Supreme Court of the United States

No. 128, Original

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM IN SUPPORT OF ALASKA'S MOTION FOR SUMMARY JUDGMENT ON COUNT III

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INTRODUCTION

Not only has the United States reversed its pre-statehood position with regard to the pockets and enclaves more than three miles from the physical coast, it also contends that Alaska has no title even to tidal and submerged lands less than three miles from that coast, by virtue of the supposed reservation of those lands as part of the Tongass National Forest. That Forest covers virtually all of the mainland of Southeast Alaska and the islands of the Alexander Archipelago. Count III of the Amended Complaint presents the question whether the land beneath the waters of the Archipelago constitute Forest lands. As shown below, Alaska is entitled to summary judgment on that issue because the undisputed facts demonstrate that no such reservation was ever accomplished. Under the equal footing doctrine and the

Submerged Lands Act, the Federal Government cannot defeat Alaska's title to these lands unless Congress's intent to do so was definitely declared or otherwise made plain. The United States cannot satisfy that standard. The only lands definitely declared to be within the Tongass National Forest were uplands, not marine waters that cannot even conceivably contain forests.

Deciding this question will not require resolution of material factual issues. It will instead require legal interpretation of federal statutes and proclamations, and examination of federal actions that indisputably occurred. As will be shown, the presidential proclamations describing the Forest boundaries do not evince the requisite intent to reserve submerged lands as part of the Forest. Indeed, historical documents demonstrate the consistent position of the Federal Government that the pertinent forest legislation did not authorize reservation of lands below high tide and that such lands were not part of the Forest—an understanding that directly contradicts the United States' current position that such a reservation was unambiguously intended. In addition, the background of the 1958 Alaska Statehood Act demonstrates that Congress intended the lands underlying marine waters in the Tongass to pass to Alaska at statehood, a position the Forest Service continued to concede even after statehood.

Accordingly, summary judgment should be granted to Alaska on Count III of its Amended Complaint.

ARGUMENT

I. ALASKA ACQUIRED TITLE TO THE SUBMERGED LANDS WITHIN THE TONGASS NATIONAL FOREST AT STATEHOOD

The lands at issue in this case include both (1) lands that generally pass to a State under the equal footing doctrine—tidelands and inland waters; and (2) lands granted by the Submerged Lands Act—land three miles seaward of the coast line. While the bases of state ownership for these two types of land are somewhat different, for both types " '[a] court deciding a question of title * * * must * * * begin with a strong presumption' against defeat of a state's title." United States v. Alaska, 521 U.S. 1, 34 (1997) (quoting Montana v. United States, 450 U.S. 544, 552 (1981)).

Equal footing doctrine lands pass to a State as a matter of constitutional right. A new State's ownership of these lands is an inseparable attribute of the equal sovereignty it enjoys upon admission to the Union. United States v. Louisiana, 363 U.S. 1, 16 (1960). To implement the equal footing doctrine, the United States holds submerged lands in trust for the future States to be created out of the territories. Shively v. Bowlby, 152 U.S. 1, 49-50, 57 (1894). Title passes automatically from the United States, as trustee, to the new State. Arizona v. California, 373 U.S. 546, 597 (1963).

Congress granted to the States the lands three miles seaward of the coast line in the Submerged Lands Act of 1953, 43 U.S.C. § 1311, which was incorporated into the Alaska Statehood Act, Pub. L. No. 85-508, § 6(m), 72 Stat. 343 (codified at 48 U.S.C. note prec. § 21). Congress intended that this grant be given the same presumption of state ownership as equal footing lands, requiring that if the United States wished to retain any submerged lands, it must do so "expressly." Alaska, 521 U.S. at 35 (quoting 43 U.S.C. § 1313(a)).

For submerged lands that pass to a State under either the equal footing doctrine or the Submerged Lands Act, this Court will not infer an intent to defeat a future State's title unless the intention was "definitely declared or otherwise made very plain." Id. at 34 (quoting United States v. Holt State Bank, 270 U.S. 49, 55 (1926)). This presumption that the State, as local sovereign, will hold title to these lands is consistent with the "principle" that a court should "hesitate" to interpret a statute to effect "a substantial change in the balance of federalism unless that is the manifest purpose of the legislation." Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 122 S.Ct. 934, 939 (2002); see also id. at 940 (interpreting statute in light of "doubt [that] Congress meant to intervene in * * * drastic fashion with traditional state functions").

To overcome the presumption of state ownership, the United States must meet the two-pronged test of Utah Division of State Lands v. United States,

482 U.S. 193, 200 (1987), to distinguish federal retention of submerged lands pending statehood from a pre-statehood conveyance of such lands. The two categories of cases are different in a crucial respect: when Congress intends to convey submerged lands, it necessarily also intends to defeat the future State's claim to title. When Congress reserves land for a particular purpose, however, it does not necessarily intend to defeat the future State's title. "The land remains in federal control, and therefore may still be held for the ultimate benefit of future States. * * * Congress, for example, may intend to create a reservoir, but also intend to let the State obtain title to the land underneath this reservoir upon entry into statehood," a situation that "would not be unusual." Id. at 202.

Thus, to argue successfully that a pre-statehood federal reservation of submerged lands defeats a State's title, the United States carries two burdens. First, it must show that Congress clearly intended to include the particular submerged lands in the reservation. Second, the United States must also establish that Congress affirmatively intended, because of exceptional circumstances, to defeat the State's title to the submerged lands. Id.

The Court recently refined its analysis to address reservations originally established by executive order. In such cases, the first prong of the Utah test—intent to include submerged lands within the reservation—may be fulfilled by executive action. Alaska, 521 U.S. at 45-46. The second prong may be met if

Congress, after being put on notice that the executive reservation includes submerged lands, ratifies their inclusion. An intent to ratify is found where Congress "explicitly recogniz[ed], at the point of * * * statehood, an Executive reservation that clearly included submerged lands," or where Congress "acknowledged" continuing federal ownership of the reservation in the statehood act. Id. at 44-45. Congress must speak in plain language that "reflects [its] intent to ratify the inclusion of submerged lands within the Reserve and to defeat the State's title to those lands." Id. at 46 (emphasis added).

In this case, the United States cannot meet even the first prong of the test. It cannot demonstrate that the President reserved submerged lands as part of the Forest reservation because Congress did not give him the authority to do so.

II. THE PRESIDENT DID NOT HAVE THE AUTHORITY TO INCLUDE LANDS UNDERLYING MARINE WATERS AS PART OF A FOREST RESERVATION

The language and purpose of the authorizing legislation demonstrate that Congress never intended for lands underlying marine waters to be reserved as national forests. Reservation of these submerged lands would have contributed nothing toward fulfilling the purposes of forests articulated in the national forest statutes. Further, the legislation allows the creation of forests only on "public lands

wholly or in part covered with timber or undergrowth," a term that does not include tidelands or lands under navigable waters.[1]

A. Reservation Of Submerged Lands Would Have Contributed Nothing To The Purposes For Which Congress Limited The Creation Of Forest Reserves

The dual purposes of the forest legislation—to furnish a continuous supply of timber and to protect water flows—do not relate to lands underlying marine waters. The limited authority that Congress granted the President to reserve forest lands therefore did not extend to the submerged lands at issue here.

During the 1800s, many of the country's forests were ravaged, raising fears that forest land would soon disappear. United States v. New Mexico, 438 U.S. 696, 705 (1978). By the end of the century, widespread concern resulted in two key pieces of legislation. The first, enacted in 1891, granted general authority to create forest reserves:

> [T]he President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof. [Creative Act of Mar.

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[1] The Alaska Supreme Court adopted both of these principles and applied them to the Tongass National Forest in James v. State, 950 P.2d 1130 (Alaska 1997).

3, 1891, § 24, 26 Stat. 1103 (codified as amended at 16 U.S.C. § 471 (repealed 1976)).]

President Harrison took full advantage of this broad authority, establishing more than 13 million acres of forest reserves. J. Ise, The United States Forest Policy 120 (1972) (Ex. AK-181). This aggressive federal activity in turn precipitated a firestorm of opposition from the western States. Western Congressmen objected to what they viewed as the indiscriminate creation of forest reserves, and in particular to President Cleveland's reservation of 21 million acres in February 1897. New Mexico, 438 U.S. at 706. They considered this reservation "hasty and ill considered" and disastrous to nearby settlers. Id.

Congress responded in 1897 with legislation to constrain the operation of the 1891 Act. The new statute—the Organic Act—suspended the February 1897 executive order, and provided that "public lands" reserved as national forests would be created and administered only for the limited purposes of conserving water flows and providing for a continuous timber supply:

> No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States * * *. The Secretary of the Interior[2] shall make provisions for

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2 In 1905, most responsibility for national forests was transferred from the Department of the Interior to the Department of Agriculture. Act of February 1, 1905, ch. 288, § 1, 33 Stat. 628 (codified at 16 U.S.C. § 472).

> the protection against destruction by fire and depredations upon the public forests and forest reservations * * *; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction * * *. [Organic Administration Act of June 4, 1897, 30 Stat. 35 (codified at 16 U.S.C. §§ 473, et seq. (1976)).]

This Court has found that this Act significantly limited the purposes for which forests could be reserved. In New Mexico, 438 U.S. 696, the Court gave a detailed explanation of the legislation in addressing the water rights reserved by the United States in connection with the establishment of a national forest. Because a federal reserved water right—which does not carry with it title to the submerged lands—includes only the minimal amount of water necessary to accomplish the purposes of the reservation, determining the purposes of the forest reservation was a pivotal issue in New Mexico.

Referring to the "limited" and "relatively narrow purposes" for which Congress authorized the creation of national forests in the Organic Act, the Court concluded that "a close examination of the language of [the Act] * * * reveals that Congress only intended national forests to be established for two purposes." Id. at 705, 707 n.14, Forests might be "created only 'to improve and protect the forest within the boundaries,' or, in other words, 'for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber.' " Id. at

707 n.14 (emphasis in original). See also id. at 708 n.16 (noting Interior Department regulation that "[p]ublic forest reservations are established to protect and improve the forests for the purpose of securing a permanent supply of timber for the people and insuring conditions favorable to continuous water flow"); id. at 708 n.15 (noting Chief Forester's 1913 statement that "[t]he National Forests are set aside specifically for the protection of water resources and the production of timber").

Thus, prior to the Tongass reservation, Congress gave the President authority to create national forests, but limited that authority to the reservation of lands needed to preserve water supplies and ensure sustainable timber reserves. Neither purpose would justify reservation of lands under marine waters.

The Department of Agriculture itself has cited the limited purposes of these Acts as a reason that only uplands can be national forest lands. In 1918, responding to an inquiry as to how the Forest Service could secure jurisdiction over the tidelands of the Tongass and Chugach Forests (Ex. AK-182), the Solicitor responded that "[i]t seems clear that under existing legislation there is no authority to include the tide lands and adjacent waters in the National Forests * * *." Ex. AK-183 at 1. The President "may establish National Forests only for the purpose of improving and protecting the forests within the reservation, or securing favorable conditions of water flows, and furnishing a continuous supply of timber for the use

and necessities of the citizens of the United States." Id. at 2. The opinion concludes that this authority does not extend to tidelands or marine waters:

> Obviously the lands in question and the waters adjacent thereto are not of the character which he is authorized to set aside for or include within National Forests, and their withdrawal as National Forest lands would not promote any of the objects named in the statute. It is clear, therefore, that the tide lands and adjacent waters may not be included within the National Forest. [Id.[3]]

Even if the President were authorized to reserve lands underlying marine waters as national forests, there would have been no need to do so in the Tongass. The United States was in no danger of losing any use of the tidelands in Southeast Alaska because they were already reserved for the future State and were unavailable for other uses.

B. Congress Intended The Term "Public Lands" In The Forest Legislation To Refer To Lands Subject To Disposition Under General Laws, And Not To Tidelands Or Submerged Lands

The federal forest legislation further limited the President's authority in allowing him to create national forests only from "public lands." Creative Act of 1891, § 24. In the 1890s, "public lands" was a term of art well understood by Congress. It referred only to lands subject to sale or some other disposition under the general land laws, which did not include tidelands or lands under navigable

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[3] The opinion then suggests that the President would have authority to withdraw the tidelands for other purposes. Id. at 3.

waters held in trust for future States. As this Court stated in 1894, "the general legislation of Congress in respect to public lands does not extend to tide lands." Mann v. Tacoma Land Co., 153 U.S. 273, 284 (1894). And while this general principle had occasional exceptions, there was no doubt that the use of the term in the particular context of forest legislation did not include submerged lands.

The general definition of "public lands" was established well before the legislation and executive orders at issue here. Mann, decided three years before the 1897 forest legislation, quotes an earlier case for the proposition that "[t]he words 'public lands' are habitually used in our legislation to describe, such as are subject to sale or other disposal under general laws." Id. at 284 (quoting Newhall v. Sanger, 92 U.S. 761, 763 (1875)). This Court interpreted the phrase to the same effect in two cases shortly thereafter, quoting the same language. See Minnesota v. Hitchcock, 185 U.S. 373, 391 (1902); Barker v. Harvey, 181 U.S. 481, 490 (1901). This principle has survived the century. See Utah Div. of State Lands, 482 U.S. at 203, 206; Borax Consol., Ltd. v. Los Angeles, 296 U.S. 10, 17 (1935) ("Specifically the term 'public lands' did not include tidelands."); Ernest C. Baynard, III Public Land Law and Procedure § 1.1, at 2 (1986) ("Most enduringly, the public lands have been defined as those lands subject to sale or other disposal under the general land laws") (emphasis in original); Bureau of Land Mgmt., Manual of Instructions for Survey of Public Lands of the United States § 3-115, at

93 (1973) ("All navigable bodies of water and other important rivers and lakes are segregated from the public lands at mean high-water elevation").

More recently, the issue arose in Alaska, in both the National Petroleum Reserve-Alaska ("NPRA") and Arctic National Wildlife Refuge ("ANWR") portions of the case. In its discussion of NPRA, the Court assumed arguendo that Alaska was correct that "public lands" cannot include submerged lands. 521 U.S. at 44.[4] In its discussion of ANWR, the Court observed that although submerged lands are not subject to disposition under the general land laws, certain specific land laws had, by statehood, changed that understanding so far as Alaska was concerned. Id. at 58. This point has no application to the national forest legislation of the 1890s, however. In referencing "public lands" in the 1890s, Congress necessarily used the term as it was ordinarily understood at that time.

The United States itself concurred in this definition of "public lands" when Congress enacted the forest legislation and the President issued the executive orders creating the Tongass National Forest. In a 1900 decision, the Secretary of the Interior considered the validity of certain mining claims in Alaska, including some on tidelands. James W. Logan, 29 Pub. Lands Dec. 395 (Jan. 3, 1900) (Ex. AK-184). He concluded that the tidelands claims were invalid, because "tide lands

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[4] The Court did not need to decide the issue because it found congressional ratification of the reservation. Id.

are not public lands belonging to the United States, within the meaning of the mining laws * * *." Id. at 396-397; see also Nome Transp. Co., 29 Pub. Lands Dec. 447, 449 (Jan. 30, 1900) ("Tide lands * * * are not a part of the 'public domain' * * *.") (Ex. AK-185); accord, Jesse C. Martin, 32 Pub. Lands Dec. 1, 3 (Jan. 10, 1903) (Ex. AK-186).

The United States continued to subscribe to this principle for decades. In an opinion on the applicability of the Mineral Leasing Act to coastal submerged lands, the Department of the Interior noted that the Act provides for the disposition of "public lands" and found for this reason alone that the statute did not apply to lands situated below high water mark. Mineral Leasing Act, M-34985, 60 I.D. 26, 27 (Aug. 8, 1947) (Ex. AK-187). In 1949, Interior concluded that it could not dispose of seaweed from Alaskan tidelands and submerged lands; a Solicitor's opinion reasoned that while federal legislation permitted harvest of vegetation on "public lands," there was no indication that Congress meant to change the general meaning of this term, which did not include submerged lands. Use of Seaweed Beds in Southeastern Alaska, M-36006, at 4 (June 30, 1949) (Ex. AK-188). In another Solicitor's Opinion the next year, the Department found that the statute authorizing it to dispose of gravel on "public lands" did not cover lands underlying navigable inland waters in Alaska, again because the term "public lands" did not apply to these lands. Extraction of Gravel from Beds of Navigable Streams in

Alaska, M-36024, 60 I.D. 402 (Mar. 16, 1950) (Ex. AK-189). The Department of Agriculture based a 1950 Solicitor's Opinion on the same principle, concluding that the Forest Service had no authority over reclaimed tidelands within the boundaries of the Tongass because national forests consist only of "public lands" and such tidelands "are held in trust for the benefit of the State which may be formed in the Territory." Ex. AK-190 at 1-2.

This is not to say that the term "public lands" has an invariable meaning, irrespective of context. The words have a "settled meaning," but sometimes Congress may clearly express an intention that they be understood differently. Northern Lumber Co. v. O'Brien, 139 F. 614, 616 (8th Cir. 1905), aff'd, 204 U.S. 190 (1907). A different meaning also may emerge from the purpose of the particular statute in which the term is used. See, e.g., Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 547, n.14 (1987).

Here, there is no indication that Congress intended to depart from the settled meaning of "public lands" in enacting forest legislation, so as to include tidelands or marine waters. The legislation and its history give no indication that Congress intended the phrase to have this different meaning, and the purpose of this legislation compels adoption of the settled interpretation. Preservation of mountainous watersheds and provision for a continuous supply of timber would not be advanced by including marine waters or the underlying lands as part of the

national forest. Further, the 1891 Act granted authority to reserve only "public lands wholly or in part covered with timber or undergrowth." 26 Stat. 1103 (emphasis supplied). Even if "public lands" might in some contexts include submerged lands, "public lands * * * covered with timber" could never include lands covered by salt water, because such lands do not exist.

Thus, the law is clear that when the President reserved for inclusion in the Tongass National Forest certain "public lands wholly or in part covered with timber or undergrowth," that reservation did not include submerged lands because Congress, in the governing legislation, did not grant the President any legal authority to reserve such lands. That alone is dispositive of the issue. But in any event, as shown next, even if it would have been legally permissible for the President to have reserved submerged lands as part of a forest, nothing in the Presidential proclamations evinced any intent to do so.

III. THE PRESIDENT DID NOT INTEND TO RESERVE LANDS UNDERLYING MARINE WATERS AS PART OF THE TONGASS NATIONAL FOREST

Having no authority to create forest lands from the bottom of the sea, the President's proclamations creating and expanding the Tongass National Forest would be invalid to the extent they purported to include submerged lands. But these proclamations do not by their terms include such lands, nor were they intended to. The language of the proclamations as written—and as interpreted by the United

States—demonstrates that they reserved as Forest land only the uplands of Southeast Alaska.

A. In Promulgating The 1902 And 1907 Proclamations, The President Did Not Intend To Include Submerged Lands Underlying The Marine Waters Within The Tongass National Forest

Of the many additions to and exclusions from the Tongass before statehood, only a few are critical to this case. These are the ones accomplished by the proclamations of 1902 and 1907, which established the Forest, and the proclamations of 1909 and 1925, which added land by enclosing most of Southeast within an enormous exterior boundary. The Tongass National Forest, created by presidential proclamation in September 1907, was combined in 1908 with the Alexander Archipelago Forest Reserve, created in 1902.[5] Neither the order creating the Alexander Archipelago Reserve nor that creating the Tongass indicates an intent to include submerged lands as part of the forest reservation.

In creating the Alexander Archipelago Forest Reserve, the President "set[] apart and reserve[d]" the "public lands" described as

> Chichagof Island and the adjacent islands to the seaward thereof, Kupreanof Island, Kuiu Island, Zarembo Island, and Prince of Wales Island and the adjacent islands to the seaward thereof, in Alaska. [Ex. AK-192.]

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[5] For background on the creation of this reserve, see David E. Conrad, Creating the Nation's Largest Forest Reserve: Roosevelt, Emmons and the Tongass National Forest, 46 Pacific Historical Review, No. 1, at 65-82 (Feb. 1977) (Ex. AK-191).

The language of this proclamation straightforwardly declares that the forest designation was limited to the public lands described as the islands listed. The order does not mention water and includes no boundaries or limits other than the islands themselves.

While the map accompanying the President's order creating the Tongass National Forest five years later delineated the boundaries through two canals, the language of the order reveals an intent to reserve only the land, not the water areas. Again, the proclamation limited the reservation to "public lands" that were "in part covered with timber," identified as "the tracts of land * * * shown as the Tongass National Forest on the [accompanying] diagram * * *." Ex. AK-193. These tracts of land were "reserved from settlement, entry, or sale * * *." Id.

The reason for drawing lines through the canals was technical rather than substantive. Meandering water areas serve as natural geographic boundaries. The Associate Forester made this clear in a letter to the Secretary of the Interior describing the proposed Tongass National Forest. Ex. AK-194. He described the proposed Forest as "the mainland area bounded by the International Boundary, Portland Canal, Behm Canal, and the Unuk River." Id.

Choosing the canals as boundaries eliminated any uncertainty about where the Forest lay, but did not reserve the submerged lands. The lands underlying the marine waters in these canals were already reserved by the United States for the

future State of Alaska. They were already not open to "settlement, entry, or sale," and therefore the proclamation would have had no effect on these lands. The language of the 1907 proclamation is similar in this respect to the language of the 1888 Act this Court examined in Utah Division of State Lands. That Act provided that the subject lands were " 'reserved from sale as the property of the United States, and shall not be subject * * * to entry, settlement or occupation until further provided by law.' " 482 U.S. at 203 (citation omitted). The Court found that this language "did not necessarily refer to lands under navigable waters because lands under navigable lakes and rivers such as the bed of Utah Lake were already the property of the United States, and were already exempt from sale, entry, settlement, or occupation under the general land laws." Id. (emphases in original). Concluding that little purpose would have been served by the reservation of the bed of Utah Lake, the Court found that the Act failed to evince a sufficiently plain congressional intent to include the bed of the Lake within the reservation. Id. So too here, the reservation of public lands to prevent them from being "subject * * * to entry, settlement or occupation" was not a clear statement of any intent to reserve submerged lands, which were "already exempt from sale, entry, settlement, or occupation." Id.

This status was well established by 1907. In 1884, Congress had enacted the Alaska District Organic Act, establishing Alaska as a civil and judicial

district and extending to Alaska the mining laws of the United States. Act of May 17, 1884, 23 Stat. 24, § 8. Under these laws, only public lands belonging to the United States were open to exploration, occupation, location, and purchase. Further, Congress made explicit its intention to exclude submerged lands from those subject to private settlement when it extended the homestead laws to Alaska by the Act of May 14, 1898, known as the Alaska Right-of-Way Act. 30 Stat. 409 (codified at 48 U.S.C. § 411). Congress specifically excluded navigable waters from the Act's effect, stating that the Act should not be "construed as impairing in any degree the title of any state that may hereafter be erected out of [the Territory of Alaska] * * * to tide lands and beds of any of its navigable waters * * * 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 * * * be erected out of said [Territory]." 43 U.S.C. § 942-1. Congress acknowledged that it excluded the submerged lands only as a precaution, codifying existing law.[6] The United States frequently cited

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6 See 55 Cong. Rec. S2369 (daily ed. Mar. 2, 1898) (statement of Sen. Spooner) (legislation should " leave the State of Alaska, if it shall ever become a State, as free as all of the other States have been left as to its water rights and its tide lands, and not embarrass and not bedevil, so to speak, by innumerable private grants the jus publicum which it is intended should be left subject to the dominion and the regulation of the States") (Ex. AK-195); see also James W. Logan, 29 Pub. Lands Dec. at 397 ("This legislative declaration [in the Alaska Right-of-Way Act] is in entire harmony with the law as it had been previously announced by the supreme court * * *, and is indicative of a purpose on the part of the Congress, in dealing

this provision over the next 60 years in explaining the status of tidelands and submerged lands in Alaska. See, e.g., Ex. AK-196 at GLB7310-23; Status of the Natives of Alaska with Respect to the Title to Certain Tide Lands Near Ketchikan, 50 Pub. Lands Dec. 315 (Mar. 12, 1924) (Ex. AK-197); Ex. AK-198 (1914 letter from Interior Department to Attorney General discussing "houses of ill-fame" on the tideflats of Gastineau Channel in Juneau); see also United States v. Lynch, 8 Alaska 135, 144 (D. Alaska 1929).

Congress made an exception to its general policy not to include submerged lands in public land laws in 1900, when it again extended to Alaska the laws of the United States regulating mining claims and mineral locations. 31 Stat. 329, § 26 (codified at 48 U.S.C. § 381). In response to the Gold Rush in Nome, Congress included a proviso explicitly opening to exploration and mining for precious metals all land and shoal waters between low and mean high tide on the shores and inlets of Bering Sea. This proviso, which did not affect Southeast Alaska, again indicates the general understanding that the submerged lands of Alaska were otherwise reserved for the future State. The language of the 1907 Forest Reserve proclamation withdrawing public lands from settlement, entry, or sale plainly reserved only uplands for the Forest.

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with the District of Alaska, to adhere to the policy theretofore existing with respect to the tide lands.") (Ex. AK-184).

B. In Promulgating The 1909 Executive Order, The President Did Not Purport To Withdraw And Reserve Submerged Lands Underlying The Marine Waters

In 1909, the President issued a proclamation that dramatically changed the boundaries of the Tongass National Forest.[7] It added a significant amount of forested "public lands" by drawing boundary lines along the international boundary and through the North Pacific Ocean, to surround most of Southeast Alaska. This proclamation, like those before it, reserved as national forest land only the federally-owned uplands within the described boundaries. It did not purport to create Forest lands, to be regulated by foresters, out of lands covered by the sea.

1. The Executive Order Includes Only "Public Lands" Within The Boundaries

The 1909 Executive Order delineated the Tongass National Forest exterior boundaries to enclose the mainland of southeast Alaska, the islands of the Alexander Archipelago, the high seas well seaward of the Archipelago, and other marine waters. Ex. AK-200; see Ex. AK-201. The area actually reserved, however, was described as the "public land lying within [the given] boundaries." Ex. AK-200 at 2227 (emphasis added). In other words, by the plain terms of the Executive Order, not every square mile within the exterior boundaries was deemed part of the

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7 For background on this expansion, see Lawrence W. Rakestraw, A History of the United States Forest Service in Alaska at 22-24 (Alaska Historical Soc'y 1981) (Ex. AK-199).

Forest—only the "public land" was. This understanding of the proclamation's scope is supported by the Secretary of Agriculture's request for the order. The Secretary represented that a forest officer's examination of the area to be reserved "shows that such additional area is wholly or in part covered with timber or undergrowth, and should be included in the National Forest." Ex. AK-202.

The Executive Order itself corroborates this interpretation in an additional way. After describing the exterior boundaries, it adds: "and embracing all islands within said described boundaries." Ex. AK-200 at 2227. The mainland within the Forest's exterior boundaries was obviously part of the Forest, and the order does not say "embracing the mainland." The islands are arguably less obvious, so the order explicitly references them. The order does not, however, explicitly reference the lands that are least obviously included—those underlying marine waters. If the President had intended to include those lands as part of the Forest—in direct contradiction to the reference to timbered and public lands—surely he would have mentioned them as well.

Further, as discussed below, the 1909 order did not create a definite western boundary, but designated a line drawn from an undetermined point west of Cape Bingham. The boundary line drawn on the map accompanying the order makes a random guess as to where that point might be. This complete lack of specificity would be astounding in a presidential order creating national forest lands

from all lands within the boundary; since the order only applies to "public lands" within the boundary, however, the imprecision is inconsequential.

2. The President's Delineation Of The Forest In Part By Water Boundaries Does Not Establish His Intent To Include The Submerged Lands

The 1909 proclamation's placement of boundary lines through marine waters does not evince an intent to include the submerged lands as part of the Forest. This Court has required much more to find the requisite clear intent. Rather, the evidence indicates that the straight-line western and southern boundaries that boxed in most of Southeast Alaska were the simplest way to encompass the myriad islands of the Archipelago without having to go through the laborious task of establishing the precise metes and bounds of all forested uplands added to the reservation.

a. Delineating The Exterior Boundaries Of A Federal Reserve Through Water Does Not Demonstrate An Intent To Include Lands Underlying Interior Waters As Part Of The Reserve

The interior waters of the Tongass are entitled to the full weight of the presumption in favor of state ownership of the lands underlying navigable waters in federal reserves, regardless of whether the reserve's exterior boundaries lie on uplands or in the water. The presumption would be virtually eviscerated if it could

be overcome with respect to lands under interior waters because of a reference to the boundary waters in documents creating the reserve.

Were this proposition subject to any question, Montana v. United States, 450 U.S. 544 (1981), would resolve it. In Montana, this Court was asked to adjudicate title to the bed of the Big Horn River, included by treaty in the Crow Reservation. In ruling for the State, the Court found that "[t]he mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance." Id. at 554. Significantly, one of the boundaries to which the Court referred was the "mid-channel of the Yellowstone River * * *." Id. at 553 n.4. The existence of an exterior water boundary, although noted expressly, did not alter the presumption in the State's favor that the waters within the boundaries were not included.

The same presumption applies to marine boundary waters, as they cover either tidelands that passed to the State under the equal footing doctrine or lands that passed under the Submerged Lands Act. See Alaska, 521 U.S. at 35-36. In Alaska, this Court reiterated the law, set forth in Montana and Utah Division of State Lands, that "the fact that navigable waters are within the boundaries of a conveyance or reservation does not itself mean that submerged lands beneath those

waters were conveyed or reserved." 521 U.S. at 38 (emphasis added). The Court, however, found that other factors—not present with respect to the Tongass reservation—demonstrated that the boundary description contained in the order creating the NPRA necessarily embraced certain submerged tidelands. Id. at 39.

The Court's conclusion, however, was a narrow, fact-based finding and not a general principle applicable to this case. In Alaska, the Court gave two reasons for its conclusion, neither of which applies to the Tongass reservation. First, the 1923 Executive Order creating NPRA defined the marine boundaries in a manner fundamentally different from the Tongass boundaries. It did not merely define a boundary enclosing a body of navigable water, but "described a boundary following the Arctic 'coast line' * * *." Id. at 36. In the NPRA reservation, the Arctic "coast line" was "measured along 'the ocean side of the sandspits and islands forming the barrier reefs and extending across small lagoons from point to point, where such barrier reefs are not over three miles off shore.' " Id. (citation omitted). The Court found that, "in describing a boundary following the ocean side of offshore islands and reefs, the Order created a Reserve that necessarily embraced certain submerged lands—specifically, tidelands shoreward of the barrier islands." Id. at 39.

The Court did not hold that tidelands are not entitled to the same presumption of state title as other inland waters; nor could it have, given that tidelands are state lands under the constitutional equal footing doctrine. Borax

Consolidated, 296 U.S. at 15. The Court's characterization of the boundary description in Alaska as "necessarily" including tidelands was based on the fact that the description "d[id] not merely define a boundary that encloses a body of navigable water," as in Montana and Utah Division of State Lands, but rather, in describing a boundary following the ocean side of offshore islands and reefs, created a Reserve that necessarily embraced certain submerged lands. Alaska, 521 U.S. at 38-39 (emphasis in original). The Court seemed to view the boundary described as skirting the ocean side of fringing islands as the functional equivalent of a boundary described as following the coast at low tide. Both necessarily include tidelands because the boundary line is defined as following a coastline that expressly includes them. The same is not true of a boundary line drawn through water areas without following any coast line. The Tongass boundary, for example, does not follow a coast line described so as to include lands below mean high tide, but consists of two broad, straight lines far out into the ocean to encompass an entire section of the Territory—the rugged shore of Southeast Alaska and all its islands—and only incidentally encompassing the intervening waters.

The second basis for the Court's holding in Alaska likewise does not apply to the Tongass reservation. In Alaska, the Court heavily relied on the purpose of the reservation. The NPRA order referred to "large seepages of petroleum along the Arctic Coast of Alaska" and to the "conditions favorable to the occurrence of

valuable petroleum fields on the Arctic Coast * * *." Id. at 39 (citation omitted). It "described the goal of securing a supply of oil for the Navy as 'at all times a matter of national concern.' " Id. The Court found that the order's purpose was to retain federal ownership of land containing oil deposits, and that this purpose would have been undermined if deposits underlying lagoons and other tidally influenced waters had been excluded. Unlike oil, which underlies uplands and submerged lands alike, forests grow only above high tide. Unlike in Alaska, no purpose of the Tongass Forest reservation would be compromised if the submerged lands were not reserved.

b. In The Tongass, Water Boundaries Were Drawn Only For Convenience And Include High Seas That The Federal Government Could Never Have Reserved

The 1909 water boundaries of the Tongass were drawn for simplicity, clarity, and ease of reference in enclosing upland areas. The daunting topography of this vast area would have made any other delineation of the boundaries too complicated and confusing for the purpose at hand.

The western boundary of the Tongass, as established in 1909, offers no meaningful rationale for including the submerged lands within. This boundary is not even drawn in any particular place; it extends from "a point west of Cape Bingham; thence southeasterly to a point sixty miles west of Cape Muzon * * *." Ex. AK-200 at GLB7273. The northwesterly point is somewhere in the Gulf of Alaska, but the order does not specify what distance it is from Point Bingham. If the objective had

been to reserve the lands underlying the waters of the Gulf for national forest purposes, why would the order be so imprecise in setting the northwesterly point of the Forest? And without a defined northwestern point, the entire western boundary is undefined. The 1958 maps of federal reservations that the Department of the Interior created for Congress when it considered the Statehood Act did not even include the western boundary of the Tongass; the Tongass maps delineate the southern, eastern, and northern boundaries, but the western boundary is shown only on its northern and southern ends as short line segments that disappear into the ocean. See Exs. AK-203-209. Given that the reservation issue depends at bottom on Congress's intent at statehood, this omission of a western boundary in the maps presented to Congress at that time is a telling indication that the boundaries were never intended to reserve marine waters. Modern maps are similarly inexact. See Exs. AK-210 to AK-213. A proclamation expressing in clear terms the intent to reserve the submerged lands as a national forest would surely specify where the non-forest lands end and where the forest lands begin.

Further, the order places the southwesterly point of the western boundary—60 miles west of Cape Muzon—in the high seas! No national forest purpose would require a boundary 60 miles into the Gulf of Alaska. Foresters would have no need to have regulatory authority so far from any forest, and Congress itself

could not even impose its laws in this area. In 1907, this part of the Tongass boundary was well outside the national boundaries claimed by the United States.[8]

In fact, this boundary was randomly drawn far out into the deep blue ocean because the alternative—referencing hundreds of points, capes, promontories and islands—would have been an unmanageable task, and entirely unnecessary to the task at hand of enclosing the mainland and islands of the Archipelago. Instead, drawing a vague but inclusive line as an outer limit avoided referencing countless far-flung and unsurveyed points of land.

The order's description of the southern boundary of the Tongass, east of Cape Muzon, reaffirms this. The 1909 order sweeps within the Tongass's exterior boundaries thousands of square miles of waters with this language: "thence [from Cape Muzon] in a general easterly, northerly, northeasterly, and northwesterly direction along the said International Boundary Line to the summit of Elbow Mount * * *." Ex. AK-200 at 2227. As is apparent from the map included in the proclamation, the Tongass' southern boundary from Cape Muzon to the southeasterly edge of the Forest is drawn entirely in the water. See Ex. AK-201. The Executive Order,

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8 Until 1988, when the United States extended its territorial seas to 12 nautical miles, see 54 Fed. Reg. 777 (1988), the United States asserted that areas more than three miles seaward of the coast line were high seas.

however, makes no mention of the specific bodies of water that border the forest on its south and west—much less of lands underlying those waters.

As the boundary wends its way "northerly" and "northeasterly," in a "direction along the said International Boundary Line * * *," it encounters Portland Canal, which forms the referenced international boundary for some 100 miles and, thus, the southeastern-most portion of the Forest's border. Once again, the order draws a water boundary with no mention of any waterbody or submerged lands. This boundary most likely bisects the canal because international boundaries drawn in the water follow the middle of the main channel. Choctaw Nation v. Oklahoma, 397 U.S. 620, 632 n.8 (1970) (citing earlier cases and their reference to the boundary between nations or states as the line "medium filium aquae").

The history of the changes made to the Forest boundaries confirms that they were drawn to be simple and inclusive. In 1906, Gifford Pinchot—head of the Division of Forestry in the Department of Agriculture—was faced with hostility toward, and administrative problems with, the Alexander Archipelago Forest Reserve. See Lawrence W. Rakestraw, A History of the United States Forest Service in Alaska 12, 21 (Alaska Historical Comm'n 1981) (Ex. AK-199). He deployed the assistant chief in charge of general inspection, Frederick E. Olmsted, to examine the Alaska Forest situation and report on the administrative problems and the possibility of creating new reserves. Id. The result was an extensive report

that, among other recommendations, strongly urged that "the Alexander Archipelago Forest Reserve be extended to include all of south-east Alaska, with boundaries as recommended * * *." Ex. AK-214 at 48.

Olmsted's comments on the existing boundaries of the 1902 reserve give insight to the different way the new boundaries were drawn when his recommendation was implemented. He complained that the 1902 proclamation was

> quite vague as to just what islands [were] included on the eastern [landward] side. It mentions certain large islands by name and includes "all islands to seaward." That is plain so far as the western boundary goes, but what about all the little islands just off the eastern coasts of the various large islands? According to a strict reading of the proclamation they are not included, although they certainly should be within the reserve. If the proposed addition is made this matter will be remedied * * *. [Id. at 27.]

Which seaward islands were included in the reserve might have been plain under the 1902 proclamation when the reserve was limited to five specific large islands "and the adjacent islands to the seaward thereof," Ex. AK-192, but the extension of the reserve to nearly all of Southeast Alaska would make this boundary problematic also. By Olmsted's description, Southeast Alaska consists of a few large islands that are the tops of the peaks of a mountain range sunk into the sea, with "innumerable islands" "of all sizes" sprinkled in all directions and seaward "at distances from ten to fifty miles." Ex. AK-214 at 3. A straight boundary line far out into the ocean encompassing "[a]ll of the public land lying within," Ex. AK-200 at

2227, was a simple and efficient way of including thousands of islands of all sizes. An explicit description of the lands included would have been impossible, as nearly none of the area had even been surveyed, and a broad, inclusive line eliminated the geographical ambiguities and anomalies that surely would have arisen from an attempt to be more specific. That was why the line was drawn where it was—not because of any intent to reserve submerged lands.

Designating ocean boundaries that do not thereby encompass lands underlying marine waters has not troubled the Department of the Interior in other instances. In 1960, the Interior Solicitor issued an opinion finding that the Aleutian Islands National Wildlife Refuge consisted only of the land areas within such a boundary. Ex. AK-215 at 1. The Solicitor considered in part a 1930 executive order that added to the Aleutian Islands Reservation "Amak Island, the Sealion Rocks, and a small unnamed island lying southeast of Amak Island * * * within the boundary indicated by the broken line upon the diagram hereto attached * * *." Id. at 2. The diagram showed a "rather compact cluster of islands and rocks with an oval-shaped broken line enclosing the rocks and islands, together with the water area immediately surrounding them." Id. at 3. While the Solicitor acknowledged that "[t]he circling of the entire area of islands and contiguous waters might be construed as showing an intent to reserve everything within the circle," the opinion concludes that this was not the order's intent. Id. The Solicitor found significant

that while the order made a general reference to the marked boundary, "only islands and rocks, not water or submerged lands, are mentioned as being within that boundary." Id. Especially noteworthy was the fact that "nowhere in the Order is there any express mention of offshore waters or submerged lands." Id.

The 1909 Tongass expansion order is similarly silent about offshore waters or submerged lands. Like the 1930 Aleutians Reservation order, it mentions only the lands—"lands * * * in part covered with timber"—and reserves "[a]ll the public land lying within the boundaries described * * *." Ex. AK-200 at 2226-27. Thus, the Tongass Reservation likewise did not include the submerged lands.

C. The 1925 Changes To The Tongass Boundaries Do Not Indicate An Intent To Include Lands Underlying Marine Waters As Forest Lands

The last major expansion of the Tongass, in 1925, also fails to demonstrate any intent to include marine waters in the Forest. Despite the enormity of the Tongass after the 1909 addition, another expansion was suggested as early as 1913. In a report to the District Forester, the Forest Supervisor stated that "[t]he boundary of the Tongass National Forest was well placed except at the northwest corner where the west shore of Lynn Canal, including all of the Chilkat River and the north shore of Icy Straits, should have been included in the National Forest in as much as these places are well timbered and operators not being familiar with the

location of the boundary frequently come to us for timber sales when they should go to the Land Office." Ex. AK-216 at 14.

The expansion was more than a decade in coming. An April 1924 executive order temporarily withdrew a large area north of the Tongass so that the Department of the Interior could consider an application for the establishment of Glacier Bay National Monument. Ex. AK-217. Within a short time, however, Interior and Agriculture considered dividing the area into both a monument and an addition to the Tongass. By July 1924, the District Forester sent a report to the United States Land Office about "the area under consideration for inclusion in the Tongass National Forest * * *." Ex. AK-218 at 1. The report describes the proposed addition as "a section of the mainland" and "certain islands." Id. at 2. The acreage given for these areas is for uplands only. Id.

Glacier Bay National Monument was created in February 1925 from part of the area that had been temporarily withdrawn, Ex. AK-219, and most of the rest was added to the Tongass. Ex. AK-220. A March 1925 letter from the Secretary of Agriculture to the Secretary of the Interior discussed the boundaries of the expansion. Ex. AK-221; see also Ex. AK-222. The added region, north of the then-existing Forest, was defined only by a description of the northern and eastern boundaries of the additional area. Ex. AK-221 at 1, 3-4. The southern boundary was not explicitly described, because it was the northern boundary of the existing

Forest. Id. The western boundary of the addition also was not mentioned in the description, but was drawn on the map accompanying the proclamation as a straight-line extension of the earlier straight-line boundary drawn out in the North Pacific. Compare Ex. 201 (1909 map) with Ex. AK-223 (1925 map). The extension of this line is no more a demonstration of intent to include the ocean in the Forest than was the original, shorter line. It is simply a line to box off the enormous exterior boundary of the Tongass and enclose all the islands and mainland within.[9]

Thus, none of the major orders adding land to the Tongass demonstrate an intent to reserve lands underlying the marine waters of Southeast Alaska—much less a clear intent. Were the orders ambiguous, the Court would apply the "strong presumption" in favor of the State. The Federal Government has not found the orders unclear, however; from the time the Forest was established through statehood, it continually took the position that the Tongass proclamations did not reserve the ocean floor as Forest lands.

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[9] Much of the 1925 expansion of the Tongass was excluded from the Tongass and added to Glacier Bay National Monument in 1939. Proclamation 2330, 3 C.F.R. 83 (1939).

III. BEFORE STATEHOOD, BOTH THE DEPARTMENTS OF THE INTERIOR AND AGRICULTURE CONSISTENTLY TOOK THE POSITION THAT THE TONGASS NATIONAL FOREST DID NOT INCLUDE LANDS BELOW MEAN HIGH TIDE

Despite the extensive ocean area shown within the exterior boundaries of the Tongass on the 1909 map, the Forest Service never believed the lands underlying it were Forest lands subject to its jurisdiction. Before statehood, both the Forest Service and the Department of the Interior steadfastly maintained that these submerged lands were not part of the Tongass. These statements of the Federal Government against its current interests, some made almost contemporaneously with the Tongass reservation and expansions, constitute compelling evidence that the reservation proclamations did not clearly and unambiguously include submerged lands—as the United States now asserts.

The Forester in Washington explained as early as 1906 that the Forest Service did not have authority over the bays or inlets of the islands of the reserve. Forest Inspector W. Langille asked about jurisdiction over these areas because "the proprietors of the saloons on the reserve" intended to move to a scow anchored "in front of the places they now occupy," apparently to avoid Forest Service bluenoses. Ex. AK-224 at GLB7324. The Forester responded that "[t]he Forest Service has no jurisdiction over the tidal waters of the islands in the reserve, and will have done its

full duty when it shall have secured the removal of the trespassers from forest reserve lands." Ex. AK-225 at GLB7325-26.

In 1915, the Acting Forester asked for a Solicitor's Opinion addressing "what authority, if any, the Forest Service has to issue a permit which would give an exclusive right to work the kelp beds and take the kelp from the waters in Alaska adjoining Forest lands." Ex. AK-226. The request specified that kelp does not float, but takes root on the submerged land. Id. The resulting Solicitor's Opinion is being withheld pursuant to a doubtful claim of privilege, but its conclusion is referenced in other documents. The opinion concluded that the Forest Service had no authority to grant permits to gather kelp from submerged lands. Ex. AK-227. The opinion was plainly based on the lack of authority over the tidelands, because the Assistant Forester, forwarding the opinion to the District Forester, pointed out that its conclusion would "not prevent us from granting the exclusive use of the only suitable site from which to gather it"—the uplands under the Forest Service's jurisdiction. Id.

This position was reinforced several years later in another opinion. The Forest Service wanted jurisdiction over a strip of tidelands 1000-2000 feet wide along the entire shore of the Forest. Ex. AK-228 at 1, 3. A 1918 Department of Agriculture Solicitor's Opinion concluded, however, that the Tongass did not include such lands underlying marine waters; the pertinent forest legislation gave

"no authority to include the tide lands and adjacent waters in the National Forests, since the authority of the President is limited by statute * * * in creating National Forests to those public lands which are wholly or in part covered with timber and undergrowth." Ex. AK-183 at 1. The opinion also based the lack of authority to reserve submerged lands on the limited purposes of the forest legislation. Id. at 2.

The Forest Service still wanted use of some of the tidelands in Southeast Alaska, so it asked the Department of the Interior to reserve them on its behalf. Through the 1920s, however, Interior believed that it did not have authority to reserve the tidelands either. When the Secretary of Agriculture asked the Secretary of the Interior in 1923 to withdraw a small area upon which the Forest Service had already constructed a warehouse and boat landing, Ex. AK-229, the Secretary of the Interior responded that the area was entirely below the line of mean low tide, and "[u]nder the settled rule laid down by the United States Supreme Court the bed of navigable waters and the tide lands in * * * Alaska are held * * * in trust for the future state * * * and rights thereto may only be granted by Congress." Ex. AK-330 at US9146.[10]

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10 Nine years later, recognizing that "these tide lands are held by the United States for the use and benefit of any State which hereafter may be created in Alaska," the Secretary of Agriculture asked the Secretary of the Interior to reserve the lands temporarily for the Federal Government, noting that "[u]ntil a State is created in Alaska, it would seem that the lands in question are certainly subject to

In 1949, the Department of the Interior issued a Solicitor's Opinion that again demonstrated that it did not consider the submerged lands in Southeast Alaska to be part of the Forest. The opinion, addressing the seaweed beds "scattered along the coast and the inland waterways of Southeastern Alaska," concludes that the United States has title to the submerged lands upon which the seaweed grows, "[i]n view of the territorial status of Alaska." Use of Seaweed Beds in Southeastern Alaska, M-36006 (June 30, 1949) (Ex. AK-188). Significantly, the opinion never mentions the Forest Service or the Department of Agriculture; it assumes that Interior has jurisdiction over tidelands and submerged lands, albeit no authority to lease them. Also significant is its conclusion that "if Alaska should be admitted to the Union, all tidelands and lands beneath navigable waters within the boundaries of the State of Alaska, and all seaweed beds growing upon such lands would pass into the ownership and control of the new State." Id. at [7444]. This was long after the Tongass reservation that the United States now argues prevented those submerged lands from passing to the State.

Shortly thereafter, the Department of Agriculture Solicitor's office issued an opinion concluding that reclaimed tidelands within the exterior boundaries of the Tongass do not have national forest status. Ex. AK-233. The opinion had

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the control of the United States." Ex. AK-231 (emphasis added). The Interior Secretary agreed to that limited request. See Ex. AK-232.

been requested after the Army had filled tidal flats off the shore of Excursion Inlet during the war, then abandoned them. Ex. AK-234. The fill was contiguous to Forest lands, so the Forest Service wondered if it had authority to issue permits for the reclaimed shorelands.

In the opinion, the Solicitor reasoned that a reservation should be regarded as inoperative with respect to tidelands, since the laws limit the establishment of forest reservations to "public lands," which do not include tidelands in a Territory held in trust for the future State. Ex. AK-233 at US7970-71. The reservation, he advised, should be construed as making an implied exception of tidelands, in compliance with the statutory limitation upon the establishment of forest reservations, and in conformity with settled principles of policy and law with respect to the status of such lands. Id. at 2. Thus, he concluded, the reclamation was a military engineering project for temporary use, and was not "undertaken with a view to severing part of the shore of Excursion Inlet from the great body of tidelands which the United States held in trust for the future State." Id. The Forest Service verified in 1960 that these filled tidelands had passed to the State. See Ex. AK-235 (Forest Service 1960 advice that these filled tidelands had passed to the state, which was the proper authority to grant special use permits for the Excursion Inlet Packing Co. to build upon them); Ex. AK-236 (same advice given in 1961).

Thus, the United States cannot overcome the presumption that the lands underlying marine waters in Southeast Alaska were not reserved as forest lands. As a matter of law, the President did not have authority to reserve them. Further, the Tongass proclamations clearly did not intend to reserve the tidelands and submerged lands within the forest boundaries, an interpretation shared by the federal agencies responsible for federal lands.

IV. CONGRESS DID NOT INTEND TO DEFEAT ALASKA'S TITLE TO THE SUBMERGED LANDS AND MADE CLEAR AT STATEHOOD THAT IT INTENDED ALASKA TO TAKE TITLE TO THEM

Assuming for the sake of argument that the United States could establish the requisite intent and authority to reserve lands under the ocean as a forest, it cannot establish that Congress "expressly retained" title to these lands, or "definitely declared or otherwise made very plain" this intention. 43 U.S.C. § 1313(a); Alaska, 521 U.S. at 34 (citation omitted). To the contrary, in discussing the terms of Alaska statehood, Congress repeatedly and expressly acknowledged that tidelands and lands underlying marine waters within the Tongass boundaries would pass to the new State. The discussions were prompted by a provision in several Alaska statehood bills that addressed the tidelands or submerged lands within the Tongass. Several versions of the provision—which was not in the Statehood Act as passed—were promoted by the Forest Service and its contractors in the Tongass, who wanted assurance that they would continue to have access over

the tidelands. All the discussions about the need or lack of need for the access provision were based on the premise that the State would take title to the lands at statehood. Ultimately, Congress considered the provision unnecessary because it concluded that the State's ownership of these lands would not interfere with access.

In 1951, the Acting Secretary of Agriculture had commented on an early Alaska statehood bill by recommending an amendment to provide that the United States would retain access over the tidelands to the Forest lands in Southeast Alaska—"[a] reasonable right of ingress and egress * * * so there should be no conflict between the interests of the State of Alaska, which would have title to the lands, and those of the United States." Ex. AK-237. Obviously, such an amendment would not have been necessary if the United States would be retaining those lands after statehood.

That same year, a Senate statehood bill provided that the United States shall retain the right of ingress and egress from its lands across adjoining lands which are subject to the ebb and flow of daily tides. Ex. AK-238 at 50. Opponents of statehood criticized the provision, concluding that it would permit the Federal Government to control the tidelands in Alaska: "This language, when considered in the light of the firm policy of the Interior Department to control Alaska, its lands and its resources, leaves no choice but to assume that the Department will construe the bill as retaining control of the tidelands in the Federal Government." Id.

Alaska's delegate to Congress, E. L. Bartlett, downplayed this concern, but also confessed some anxiety about it. He believed that the legislative history would prevent the Federal Government from interpreting the provision as broadly as the opponents of statehood predicted, and explained its true purpose:

> [T]he legislative history of the statehood bill will * * * amply demonstrate the purpose of this amendment. It was urged by the Forest Service and adopted by the committee upon the presentation that in respect to the national forests there ought to be a guarantee of access to salt water over the state tidelands or the private tidelands if the state should subsequently divest itself of title. [Ex. AK-239 at 1.]

Thus, as with its counterpart in the House, the early Senate statehood bill clearly contemplated that title to the submerged lands would pass to Alaska; otherwise, there would have been no need to guarantee a federal right of access.

Alaska statehood became a low priority during 1951 and 1952 due to the Korean War, see Ex. AK-240 at 153, but new statehood bills were submitted in 1953 and 1954. The tidelands access provision was sometimes included in and sometimes excluded from these bills. See, e.g., Hearings on S. 50 and S.224 Before the Comm. on Interior and Insular Affairs, 83d Cong. 3 (1953) (§ 4) (Ex. AK-241); Ex. AK-242 at 8-9 (§ 4) (Senate bill containing access provision providing easement in favor of Federal Government); Hearings on S. 50 Before the Committee on Interior and Insular Affairs, 83d Cong. 329 (1954) (bill containing no access provision) (Ex. AK-243); H.R. Rep. No. 83-2982, at 31 (1953) (§ 4) (Ex. AK-244);

see also H.R. Rep. No. 83-675, at 15 (1953) (§ 4) (House bill containing access provision) (Ex. AK-245). Delegate Bartlett continued to believe such a measure was unnecessary "because * * * there would be no doubt whatsoever that the State would make provision for ingress and egress to this timberland * * *." Hearings on S. 50 Before the Comm. on Interior and Insular Affairs, 83d Cong. 240 (1954) (Ex. AK-246). See also id. at 241 (statement of Senator Clements that since no State had ever "bottled up the Federal Government" by denying it access to public lands, Alaska was unlikely to do so).

In 1953, however, Delegate Bartlett reported that some House members opposed to statehood had been inspired by the forest tidelands matter to "hit upon a new theory of attack." Ex. AK-247 at US17892. They would amend the bill to give ownership of the tidelands to the Federal Government—not just access—reasoning that "vast areas of the coastline are backed by federal property," such as the "Tongass National Forest," and "[i]t would be an intolerable affront to the integrity of that property if the state were to receive title to the [tidelands]." Id. at US17893. Bartlett told the Representatives advancing this position that "if such an amendment were adopted there would be virtually no support for statehood in Alaska." Id. at US17894.

> I for one would not support it under those terms. Then, indeed, we should have what has been falsely alleged in the past—a federal state wherein the federal government would

> maintain a measure and degree of control that it does not in any other state. * * * I do not believe there is any prospect of their suggestion being incorporated in the bill as finally written, but the danger is there nonetheless. [Id.]

This "attack" apparently never manifested itself as an amendment, and the statehood efforts ultimately failed for this session of Congress. In 1957, the access issue was raised during hearings on a new Senate bill. Senator Jackson characterized the issue as relating to contracts in the Tongass National Forest, and read an amendment proposed by the Forest Service that would have made tidelands and submerged lands "available to the United States for use in connection with the protection, management, development and utilization of such national forest and the resources thereof." Hearings on S. 49 Before the Comm. on Interior and Insular Affairs, 85th Cong. 169-170 (1957) (Ex. AK-248).

After a recess, Senator Jackson then suggested that counsel and staff for Delegate Bartlett, the Departments of the Interior and Agriculture, and the Forest Service work out a new amendment that would carry out "the intent of the committee" that the contract rights between the Forest Service and a particular pulp company not be impaired. Id. at 170. A few days later, Senator Jackson proposed a new amendment, which he said had been approved by the Departments and Bartlett, that would have required Alaska after statehood to provide the United States and its contractors "the right to use necessary tidelands and waters over submerged lands

included within or adjacent to National Forests for the purpose of transporting, booming, and storing logs and forest products removed from said national forests by or under authority of the United States, or in performance of contracts now or hereafter executed by the United States." Id. at 173. The proposed amendment further provided that if Alaska "shall lease or otherwise dispose of property subject to said Submerged Lands Act, it shall reserve from said leases or dispositions the right to provide such use without cost to the user." Id. See also Ex. AK-249 at 20.

The inclusion of the tidelands access provision in this bill demonstrates Congress's acknowledgement that the State would take ownership of the tidelands and submerged lands of Southeast Alaska at statehood. If Congress intended to retain the submerged lands within the Tongass boundaries, the Forest Service and its contractors would have no concern about access. Congress would have no reason to add a proviso to the Statehood Act's incorporation of the Submerged Lands Act, and no reason to require the State to reserve access rights for Forest Service contractors when it sold or leased the lands. Congress intended that the new State would take title to the lands, and meant to assure access to timber companies by retaining a limited right of access.

As finally passed and signed into law, the Alaska Statehood Act did not contain the tidelands access provision. On May 26, 1958, the House passed its version of the Alaska Statehood bill. It appeared that the Senate might also pass its

version, but Delegate Bartlett and other statehood advocates worried that if the Senate bill differed significantly from the House-passed version, the opportunity for statehood that year would be lost. Ex. AK-250 at 164-165. Bartlett and others set up a meeting with Senator Jackson, floor manager of the bill, and convinced him to abandon the Senate bill and take up the House measure instead. Id. Senator Jackson then convinced the Senate to pass the House version without amendment. As Jackson saw it, Congress "face[d] the almost unbelievable situation in which Alaska statehood could be voted by both the State and the House of Representatives and still not go to the President for signature," a predicament he called a "legislative fact[] of life." 104 Cong. Rec. S12009 (daily ed. June 24, 1958) (Ex. AK-251). This would happen if the Senate passed the bill with amendments, and it were sent back to the House for conference and was referred to the Rules Committee, where it would die. Id. at S12010.

In his remarks on the Senate floor, Senator Jackson referred to the differences between the House-passed statehood bill and S.49 as "differences * * * of wording and language rather than policy." Id. Explaining why the tidelands access provision in S.49 was not necessary, he stated that "[t]he Senate committee does not believe that the State of Alaska would, under any circumstances, attempt to interfere with the proper performance of [logging] contracts * * *." Id. at S12015. He stated that the committee also believed that the contracts carried the implied or

specific provision that the operators would be entitled to use necessary means of access and waters areas to fulfill the terms of the contracts. "Since we believe these conditions are required and will not in any event be interfered with, we do not consider it necessary to make specific mention of it in the act." Id.

The Senate accepted the House bill without amendments after six days of debate. The timber access provision was sacrificed in the interest of avoiding the complications of amendments. Its elimination reflected no change in interpretation of title and no change in policy; it was simply found to be unnecessary. Thus, far from manifesting a definite or plain statement to reserve submerged lands for the United States after statehood—as is required to defeat Alaska's title—Congress manifested an unwavering view during discussion on statehood that Alaska would retain title to those lands.

V. SINCE STATEHOOD, THE UNITED STATES HAS ACTED AS THOUGH THE STATE OWNS THE SUBMERGED LANDS WITHIN THE BOUNDARIES OF THE TONGASS

Actions occurring after statehood are largely immaterial to the question at hand because "Congress cannot, after statehood, reserve or convey submerged lands that 'ha[ve] already been bestowed' upon a State." Idaho v. United States, 533 U.S. 262, 280 n.9 (2001) (quotation omitted). Nevertheless, the actions of the United States after statehood demonstrate that it has understood that the tide and submerged lands within the Tongass boundaries had passed to the new State.

Almost immediately after Alaska entered the Union, the Forest Service acknowledged that the United States no longer owned or had authority to permit the use of lands below mean high tide. This is well illustrated by the Forest Service's pre- and post-statehood dealings with the Excursion Inlet Packing Company, which had its operations on filled tidelands and wanted to expand in part onto more tideland areas. In response to the company's initial proposals for expansion, the Forest Service in April 1958 sent a letter reflecting its pre-statehood position on tidelands jurisdiction. The letter informed the company that " Tract 'A' is on filled tide land and therefore is not under Forest Service jurisdiction * * * [so] it will be necessary to word the special use permit to include only that area originally above mean high tide." Ex. AK-252 at US10163.

After Alaska became a State, the Regional Forester wrote to the Forest Supervisor recommending that the company be notified that it should obtain a state permit for the filled tidelands, "now owned by the State of Alaska." Ex. AK-235 at US10050. Apparently, the Forest Service was slow in giving this notification, because six months later the company noticed that while the Forest Service had billed it for its other use permits, it had not received a bill for use of the filled tidelands. "We feel this may be an oversight, or can we assume that the original tide lands on which these cannery installations are located have been turned over to the State of Alaska?" Ex. AK-253 at US10049. To protect its property "during this

transition period," the company submitted the money for the original special use permit. Id.

In June 1961, the company's surveyors submitted applications to the Forest Service for special use permits, careful not to include the State's filled tidelands. "You will note that the outer or seaward limit of these permit descriptions is the original meander line of mean high tide prior to the fill being placed on the tidelands," which the 1950 Agriculture Solicitor's opinion had found to be "the legal seaward limit of the uplands * * *." Ex. AK-254.

The next month, the District Ranger sent a report of an inspection of the Company's property and made recommendations about its permits. Ex. AK-255. Two of its existing permits included tidelands, and the report recommended terminating them or reducing them to eliminate the tideland areas. A letter to that effect was sent to the company a month later. It advised that the inspection had found that the cannery and powerhouse "are on tidelands and therefore should be under permit from the State of Alaska," and that the Forest Service permit covering this area would be terminated. Ex. AK-256 at US10000. The second permit would "be revised to exclude the tideland as shown on the [company's] survey." Id.[11]

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11 Correspondence among the State, the Forest Service, and the Excursion Inlet Packing Company continued for several years regarding the application to and issuance by the State of tidelands permits. See Exs. AK-256 to AK-259. Never did

During this same time period, the Forest Service itself applied to the State for a tideland permit for construction of a log dump and rafting booms, Ex. AK-260, and informed fish trap permittees that "a portion of [the] improvements used in connection with your special use permit are located on State of Alaska tidelands below mean high tide." Ex. AK-261.

The State and Forest Service recognized the need for a more coordinated procedure, and met in mid-1959 to discuss "the tidelands situation." Ex. AK-262 at 1; see also Ex. AK-263. The meeting led to a memorandum of understanding ("MOU") between the State and the Forest Service concerning use of the tidelands and submerged lands. Ex. AK-264. The MOU, effective December 27, 1961, memorialized the understanding that the Alaska Department of Natural Resources "has jurisdiction over the tidelands and contiguous submerged lands within the State of Alaska, which are adjacent to lands of the Chugach and Tongass National Forests for approximately 10,000 miles of coastline * * *." Ex. AK-265 at 1. The State agreed "[t]o recognize that some use of the tideland and submerged land by the Forest Service and/or its contractors is essential for prompt and efficient management of adjoining national-forest upland," and gave the Forest Service authority to permit short-term uses of specific tracts. Id. at 1-2. For leases for future develop-

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the Forest Service waver in its position that the State had taken title to the filled tidelands at statehood.

ment that would exceed five years, the Forest Service agreed to apply to the State. Id. at 2. The MOU was in effect for years. See, e.g., Exs. AK-266 to AK-269. Many letters and memoranda sent to and from the Forest Service distinguished between the permits necessary for National Forest uplands and those required for the adjoining state-owned tidelands. See, e.g., Exs. AK-270 to AK-285.

The regional supplement to the Forest Service Manual shows that the agency's view of state ownership had not changed as of its date, July 1975. Its section on "Tidelands and Submerged Lands" explains that the lands "from mean high tide to three miles seaward became the property of the State of Alaska as a result of the Statehood Act * * *." Forest Service Manual, § 5448, R-10 Supp. No. 17 (July 1975) (Ex. AK-286). It refers to the MOU and sets out the procedures it requires for uses of these lands. Id. The Manual was amended in 1978 to reflect procedural changes necessary after the State Attorney General found in 1977 that the State Commissioner of Natural Resources never had authority to transfer land management decisions to the Federal Government, specifically to allow the Forest Service to issue short-term tideland permits on the State's behalf. Ex. AK-287. Nevertheless, the revised Manual still explicitly recognized state ownership of tidelands and submerged lands within the Forest boundaries. Ex. AK-288.

The current Forest Service Handbook for Region 10 continues to distinguish between federal uplands and state tidelands. The handbook requires that

Forest Service permits that "involve, or may involve the use of tide lands" include a clause stating that the permit "authorizes only the area and improvements above the line of mean high tide," and that "[a]uthorization for the use of the tidelands from the line of mean high tide must be secured from the State of Alaska * * *." Ex. AK-289 at 4.

The Forest Service has conceded state ownership of lands below high tide within the Tongass in a number of other ways in recent years. For example, the subsistence hunting and fishing regulations promulgated by the Departments of Agriculture and Interior apply to "public lands," which the United States has interpreted, for purposes of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3102, to include marine waters over federally-owned submerged lands. 36 C.F.R. § 242.3(28); 50 C.F.R. § 100.3(b)(28). The regulations' applicability to the Tongass, however, is described as "all navigable and non-navigable water within the exterior boundaries of * * * Tongass National Forest, including Admiralty National Monument and Misty Fjords National Monument, and excluding marine waters * * *." 50 C.F.R. § 100.3(b)(28) (emphasis added). Environmental Impact Statement notices from the Forest Service have included the same message for at least the past ten years, directing that a "Tideland Permit and Lease or Easement" should be obtained from the Alaska Department of Natural Resources. See Notices of Intent to Prepare an Environmental Impact Statement, 56 Fed. Reg. 28368

(1991); 58 Fed. Reg. 52076 (1993); 59 Fed. Reg. 44963 (1994); 60 Fed. Reg. 55696 (1995); 62 Fed. Reg. 25161 (1997); 63 Fed. Reg. 43903 (1998); 64 Fed. Reg. 63007 (1999); 65 Fed. Reg. 25903 (2000); 66 Fed. Reg. 35583 (2001).

Further, the Department of the Interior's recent revocations of pre-statehood lighthouse reservations within the Tongass boundaries demonstrate that it did not consider tidelands to be part of the Forest before statehood. In the early part of the century, lighthouse reservations were superimposed on the Forest reservation, and sometimes included lands below high tide. In revoking the lighthouse reservations, the Department of the Interior has distinguished between the uplands and tidelands. For example, a 1994 order revoking the 1925 reservation for the Woronkofski Point Lighthouse stated that the uplands would continue to be subject to the forest reservation, while the post-revocation tidelands would become "public land." Ex. AK-290; Ex. AK-291.

Thus, although the United States believed in 1993 that it had defeated the State's title to these submerged lands, it based the defeat on the lighthouse reservation, not on the forest reservation. The 1993 revocation of the 1901 reservation for the Mary Island Lighthouse was handled the same way, as were the revocation orders for the Cape Strait and Lemesurier Lighthouses. See Exs. AK-292-297.

VI. THE MAGNITUDE OF THE TONGASS SUBMERGED LANDS REQUIRES EVIDENCE OF CONGRESSIONAL INTENT FAR MORE COMPELLING THAN EXISTS IN THIS CASE

The sheer magnitude of the lands the Federal Government now claims that it held back from Alaska's birthright casts doubt on the plausibility of the claim. At 11,000 miles, the shoreline of Southeast Alaska represents fully one-third of the shoreline of the entire State, and more than one-tenth of the shoreline of the entire Nation. NOAA, Office of Public Affairs, The Coastline of the United States (1975) (Ex. AK-298). The very purpose of the constitutional equal footing doctrine—to ensure that new States enter the Union with the same "essential attribute[s] of sovereignty" as their new peers, Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 293 (1997) (quotation omitted)—would be subverted if the Federal Government were to retain title to such a vast portion of a new State's heritage lands. It is a difficult question whether the Federal Government could legally do so without contravening the equal footing doctrine by rendering it a hollow and fraudulent guarantee. At the very least these concerns should compel the Court to apply the requisite intent standard in the most exacting manner, and insist that the United States demonstrate that Congress carefully considered, actually decided, and fully intended to retain title to these lands.

And it is not just the audacious size of the Federal Government's claim that should give pause. Perhaps even more importantly, the marine waters of

Southeast Alaska are in many respects the historic, cultural, and commercial heart of the State. It is not fortuitous that today's capital—and the Russian capital before it—are on the waters. The waters are plainly the lifelines for the area's communities—the highways of commerce, the foundation of transportation, the habitat for fisheries, and—more recently—the magnet of tourism. Given the magnitude and role of the submerged lands in Southeast Alaska, federal defeat of state title to these lands would more than shift "the delicate balance" of state and national authority; it would push so much state authority entirely off the scale as to damage the State's vitality as a distinct sovereign in our federal system.

And while a strict presumption of state ownership is always applicable to a claim of federal retention of title to submerged lands, it is especially critical when the United States contends that it held back a traditional state authority in admitting a new State to the Union. Congress does not simply decide to admit a new State; it is a bilateral act. The people who will join together to form the State must also agree to accept the terms of their self-governance. The Alaska Statehood Act by its terms would not have become effective had it not been ratified by the electorate of Alaska. See Alaska Statehood Act, § 8 (codified at 48 U.S.C. note prec. § 21).

In ratifying the Statehood Act, Alaskans relied on its terms, including its incorporation of the Submerged Lands Act. The United States' current claim that

it retained title to the submerged lands in the Tongass, however, does not rest on any clear language in the Statehood Act. Years after statehood, the United States has adopted the type of position that Delegate Bartlett feared nearly half a century ago. Not only is there no evidence that Alaskans would have approved statehood without title to the submerged lands in Southeast Alaska, Bartlett said before statehood that less onerous terms would have been unacceptable. He indicated in 1953 that federal retention of the tidelands of the Tongass—not even including the lands three miles seaward of low tide—would be an unacceptable condition. In response to a rumor that statehood opponents were planning an amendment to retain the tidelands of the Tongass, Bartlett stated, "I for one would not support [statehood] under those terms," as Alaska would then "have what has been falsely alleged in the past—a federal state wherein the federal government would maintain a measure and degree of control that it does not in any other state * * *." Ex. AK-247 at US17894. Indeed, the proposal of which Bartlett was speaking was planned as a ploy to kill support for a statehood act, not as a condition expected to be acceptable to statehood supporters. Id. This Court is properly alert to potential encroachments on state sovereignty that might threaten to render States "mere appendages of the Federal Government." Federal Maritime Comm'n v. South Carolina State Ports Auth., 122 S. Ct. 1864, 1870 (2002). Delegate Bartlett was

concerned that a proposed retention of the tidelands alone by the Federal Government in Southeast would have precisely that consequence.

The United States' recent change in its long-held position has a "bait and switch" aspect that fulfills the prophetic fear of Delegate Bartlett that any ambiguous language about the tidelands later would be spun to a pro-federal interpretation. Cf. ASARCO, Inc. v. Kadish, 490 U.S. 605, 632 (1989) ("Congress could not * * * grant lands to a State on certain specific conditions and then later, after the conditions had been met and the lands vested, succeed in upsetting settled expectations through a belated effort to render these conditions more onerous."). Unfortunately, Bartlett, like many Alaskans, had become "gun shy * * * after long experience in Alaska," that gave him "a constant fear that no matter what the intent of a proposition like this may be, the administration to follow could be quite different." Ex. AK-239 at 1.

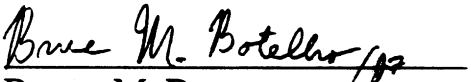
The United States' new position on title to a staggering amount of sovereign lands calls for the strictest application of the principle of judicial restraint that is deeply rooted in this Court's jurisprudence and vital to our federal structure: when construing a federal statute in a manner that "would upset the usual constitutional balance of federal and state powers," "it is incumbent upon the federal courts to be certain of Congress's intent before finding that federal law overrides this balance." Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (quotation omitted).

Put somewhat differently, "[i]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." Id. (emphasis added). The reason is that the federal system was designed by the Framers to protect basic liberties, and "[b]y guarding against encroachments by the Federal Government on fundamental aspects of state sovereignty, * * * we strive to maintain the balance of power embodied in our Constitution and thus to 'reduce the risk of tyranny and abuse from either front.' " Federal Maritime Comm'n, 122 S. Ct. at 1879 (quoting Gregory, 501 U.S. at 458). A court should not construe a federal statute to restrict state title to submerged lands—key to "the sovereign's ability to control navigation, fishing, and other * * * activity" on navigable waters—"unless [such an] intention was definitely declared or otherwise made very plain, or was rendered in clear and especial words." Utah Div. of State Lands, 482 U.S. at 195, 198. This plain statement rule is intended to prevent precisely what the United States is attempting to secure here—a judicial pronouncement that Congress took over authority traditionally held by States without undeniable evidence that Congress actually considered and decided to assume it. Indeed, as detailed above, the evidence clearly establishes the opposite: that Congress and, for that matter, the Executive plainly viewed the submerged lands as belonging to the State.

CONCLUSION

For the foregoing reasons, summary judgment should be granted in favor of Alaska on Count III.

Respectfully submitted,



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