland submerged lands were included in the withdrawal at its creation in 1943 and remained in the withdrawal through the moment of Alaska Statehood; and (2) Congress affirmatively intended in the Alaska Statehood Act to defeat Alaska's title to the submerged lands within PLO 82.

Tom Sansonetti

Thomas L. Sansonetti
Solicitor

I concur: Manuel Lujan Jr. Date: 4/20/92

West Virginia, pursuant to an order of the Division issued October 7, 1941, and subsequently postponed by an Order of the Division issued March 7, 1942, to a date and hearing room thereafter to be designated by an appropriate order; and

The complainant having filed on January 20, 1943, with the Division its Motion to Dismiss the above-entitled matter without prejudice to the filing of a new complaint; and

The Director deeming it appropriate that said motion should be granted and that the above-entitled matter should be dismissed and said hearing be cancelled;

Now, therefore, It is ordered, That the above-entitled matter be, and the same is hereby dismissed without prejudice to the institution of any other proceeding that the Division may deem appropriate;

It is further ordered, That the hearing in the above-entitled matter be and the same is hereby cancelled.

Dated: February 1, 1943.

[SEAL] DAN H. WHEELER,
Director.

[F. R. Doc. 43-1821; Filed, February 3, 1943; 11:16 a. m.]

General Land Office.

[Public Land Order 78]

NEW MEXICO

WITHDRAWING PUBLIC LANDS FOR THE RIO GRANDE CANALIZATION PROJECT

By virtue of the authority vested in the President by sec. 1 of the act of May 13, 1924, c. 153, 43 Stat. 118, as amended by the act of August 19, 1935, c. 561, 49 Stat. 660, by the act of August 28, 1935, c. 805, 49 Stat. 961, and by the act of June 4, 1936, c. 500, 49 Stat. 1463, and pursuant to Executive Order No. 9146 of April 24, 1942, and to sec. 1 of the act of June 28, 1934, as amended, c. 865, 48 Stat. 1269 (U.S.C. title 43, sec. 315), *It is ordered as follows:*

Subject to valid existing rights, the following-described public lands are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining and mineral leasing laws, and reserved for the use of the Department of State, in connection with the Rio Grande Canalization Project:

NEW MEXICO PRINCIPAL MERIDIAN

T. 22 S., R. 1 E.,
Sec. 20, S½SW¼
T. 19 S., R. 3 W.,
Sec. 24, NE¼

The areas described aggregate 240 acres.

The orders of the Secretary of the Interior of July 11, 1935, and April 8, 1935, establishing New Mexico Grazing Districts Nos. 3 and 4, respectively, are hereby modified to the extent necessary to permit the use of the land as herein provided.

ABE FORTAS,
Acting Secretary of the Interior.

JANUARY 15, 1943.

[F. R. Doc. 43-1795; Filed, February 3, 1943; 9:44 a. m.]

[Public Land Order 82]

ALASKA

WITHDRAWING PUBLIC LANDS FOR USE IN CONNECTION WITH THE PROSECUTION OF THE WAR

By virtue of the authority vested in the President and pursuant to Executive Order No. 9146 of April 24, 1942, *It is ordered as follows:*

Subject to valid existing rights, (1) all public lands, including all public lands in the Chugach National Forest, within the following-described areas are hereby withdrawn from sale, location, selection, and entry under the public-land laws of the United States, including the mining laws, and from leasing under the mineral-leasing laws, and (2) the minerals in such lands are hereby reserved under the jurisdiction of the Secretary of the Interior, for use in connection with the prosecution of the war:

NORTHERN ALASKA

All that part of Alaska lying north of a line beginning at a point on the boundary between the United States and Canada, on the divide between the north and south forks of Firth River, approximate latitude 68°32' N., longitude 141°00' W., thence westerly, along this divide, and the periphery of the watershed northward to the Arctic Ocean, along the crest of portions of the Brooks Range and the De Long Mountains, to Cape Lisburne.

The area described, including both public and non-public lands, aggregates 48,800,000 acres.

ALASKA PENINSULA

Beginning at the highest point on Mt. Veniaminof, approximate latitude 56°12' N., longitude 159°24' W.;

South, approximately 24 miles, to a point on the north shore of Ivanof Bay;

Northeasterly, approximately 400 miles, along the Pacific Ocean, Shelikof Strait and Cook Inlet to Tuxedni Bay;

Northwesterly, approximately 46 miles, along the south shore of Tuxedni Bay, to the headwaters of the principal stream entering Tuxedni Bay from the west, across the Aleutian Range of mountains to the most northerly point of Little Lake Clark;

Southwesterly, approximately 240 miles, along the easterly shores of Little Lake Clark, Lake Clark and Sixmile Lake to Newhalen River, downstream along the left bank of Newhalen River to Iliamna Lake, southwesterly along the north and west shores of Iliamna Lake to Kvichak River, downstream along the left bank of Kvichak River, and the shores of Kvichak Bay and Bristol Bay, to a point due north of the point of beginning;

South approximately 32 miles, to the point of beginning.

The area described, including both public and non-public lands, aggregates 15,600,000 acres.

KATALLA-YAKATAGA

Beginning at Cottonwood Point, at the mouth of Copper River, approximate latitude 60°17' N., longitude 144°55' W.;

Northerly, approximately 18 miles upstream along the left bank of Copper River to a point on the North boundary of the Chugach National Forest;

Easterly, approximately 92 miles, along the north boundary of the Chugach National Forest to the east boundary of the national forest;

East, approximately 100 miles, to the boundary between the United States and Canada;

South, approximately 16 miles, along the International Boundary to Mt. St. Elias;

South, approximately 38 miles, across Malaspina Glacier, to the Gulf of Alaska;

Westerly, approximately 140 miles, along the Gulf of Alaska, to the point of beginning.

The area described, including both public and non-public lands, aggregates 3,040,000 acres.

The total area described in the three tracts aggregates approximately 67,440,000 acres.

This order shall not affect or modify existing reservations of any of the lands involved except to the extent necessary to prevent the sale, location, selection, or entry of the above-described lands under the public-land laws, including the mining laws, and the leasing of the lands under the mineral-leasing laws.

ABE FORTAS,
Acting Secretary of the Interior.

JANUARY 22, 1943.

[F. R. Doc. 43-1796; Filed, February 3, 1943; 9:45 a. m.]

[Stock Driveway Withdrawal 14, Wyo. 2]

WYOMING

REDUCTION OF STOCK DRIVEWAY WITHDRAWAL

The order of the Acting Secretary of the Interior of April 24, 1918, establishing Stock Driveway Withdrawal No. 14, Wyoming No. 2, under section 10 of the act of December 29, 1916, 39 Stat. 865, 43 U. S. C. 300, is hereby revoked so far as it affects the following-described lands:

SIXTH PRINCIPAL MERIDIAN

T. 58 N., R. 78 W.,
Sec. 16;
T. 58 N., R. 77 W.,
Sec. 24;
Sec. 25, N½N½, SW¼, and S½SE¼.

The areas described aggregate 1,280.24 acres.

OSCAR L. CHAPMAN,
Assistant Secretary of the Interior.

JANUARY 8, 1943.

[F. R. Doc. 43-1794; Filed, February 3, 1943; 9:44 a. m.]

DEPARTMENT OF LABOR.

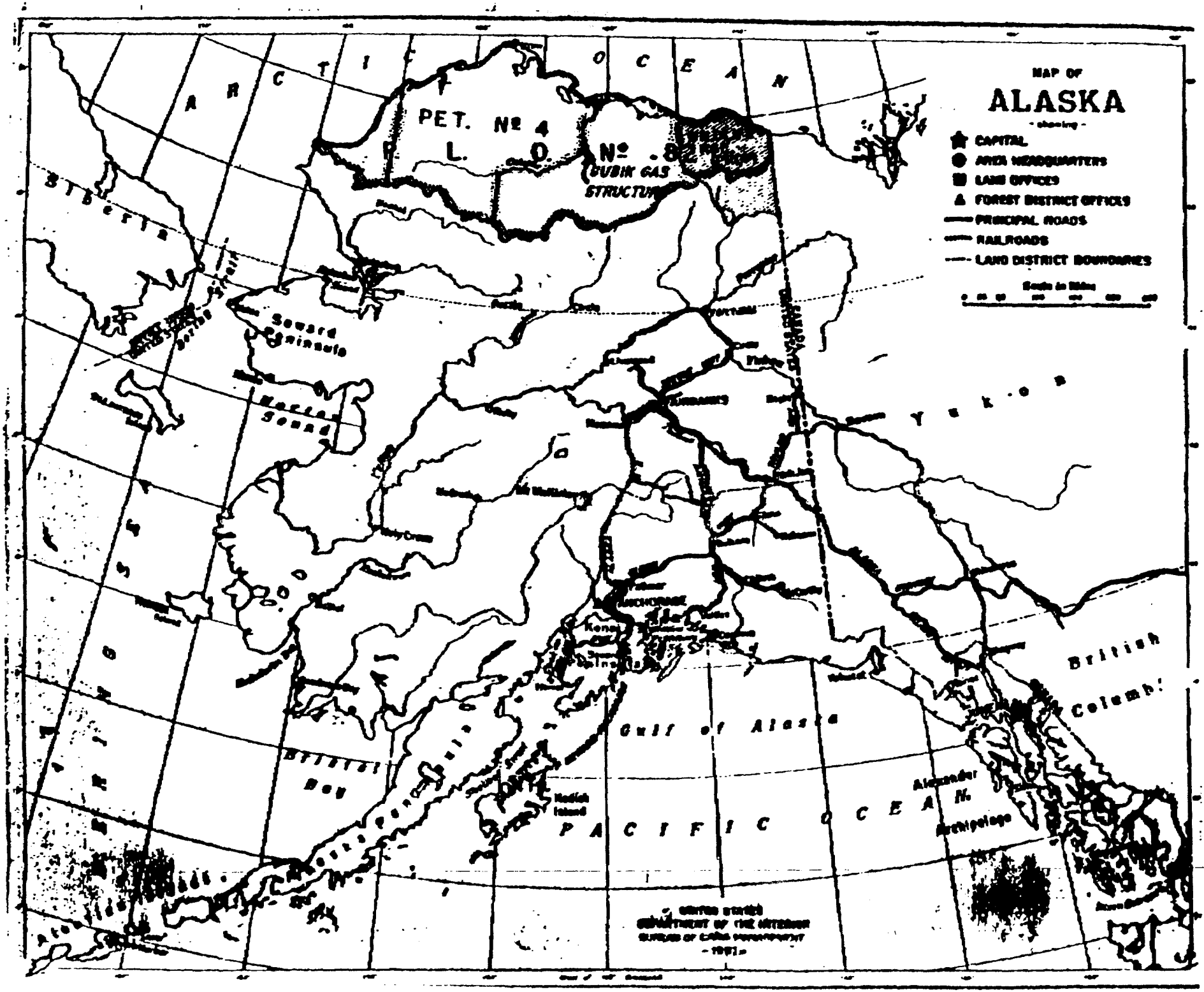
Wage and Hour Division.

LEARNER EMPLOYMENT CERTIFICATES

ISSUANCE TO VARIOUS INDUSTRIES

Notice of issuance of Special Certificates for the employment of learners under the Fair Labor Standards Act of 1938.

Notice is hereby given that special certificates authorizing the employment of learners at hourly wages lower than the minimum wage rate applicable under section 6 of the Act are issued under section 14 thereof, Part 522 of the Regulations issued thereunder (August 16, 1940 5 F.R. 2862, and as amended June 25, 1942, 7 F.R. 4723), and the Determination and Order or Regulation listed


MAP OF
ALASKA
showing
CAPITAL
AREA HEADQUARTERS
LAND OFFICES
FOREST DISTRICT OFFICES
PRINCIPAL ROADS
RAILROADS
LAND DISTRICT BOUNDARIES
PET. Nº 4
P. L. O. Nº. 8
DUBIK GAS STRUCTUR
ARCTIC OCEAN
Seward Peninsula
Norton Sound
Yukon
Fairbanks
Anchorage
Kenai Peninsula
Gulf of Alaska
British Columbi
Bristol Bay
Kodiak Island
PACIFIC OCEA
Alexander Archipelago
UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
1971

United States Department of the Interior

GEOLOGICAL SURVEY
4200 University Drive
Anchorage, Alaska 99508-4667

25 February 92

Memorandum

To : Paul Kirton, Solicitor's Office

From : Max Brewer, Branch of Alaskan Geology

Subj. : DEWLine Stations in Alaska

In additional response to your questions from yesterday, the following are the names and locations of the DEWLine Sites in Alaska. The sites designated as "Main" sites were originally constructed with two rows (trains) of joined prefabbed structures, 20 feet wide by 528 feet long, to house a complement of 48 men plus radar and communications equipment. The "numbered" sites, called auxiliary radar sites, had only one "train," 528 feet long and with a complement of 20 men. The "lettered" sites, called "intermediate" sites, were only used as communications (line of sight) relay stations, did not contain radar equipment, had a complement of 6 or 7 men, and were about one-half the length of a normal train. All sites had a few outlying structures for equipment and storage. All structures were on wooden piling steamed or augured 12 feet into the permafrost. The intermediate sites had airstrips 1200-1500 feet long; the auxiliary sites airstrips 3500 feet long, and the main sites airstrips 5000 feet long. All the intermediate sites were deactivated on 1 July 1963; some of the auxiliary sites have been deactivated since that time.

LIZ-1	(at Cape Lisburne). This site is the northernmost part of the WHITE ALICE radar net and is the interface between the WHITE ALICE and the DEWLine. It is larger than a DEWLine MAIN site and was the only one on the list that was operated by military personnel.
LIZ-A	Code name Cape Beaufort, but actually located at the nearby Cape Sabine.
LIZ-2	Located near Point Lay.
LIZ-B	Located at Icy Cape, just inside the western boundary of PET-4 (NPRA).
LIZ-3	Located about 4 miles inland from the village of Wainwright.
LIZ-C	Code name Skull Cliff.
POW MAIN	Located one-half mile east of the NARL Camp at Barrow.
POW-A	ON the northeast coast of Cape Simpson.
POW-1	Originally called Pitt Point, but located about 4 miles west of Pitt Point and more recently called Lonely. The base of operations for the recent NPRA exploration is located 0.4 mile west of this site.
POW-B	Located on Kogru Inlet and the most easterly site in NPRA.
POW-2	Located at Oliktok Point just northeast of the mouth of the main channel of the Colville River.
POW-C	Located at Point McIntyre just west of Prudhoe Bay.
POW-3	Code name is Flaxman Island, although the station is located on the mainland at Bullen Point.
.....	Prototype (1953-54 feasibility test) site at Brownlow Point near the mouth of the Canning River. This is the western counterpart of the prototype

BAR-1-A station east of Barter Island, i.e., the Air Force established two stations, one about 100 miles west of Barter Island and one about 100 miles east of Barter Island, to check if the equipment would perform as planned before embarking on construction of the DEWLine. I never knew of a code name for this site.

POW-D — Code name Camden Bay, located west of the mouth of the Sadlerochit River. Camden Bay, located within the 1002 Area, has the best anchorage for boats/barges between Nome and Demarcation Point.

BAR MAIN — Located on Barter Island immediately adjacent to Kaktovik.

BAR-A — Located at Humphrey Point, but the site is often called Beaufort Lagoon.

BAR-A-1 — Prototype (1953-54 feasibility test) site located on the eastern shore of Demarcation Bay. A WWII LST vessel, decommissioned at Barter Island in July 1963, sold as surplus property shortly thereafter, and sailed, without any crew, to its present location on 3-4 October 1963, is aground in Demarcation Bay.

Construction of the DEWLine began in January 1955 and it officially went into operation on 1 July 1957.

The PROJECT CHARIOT camp (Cape Thompson) was established on the bank of Ogotoruk Creek. Scientific studies were begun during the summer of 1958, with the most intensive scientific work being accomplished during 1959-61.

The NARL, in addition to having use of the eight deactivated DEWLine Intermediate Sites, had permanent, year-round (insulated wooden structures) camps at:

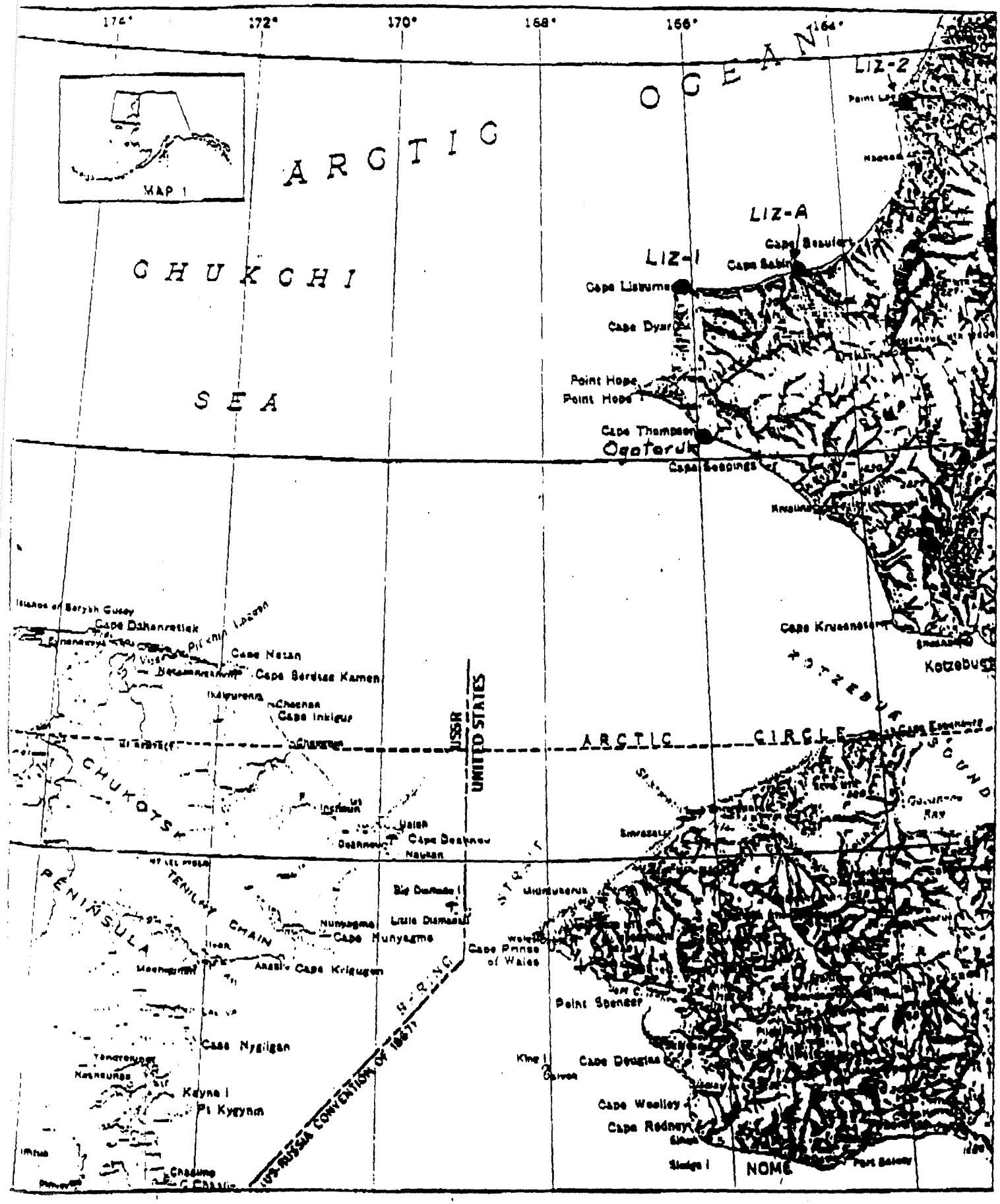
Point Hope	- large cabin on piling
Cape Thompson	- 5 wanigans
Wainwright	- 3 wanigans
Skull Cliff	- 1 wanigan
Atqasuk	- (Meade River Village) - 5 wanigans
Noluck Lake	- 1 wanigan
Umiat	- 5 buildings, including 3 quonsets
Anaktuvuk Pass	- 1 wanigan
Teshekpuk Lake	- 1 wanigan at the NW corner of the lake
Putu	- 2 wanigans on the bank of the west channel of the Colville River, near Nuiqsut
Peters Lake	- 6 structures and wanigans

The only major military efforts, other than those discussed yesterday, were the annual Naval ship resupply expeditions for the 1944-1953 petroleum exploration program, 1944-53; the MSTS resupply expeditions for the DEWLine, 1955-62 (this effort was contracted out to a commercial barge company in 1963); and the construction of a 625-foot high Loran tower at Skull Cliff in 1949.

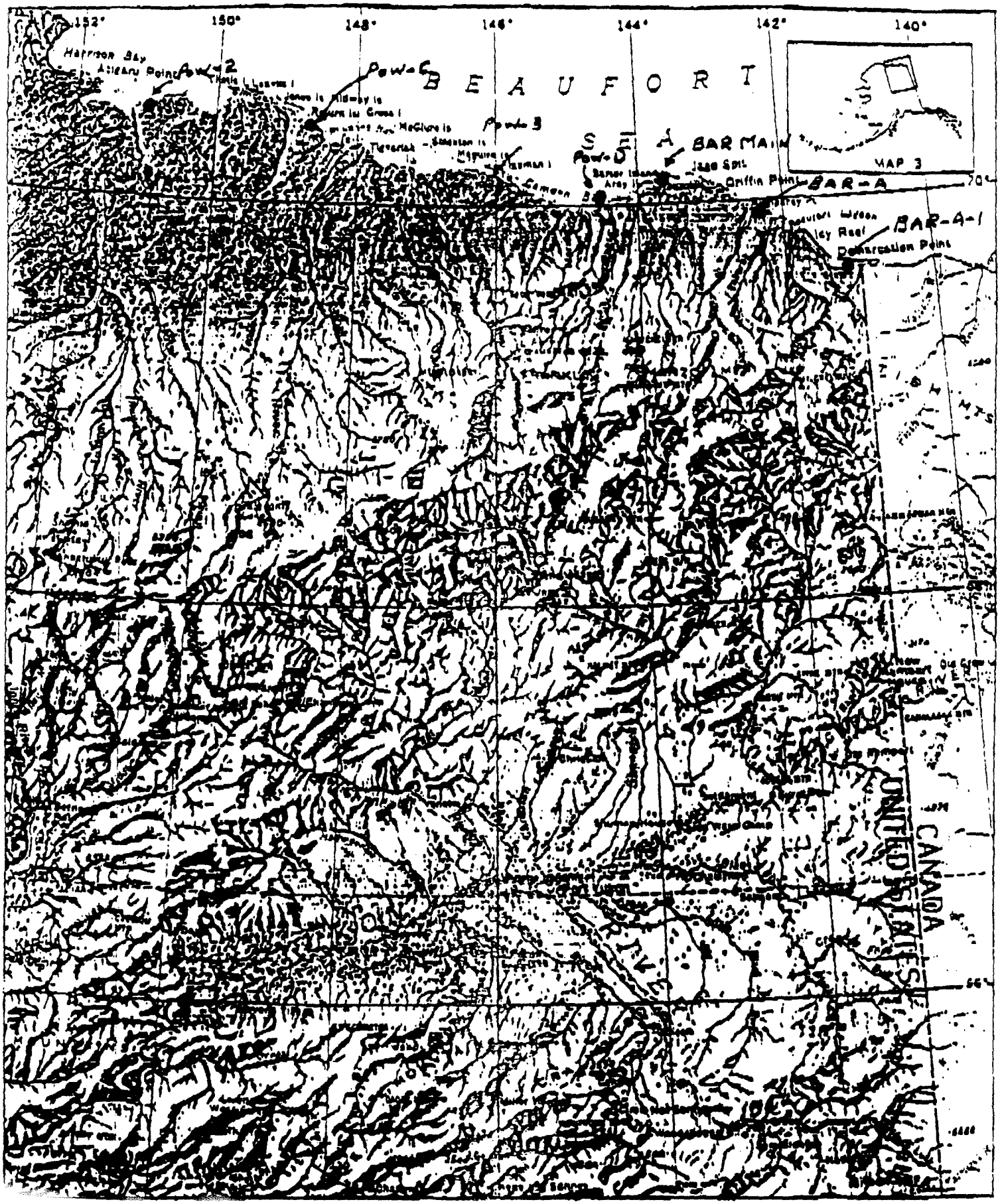
Don't hesitate to ask if additional information is needed. Meanwhile, it was good to talk with you again.

Max C. Brewer

Attachments (3 maps)


176°
172°
170°
168°
166°
164°
MAP 1
ARCTIC OCEAN
CHUKCHI SEA
LIZ-2
LIZ-A
LIZ-1
Cape Lisburne
Cape Dyer
Point Hope
Cape Thompson
Ogotoruk
Cape Seppings
Cape Krusenstern
Kotzebue
Cape Dahanrretlak
Cape Nazan
Cape Serdtse Kamen
Inkigurenn
Chaonak
Cape Inkigur
ARCTIC CIRCLE
USSR
UNITED STATES
CHUKOTSK PENINSULA
TENIGAT CHAIN
Cape Nunyagmo
Cape Krigugen
Cape Nygilgan
Kayne I
Pt Kygynm
Cape Deshnev
Naukan
Big Diomede I
Little Diomede I
Cape Prince of Wales
BERING STRAIT
1867 RUSSIA CONVENTION OF
Point Spencer
King I
Cape Douglas
Cape Woolley
Cape Rodney
Sledge I
NOME
Port Safety
KOTZEBUE SOUND
Cape Espenberg
Goodhope Bay
Escarpada


ARCTIC OCEAN
MAP 2
LIZ-1
LIZ-2
LIZ-3
LIZ-B
LIZ-C
Barrow
Point Barrow
Wainwright
Icy Cape
Point Lay
Kotzebue
Selawik Lake
KOTZEBUE SOUND
Cape Simpson
Pitt Point
Harrison Bay
Atigaru Point
70°
160°
158°
156°
154°
152°
162°
164°


152°
150°
148°
146°
144°
142°
140°
Harrison Bay
Atigaru Point
BEAUFORT
SEA
BAR MAIN
BAR-A
BAR-A-1
Griffin Point
Oceanographic Point
MAP 3
UNITED STATES
CANADA