Jurisdiction and the Hunt: Subsistence Regulation, ANILCA and *Totemoff*

This Note discusses the Alaska National Interest Lands Conservation Act ("ANILCA") and the relationship between state and federal jurisdiction over subsistence hunting on Alaskan lands. It focuses on the case of Totemoff v. State, *a hunting case in which native subsistence hunters shot deer on federal land and were arrested and convicted of an Alaska criminal regulation banning the use of spotlighting as a hunting method. The Note analyzes whether the hunters were properly convicted and argues that there was no jurisdiction to prosecute under state law, as ANILCA provided a sufficiently comprehensive regulatory scheme so as to preempt state regulation of the same activities on the same land. The Note then discusses how it may have been possible for these federal regulations to be litigated in state court, although it questions whether state prosecutors had the authority to bring the case.*

I. INTRODUCTION

"We're stuck now with a system that's in total conflict."[1]

The fight for land use is one of the defining features of Alaskan culture and jurisprudence. Commercial and subsistence users are often pitted against each other in a struggle to gain priority over resources to which access is limited. This struggle recently came to a head in the case of *Totemoff v. State*,[2] in which the Alaska Supreme Court placed itself firmly at odds with the United States Court of Appeals for the Ninth Circuit. Since the Supreme Court has denied certiorari on both federal and state cases,[3] no resolution is in sight.

In an attempt to provide such a resolution, this Note analyzes the conflict of law created by the divergent holdings of the state and federal courts. After discussions of the history of the fight for

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1. *Supreme Court Lets Stand Ruling on Subsistence*, ANCHORAGE DAILY NEWS, June 11, 1996, at B3.

2. 905 P.2d 954 (Alaska 1995), *cert. denied*, 116 S. Ct. 2499 (1996).

3. *See* Totemoff v. Alaska, 116 S. Ct. 2499 (1996) (state); Alaska v. Babbitt, 116 S. Ct. 1672 (1996) (federal).

jurisdiction in Part II and of the facts of the case in Part III.A, Part III.B will explain the Alaska Supreme Court's decision in *Totemoff* and demonstrate how the supreme court sought to time *Totemoff* to influence the Ninth Circuit's view of the jurisdictional question. Part IV will then analyze the question of whether the state courts could properly assert jurisdiction over the defendants in *Totemoff* and to what extent.[4] The Note concludes that while the state court might in fact be empowered to hear this case, it is not empowered to apply state law. Since the federal and state regulations are identical in form, the state ultimately achieved the right result, but by the wrong means.

II. REGULATION OF SUBSISTENCE HUNTING

Before we can approach the courts' reasoning in this case, some background on hunting is necessary, as its importance in Alaska – and therefore to the Alaskan courts – cannot be underestimated. For many residents of Alaska, hunting is a way of life that is part of their cultural heritage, as subsistence hunting both feeds the hunters and maintains their spiritual connection to the land.[5] For others, who do not have the same long history of subsistence hunting as a way of life, the hunt is nonetheless equally important as a way of asserting their independence from the constraints of modern society.[6] The importance of hunting to all Alaskans is codified in the equal access clauses of Article VIII of the Alaska Constitution, which guarantee that all Alaskan citizens will have equal access to the state's natural resources.[7] It is not surprising, therefore, that a movement to conserve federally owned resources[8]

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4. Judicial and legislative jurisdiction are also referred to as procedural and substantive jurisdiction.

5. *See* William M. Bryner, Note, *Toward a Group Rights Theory for Remedying Harm to the Subsistence Culture of Alaska Natives*, 12 ALASKA L. REV. 293, 295-96 (1995); Mary Beth McLeod, Note, *The Subsistence Debate in Alaska: Who Will Control Navigable Waters?*, 3 W.-NW. J. ENVTL. L. & POL'Y 355, 355-56 (1996).

6. *See* Darren K. Cottriel, Comment, *The Right to Hunt in the Twenty-First Century: Can the Public Trust Doctrine Save an American Tradition?*, 27 PAC. L.J. 1235, 1286-87 (1996).

7. *See* ALASKA CONST. art. VIII, §§ 3, 5, 17; *see generally* Stephen M. White, *"Equal Access" to Alaska's Fish and Wildlife*, 11 ALASKA L. REV. 277 (1994).

8. In its report accompanying H.R. 39, the bill that became the Alaska National Interest Lands Conservation Act ("ANILCA"), the U.S. Senate Energy and Natural Resources Committee cited the importance of conservation as justification for ANILCA and the previously enacted Alaska Native Claims Settlement Act, Pub. L. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629a (1994)). *See* S. REP. NO. 96-413, at 129-130 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5074. The report particularly noted the long history of

prompted a struggle among Alaskans between native subsistence hunters seeking preferential treatment and sport and commercial users seeking equal access.[9]

This battle for priority resulted in an apparent victory for subsistence hunters. In the Alaska National Interest Lands Conservation Act[10] ("ANILCA"), Congress guaranteed a subsistence preference, stating that "the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes."[11]

Through ANILCA, Congress gave the State of Alaska an opportunity to regulate hunting on federal lands so long as it maintained a subsistence preference,[12] and the state enacted a subsistence regulatory scheme in compliance with ANILCA's requirements.[13] However, that regulatory scheme was short-lived, as the Alaska Supreme Court held that the state was barred by the equal access clauses from implementing regulations granting such hunting preferences.[14] Although the supreme court allowed for the possibility of new regulations sufficient to satisfy both ANILCA and the equal access clauses, the state legislature was unable to implement such regulations successfully.[15] As a result of the state's failure to implement ANILCA, the federal government took over regulation of hunting on federal lands,[16] and the Department of Interior promulgated new hunting regulations.[17] Many of these

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"conservation of wildlife by [f]ederal withdrawal of their habitats under protective management," and noted the importance of preemptive protection of wildlife even in areas where wildlife populations had not yet been greatly reduced in numbers. *Id.* at 173-74, *reprinted in* 1980 U.S.C.C.A.N. at 5117-18.

9. *See* McLeod, *supra* note 5, at 356-58.

10. Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended at 16 U.S.C. §§ 3101-3233 (1994)).

11. 16 U.S.C. § 3114; *see also* McLeod, *supra* note 5, at 358; Joan M. Nockels, Note, *Katie John v. United States: Redefining Federal Public Lands in Alaska*, 26 ENVTL. L. 693, 694-95 (1996); Natasha Summit, Note, *State v. Kenaitze Indian Tribe: A "Journey" for Subsistence Rights*, 13 COOLEY L. REV. 615, 627-28 (1996).

12. *See* 16 U.S.C. § 3115(d).

13. *See* ALASKA STAT. § 16.05.258 (Michie 1996); Alaska v. Babbitt, 72 F.3d 698, 700-01 (9th Cir. 1995), cert. denied, 116 S. Ct. 1672 (1996); McDowell v. State, 785 P.2d 1, 2 (Alaska 1989).

14. *See McDowell*, 785 P.2d at 9 (holding that the state regulations implementing ANILCA were in violation of the equal access clauses, but providing that, for the purposes of implementing ANILCA, a classification scheme based on individual characterization of prospective subsistence hunters might be permissible).

15. *See Babbitt*, 72 F.3d at 701; Ralph Thomas, *Knowles Wants a Public Vote on Subsistence*, ANCHORAGE DAILY NEWS, Apr. 23, 1996, at A1.

16. *See* Thomas, *supra* note 15, at A1.

17. *See id.* The federal regulations of subsistence hunting are codified at 36

regulations, however, particularly as they relate to the manner of hunting, appear to have been copied from the general Alaska hunting regulations, which apply everywhere else in the state.[18]

The uniformity of the state and federal regulations resulted in confusion as to whether the state regulations could apply to incidents occurring on federal lands, and the resolution of this conflict was at issue in *Totemoff v. State*.[19] Whether the state regulations would apply is particularly interesting because the federal regulations are identical to the general Alaska hunting regulations which they purport to supersede.[20] The state contended in *Totemoff*, and the Alaska Supreme Court agreed, that not only were the state regulations applicable to hunting activity on federal lands, but indeed, that one of the reasons for such applicability was the symmetry between the state and federal regulations.[21]

III. A STRANGE CHRONOLOGY

A. The Hunt

The *Totemoff* war over jurisdiction began in the middle of a cold December night, when state troopers patrolling Prince William Sound saw a small two-man boat shining a spotlight onto several island beaches.[22] Deeming this to be suspicious activity, they followed the boat to Naked Island, a federally owned island in the sound, where they saw one person "disappearing into the trees for a few seconds and then returning to the boat at a slower pace."[23] They then surprised the two men, Mike Totemoff and Henry Milette, whom they discovered with a total of five freshly gutted deer

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C.F.R. §§ 242.1-.27 (1996).

18. *Compare* 36 C.F.R. § 242.25(b)(1)(viii) (1996) *with* ALASKA ADMIN. CODE tit. 5, § 92.080(7) (1996). Note that the state regulations upon which the Department of the Interior based the federal regulations were not the regulations the state attempted to promulgate under ANILCA in order to govern federal lands, but are the general regulations that predate ANILCA.

19. 905 P.2d 954 (Alaska 1995), *cert. denied*, 116 S. Ct. 2499 (1996). While the significance of this problem is not immediately apparent, as the effect of the federal and state regulations is identical, the future effects are far-reaching, as a determination of whose regulations control also determines who has the power to change regulation of subsequent use.

20. *See id.* at 960; *see also* 36 C.F.R. § 242.25(b)(1)(viii); ALASKA ADMIN. CODE tit. 5, § 92.080(7). Again, the state regulations in question are the general regulations and not those the state attempted to implement under ANILCA to govern federal lands.

21. *See* Totemoff, 905 P.2d at 960.

22. *See* Totemoff v. State, 866 P.2d 125, 126 (Alaska Ct. App. 1993), *rev'd*, 905 P.2d 954 (Alaska 1995), *cert. denied*, 116 S. Ct. 2499 (1996).

23. *Id.*

carcasses, two rifles, a spotlight and other hunting equipment.[24]

The officers concluded that Totemoff and Milette had been taking deer unlawfully by spotlighting,[25] and charged them accordingly.[26] They then returned the hunters to the larger vessel from which they were working: a fifty-foot fishing boat anchored about a mile away.[27]

Totemoff and Milette promptly moved to dismiss, "contending, among other things, that the state had no jurisdiction to prosecute them."[28] The district judge denied this motion. Finding that the hunting occurred on federal lands, the state district court held that the state's concurrent jurisdiction was not preempted by ANILCA[29] or its implementing regulations.[30]

In reaching this conclusion, the court first noted that the federal regulations promulgated pursuant to ANILCA provide that "State of Alaska fish and wildlife regulations, other than subsistence regulations, apply to public lands unless the [subsistence] board finds it necessary to promulgate regulations which supersede state regulations in order to insure the opportunity for subsistence take of fish or wildlife."[31] The court then found that these federal regulations specifically adopted certain state restrictions on subsistence hunting techniques, including a ban on spotlighting.[32] Because there were licensing procedures for prospective subsistence hunters and regulations governing their hunting activities, the judge felt it inappropriate to allow hunters to "use any method they think they can arguably support knowing it's in violation of existing regulations and argue subsistence later."[33]

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24. *See id.*

25. *See* ALASKA ADMIN. CODE tit. 5, § 92.080(7) (1996). Spotlighting is the practice of hunting by artificial light at night. *See* Ruth S. Musgrave et al., *The Status of Poaching in the United States – Are We Protecting Our Wildlife*, 33 NAT. RESOURCES J. 977, 988 (1993).

26. *See Totemoff*, 866 P.2d at 126.

27. *See* State v. Totemoff, No. 3WH-91-25 (Alaska Super. Ct., 3d Judicial Dist., Sept. 25, 1991) (ruling from bench denying motion to dismiss), transcribed in Appendix to Petition for Writ of Certiorari at 71, 71-72, Totemoff v. Alaska, 116 S. Ct. 2499 (1996) (No. 95-1512) [hereinafter District Court Order].

28. *Totemoff*, 866 P.2d at 126.

29. 16 U.S.C. §§ 3101 et seq. (1994).

30. *See* District Court Order, *supra* note 27, at 83.

31. *Id.* at 78 (citing 50 C.F.R. § 242.14 (1995)).

32. *See* District Court Order, *supra* note 27, at 79-80; *see also* ALASKA ADMIN. CODE tit. 5, § 92.080(7) (1996); 36 C.F.R. § 242.25(b)(1)(viii) (1996).

33. District Court Order, *supra* note 27, at 83. This argument – that "subsistence use" is an affirmative defense that may be raised under ANILCA – was raised by the Ninth Circuit in *United States v. Alexander*, 938 F.2d 942, 948 (9th Cir. 1991). The court, rather than "strik[ing] down a state regulation that is

At trial, Totemoff and Milette were convicted in the state district court of a violation of the Alaska regulation,[34] and thereafter appealed, claiming their motion to dismiss had been denied improperly.[35] The Alaska Court of Appeals affirmed the trial court's findings, arguing that the state regulations could be enforced because "there is no actual inconsistency between the state and federal regulations in question here."[36]

B. The Alaska Supreme Court vs. the Ninth Circuit

The following February, Totemoff appealed to the Alaska Supreme Court, and the state filed its Response and Opposition the following month. Both documents assumed, just as both lower courts had found as fact, that the entire occurrence was on federal lands.[37]

Conflict with the federal courts began when the Federal District Court for the District of Alaska decided *John v. United States*[38] ("*Katie John*"), holding that under the federal navigational servitude,[39] ANILCA applies to navigable waters within Alaska.[40] Be-

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inconsistent with federal law . . . [chose to] permit [defendants] to defend against a criminal prosecution on the ground that their activity is protected by ANILCA." *Id.* For a discussion of the application of the "*Alexander* defense" to this case, see *infra* notes 156-59 and accompanying text.

34. The Alaska hunting regulations are criminal. The Fish and Game Code provides that, with certain exceptions, violations of any provisions of the Code or regulations promulgated thereunder (such as these) constitute misdemeanors. ALASKA STAT. § 16.05.925 (Michie 1996); *see also id.* § 16.05.920 (prohibiting the hunting of game except as permitted by regulation); *id.* § 16.05.255 (authorizing the Board of Game to "adopt regulations it considers advisable . . . for . . . establishing the means and methods employed in the pursuit, capture, taking, and transport of game"); *id.* § 16.05.258 (authorizing regulation of subsistence take of fish and game).

35. *See* Totemoff v. State, 866 P.2d 125, 126 (Alaska Ct. App. 1993), *rev'd*, 905 P.2d 954 (Alaska 1995), *cert. denied*, 116 S. Ct. 2499 (1996).

36. *Id.* at 128.

37. *See* William E. Caldwell, *Chronology of the Alaska Supreme Court's Disposition in* Totemoff v. State, Appendix to Cross Petition for Certiorari by Native American Resource Fund at 1a, Alaska v. Babbitt, 116 S. Ct. 1672 (1996) (No. 95-1084). Milette's lawyer failed to file a timely appeal; he was later disbarred, in part as a result of this failure. Telephone interview with Paul E. Malin, Public Defender, Anchorage, Alaska (Jan. 9, 1996).

38. No. A90-0484-CV, consolidated with No. A92-0264-CV, 1994 WL 487830 at *1 (D. Alaska Mar. 30, 1994), *rev'd sub nom.* Alaska v. Babbitt, 54 F.3d 549 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1672 (1996).

39. The navigational servitude is a right retained by the federal government grounded in the Commerce Clause. The court described its purpose as "to relieve the government of the obligation to compensate an owner of riparian, littoral, or submerged lands for acts which normally require compensation under the Fifth

fore this point, the proceedings in *Totemoff* had seemed fairly straightforward. With the federal courts' appearance on the scene, the picture muddied considerably, as the two court systems maneuvered for jurisdiction over the subject.

The *Katie John* court first noted that ANILCA applies to all "public lands," which are defined as lands, waters and interests therein to which the federal government holds title.[41] However, the statutory language does not define what constitutes "title," and so the federal district court embarked on a quest for legislative intent.[42] Although the court determined that the navigational servitude probably was not sufficient to constitute title per se, the court held that regulatory authority under the servitude was sufficient to empower the federal government to regulate navigable waterways under ANILCA.[43] Furthermore, it recognized such a regulatory scope was necessary to effect ANILCA's purpose.[44]

In the wake of the *Katie John* decision, the Alaska Supreme Court granted Totemoff's petition for review.[45] However, the supreme court appeared more interested in reconsidering the federal district court's logic in *Katie John* than in deciding the issues raised on appeal. In its order granting Totemoff's petition, the court specified three issues to be addressed:

> A. Whether the prosecution is "subject to a defense that spotlighting is a 'customary and traditional' method of taking game which is protected by ANILCA?"
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> B. "If the answer to the above question is in the affirmative, is there a sufficient non-federal nexus in this case to sustain the conviction solely under Alaska law?"
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> C. "With respect to question B above, is the [s]tate precluded by the [*Katie John*] decision from contending that tidelands or lands under navigable water within the three-mile limit are not subject to ANILCA?"[46]

While the Alaska Supreme Court was obviously concerned

Amendment." *Katie John*, 1994 WL 487830, at *14 (citing Boone v. United States, 944 F.2d 1489, 1494 (9th Cir. 1983)).

40. *See Katie John*, 1994 WL 487830, at *18. While applying the navigational servitude, the court determined that the related reserved water rights doctrine should not be applied in this context in Alaska, although it saw the possibility that it might apply in similar circumstances in other states. *See id.* at *14.

41. *Id.* at *12 (citing Alaska National Interest Lands Conservation Act, Pub. L. No 96-487, § 102, 94 Stat. 2371, 2375 (codified at 16 U.S.C. § 3102 (1994))).

42. *See id.* at *12-*18.

43. *See id.* at *18.

44. *See id.*

45. *See* Totemoff v. State, No. S-6151 (Alaska April 18, 1994) (order granting petition for review).

46. Caldwell, *supra* note 37, at 2a (quoting Totemoff v. State, No. S-6151 (Alaska Apr. 18, 1994) (order granting petition for review)).

about the issues raised in *Katie John*, so was the Ninth Circuit, and, on May 17, 1994, the Ninth Circuit granted the petitions of the state and federal governments for an interlocutory appeal.[47] Seeing this, Totemoff and the state filed a "Stipulated Request for Stay" with the supreme court pending the Ninth Circuit outcome; the court granted this stay.[48] However, after oral arguments in the Ninth Circuit case, the supreme court "*sua sponte* issued an order vacating the . . . stay and directing that briefing proceed forthwith on an expedited basis."[49]

The briefs were filed just before the Ninth Circuit issued its first decision in *Alaska v. Babbitt*,[50] the case with which *Katie John* was joined and whose name it took on appeal. In *Babbitt*, the Ninth Circuit held that, while the district court incorrectly applied the overly broad navigational servitude in determining the extent of federal lands for the purposes of ANILCA, the doctrine of "reserved water rights" did apply to those waters appurtenant to the lands protected under ANILCA.[51] That decision was then filed with the Alaska Supreme Court, which requested supplemental briefs concerning its implications.[52] Shortly thereafter, the supreme court heard oral arguments in *Totemoff* and within sixty days filed its opinion.[53]

In addressing possible federal preemption, the supreme court held that ANILCA permitted state subsistence management.[54] Under its analysis, in order for a state law to apply in an area that may be federally regulated, three tests are applied: (1) whether federal statutes expressly preempt state regulation; (2) if no federal statute expressly preempts state regulation, whether Congress manifested an intent to occupy exclusively the field being regulated; and (3) whether, if neither of the above conditions is met, any federal statute (or any regulation properly promulgated thereunder) is in actual conflict with the state regulation.[55]

The court held that state regulation in this case survived all three tests. First, ANILCA did not expressly preempt state regula-

47. *See id.* at 3a.

48. *See id.*

49. *Id.* at 4a. The court never explained or justified this order.

50. 54 F.3d 549 (9th Cir. 1995).

51. *See id.* at 554.

52. *See* Caldwell, *supra* note 37, at 5a.

53. *See id.* at 5a-6a.

54. *See* Totemoff v. State, 905 P.2d 954, 961 (Alaska 1995), *cert. denied*, 116 S. Ct. 2499 (1996).

55. *See id.* at 958; *see also* California Fed. Savings & Loan Assoc. v. Guerra, 479 U.S. 272, 280-81 (1987); Dayhoff v. Temsco Helicopters, Inc., 848 P.2d 1367, 1369 (Alaska 1993).

tion.[56] Second, Congress had manifested no intent to occupy the field.[57] Relying on *English v. General Electric Co.*,[58] the court noted that congressional intent to occupy a field can be inferred either when the regulation is so pervasive that Congress seems to have left no room for state regulation or when the regulations touch on a field in which there is a clearly dominant federal interest.[59] However, in cases where the field to be preempted has traditionally been occupied by the states, congressional intent to occupy the field must be "'clear and manifest.'"[60] The court held that since hunting regulation has traditionally been in the state domain, such a showing of "clear and manifest" intent had to be made.[61] The court did not find sufficient evidence of such an intent, noting that it is possible for the state to "promulgat[e] hunting and fishing regulations which may affect subsistence hunters on federal land, so long as those regulations do not conflict with federal laws or regulations [and that] [n]othing in Title VIII [of ANILCA] discloses a clear and manifest purpose to prohibit all state regulation of subsistence hunting."[62]

Finally, the court held that the state regulations were not in actual conflict with ANILCA, which "does not protect the use of a spotlight as a customary and traditional method of subsistence hunting."[63] Totemoff had argued that the state regulations are in actual conflict with ANILCA as interpreted in *United States v. Alexander*[64] because the regulations fail to provide any subsistence defense.[65] However, the court rejected this argument, holding that ANILCA does not provide for such a defense.[66] Indeed, it held that ANILCA's protection was limited to specific modes of transportation.[67] That, coupled with ANILCA's failure to mention hunting methods, precluded the subsistence defense and created no conflict between ANILCA and the state regulations.[68]

The court then held that ANILCA was irrelevant in any event,

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56. *See Totemoff*, 905 P.2d at 958.
57. *See id.* at 959.
58. 496 U.S. 72 (1990).
59. *See Totemoff*, 905 P.2d at 958 (quoting *English*, 496 U.S. at 79).
60. *See id.* (quoting *English*, 496 U.S. at 79).
61. *See id.*
62. *Id.* at 959.
63. *Id.* at 961.
64. 938 F.2d 942 (9th Cir. 1991).
65. *See Totemoff*, 905 P.2d at 960. For a further discussion of the Alexander interpretation of ANILCA and the "subsistence defense," see *infra* notes 156-59 and accompanying text.
66. *See Totemoff*, 905 P.2d at 960.
67. *See id.* (citing 16 U.S.C. § 3121(b) (1994)).
68. *See id.* at 961.

as a portion of the transaction had occurred on state lands.[69] The shots were fired and the spotlight was shone from navigable waters, and neither the navigational servitude nor the reserved water rights doctrine granted the federal government jurisdiction over the waters of Prince William Sound, which otherwise belong to the state pursuant to the Submerged Lands Act.[70] As a related issue, the court held that neither the navigational servitude nor the reserved water rights doctrine applied to this case.[71] It noted that it was not "bound by decisions of federal courts other than the United States Supreme Court on questions of federal law,"[72] and that it was therefore not estopped from reconsidering the issue of the applicability of ANILCA to navigable waters, despite the *Katie John* decision.[73] Its interpretation was that since neither the navigational servitude nor reserved water rights are possessory interests constituting title, navigational waters do not constitute federal lands.[74] The court held that it was therefore irrelevant whether ANILCA allowed spotlighting, as the spotlighting was done from state lands.[75]

Despite all of this, the Alaska Supreme Court ultimately reversed the lower court's decision.[76] That reversal, however, was on limited grounds: Totemoff was entitled to challenge the validity of the regulation under which he was prosecuted by showing that it had been enacted without meeting all the procedural requirements of the Alaska Administrative Procedure Act.[77] This relative technicality aside, the court essentially affirmed the lower courts' decisions by holding as valid the application of the state hunting regulations.[78]

After "winning" the *Totemoff* decision, the state petitioned the Ninth Circuit for rehearing *en banc* of *Alaska v. Babbitt*, submitting the *Totemoff* decision as supplemental authority. The State's request was denied,[79] although the Ninth Circuit thereafter

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69. *See id.* at 964.

70. *See id.* at 962-63; Submerged Lands Act of 1953, 43 U.S.C. § 1311(a) (1994). The Submerged Lands Act conferred title to all lands submerged beneath navigable waters to the states. *See* 43 U.S.C. § 1311(a) (1994).

71. *See Totemoff*, 905 P.2d at 963.

72. *Id.*

73. *See id.*

74. *See id.* at 965.

75. *See id.* at 968.

76. *See id.* at 973.

77. *See id.*; ALASKA STAT. § 16.05.259 (1996).

78. *See Totemoff*, 905 P.2d at 973.

79. *See* Caldwell, *supra* note 37, at 6a. The Alaska Attorney General thereafter commented that "the court wanted to get the opinion out as quickly as possible so the Ninth Circuit would have a chance to see it before it ruled on the re-

did request letter briefs addressing *Totemoff*'s public lands analysis.[80] At this point, the Alaska Supreme Court withdrew its prior opinion and issued a new opinion in which it added additional strong rhetoric about how neither reserved water rights nor the navigational servitude applied in the *Totemoff* case.[81] The Ninth Circuit in turn withdrew and reissued its opinion in *Alaska v. Babbitt*, with the only substantive change being the addition of a dissent by Judge Hall that was very similar in its reasoning to that of *Totemoff*.[82]

Conflict between the Alaska Supreme Court and the Ninth Circuit is nothing new, and it has been particularly pronounced in the area of native rights.[83] However, the language of the news reports of this case is particularly striking: "In no uncertain terms, the . . . ruling defies [the Ninth Circuit]."[84] If the news report was correct in reading the decision as a "defiant" one – an interpretation supported by the timing of the decision – the decision demands close scrutiny. Perhaps the Alaska Supreme Court, unsatisfied with the result in the *Katie John* case, sought to create conflict, in the hope that the United States Supreme Court would grant certiorari.[85]

This situation requires an examination of whether the supreme court's reasoning was based solidly on the evidence before it or whether the decision was made with an eye toward the potentially far-reaching effects of the decision. The following sections therefore will closely scrutinize the bases for the Alaska Supreme Court's decision and attempt to decipher what ANILCA really means.

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consideration issue. Unfortunately, we didn't beat the clock." David Hulen, *Court Ties a New Knot in Subsistence Tangle: State Justices Defy Federal Waterway Rulings*, ANCHORAGE DAILY NEWS, Aug. 9, 1995, at A1.

80. *See* Caldwell, *supra* note 37, at 7a.

81. *See Totemoff*, 905 P.2d at 964-66.

82. *See* Alaska v. Babbitt, 72 F.3d 698, 704-08 (9th Cir. 1995) (dissenting opinion), *cert. denied*, 116 S. Ct. 1672 (1996).

83. For discussions of the conflict between the courts over native rights before *Totemoff*, see Cheryl A. Rawls, *Alaska Natives*, 22 ENVTL. L. 1251 (1992); Kenton Keller Pettit, Note, *The Waiver of Tribal Sovereign Immunity in the Contractual Context: Conflict Between the Ninth Circuit and the Alaska Supreme Court?*, 10 ALASKA L. REV. 363 (1993). Direct conflict between the Ninth Circuit and the Alaska Supreme Court is not limited to native rights, however. *See, e.g.*, Irene W. Bruynes, Note, *Strict Liability and the Admissibility of Evidence of Subsequent Remedial Measures Under Evidence Rule 407*, 5 ALASKA L. REV. 333 (1988) (discussing conflicts over standards of proof in strict liability actions).

84. Hulen, *supra* note 79, at A1.

85. The Supreme Court's grant of certiorari clearly was the State's wish; the Alaska Attorney General described the case as one that "cries out for final resolution before the U.S. Supreme Court." *Id.*

IV. JURISDICTION AND THE STATE'S POWER TO PROSECUTE

The conflict in *Totemoff* is one of jurisdiction. As a consequence, this case is fundamentally about power: who has the power to prosecute hunting violations, and who has the power to make the regulations under which violators are prosecuted. These two questions are addressed by the doctrines of judicial jurisdiction and legislative jurisdiction, respectively. Although these doctrines share some common elements, they are relatively independent.

A. Judicial Jurisdiction

Judicial jurisdiction refers to a court's power to hear a matter.[86] Two basic questions must be answered in determining whether a court has judicial jurisdiction: (1) whether the court has the power to bring a party into court, and (2) whether the court has the power to apply the relevant laws to that person.[87] The first tier of analysis, referred to as in personam jurisdiction, is generally rooted in physical power. According to the Supreme Court, "the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court [is] prerequisite to [the court's] rendition of a judgment personally binding him."[88] Among the "reasonable" bases of jurisdiction noted in the *Restatement (Second) of Conflict of Laws* are acts committed in the state.[89]

The requirement that the act occur within the state is the core of in personam jurisdiction in the criminal context. The Model Penal Code, for instance, states that "a person may be convicted under the law of this [s]tate of an offense committed by his own

86. *See* United States v. O'Grady, 89 U.S. (22 Wall.) 641, 647-48 (1874).

87. For the purposes of this analysis, I am largely excluding in rem and quasi in rem jurisdiction. Their treatment would be similar, however, as both play to essentially the same issues of power as in personam jurisdiction.

88. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citing Pennoyer v. Neff, 95 U.S. 714, 733 (1877)). In the civil setting, the relevant test is more permissive: whether the party has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.*; *see also* Shaffer v. Heitner, 433 U.S. 186, 188 (1977) (applying the International Shoe standard to in rem jurisdiction). The *Restatement (Second) of Conflict of Laws* expresses the limits of civil judicial jurisdiction slightly differently: "A state has power to exercise judicial jurisdiction over a person if the person's relationship to the state is such as to make the exercise of such jurisdiction reasonable." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 24(1) (1988). For a full enumeration of "reasonable bases," see *id.* § 27(1).

89. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 36 (1988).

conduct or the conduct of another for which he is legally accountable if . . . the conduct that is an element of the offense or the result which is such an element occurs within [the] [s]tate."[90] While the Alaska criminal code (Title 11 of the Alaska Statutes) lacks such a jurisdictional statement, it may nonetheless be inferred, as the court's jurisdiction is still limited by constitutional due process concerns to persons acting either within the state or in a manner designed to cause effects within the state.[91]

Thus, since Totemoff and Milette acted within the state (by hunting within its territorial boundaries),[92] they could not contest state jurisdiction over their persons and thus could reasonably expect to be haled into state court – assuming that state law applies to their case.

If federal law applies, however, the analysis is somewhat more complex. In many areas, the federal and state powers are concurrent, creating a web of laws and raising questions as to who may enforce them. The general rule is that federal courts can enforce all state laws, and state courts can enforce all federal laws that do not provide for exclusive federal jurisdiction. As expressed by the U.S. Supreme Court in *Claflin v. Houseman*,[93] "if exclusive jurisdiction be neither express nor implied, the [s]tate courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it."[94] In the *Claflin* decision, the Court reasoned that

> [t]he fact that a [s]tate court derives its existence and functions from the [s]tate laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the [s]tate as it is to recognize the [s]tate laws.[95]

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90. MODEL PENAL CODE § 1.03(1) (1985).

91. *See* U.S. CONST. amend. XIV, § 1; Shaffer v. Heitner, 433 U.S. 186, 186 (1977). This Note is not addressing accomplice or conspiracy liability, as neither is relevant to the facts at hand.

92. Although the lands are federally owned and subject to regulation under the Property Clause, they are nonetheless lands within the State of Alaska. ANILCA defines federal lands as "lands the title to which is in the United States." 16 U.S.C. § 3102(2) (1994). Title certainly grants the federal government regulatory prerogative with respect to federal lands by virtue of the Property Clause. *See* Kleppe v. New Mexico, 426 U.S. 529, 539-40 (1976). However, the state exercises concurrent jurisdiction over such lands, and to that extent, state courts clearly have the authority to hear matters arising on federal lands within a state. *See id.* at 543; California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580 (1987).

93. 93 U.S. 130 (1876).

94. *Id.* at 136.

95. *Id.* at 137; *see also* Testa v. Katt, 330 U.S. 386, 391 (1947) (citing *Claflin*,

Thus, insofar as a federal statute does not specify an exclusive federal remedy,[96] federal matters can be heard in state courts.

ANILCA does not grant exclusive jurisdiction over violations of its regulations to federal courts.[97] It requires only that a subsistence priority "be implemented through appropriate limitations [on hunting and fishing]"[98] and stipulates that "[t]he Secretary shall prescribe such regulations as are necessary and appropriate to carry out his [subsistence management] responsibilities . . . ."[99] It makes no mention of any other federal enforcement mechanism.[100]

Neither does the statute impliedly reserve power to the federal courts. Indeed, the state was empowered to create its own regulations implementing the subsistence preference.[101] The federal regulations were only adopted after the initial state regulatory scheme failed due to the Alaska Supreme Court's holding that the state regulations were unconstitutional and the state legislature did not enact new regulations.[102]

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93 U.S. at 137, as authority for the proposition that state courts have a duty to enforce federal laws).

96. For example, Congress has provided that "[t]he district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." 18 U.S.C. § 3231 (1994). This provision probably does not apply to ANILCA, since ANILCA is not a criminal statute contained within Title 18 of the United States Code. This is true even though the provisions of ANILCA might have a "penal" quality, as the Supreme Court has held that states can enforce – and be required to enforce – federal laws that are penal in effect. *See Testa*, 330 U.S. at 392-93 (holding that while a state may choose not to consider the penal laws of another state as contrary to state policy, it could not so act with respect to a federal penal law, whose policy was binding on all states). Moreover, compelling arguments recently have been made for expansion of state-court jurisdiction to federal criminal matters. *See, e.g.*, Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 1010-15 (1995) (noting that there is no constitutional bar to state courts hearing federal criminal cases). *But see* Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 69 (1996) (arguing against symmetrical constitutional treatment of state and federal crimes).

97. It does, however, limit the judicial remedy for a governmental failure to "provide for the priority of subsistence uses" to suits in federal district court. 16 U.S.C. § 3117(c) (1994).

98. *Id.* § 3114.

99. *Id.* § 3124.

100. *See id.* §§ 3115, 3124.

101. *See id.* § 3115(d).

102. *See* Alaska v. Babbitt, 72 F.3d 698, 701 (9th Cir. 1995) (discussing the state legislature's failure to adopt new subsistence regulations and the subsequent federal implementation of ANILCA); McDowell v. State, 785 P.2d 1, 9 (Alaska 1989) (holding that the subsistence preference as enacted violates the equal access clauses of the Alaska Constitution). *See also* Ralph Thomas, *Knowles Wants a*

Thus, the state court might have been empowered under *Claflin* to hear the case under federal law. However, there remains the question of whether the state is empowered to *prosecute* any violations. The historical rejection by state courts of federal prosecutions therein[103] was quieted in part by *Testa v. Katt*,[104] which held that state courts had a duty to enforce federal laws.[105] However, even in cases like *Testa* which allowed for federal prosecutions in state courts, the prosecutions were brought by private parties (where authorized) or federal officials.[106] The primary concern with state prosecutors enforcing federal regulation is that of usurpation of prosecutorial discretion.

The Supreme Court has held prosecutorial discretion to be a federal executive function.[107] One commentator has suggested that state prosecutions under federal law would thus violate well-settled principles regarding the separation of powers.[108] However, this concern is addressed by Professor Beale's proposal that prosecutorial discretion be exercised on a class, rather than an ad hoc, basis, that is, by providing the federal prosecutors with discretion over what types of cases could be brought in what context, regardless of by whom.[109] Such a system would preserve primary authority in the federal officials, while not leaving state prosecutors feeling powerless to act against hunting violators.[110]

Public Vote on Subsistence, ANCHORAGE DAILY NEWS, Apr. 23, 1996, at A1 ("Past governors and legislatures have made numerous unsuccessful attempts to [enact subsistence legislation]."). For a scholarly treatment of the equal access clauses, see White, *supra* note 7.

103. *See, e.g.*, United States v. Lathrop, 17 Johns. 4 (N.Y. Sup. Ct. 1819); *see also* Kurland, *supra* note 96, at 65.

104. 330 U.S. 386 (1947).

105. *See id.* at 391-92.

106. *See* Kurland, *supra* note 96, at 70-74.

107. *See, e.g.*, United States v. Allied Oil Corp., 341 U.S. 1, 5 (1951) (holding that ultimate authority in prosecution of federal cases rests in the President); McGrain v. Daugherty, 273 U.S. 135, 150 (1927) (holding that all prosecutorial functions of the Department of Justice are "to be exercised under [the] supervision and direction" of the Attorney General); Ponzi v. Fessenden, 258 U.S. 254, 261-62 (1922) (holding that authority to transfer a federal prisoner to state courts, while not statutorily granted, is an exercise of prosecutorial discretion vested in the Attorney General); United States v. San Jacinto Tin Co., 125 U.S. 273, 280 (1888) (holding that the Attorney General's powers, as granted in the Judiciary Act of 1789, are essentially those of his English counterpart, and that he acts as an agent of the President).

108. *See* Kurland, *supra* note 96, at 79-80.

109. *See* Beale, *supra* note 96, at 1016-18. Beale notes that this does require a significant degree of oversight, but argues that it is nonetheless feasible. Her analysis largely dismisses the constitutional claims raised by Kurland.

110. The effect of such a system would be to ensure enforcement of any regula-

Thus, although unlikely under present jurisprudence, it might be possible for a state official to prosecute Totemoff in state court under ANILCA. It almost certainly would be possible for a federal official to do so. However, the court proceeded impermissibly by allowing the prosecution under *state law*. The next section will address why that is so.

B. Legislative Jurisdiction

Whether a state has the authority to apply its own law to a legal problem – here, whether Alaska could apply its own hunting regulations to Totemoff's activity – is the basic question of legislative jurisdiction.[111] The doctrine is constitutional in its origins; indeed, "the underlying source of limitation on legislative jurisdiction [is] federalism."[112] Federal legislative jurisdiction is vested in Congress by article I of the Constitution;[113] state legislative jurisdiction, vested by the individual state constitutions, is limited when it conflicts with the United States Constitution and laws promulgated thereunder.[114]

In this case, the question of whether Alaska has legislative jurisdiction over subsistence hunting activity requires a two-step analysis. The first step is a determination of whether the lands are properly characterized as state or federal. If the lands in question are state lands, the state retains control over them unless the state is limited by a federal doctrine. If the lands are federal, however, the analysis proceeds to the second step: whether the state retains any legislative authority over them.

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tions that both federal and state prosecutors deem particularly important, even if federal resources are spread too thin. Such a cooperative enforcement arrangement could go a long way toward easing the tensions that caused this case.

111. *See* James A. Martin, *The Constitution and Legislative Jurisdiction*, 10 HOFSTRA L. REV. 133, 133 (1981). Black's Law Dictionary defines legislative jurisdiction as "[t]he sphere of authority of a legislative body to enact laws and to conduct all business incidental to its law-making function." BLACK'S LAW DICTIONARY 900 (6th ed. 1991).

112. Martin, *supra* note 111, at 145.

113. *See* U.S. CONST. art. I, § 1.

114. This is the effect of the Supremacy Clause, U.S. CONST. art. VI, cl. 2.

1. *State lands and legislative jurisdiction.* One of the bases of the *Totemoff* decision was that the shots were fired and the spotlight was shone from navigable waters, which the Alaska Supreme Court treated as state lands.[115] The Alaska Supreme Court reasoned that this was so on the basis of the Submerged Lands Act of 1953, which granted the states

> (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable [s]tate law.[116]

The Submerged Lands Act did reserve to the federal government "all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to . . . [the state's possessory and administrative interests]."[117]

Prince William Sound is a navigable waterway and therefore falls within the jurisdiction of the Submerged Lands Act.[118] Noting this, the Alaska Supreme Court contended that since neither the navigational servitude nor the reserved water rights is a possessory interest, the federal government could claim no title to the waters of the sound.[119] The court reasoned that although ANILCA spoke of "'interests' in 'lands' or 'waters,' 'the title to which is in the United States,' . . . the word 'interests' was intended to cover possessory interests lesser than fee interests such as leases, as there is considerable authority that title can be held to such interests."[120] Thus, the court held that navigable waters are state lands that

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115. *See* Totemoff v. State, 905 P.2d 954, 962 (Alaska 1995), *cert. denied*, 116 S. Ct. 2499 (1996).

116. 43 U.S.C. § 1311(a) (1994). The provisions of the Submerged Lands Act, while implicitly applicable to Alaska under the Equal Footing Doctrine, were explicitly made applicable to Alaska in the Alaska Statehood Act, Pub. L. No. 85-508, § 6(m), 72 Stat. 339, 343 (1958). *See* Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 228-29 (1845).

117. 43 U.S.C. § 1314(a) (1994). This language is probably redundant because these interests are constitutionally protected. *See* U.S. CONST. art. IV, § 3.

118. *See Totemoff*, 905 P.2d at 957 (noting that the sound is navigable); 43 U.S.C. § 1311(a) (1994) ("[T]itle to and ownership of the lands beneath navigable waters within the boundaries of the respective States . . . [is] vested in, and assigned to [them].").

119. *See Totemoff*, 905 P.2d at 965 ("[I]t is generally accepted that 'title' signifies at least some sort of possessory interest in property and does not include lesser interests such as easements." (citations omitted)).

120. *Id.* at 965-66 (citations omitted).

ANILCA cannot reach.[121] Under this analysis, any conflict with ANILCA is irrelevant, since exclusive legislative jurisdiction over the navigable waters is vested in the state.

The Ninth Circuit, however, felt it proper to apply the reserved water rights doctrine.[122] The doctrine is relatively straightforward in theory: "[W]hen the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation."[123] This doctrine is derived from federal powers under the commerce clause, and therefore is not dependent on actual ownership of the waters.[124] Moreover, the doctrine is absolute and does not call for any equitable balancing between state and federal interests.[125] The doctrine protects both federal use and federal non-use of the water – that is, it can protect either consumption or conservation or both, depending on the nature of the reservation.[126] The court therefore found that subsistence fishing in navigable waters within federal lands was protected by ANILCA.[127]

The issue admittedly is more complex in *Totemoff*, as here the navigable waters surround the land rather than being contained within it. New amendments to the Code of Federal Regulations, proposed by the Department of the Interior in the wake of the *Babbitt* decision, explicitly extend the scope of ANILCA to cover "all public lands including all waters located on these lands, on all navigable and nonnavigable waters within the exterior boundaries of . . . [a series of national parks, preserves, monuments, and refuges], and on inland waters adjacent to the exterior boundaries of [them],"[128] but do not extend coverage to coastal waters such as Prince William Sound. Given the specificity of these regulations, courts will be reluctant to declare Prince William Sound federally reserved for the purposes of ANILCA.

However, the resources Totemoff sought were not fish or

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121. *See id.*

122. *See* Alaska v. Babbitt, 72 F.3d 698, 703 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1672 (1996).

123. Cappaert v. United States, 426 U.S. 128, 139 (1976).

124. *See id.* at 138.

125. *See id.* at 139.

126. *See id.* at 138-40; *see also* United States v. New Mexico, 438 U.S. 696, 699 (1978) (outlining the history of water reservations and noting multiple purposes for them); Arizona v. California, 373 U.S. 546, 595-97 (1963) (analyzing a reservation made under the Indian Commerce Clause).

127. *See Babbitt*, 72 F.3d at 704.

128. Subsistence Management Regulations for Public Lands in Alaska, Identification of Waters Subject to Subsistence Priority Regulation and Expansion of the Federal Subsistence Program and the Federal Subsistence Board's Authority, 61 Fed. Reg. 15,014, 15,018 (1996) (to be codified at 36 C.F.R. § 242.3).

wildlife within the waters of Prince William Sound, but rather deer on Naked Island. This fundamental difference weakens the Alaska Supreme Court's argument that "the [s]tate has an interest in fish and wildlife located in navigable waters which precludes federal regulation of such fish and wildlife."[129] The federal regulations as here applied deal with hunting of wildlife clearly located on federal lands, and any reserved water rights in this context would be for the purpose of allowing such hunting to go forward.

Moreover, ANILCA specifically requires that regulations "permit on the public lands appropriate use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes by local residents."[130] While the statute may be read as requiring only that motorboats be allowed for transportation purposes, it implies that they are an integral part of the subsistence hunting process. Since "appropriate subsistence use" may include hunting from, as well as riding in, motorboats, ANILCA may be interpreted to reserve waters necessary for motorboat use in hunting, and not merely for transportation. Thus, the Alaska Supreme Court should at least have found a federal interest in the lands sufficient to require some analysis of whether state law might be preempted.

2. *Federal lands—now what?* The state does have some authority, albeit limited, to regulate federal lands: "Absent consent or cession a [s]tate undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause."[131] The question, in the view of the United States Supreme Court, "is whether Congress has enacted legislation respecting this federal land that would pre-empt [state regulations]."[132]

Congress has provided a mechanism by which much of state criminal law is given effect on federal lands. In 1948 it adopted the Assimilative Crimes Act,[133] which provides that when an act that

129. Totemoff v. State, 905 P.2d 954, 964 (Alaska 1995), *cert. denied*, 116 S. Ct. 2499 (1996).

130. 16 U.S.C. § 3121(b) (1994).

131. Kleppe v. New Mexico, 426 U.S. 529, 543 (1976) (citing Mason Co. v. Tax Comm'n, 302 U.S. 186, 197 (1937); Utah Power & Light Co. v. United States, 243 U.S. 389, 403-05 (1917); Ohio v. Thomas, 173 U.S. 276, 283 (1899)). This proposition was more recently reaffirmed in California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581 (1987).

132. *California Coastal Comm'n*, 480 U.S. at 581.

133. Pub. L. No. 80-772, § 13, 62 Stat. 645, 686 (1948) (codified at 18 U.S.C. § 13 (1994)).

would constitute a state crime is committed on federal lands within the state, and when that act has not been criminalized or otherwise made punishable by Congress, the relevant state crime is "assimilated" and treated as if it were a federal crime under which the actor may be federally prosecuted.[134] This assimilation of state criminal law is prospective: laws enacted by the state after the Act are enforceable on federal lands, as are those which were already in place at the time of the Act.[135]

However, the assimilation under the Act is limited by the existence of other federal law or policy, and state laws may be assimilated only insofar as they do not conflict with it.[136] The Supreme Court has cast the limitation very broadly: "Where enforcement of the state law would handicap efforts to carry out the plans of the United States, the state enactment must . . . give way."[137] The question of whether the state retains control of the federal lands, therefore, is twofold: (1) whether conflicting federal regulations exist[138] and (2) whether the conflict is such that the state regulation cannot apply.

The trouble with this analysis is that it presumes that federal statutes are clear in their intended scope; this is rarely the case. ANILCA is no exception: "It does not of its own force regulate subsistence and nonsubsistence uses; it criminalizes no conduct; it prescribes no penalties. In fact, ANILCA does little more than provide a broad outline of what uses must be preferred over others; it leaves implementation to the Secretary of the Interior."[139]

As a result, after the *McDowell v. State* decision and the state legislature's subsequent inaction,[140] the Department of the Interior apparently had broad latitude in its implementation. Apparently in an effort to ease the transition to federal regulation, the department chose to take its regulations restricting the manner of hunting almost verbatim from the Alaska state law. The Alaska courts read this symmetry to imply that the state statute could be applied as readily as the federal statute.[141] To analyze the validity

134. 18 U.S.C. § 13.

135. *See* United States v. Sharpnack, 355 U.S. 286, 293-94 (1958).

136. *See* James Stewart & Co. v. Sadrakula, 309 U.S. 94, 103-04 (1940); *see also California Coastal Comm'n*, 480 U.S. at 581.

137. *James Stewart*, 309 U.S. at 103 (citing Anderson v. Chicago & N.W. Ry., 168 N.W. 196 (1918)).

138. "Conflicting" in this sense means only that the federal regulations govern the same activities as do the state's.

139. United States v. Alexander, 938 F.2d 942, 945 (1991).

140. *See supra* note 14 and accompanying text.

141. *See* Totemoff v. State, 905 P.2d 954, 960 (Alaska 1995), *cert. denied*, 116 S. Ct. 2499 (1996); Totemoff v. State, 866 P.2d 125, 128 (Alaska Ct. App. 1993),

of this conclusion, however, the two-step analysis discussed above must be performed.

The first question is easily answered: The federal and state regulations clearly cover the same activities, and prior to ANILCA the state hunting regulations applied to acts on federal lands; thus, the two regulatory schemes are in conflict. As to the second question, state law is preempted in three types of cases: "if it is impossible to comply with both state and federal law; if state regulation prevents attainment of . . . [federal] goals; or if a state regulation's impact on matters within federal control is not an incident of efforts to achieve a proper state purpose."[142] The state has convincing arguments against preemption to defeat each of these justifications.

The first and third points are the strongest. Compliance with both state and federal regulations was entirely possible at the time of *Totemoff* since the regulations were identical,[143] and hunting certainly is within the state's police power.[144] As to the second point, it certainly is true that application of this state statute would not in itself prevent the attainment of federal goals, since the result of compliance with identical statutes is identical.

However, the goal of ANILCA is facilitation of subsistence hunting and that of the state law is regulation of hunting methods. The Alaska Supreme Court argued that these goals are not inconsistent. Indeed, the court held that by explicit reference to a limited class of permissible hunting methods,[145] ANILCA left room for the regulation of other hunting methods.[146]

This logic is somewhat disingenuous. To be sure, the provision does not explicitly preclude regulation (including permission) of other methods of hunting, but simply provides that motorboats and snowmobiles specifically shall be allowed. However, the reversionary provision within ANILCA suggests that the state regu-

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rev'd, 905 P.2d 954 (Alaska 1995), *cert. denied*, 116 S. Ct. 2499 (1996).

142. Northwest Central Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 515-16 (1989).

143. *See supra* notes 16-18 and accompanying text.

144. *See, e.g.*, Lacoste v. Department of Conservation, 263 U.S. 545, 549 (1924) ("The wild animals within its borders are, so far as capable of ownership, owned by the [s]tate in its sovereign capacity . . . . Because of such ownership . . . the [s]tate may regulate and control the taking, subsequent use and property rights that may be acquired therein."); State v. Bundrant, 546 P.2d 530, 552 (Alaska 1976) (holding that attempts to conserve fish within state waters were a valid exercise of state police power).

145. *See* 16 U.S.C. § 3121(b) (permitting use of "snowmobiles, motorboats and other means of surface transportation traditionally employed for [subsistence hunting] purposes").

146. *See Totemoff*, 905 P.2d at 961.

lations are permitted only so long as the state is fully in compliance with ANILCA. Once it dropped out of compliance (by failing to implement regulations pursuant to ANILCA), full regulatory authority reverted to the Department of the Interior. Given that the regulatory scheme envisioned by ANILCA is a sweeping, comprehensive one, the attainment of its goals precludes state hunting regulation on federal lands until the state comes back into compliance with ANILCA.

3. *Loose ends.* Totemoff and Milette raised two other arguments that are worth noting but do not fit neatly into the above categories. The first argument is that the state was estopped from relitigating the Ninth Circuit's decision that navigable waters were subject to ANILCA. The second argument is that their convictions were improper because they were not allowed to raise a subsistence defense as suggested in *United States v. Alexander.*[147] A third argument, which they did not raise but which has potential bearing on the case, is that a due process-based doctrine of "surprise" precludes their prosecution.

a. *The estoppel argument.* In the wake of *Alaska v. Babbitt,*[148] Totemoff contended that the state was collaterally estopped from relitigating the applicability of ANILCA to navigable waters. The Alaska Supreme Court rejected this argument: "[The state] is not collaterally estopped here as to the issues decided in that case because the applicability of ANILCA to navigable waters is a pure question of law which does not involve factual issues."[149] While this is indeed a question of law, the court's position is not as strong as its summary rejection of Totemoff's argument would suggest.

The application of collateral estoppel under Alaska law has three basic criteria:

> 1. The plea of collateral estoppel must be asserted against a party or one in privity with a party to the first action;
>
> 2. The issue to be precluded from relitigation by operation of the doctrine must be identical to that decided in the first action;
>
> 3. The issue in the first action must have been resolved by a final judgment on the merits.[150]

147. 938 F.2d 942 (9th Cir. 1991).

148. 72 F.3d 698 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1672 (1996).

149. *Totemoff*, 905 P.2d at 963 (citing State v. United Cook Inlet Drift Ass'n, 895 P.2d 947, 954 (1995)); *see also* Pacific Marine Ins. Co. v. Harvest States Coop., 877 P.2d 264, 267 (Alaska 1994) (holding that collateral estoppel is an issue of law to be reviewed de novo on appeal) (citing Rapoport v. Tesoro Alaska Petroleum Co., 794 P.2d 949, 951 (Alaska 1990)).

150. Sopcak v. Northern Mountain Helicopter Serv., 924 P.2d 1006, 1009

It is irrelevant in the analysis of collateral estoppel whether the earlier case was state or federal: state courts are required to give estoppel effect to federal court judgments.[151] Moreover, although *State v. United Cook Inlet Drift Association*,[152] on which *Totemoff* relied, provides an exception to the estoppel doctrine for unmixed questions of law, it does so with a caveat: Relitigation of an issue of law should be permitted only if "'treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule on which it was based.'"[153] In addition, while the *Restatement (Second) of Judgments* is somewhat permissive of relitigation of issues of law in different fora, it encourages the application of stare decisis,[154] something which the Alaska Supreme Court clearly did not do. Indeed, the court entirely ignored its prior reasoning in *Sopcak* that preclusive considerations are especially strong when the question is one of federal law.[155] In essence, the court held that it is free to reinterpret federal law to its liking and encouraged the state to run to state courts to correct every unfavorable ruling it gets from the federal courts. In short, the Alaska Supreme Court's dismissal of the estoppel argument was likely incorrect, and the lands at issue in *Totemoff* should be treated as federal on collateral estoppel grounds alone.

b. *The Alexander defense: Spotlighting as a "traditional method of subsistence hunting."* Given the applicability of ANILCA, Totemoff also sought to argue that spotlighting must be permitted as a "traditional means of subsistence hunting," citing as precedent *United States v. Alexander*.[156] Under this analysis, the state regulations need not be stricken, but Totemoff can defend against the application of the state regulations on the grounds that their hunting activities are protected as subsistence activities under

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(Alaska 1996) (quoting Campion v. State, 876 P.2d 1096, 1098 (Alaska 1994)). This phrasing of the collateral estoppel criteria is common in Alaska jurisprudence. *See, e.g.*, State v. United Cook Inlet Drift Assoc., 895 P.2d 947, 950-51 (Alaska 1995); Pacific Marine Ins. Co. v. Harvest States Coop., 877 P.2d 264, 267 (Alaska 1994); Borg-Warner Corp. v. Avco Corp., 850 P.2d 628, 634 (Alaska 1993); Murray v. Feight, 741 P.2d 1148, 1153 (Alaska 1987).

151. *See* Stoll v. Gottlieb, 305 U.S. 165, 170-71 (1938); Americana Fabrics v. L & L Textiles, Inc., 754 F.2d 1524, 1529 (9th Cir. 1985); *Sopcak*, 924 P.2d at 1008.

152. 895 P.2d 947 (Alaska 1995).

153. *Id.* at 952 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 29(7) (1982)).

154. RESTATEMENT (SECOND) OF JUDGMENTS § 29 Cmt. i (1982).

155. *See Sopcak*, 924 P.2d at 1008.

156. 938 F.2d 942 (9th Cir. 1991); *see* Totemoff v. State, 905 P.2d 954, 960 (Alaska 1995), *cert. denied*, 116 S. Ct. 2499 (1996).

ANILCA. This defense is flawed in two respects.

First, the Ninth Circuit's analysis of the role of ANILCA was flawed in *Alexander*. It argued that "[t]here's no reason to throw a monkey-wrench into the state regulatory machinery when a little fine tuning will do."[157] This is certainly true, and the Supreme Court's desire to allow the states to maintain, where possible, their police powers is manifest.[158] However, the mechanism by which this may properly be done is not an affirmative defense to the state charges. Preemption is still the rule when federal laws cover specific acts. If there is hunting activity on federal lands in Alaska, it is governed by ANILCA and the implementing regulations. State regulations do not apply except as provided in ANILCA,[159] and it makes more sense simply to state this and preclude state exercise of its legislative jurisdiction than to allow it to attempt regulation which could then be subject to a new challenge with every new subsistence case.

Second, even under federal regulations, Totemoff and Milette would be subject to the federal prohibition against spotlighting. In that instance, it is no longer a question of independent state regulations clashing with ANILCA. Whereas in *Alexander*, the court weighed state regulations against a federal act and regulations that were silent on the matter, here the "choice" is between state and federal regulations, *both* of which prohibit spotlighting. There is thus direct federal regulation which precludes state regulation in the same sphere. *Totemoff* does not present the sort of dormant commerce clause analysis where one must ask whether the federal regulatory scheme was so comprehensive as to preclude state regulation of the same area. That regulation subjects Totemoff and Milette to liability under ANILCA and precludes the *Alexander* defense.

c. *The due process question.* A final possible challenge to the state's attempt to assert jurisdiction over Totemoff and Milette, albeit one rarely invoked, is that their prosecution may have violated their due process rights, under a doctrine of "surprise." To be sure, "surprise is an irrelevancy in a legal system that

157. *Alexander*, 938 F.2d at 948.

158. *See, e.g,* United States v. Winstar Corp., 116 S. Ct. 2432, 2461 (1996) (holding that state police power cannot be contracted away); United States v. Lopez, 115 S. Ct. 1624, 1633 (1994) (holding that the federal government cannot exercise a general police power that would conflict with the states'); Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994) (holding that federal preemption in an area of traditional state police powers "'should not be lightly inferred'" (quoting Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21 (1987))).

159. *See* 16 U.S.C. § 3115(d) (1994).

charges litigants with knowledge of the law."[160] However, "[w]hen the surprise is understandable enough, and when . . . [application of] unanticipated law would upset the reasonable planning of the parties, there is surely an inclination to label the assertion of legislative jurisdiction as unfair and hence a violation of due process."[161]

This doctrine of surprise, arising primarily from the case of *Home Insurance Co. v. Dick*,[162] could prove useful in this context. ANILCA's apparent announcement of a comprehensive scheme protecting subsistence hunting on federal lands may have induced Totemoff and Milette to believe they were immune from prosecution under state law. While they can argue this, they cannot claim that they believed that they were immune from prosecution altogether because the federal regulations clearly criminalize the conduct in which they sought to engage. Absent such federal regulations, "surprise," as well as ANILCA's intent to occupy the field, would preclude application of state regulations.

Thus, while this surprise doctrine would not have helped Totemoff and Milette, it could be important to others in the future assuming two conditions: first, that ANILCA continues to provide for a relatively comprehensive scheme of regulation; and second, that ANILCA does not regulate a particular subsistence activity, which is then prosecuted under state regulations.

V. CONCLUSION

Totemoff and Milette did violate the law. They hunted in a manner proscribed by regulations of which they should have been aware, and indeed they were convicted of such a violation. However, they were convicted of violating the wrong regulations. The Alaska Supreme Court, in an effort to assert the fullest possible reach of state legislative and regulatory authority, incorrectly narrowed the reach of federal jurisdiction. To be sure, the matter could have been heard in state court, as the states have the

160. Martin, *supra* note 111, at 134.

161. *Id.*

162. 281 U.S. 397 (1930) (treating the application of Texas law to a Mexican company's insurance policy as unfair surprise, despite the assignee's residence in Texas). Justice Stevens is the greatest advocate on the bench of this doctrine. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 837 (1985) (Stevens, J., concurring in part and dissenting in part) ("[A] constitutional claim of 'unfair surprise' . . . rest[s] on a persuasive showing of an unexpected result arrived at by application of that law." (emphasis omitted)); Allstate Ins. Co. v. Hague, 449 U.S. 302, 327 (1981) (Stevens, J., concurring) ("Th[e] desire to prevent unfair surprise to a litigant has been the central concern in this Court's review of choice-of-law decisions under the Due Process Clause.").

authority to hear federal "penal" matters. However, the federal regulations – on which Totemoff and Milette could properly have been charged – were ignored. As it does not appear that the Supreme Court will grant certiorari on this question in the foreseeable future, the burden rests on the Alaska Supreme Court to limit as much as possible the scope of its holding.

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