

2006

## Glacier Bay And Alaska v. United States: Who Owns Submerged Lands In Federal Reserves?

Jana Magnuson

*University of Maine School of Law*

Follow this and additional works at: <http://digitalcommons.mainerlaw.maine.edu/oclj>

---

### Recommended Citation

Jana Magnuson, *Glacier Bay And Alaska v. United States: Who Owns Submerged Lands In Federal Reserves?*, 12 Ocean & Coastal L.J. (2006).

Available at: <http://digitalcommons.mainerlaw.maine.edu/oclj/vol12/iss1/7>

This Case Note is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Ocean and Coastal Law Journal by an authorized administrator of University of Maine School of Law Digital Commons. For more information, please contact [mdecrow@maine.edu](mailto:mdecrow@maine.edu).

GLACIER BAY AND ALASKA v. UNITED STATES:  
WHO OWNS SUBMERGED LANDS IN  
FEDERAL RESERVES?

*Jana Magnuson*\*

I. INTRODUCTION

In *Alaska v. United States*,<sup>1</sup> the State of Alaska sued the federal government to quiet title to submerged lands underlying the waters of Glacier Bay National Monument (the Monument)<sup>2</sup> and other marine areas of the storied southeastern region of the state.<sup>3</sup> The State invoked the United States Supreme Court's original jurisdiction over suits between a state and the United States,<sup>4</sup> and was given leave to file a bill of complaint against the United States.<sup>5</sup> After a Special Master<sup>6</sup> appointed by the Court recommended summary judgment be granted for the United States, Alaska filed exceptions and the Court set oral argument.<sup>7</sup>

The principal question presented in this case was whether title to the submerged lands had passed to Alaska at statehood under the "equal

---

\* University of Maine School of Law, Class of 2007. In dedication, the Author remembers two twentieth century men: Anastasios Kollias and Charles W. Harmon, her grandfathers.

1. 545 U.S. 75, 125 S. Ct. 2137 (2005), judgment entered, \_\_\_ U.S. \_\_\_, 126 S. Ct. 1014 (2006).

2. The Monument was so named until 1980, when it was expanded and re-designated as "Glacier Bay National Park" and "Glacier Bay National Preserve." See Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as 16 U.S.C. § 410hh-1(1) (2000)).

3. The other marine areas at issue in the case were areas of the Alexander Archipelago and the Tongass National Forest. See *infra* note 68.

4. 28 U.S.C. § 1251(b)(2) (2000); U.S. CONST. art. III, § 2 cl. 2.

5. See *Alaska v. United States*, 530 U.S. 1228 (2000).

6. *Alaska v. United States*, 531 U.S. 941 (2000) (appointing Professor Gregory E. Maggs of Washington, D.C. as Special Master).

7. *Alaska v. United States*, 543 U.S. 953 (2004).

footing” doctrine and the Submerged Lands Act (SLA),<sup>8</sup> or whether the United States had successfully defeated conveyance of title at that time by a “very plain” showing of its intent to retain title for the United States. Among the counts in the complaint, the issue of title to lands under Glacier Bay proved particularly contentious as it posed the specific question of submerged lands ownership within federal reservations. On this issue, the Court overruled Alaska’s exceptions, holding that the United States held title to the submerged lands of Glacier Bay.<sup>9</sup>

This Note first reviews the development of the law of submerged lands ownership and the judicial approach to such questions arising within the context of federal reserves. After examining a prior application of this approach to other areas in Alaska, the Note discusses how the Court has set out to resolve the tension between state and federal claims of ownership by considering both the purposes of the federal reservations at issue and the state’s uses or possible uses. The Note explicates the Court’s test governing disputes over submerged lands in federal reservations and then considers the stated and unstated burdens borne by the parties in these cases. The provocative question illuminated by this case is: what must a party show to successfully claim title to submerged lands within a federal reservation?

## II. OWNERSHIP OF SUBMERGED LANDS

### A. *Equal Footing and the Submerged Lands Act*

The equal footing doctrine ensures that new states join the United States possessing the same sovereignty rights as the thirteen original states.<sup>10</sup> Because submerged lands that lie beneath navigable waters were never granted to the United States in the Constitution, but were instead reserved to the thirteen original states, the doctrine holds that the federal government holds lands under navigable waters in trust for future states, with new states assuming title to the submerged lands within their boundaries as an “incident of sovereignty”<sup>11</sup> in order to gain “equal footing” with established states.<sup>12</sup>

---

8. 43 U.S.C. § 1301 (2000).

9. *Alaska v. United States*, 545 U.S. 75, 125 S. Ct. 2137, 2161 (2005).

10. *California ex rel. State Lands Comm’n v. United States*, 457 U.S. 273, 281 n.9 (1982).

11. *Martin v. Waddell’s Lessee*, 41 U.S. (16 Pet.) 367, 409-11 (1842).

12. *Pollard’s Lessee v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845); *see also* *United States v. Alaska*, 521 U.S. 1, 5 (1997) (hereinafter *Alaska (Arctic Coast)*). This application of the equal footing doctrine is sometimes referred to as “the rule of *Pollard’s Lessee*” or “the *Pollard* rule.”

At the end of World War II, President Truman issued what is commonly known in the law of the sea as the Truman Proclamation, claiming for the federal government exclusive control over the natural resources of the continental shelf adjacent to the coasts of the United States.<sup>13</sup> Although this announcement is famous for its profound ramifications for international law,<sup>14</sup> it also manifested an abrupt departure from the domestic legal regime over coastal submerged lands by asserting that the federal government now owned these lands.<sup>15</sup>

At the time of the Truman Proclamation, some states were engaged in leasing offshore oil and gas exploration rights.<sup>16</sup> In *United States v. California*,<sup>17</sup> the federal government challenged these leases as invalid in light of the new federal claim of ownership to the submerged ocean bed. Holding in favor of the United States, the Supreme Court differentiated between inland navigable waters such as “rivers, harbors, and . . . tidelands,”<sup>18</sup> over which the original states were sovereign, and ocean waters seaward of the coast.<sup>19</sup> Persuaded by post-war considerations of national sovereignty and security,<sup>20</sup> the Court held that the United States possessed “paramount” rights and power over submerged lands (and any resources in those lands) underlying the state’s coastal ocean waters from the low-tide mark extending three nautical miles to sea.<sup>21</sup>

In response to the *California* decision and consistent Court decisions involving claims to submerged lands by Louisiana and Texas,<sup>22</sup> Congress codified the equal footing doctrine and confirmed state title to “lands

---

13. See Proclamation No. 2667, 10 Fed. Reg. 12,303 (Sept. 28, 1945).

14. Harry N. Scheiber & Christopher J. Carr, *From Extended Jurisdiction to Privatization: International Law, Biology, and Economics in the Marine Fisheries Debates, 1937-1976*, 16 BERKELEY J. INT’L L. 10, 15 (1998) (discussing how the Truman Proclamation marked the beginning of the multinational rush to claim jurisdictional control over adjacent seas, leading to the United Nations consideration that eventually yielded the U.N. Law of the Sea Convention).

15. JOSEPH J. KALO ET AL., COASTAL AND OCEAN LAW 346 (2d ed. 2002).

16. *Id.*; see also *United States v. California*, 332 U.S. 19, 23 (1947).

17. 332 U.S. 19, 22-23 (1947).

18. *Id.* at 30.

19. *Id.* at 38-39.

20. *Id.* at 35 (“The three-mile rule is but a recognition of the necessity that a [coastal nation’s] government . . . must be able to protect itself from dangers incident to its location.”). *Id.*

21. *Id.* at 38-39.

22. See *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. Texas*, 339 U.S. 707 (1950). See also Richard B. Morris, *The Forging of the Union Reconsidered: A Historical Refutation of State Sovereignty over Seabeds*, 74 COLUM. L. REV. 1056, 1058-60 (1974), for a consideration of both cases.

beneath navigable waters” by enacting the Submerged Lands Act of 1953 (SLA).<sup>23</sup> The SLA ceded ownership and control to the states of lands beneath the territorial sea<sup>24</sup> as well as inland navigable waters.<sup>25</sup> Under the SLA, state ownership carries the “right and power to manage, administer, lease, develop, and use” submerged lands beneath navigable waters and the natural resources within those lands and waters.<sup>26</sup> This ownership right has historically been recognized as a power to control commercial activity such as fishing and navigation, as well as a fundamental attribute of state sovereignty.<sup>27</sup>

Since passage of the SLA, a strong presumption exists that ownership of submerged lands passed to a state at statehood.<sup>28</sup> The federal government can rebut this presumption and defeat a state’s title, however, by demonstrating that submerged lands were set aside before statehood “in a way that shows an intent to retain title.”<sup>29</sup> The Court will not infer this intent; it must be “definitely declared or otherwise made very plain.”<sup>30</sup>

In cases involving the particular question of submerged lands within federal land reserves, such as Indian reservations, reclamation sites, and federal wildlife preserves, the Court has developed a test of intent for determining whether the federal government sufficiently prevented transferring title of submerged lands to a state. This two-step test<sup>31</sup> is met when (1) an executive reservation before or at statehood clearly includes submerged lands, and (2) “Congress recognizes the reservation in a way that

---

23. See *United States v. California*, 436 U.S. 32, 37 (1978).

24. 43 U.S.C. § 1312 (2000).

25. *Id.* § 1311(a). Although the SLA did not define inland waters, the Court subsequently adopted definitions consistent with the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone. *United States v. California*, 381 U.S. 139, 165 (1965); see *Convention on the Territorial Sea and the Contiguous Zone*, Apr. 29, 1958, [1964] 15 U.S.T. 1607, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [hereinafter *Convention*]. One recognized type of inland waters are “juridical bays,” defined as “well-marked indentations” along the coast; that is, the bays possess features that would allow a hypothetical mariner to perceive their contours on a navigational chart. *Convention*, art. 7(2).

26. 43 U.S.C. § 1311(a) (2000).

27. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987) (“Because title to [submerged] land was important to the sovereign’s ability to control navigation, fishing, and other commercial activity on rivers and lakes [under common law], ownership of this land was considered an essential attribute of sovereignty.”). *Id.*

28. *United States v. Alaska*, 521 U.S. 1, 35-36 (1997).

29. *Alaska v. United States*, 545 U.S. 75, 125 S. Ct. at 2144; *United States v. Alaska (Arctic Coast)*, 521 U.S. at 33-34.

30. *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926).

31. The inquiry is described neatly in *Idaho v. United States*, 533 U.S. 262, 273 (2001). See *United States v. Alaska (Arctic Coast)*, 521 U.S. at 36, 41; *Utah Div. of State Lands v. United States*, 482 U.S. at 202.

demonstrates an intent to defeat state title.”<sup>32</sup> Under step one, the Court will look to see whether Congress “was on notice” that the executive reservation included the submerged lands and also whether the purpose of the reservation “would have been compromised” or undermined if title to the submerged lands had transferred to the state.<sup>33</sup> Step two, as this Note will discuss further, requires a definite declaration or some other clear and plain showing of federal intent to defeat state title.<sup>34</sup>

*B. The Alaska Statehood Act and Submerged Lands in  
Alaska’s Oil Regions*

Given its abundance of coastal and inland waterways and its large areas of federally owned lands, it is not surprising that Alaska has been involved in more disputes over submerged lands than any other state.<sup>35</sup> The issue was addressed at the time of Alaska’s statehood through section 6(m) of the Alaska Statehood Act (ASA), expressly applying the SLA to Alaska upon admission and thus codifying a presumption of state title to submerged lands.<sup>36</sup>

More broadly, section 5 of the ASA provided that upon Alaska’s admission, the United States would retain ownership of all property it had held in Alaska before statehood, while the new state would acquire title to property previously held by the Territory of Alaska.<sup>37</sup> However, this general rule was subject to an exception set forth in section 6(e), regarding certain types of wildlife conservation areas, that was to prove both important and problematic:

All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska [under three specific fish and game laws listed explicitly]

---

32. *Idaho v. United States*, 533 U.S. at 273.

33. *Id.* at 273-74.

34. *See* *United States v. Alaska (Arctic Coast)*, 521 U.S. at 35.

35. Report of the Special Master 128 at 2-3, n.2 [hereinafter Special Master’s Report]. In addition to the Note case and *Alaska (Arctic Coast)*, litigation has involved coastal submerged lands in Norton Sound (*United States v. Alaska*, 503 U.S. 569 (1992)) and Cook Inlet (*United States v. Alaska*, 422 U.S. 184 (1975)). For discussions of disputed ownership of Alaska’s submerged lands, see Denise Dosier, *The Clouds Are Lifting: The Problem of Title to Submerged Lands in Alaska*, 8 ALASKA L. REV. 271 (1991); Duncan Hollomon, *The Struggle for Alaska’s Submerged Land*, 5 ALASKA L. REV. 69 (1988).

36. Alaska Statehood Act, Pub. L. No. 85-508, § 6(m), 72 Stat. 343 (1958) [hereinafter ASA].

37. *Id.* § 5.

. . . shall be transferred and conveyed to the State of Alaska . . .  
*Provided*, That such transfer shall not include lands withdrawn or  
otherwise set apart as refuges or reservations for the protection of  
wildlife . . . .<sup>38</sup>

The state-federal dispute in *United States v. Alaska (Arctic Coast)*<sup>39</sup> largely concerned title to oil-rich submerged lands within two federal reservations in the state's North Slope region: the National Petroleum Reserve and the Arctic National Wildlife Refuge (ANWR).<sup>40</sup> In holding that title to these areas had been retained by the United States, the Court first generally emphasized the SLA's terms that equal footing (submerged) lands pass to a state unless "expressly retained" by the United States.<sup>41</sup> The Court also reaffirmed that federal "intent to defeat state title to submerged lands must be 'definitely declared or otherwise made very plain.'"<sup>42</sup> The Court then looked for such express intent with both reserves.<sup>43</sup>

Regarding the National Petroleum Reserve, the Court first found the requisite expression of intent to include submerged lands within the federal reservation in President Harding's executive order creating the reserve, which described the reservation's boundaries in a way that necessarily included some submerged tidelands landward of barrier islands.<sup>44</sup> Acknowledging that the reservation of water areas does not in and of itself indicate that submerged lands are included, the Court was persuaded by considering the purpose for which the reservation was established: to secure supplies of oil for the Navy from the area's valuable subsurface petroleum resources.<sup>45</sup> To the Court, it was "simply not plausible" that the federal government would not have intended to reserve submerged areas along with upland areas, because the express purpose "would have been undermined" if oil deposits underlying lagoons and tidal waters had been excluded from the reservation.<sup>46</sup> In so deciding, the Court distinguished cases put forth by Alaska "where the disputed submerged lands were unnecessary for achieving the federal objectives."<sup>47</sup> Addressing the second step, the Court found the requisite intent to defeat state title to submerged lands of the

---

38. *Id.* § 6(e) (italics in original).

39. 521 U.S. 1 (1997).

40. *United States v. Alaska (Arctic Coast)*, 521 U.S. at 6.

41. *Id.* at 35.

42. *Id.* at 36 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)).

43. *See id.* at 36-46.

44. *Id.* at 36-40.

45. *United States v. Alaska (Arctic Coast)*, 521 U.S. at 38-39.

46. *Id.* at 39-40.

47. *Id.* at 40-41.

National Petroleum Reserve in a section of the ASA that explicitly referred to retained federal power over lands “owned by the United States and held for military . . . purposes, including [the National Petroleum Reserve].”<sup>48</sup>

Regarding ANWR, the second disputed reserve, the Court repeated its two-part analysis. It first found the intent to include submerged lands in the reservation within the boundary description,<sup>49</sup> which necessarily included submerged areas, and in the application’s express references to the purposes of the proposed range.<sup>50</sup> These purposes included the preservation of submerged areas providing nesting for migratory waterfowl, river bottoms used by moose, and coastal habitats for polar bears, seals, and whales.<sup>51</sup> Again, the Court distinguished the State’s cited authority, *Montana v. United States*<sup>52</sup> and *Utah Division of Lands v. United States*,<sup>53</sup> by recognizing that “in each case, [the Court] focused on the purpose of the . . . reservation as a critical factor in determining federal intent” and that here, retaining lands underlying waters of habitats “was critical” to the federal government’s preservation goal.<sup>54</sup>

Finally, the Court found explicit intent to defeat state title in the proviso of section 6(e) of the ASA, which named lands “withdrawn or otherwise set apart as refuges . . . for the protection of wildlife” as an exception to the general grant of title to Alaska to lands within its territory.<sup>55</sup> Significantly, however, the Court did not analyze or question the relationship between the main clause of section 6(e) and its proviso. Rather, it treated the section as exempting *all* areas set aside for wildlife conservation from conveyance to the state, rather than only a subset of property “specifically used for the sole purpose of conservation” of fish and wildlife under three specific fish and game statutes (none of which in fact were pertinent to ANWR).<sup>56</sup> Although this issue was tangentially raised by Justice Thomas in his partial dissent,<sup>57</sup> it was not discussed in any detail to foreshadow its centrality to the Glacier Bay dispute of the Note case.

---

48. *Id.*; see Alaska Statehood Act, Pub. L. No. 85-508, § 11(b), 72 Stat. 347 (1958).

49. *United States v. Alaska (Arctic Coast)*, 521 U.S. at 51.

50. *Id.*

51. *Id.*

52. 450 U.S. 544 (1981).

53. 482 U.S. 193 (1987).

54. *United States v. Alaska (Arctic Coast)*, 521 U.S. at 51-52.

55. *Id.* at 56.

56. *Alaska v. United States*, 545 U.S. 75, 125 S. Ct. 2137, 2166-67 (2005) (Scalia, J., dissenting in part) (quoting § 6, 72 Stat. at 340).

57. *United States v. Alaska (Arctic Coast)*, 521 U.S. at 69 n.5. Justice Thomas was joined in his partial dissent by Chief Justice Rehnquist and Justice Scalia.

III. THE COURT'S DECISION ON GLACIER BAY IN  
*ALASKA V. UNITED STATES*

Glacier Bay National Park is, at over three million acres, one of the nation's largest national parks.<sup>58</sup> President Coolidge created Glacier Bay National Monument in 1925 pursuant to the Antiquities Act;<sup>59</sup> Presidents Franklin Roosevelt and Eisenhower subsequently expanded and altered its boundaries.<sup>60</sup> It is a scientifically fascinating area, valuable for the study of glacier flow and of prehistoric forest remnants exposed by rapid glacial retreat.<sup>61</sup> Biologists are interested in observing the plant and animal succession that follows in the wake of this retreat, as well as the rich variety of wildlife in and around Glacier Bay's waters, including seabirds, whales, and brown bears that swim to reach sources of food on small islands.<sup>62</sup> It is also an area of pristine and awesome beauty. Naturalist John Muir described the sight of huge glacial masses "calving," crashing into the sea to become icebergs.<sup>63</sup> Today, tourists embark on the numerous cruise ships that ply Glacier Bay to witness these same sights.<sup>64</sup>

In *Alaska v. United States*,<sup>65</sup> "one of the largest quiet title actions ever litigated,"<sup>66</sup> the State of Alaska sought to quiet title<sup>67</sup> to submerged lands underlying Glacier Bay and other waters<sup>68</sup> of the state's vast and storied

---

58. *Alaska v. United States*, 545 U.S. 75, 125 S. Ct. at 2153.

59. 16 U.S.C. § 431 (2000). *See also infra* notes 87-88.

60. 53 Stat. 2534 (1939); 69 Stat. c27 (1955).

61. *See Alaska v. United States*, 545 U.S. 75, 125 S. Ct. at 2153-55; *see also* National Park Service: Glacier Bay, <http://www.nps.gov/glba/index.htm> (last visited Sept. 2, 2006).

62. *Alaska v. United States*, 545 U.S. 75, 125 S. Ct. at 2154-55.

63. *Id.*

64. National Park Service: Glacier Bay, <http://www.nps.gov/glbaplanyourvisit/cruising.htm> (last visited Sept. 2, 2006).

65. 545 U.S. 75, 125 S. Ct. 2137 (2005).

66. Special Master's Report, *supra* note 35, at 2.

67. Quiet Title Act, 28 U.S.C. § 2409a(a) (2000) (allowing the United States to be named as a defendant in a civil action over disputed title to real property); *see also* *California v. Arizona*, 440 U.S. 59, 64 (1979) (waiving the United States' sovereign immunity for actions to quiet title).

68. The complaint listed three counts in addition to the Glacier Bay issue. In Counts I and II, the State argued that the waters of the Alexander Archipelago qualified as inland waters under two alternative theories: (1) they were "historic inland waters" and (2) the geographic features of the waters met the criteria for a juridical bay (a feature recognized as inland waters under article 7(2) of the Convention on the Territorial Sea and the Contiguous Zone). Special Master's Report, *supra* note 35, at 4. The United States successfully counter-argued that the requisite showings to declare these waters as inland waters were not made. On these two counts, the Special Master recommended summary judgment for the United States. *Id.* at 137, 226.

southeastern region. In contrast to the controversy in *Alaska (Arctic Coast)*, mineral interests were not directly at issue here.<sup>69</sup> Alaska was interested in allowing more cruise boat entries into the bay,<sup>70</sup> and in allowing continued commercial and subsistence fishing within its waters.<sup>71</sup> Under federal management, commercial fishing in Glacier Bay was being phased out amid much controversy within the state.<sup>72</sup> Meanwhile, ongoing federal activities involving the submerged bed of Glacier Bay included acoustic and sonar imaging (conducted from the surface) relating to glacier study. The federal government had also installed listening devices in the bed to gauge vessel noise for its potential interference with whale communication.<sup>73</sup>

Invoking its original jurisdiction, the Supreme Court granted leave for the State of Alaska to file a complaint against the United States.<sup>74</sup> The Court then appointed a Special Master, who recommended summary judgment for the United States on all the disputed submerged lands.<sup>75</sup> Alaska filed a bill of exception and the United States filed for summary judgment.<sup>76</sup>

Alaska argued that the submerged lands within the boundaries of Glacier Bay National Monument were never expressly reserved by the

---

Count III of the State's complaint, seeking to quiet title to submerged lands within the Tongass National Forest region, was initially challenged by the United States; however, the United States changed its position and disclaimed title. *Id.* at 5. The Special Master recommended that the Court confirm the disclaimer and dismiss this count. *Id.* at 276-277.

69. Transcript of Oral Argument at 18, *Alaska v. United States*, 545 U.S. 75, 125 S. Ct. 2137 (No. 128).

70. Alaska Governor Frank Murkowski had been outspoken about allowing more vessels in the Bay. See *Surprise: Showing the Flag in Glacier Bay*, ANCHORAGE DAILY NEWS, Apr. 14, 2005, at B6, available at 2005 WLNR 5850719 (describing a public relations feat in which Governor Murkowski sent a state ferry through Glacier Bay, disregarding National Park Service vessel limits, as a "symbolic" display of state presence in those waters).

71. See *id.*; see also Liz Ruskin, *State Loses Lawsuit over Glacier Bay*, ANCHORAGE DAILY NEWS, June 7, 2005, at B1, available at 2005 WLNR 9028611.

72. See Svend Holst, *Knowles Sues for Control over Bay*, JUNEAU EMPIRE, Nov. 26, 1999 (quoting then-Governor Tony Knowles: "It is time to resolve, once and for all, the issue of where federal jurisdiction ends and state jurisdiction begins [in Glacier Bay] . . . . The [U.S.] Park Service's phase-out of commercial fishing in Glacier Bay is just one of many actions taken over the years that restricts access and activities on state waters."). *Id.*

73. Transcript of Oral Argument at 40, *Alaska v. United States*, 545 U.S. 75, 125 S. Ct. 2137 (No. 128).

74. *Alaska v. United States*, 530 U.S. 1228 (2000).

75. The Special Master recommended that summary judgment be granted to the United States on the Alexander Archipelago and Glacier Bay counts, and that the Court dismiss the Tongass claim in light of the United States Government's concession to the State of Alaska on that issue. Special Master's Report, *supra* note 35, at 1.

76. *Alaska v. United States*, 545 U.S. 75, 125 S. Ct. at 2143.

United States and so passed to Alaska at statehood under the SLA and equal footing doctrine. Unlike lands claimed in the other counts of the State's complaint, here there was no question that these waters qualified as inland waters: the area formed a "textbook" juridical bay.<sup>77</sup> Alaska thus argued that under the SLA, ownership to Glacier Bay's submerged lands belonged with the State under its "strong presumption" of title, rebuttable only by the federal government's showing under the two-part intent test that the United States had intended to include the submerged lands within the reservation, and had "definitely declared or otherwise made very plain" its intent to defeat the State's title.<sup>78</sup>

Alaska did not strenuously dispute that the federal government had included submerged lands within the reservation.<sup>79</sup> Instead, the State focused on the second part of the intent test, arguing that the United States did not meet its burden to rebut a strong presumption for Alaska's ownership by showing any sufficiently clear and unambiguous expression of intent to retain title to the Glacier Bay submerged lands at statehood.

The United States, tracking its successful argument in *Alaska (Arctic Coast)*, argued that the two-step federal intent test had been met, thus rebutting the presumption and vesting title with the federal government. Although Alaska had conceded the first step of the test, the United States nevertheless offered that the executive branch had clearly included submerged lands as part of Glacier Bay National Monument by pointing to the text of presidential proclamations establishing and expanding the Monument.<sup>80</sup> These proclamations contained boundary notations and square mileage that, by their measurements and descriptions, necessarily included submerged lands.<sup>81</sup> Finally, the United States argued that three purposes of the reservation would have been undermined by not reserving the submerged lands: scientific study of the glaciers, study of the interglacial forests, and protection of the Monument's "rich and varied flora and fauna."<sup>82</sup>

Second, as in *Alaska (Arctic Coast)*, the United States asserted that a clear expression of intent to defeat state title in the ASA could be found in

---

77. *Id.* at 2153.

78. *Id.* at 2144-45.

79. Alaska did not formally argue this point; in a footnote it did assert objections to the Special Master's conclusion that presidential proclamations clearly included submerged lands when Glacier Bay National Monument was established. Brief for the Plaintiff at 11 n.4, *Alaska v. United States*, 545 U.S. 75, 125 S. Ct. 2137 (2005) (No. 128).

80. Brief for the Defendant at 31-33, *Alaska v. United States*, 545 U.S. 75, 125 S. Ct. 2137 (2005) (No. 128). *See* 53 Stat. 2534 (1939); 69 Stat. c27 (1955).

81. Brief for the Defendant, *supra* note 80, at 31-32.

82. *Id.* at 33-34.

the proviso to section 6(e).<sup>83</sup> The United States argued that although the initial portion of the clause effectively conveyed to Alaska specific federal property governed by three specific statutes, the proviso that followed the initial clause expressed Congress's intent to retain federal title to all federal reservations withdrawn or otherwise set apart for wildlife conservation, regardless of the particular statutory authorities under which they had been established.<sup>84</sup> In other words, Congress had been specific in the first section (conveying areas used for conservation under three specific laws) and more general in the proviso (explicitly excluding from transfer lands set aside as wildlife refuge areas).

In contrast, Alaska had argued that the words "such transfer" in the proviso signaled that the proviso's federal reservation exception applied only to a subset of the specific properties covered under the initial clause. Moreover, Alaska maintained that any ambiguity in the construction of the clause had to weigh in Alaska's favor, because this proviso did not suffice as a definite declaration or otherwise plain expression under the intent test.<sup>85</sup>

The Court first acknowledged in dicta that congressional intent to reserve submerged lands in Glacier Bay for the federal government could have been found by tying together two aspects of the Antiquities Act, the statute under which the Monument was established.<sup>86</sup> Specifically, the Act expressly stated that the purpose for creating national monuments was to conserve the scenery and natural objects and wildlife and leave them unimpaired for future generations,<sup>87</sup> while also empowering the President to "reserve submerged lands."<sup>88</sup>

However, the Court based its actual holding on the intent it found in the proviso to section 6(e). In accordance with the observations of the Special Master, the Court noted that it was not helpful to generalize about whether a proviso always qualifies the statement preceding, or whether it can state a more general, independent rule.<sup>89</sup> Statutory construction law recognizes valid instances of both,<sup>90</sup> and the Court ventured that the government's preferred interpretation of the construction was logical, if atypical.<sup>91</sup>

---

83. *Id.* at 35; see *supra* note 38 for text of the initial clause and proviso of section 6(e).

84. Brief for the Defendant, *supra* note 80, at 35.

85. Brief for the Plaintiff, *supra* note 79, at (i).

86. *Alaska v. United States*, 545 U.S. 75, 125 S. Ct. at 2157.

87. *Id.* (quoting 16 U.S.C. § 1 (2000)).

88. *Id.*

89. *Alaska v. United States*, 545 U.S. 75, 125 S. Ct. at 2159.

90. *Id.* at 2159 (citing *McDonald v. United States*, 279 U.S. 12, 21 (1929); see 2A NORMAN SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47:08, at 238 (2000)).

91. *Alaska v. United States*, 545 U.S. 75, 125 S. Ct. at 2159.

More importantly, the Court determined that reading the proviso as an independent statement of intent was consistent with their interpretation of the same provision in *Alaska (Arctic Coast)*.<sup>92</sup> Thus, the Court held that the proviso of section 6(e) operated as the necessary statement of congressional intent to retain title to submerged lands in areas set aside as wildlife reservations by the federal government.<sup>93</sup> Accordingly, Glacier Bay's submerged lands had been reserved and presumption of state title was defeated.<sup>94</sup>

As in *Alaska (Arctic Coast)*, Justices Scalia, Rehnquist, and Thomas<sup>95</sup> dissented on this issue. The dissenters did not consider the proviso, by its plain text, to rise to the level of a clear expression of intent to retain submerged lands, which the United States has the burden to show under the intent test.<sup>96</sup> The dissenters objected to the majority's reliance on its interpretation of the proviso in *Alaska (Arctic Coast)*, noting that there the Court had not actually considered the question of the proviso's proper construction because they had assumed *sua sponte*<sup>97</sup> that the disputed lands were covered under the main clause.<sup>98</sup>

Finally, the dissent observed that as a practical matter, the submerged lands could be regulated under the federal government's various powers, so as to protect the federal government's purposes regardless of title.<sup>99</sup> These powers include dominant navigational servitude under the SLA (and other authority),<sup>100</sup> Commerce Clause powers,<sup>101</sup> and treaty powers.<sup>102</sup> In this

---

92. *Id.* at 2161.

93. *Id.*

94. *Id.*

95. Justice Scalia authored the partial dissent in the Note case; Justice Thomas authored the partial dissent in *Alaska (Arctic Coast)*. For simplicity, the dissenting Justices are described as "dissenters" herein; in both cases, the Justices concurred in other aspects of the judgments.

96. *Alaska v. United States*, 545 U.S. 75, 125 S. Ct. at 2166 (Scalia, J., partially dissenting).

97. As indicated, the Court had not been briefed on this point, and, notwithstanding the Court's assumption, the property in question was not covered under the main clause in fact. *Alaska v. United States*, 545 U.S. 75, 125 S. Ct. at 2167 (Scalia, J., partially dissenting).

98. *Id.*

99. *Id.* at 2168.

100. *Id.* (citing 43 U.S.C. § 1314(a) (2000)).

101. *Id.* (citing *United States v. Morrison*, 529 U.S. 598, 609 (2000) for the proposition that Congress has the power to regulate the channels and instrumentalities of interstate commerce as well as persons or things in interstate commerce).

102. *Id.* (citing letter from W.C. Henderson, Acting Chief, Bureau of Biological Survey, Dept. of Agric., to Stephen T. Mather, Dir. Nat'l Park Serv. (Nov. 4, 1926) (on file with Alaska Exh. AK-405), noting that a colony of ducks in the Monument was protected "at all times" under the Migratory Bird Treaty Act)).

regard, the dissent offered two examples of other federal “water parks” containing state-owned submerged lands, where federal-state cooperation was the governing regime.<sup>103</sup>

#### IV. DISCUSSION

The particular tension that arises when submerged lands are located within federal reservations originates from the strong presumption of state title, established under the equal footing doctrine and SLA, and the federal government’s powers, stemming from the Property Clause of the Constitution,<sup>104</sup> to convey and reserve submerged lands. The Court has consistently chosen to resolve this tension after consideration of the role that the submerged lands in question (and the waterways superjacent to them) play in the purposes and uses of federal reservations. Such considerations have been at the crux of the Court’s decisions in disputes over submerged lands within federal reservations.

In applying the two-step intent inquiry to these title disputes, federal uses and purposes have been the critical factor. In each dispute, the Court has found federal intent to defeat state title – or lack thereof – by discerning the past uses and purposes through various statutory sources, in order to determine whether federal purposes would be harmed by recognition of state ownership.

In addition to the two Alaska cases discussed above, the Court applied its test in *Utah Division of Lands v. United States*,<sup>105</sup> *Montana v. United States*,<sup>106</sup> and *Idaho v. United States*.<sup>107</sup> *Utah Division* involved the bed of Utah Lake, officially selected by John Wesley Powell as a potential federal reservoir site and reserved by congressional enactment.<sup>108</sup> The State sought declaratory judgment after the federal government began to lease oil and

---

103. *Alaska v. United States*, 545 U.S. 75, 125 S. Ct. at 2168 (Scalia, J., partially dissenting). The parks referenced were the California Coastal National Monument and Minnesota’s Boundary Waters Canoe Area.

104. U.S. CONST. art. IV, § 3 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .”). The federal government’s constitutional power to convey submerged lands to third parties in pre-state territories was recognized in *Shively v. Bowlby*, 152 U.S. 1, 48 (1893); its power to reserve such lands to itself for appropriate public purposes was finally solidified in *United States v. Alaska (Arctic Coast)*, 521 U.S. at 33-34.

105. 482 U.S. 193 (1987).

106. 450 U.S. 544 (1981).

107. 533 U.S. 262 (2001).

108. *Utah Div. of Lands v. United States*, 482 U.S. 193, 199 (1987).

gas rights in the lands underlying the lake in 1976.<sup>109</sup> Holding that title had vested in Utah at statehood, the Court noted that there had been no congressional discussion about the lake bed itself; indeed, Congress's purpose in reserving the lake had been motivated solely by concerns over increasing settlement of the dry lands surrounding the lake, which presented a threat to the United States' reclamation interests.<sup>110</sup> The Court further noted that state title would "not necessarily prevent the Federal Government from subsequently developing a reservoir or water reclamation project at the lake in any event" under its powers over navigable waters.<sup>111</sup>

Similarly, *Montana* held that title to the bed of a river on the Crow Reservation had passed to the state at statehood.<sup>112</sup> In *Montana*, federal treaties creating the reservation did not expressly mention the riverbed and federal (in this case, the Tribe's) purposes would not have required retention of the river bed as the Crow were not a fishing-dependent group and so were not historic users of the river.<sup>113</sup>

Where the Court found that federal title was retained, the federal government's purposes for establishing reservations and the uses of submerged lands and their waterways were key factors. In *Idaho*, a dispute over submerged lands within the Coeur d'Alene reservation, the Court held that title to the submerged lands had been successfully prevented from transfer to the state.<sup>114</sup> There the Court was persuaded by the fact that Congress knew that the reservation would be established for the exclusive use of the Tribe, and that the Tribe had traditionally used the lake and lake bed "for everything from water potatoes harvested from the [lake bed] to fish weirs and traps anchored in riverbeds and banks."<sup>115</sup>

Issues of purposes and uses played no less of a role in the Note decision, as evidenced by preoccupations of the Court at oral argument. From the beginning of Alaska's argument, the State's counsel attempted to focus the Court's attention on the test's second step, the requirement of a "definite" or "very plain" expression of congressional intent to defeat state title; but at least one Justice seemed astonished at how Alaska could assert that the federal government could have created a national monument as

---

109. *Id.* at 200.

110. *Id.* at 206-07.

111. *Id.* at 208.

112. *Montana v. United States*, 450 U.S. at 556.

113. *Id.*

114. *Idaho v. United States*, 533 U.S. at 281.

115. *Id.* at 265.

“watery” and inaccessible by land as Glacier Bay without intending to retain its submerged lands after statehood.<sup>116</sup>

Moreover, Justices O’Connor and Souter pressed Alaska on the potential effects of state ownership:

[J. O’Connor]: [A]s a practical matter, tell us what you’re arguing about. What does Alaska think it can do if it prevails . . . as a practical matter?

[Alaska]: [T]here are issues relating to local subsistence fishing that are important to the State. There are issues relating to local uses of the bay. But more importantly—

[J. Souter]: Well, could—could you be more concrete? I mean, there—I don’t know what you mean. What are the issues? Can you give me an explicit example?<sup>117</sup>

In response to this line of questioning, Alaska offered that the State would like to allow more subsistence fishing in Glacier Bay.<sup>118</sup> But when pressed further, given that the United States could regulate fishing activities under other powers, Alaska did not elaborate. Instead, it argued that “what Alaska seeks here really is a seat at the table. Right now, Alaska has no say over anything that happens in its navigable waters. . . . What it seeks is to have its views considered.”<sup>119</sup>

The United States spent the initial portion of its argument, mostly engaged by Justice Scalia, contending that section 6(e) of the ASA was a sufficient statement of intent to defeat state title.<sup>120</sup> Justice O’Connor broke up this exchange to ask, “what do you say are the practical consequences . . . of disagreeing with the U.S. position? What harm is done? Can the U.S. protect itself in any event under other clauses?”<sup>121</sup> Acknowledging that it would indeed have the regulatory power over navigable waters to “limit vessel entries and protect commercial fishing,” the United States answered

---

116. Transcript of Oral Argument at 9-10, 17-18, *Alaska v. United States*, 545 U.S. 75 (No. 128) (questions of Justice Breyer).

117. *Id.* at 14.

118. Historically, the native Tlingit people of Hoonah, Alaska, were engaged in subsistence fishing in Glacier Bay’s waters. For more about the Tlingits’ fishing practices and the controversy over restrictions on their traditional fishery, see National Park Service: Glacier Bay Administrative History, Subsistence Fishing, <http://www.nps.gov/glba/adhi/adhi15.htm> (last visited Sept. 2, 2006); Etta L. Walker, *Subsistence Fishing in Glacier Bay National Park*, 62 U. COLO. L. REV. 981 (1991).

119. Transcript of Oral Argument at 15, *Alaska v. United States*, 545 U.S. 75, 125 S. Ct. 2137 (No. 128).

120. *Id.* at 27-39.

121. *Id.* at 39-40.

that “[o]ur concern is with the actual use of the submerged lands. . . . This is a laboratory for scientific research.”<sup>122</sup> The United States proceeded to recite a number of seafloor scientific activities and expressed concern that if title was held by the State, “Alaska would have a realistic argument that we cannot withdraw materials from the submerged land that we use and study.”<sup>123</sup> On rebuttal, Alaska dismissed this as a “sky is falling argument” and attempted to reassure the Court that shared management regimes were both workable and commonplace.<sup>124</sup>

The Court may have been influenced by an amicus brief submitted by the National Parks Conservation Association (NPCA) in support of the United States, which was referenced in the opinion and dissent.<sup>125</sup> The NPCA argued even more emphatically than the United States had that Alaska’s planned uses for the Bay were incompatible with federal purposes.<sup>126</sup> The brief first carefully sketched the overlay of protective federal laws currently controlling minimal-impact activities in Glacier Bay, and then contrasted these with the state’s proposed approach as described through a litany of actions and statements of its legislature and governors.<sup>127</sup> Moreover, the NPCA looked beyond the state’s well-known, stated purposes of increased fishing and cruise boat traffic and raised the possibility that Alaska was also interested in aquaculture and even drilling (thus raising the specter of the ANWR controversy).<sup>128</sup> The NPCA further emphasized the particular difficulties that could arise under federal-state adjacent management, given that the federal government could keep its hand in managing this area under its constitutional powers if title was held by the State.<sup>129</sup> It argued that such shared management would result in confusion, questions of respective authority that could lead to costly litigation, and an effective division of one ecosystem.<sup>130</sup>

---

122. *Id.* at 40.

123. *Id.* at 40-41. Returning to the issue of federal intent to retain title, Justice Souter asked whether the United States had been engaged in such scientific studies at the time of statehood, which could show that Congress had notice of the importance of the submerged lands to the Monument. The United States confirmed that geological study was going on there at that time. *Id.* at 43-44.

124. *Id.* at 57-58.

125. *See Alaska v. United States*, 545 U.S. 75, 125 S. Ct. at 2157; *see also id.* at 2168 (Scalia, J., partially dissenting).

126. Brief of Nat’l Parks Conservation Ass’n as Amicus Curiae supporting Defendant, *Alaska v. United States*, 545 U.S. 5, 125 S. Ct. 2137 (2005) (No. 22-30).

127. *Id.* at 25-29.

128. *Id.* at 27-28.

129. *Id.* at 29-30.

130. *Id.*

The Court's ruling in *Alaska* was hailed as a victory by conservationists, who prefer the National Park Service's brand of stewardship to the increase in vessels and other activities that Alaska would have sanctioned.<sup>131</sup> Divorced from the Glacier Bay context, however, the case is not likely to signal any sort of new approach in federal reserves. Despite the result in *Alaska*, it would be simplistic and unsupportable to suggest that the Court has shown any general preference for recognizing title to submerged lands within federal areas in the federal government (and the tribes). Two of the disputes discussed above were resolved with state title and three with federal. The two cases specifically involving submerged lands on Indian reservations split evenly. And it is noteworthy that although the two Alaska cases both recognized federal title, the federal purposes were quite varied: classically exploitative in *Alaska (Arctic Coast)*'s Petroleum Reserve and classically preservationist in ANWR and Glacier Bay. In short, the Court has shown no general preference for a *particular* purpose or purposes, as some might wish.

Indeed, though it may be appropriate for those interested in stemming vessel traffic in Glacier Bay to breathe a sigh of relief after the *Alaska* decision, it is conceivable that, in another context, conservationists could find themselves in support of state ownership of submerged lands. For example, title to submerged lands could provide a basis for managing uses in federal reserves where the federally managed activity involves mineral extraction leasing, fishing of depleted stocks, or other exploitative uses. In such a scenario, it would be the conservationists' turn to convince a court whether state title can really matter when the federal government can draw on its numerous powers to control uses of navigable waterways. Indeed, given such formidable authority as the Commerce Clause, Alaska's efforts in challenging the United States on issues of vessel navigation and commercial fishing in navigable waters seem alternately heroic and foolhardy. Clearly, the backdrop of such federal authority is an ominous presence for any party hoping to convince a court that it too should have "a seat at the table." Could it be done? The threshold matter would be whether the state can plausibly make that initial claim of title by surmounting the Court's test of federal intent.

What the cases employing the intent test demonstrate is that despite the Court's emphasis on finding and carrying out congressional intent—which it has repeatedly stated it will "not infer"—quieting title to submerged lands

---

131. See Matt Volz, Associated Press, *High Court Rebuffs Alaska on Glacier Bay Ownership; Conservationists Relieved*, SEATTLE TIMES, June 7, 2005, at B4, available at 2005 WLNR 9046546 (noting the National Parks Conservation Association's relief with the Court's holding).

within federal reservations is an exercise in dusting off statutes and executive statements that may only tangentially contemplate submerged lands. And because these express statements and statutes generally do not address submerged lands thoroughly, consideration of the purposes and uses of the reservations has been the Court's most reliable proxy for obscure congressional intent.

This consideration does require an inference, however, which vexed the partial dissenters in *Alaska*. The section 6(e) proviso does seem to fall short of overcoming the tough presumption of state title set by the equal footing doctrine and codified in the SLA. Notwithstanding legitimate judicial debates over the proper scope and effect of provisos under the laws of statutory construction,<sup>132</sup> it may seem unsatisfactory that a proviso of arguable interpretation could suffice as "definitely declared or otherwise made very plain" federal intent. But whatever relationship to the main clause the proviso was meant to have, it does in any event show that, at the time of Alaska statehood, Congress was thinking about retaining areas of the territory that it maintained for established public purposes.

In effect, then, do rulings like *Alaska* soften the SLA's mandate to surmount a "very strong" presumption of state ownership of submerged lands? In these particularized disputes over submerged lands within the boundaries of federal reservations, yes. *Alaska* shows that the Court tends to look to the historic and existing purposes of the existing federal reservation, conscious of whether those purposes and uses would be consistent with potential and intended uses arising from state ownership.

This is a prudent analysis, though inconsistent with the federal government's high burden as set under the equal footing doctrine and the SLA (and the Court's own interpretation of both). But considering the potential pitfalls of shared management within federal areas, and the realistic fact that neither the state nor the federal agencies have coffers to support activity-monitoring *and* conflicts with one another, it is not surprising that the Court is amenable to resolving these questions of title in favor of unitary governance. Therefore, unless a state can clearly show that its management style and planned uses are aligned with federal purposes—or at least not inconsistent with them—it is likely that title to submerged areas in national reserves will be found to vest with the United States. *Alaska*, unable to articulate a future course sufficiently respectful of the historic federal

---

132. *Alaska v. United States* has already been cited for the Court's recognition that a proviso does not always qualify the main clause but may sometimes set forth a proposition independent from the clause to which it is attached. See *Rendell v. Rumsfeld*, No. Civ.A.05-CV-3563, 2005 WL 2050295, at \*15 (E.D. Pa. Aug. 26, 2005).

approach, did not meet this unstated burden in its failed bid to control Glacier Bay.