THE STRUGGLE FOR ALASKA'S SUBMERGED LAND

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This article discusses the issues of navigability and chargeability as they apply to the controversy surrounding disposition of submerged lands in Alaska. The author concludes that the State of Alaska has sufficient authority to regulate the uses of submerged lands through the public trust doctrine and state definitions of navigability, rather than by asserting that authority through outmoded theories of ownership inappropriate to the situation in Alaska. The author also argues that the new Interior Department policy not to charge a federal-land grantee for submerged land beneath non-navigable meanderable water bodies derogates from the interest of the public and the federal government in Alaska lands. Rather, federal statutory and case law should apply to protect more adequately those interests.

I. INTRODUCTION

It is perhaps unusual for an old and arcane legal concept to become the subject of a modern and far-reaching dispute. It is perhaps even more unusual for such a dispute to have ramifications that have extended far beyond the confines of the legal system to touch fundamental assumptions concerning allocation of power and responsibility in our federal system. Nevertheless, as with the case of the tiny snail darter, the presence of which halted a mammoth project,[1] large and unanticipated waves of consequence may emanate from the smallest or least expected pebble of disturbance. Such has been the nature of the dispute over submerged lands in Alaska.

With statehood in 1959, the new State of Alaska became entitled to select for its use and control millions of acres of public land from the federal government. Since then, court battles have raged between the state and federal governments over the selection, ownership, and

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1. *See* TVA v. Hill, 437 U.S. 153 (1978).

control of Alaska land. In 1970, the Alaska Natives joined the fray after passage of the Alaska Claims Settlement Act ("ANCSA"),[2] which created a system of Native Corporations with claims to ownership of extensive areas of Alaska territory. In 1980, enactment of the Alaska National Interest Lands Conservation Act ("ANILCA")[3] settled the disposition of millions of acres of Alaska wilderness with their preservation as national parks, monuments, and wildlife refuges. Nevertheless, ANILCA left unresolved several of the issues dividing the state, the Natives, and the federal government, and many questions still remain regarding the ownership and control of Alaska's natural resources.

In addition to its magnificent mountain ranges and vast areas of arctic tundra, Alaska is blessed with innumerable streams, lakes, and rivers. It is the ownership of the lands beneath these bodies of water that has been the subject of vigorous contention, both at the policy level in the state and federal governments, and in the courts. Property rights in these so-called "submerged" lands are different from dry or "fastlands" for reasons that trace back to basic principles of early Roman and English common law. To understand the background of the current disputes and the problems involved in the disposition of these submerged lands, one must investigate not only the federal statutes that provide for the ownership of Alaska land, but also the significance of the concept of navigability as it pertains to questions of title and legislative jurisdiction.

In particular, the disposition of submerged land in Alaska depends, in part, upon whether the water above was "navigable" at the time of statehood. If the water was *navigable*, as a general rule, title to the subaqueous land vested automatically in the state upon admission to the Union.[4] Consequently, submerged land beneath navigable waters is not available for selection by other claimants since it is already owned by the state. The definition of navigability, then, is pivotal in determining the ownership of Alaska's submerged lands.

On the other hand, the treatment of those submerged lands beneath *non-navigable* water depends upon the disposition made of them by the federal government. The Bureau of Land Management ("BLM") is the federal agency that administers the allocation of Alaska territory. Prior to 1983, the BLM treated land beneath non-

2. Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1629 (1982 & Supp. III 1985).

3. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended in scattered sections of 16 U.S.C., 43 U.S.C. & 48 U.S.C.); *see infra* note 316 and accompanying text.

4. *See infra* notes 21-26 and accompanying text.

navigable water as it did dry land. That is, the area under *non-navigable* water was included in the land grant, and the acreage was deducted from the selector's allotted entitlement. Under a recent change in policy by the Department of the Interior, however, the land beneath large but non-navigable bodies of water now passes to the grantee by operation of law, without the acreage being charged against the selector's entitlement.[5]

While the state, the Natives, and the Department of the Interior argue that this new policy merely corrects a past inequity by treating Alaska like the other states, many of those interested in protecting Alaska's submerged lands from further exploitation insist that the policy violates the compromises orginally settled in Congress when the land allocation processes were established, and essentially gives away valuable areas of Alaska lands. Two environmental groups have already challenged the new policy in the courts.[6] Congress is now considering legislation to resolve the dispute by statutory ratification of the new BLM policy.[7]

This article analyzes the twin issues of navigability and chargeability as they pertain to the disposition of submerged lands in Alaska. Each issue is considered in the broader context of the various ways courts historically have treated submerged land. The various legal theories underlying that treatment are explored, with a focus on the legal concept of navigability as distinguishing "public" from "private" waters. Finally, two suggested perspectives are offered: first, the current emphasis on ownership of these subaqueous areas of valuable natural resources obscures the more significant issue of the state's regulatory jurisdiction over and public usufructuary rights in these lands and waters; second, permitting state riparian rights law to determine the amount of land to pass from federal ownership, and how the acreage will be charged, may misconstrue applicable law to the derogation of the federal interest in public land in Alaska.

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5. *See* 48 Fed. Reg. 54,483 (1983) (announcing adoption of the new Interior Department policy); *infra* notes 252-61 and accompanying text.

6. Wilderness Soc'y v. Carruthers, Civ. No. 84-1823 (D.D.C. filed Jan. 30, 1986).

7. On August 3, 1987, the House passed a bill that, if enacted, would ratify the new chargeability policy. H.R. 2629, 100th Cong., 1st Sess., 133 CONG. REC. 6940-44 (1987). Both this bill and the Senate version contain several other provisions relating to the disposition of lands within the Arctic National Wildlife Refuge ("ANWR") which may prove objectionable to key leaders in the Senate, particularly Senator Ted Stevens of Alaska. S. 1493, 100th Cong., 1st Sess. (1987). Hence, as of this writing, passage of the Senate bill in this session is uncertain.

II. THE LAND-SELECTION ENTITLEMENT STATUTES

Two statutes provide for the ownership of much of the territory of Alaska: The Alaska Statehood Act,[8] and the Alaska Native Claims Settlement Act.[9] These statutes did not, however, settle questions of title, but rather provided the state and the Natives the right to select certain quantities of public land which the federal government would convey to them.[10]

A. The Statehood Act

Under the Alaska Statehood Act, Congress granted the new State of Alaska the right to select for ownership approximately 104 million acres of Alaska territory.[11] Historically, states admitted into the Union received by grant a certain quantity of land from the federal government.[12] Alaska is unique, however, in that the state was granted no particular geographically defined land area, but rather the right generally to select land so long as it was unclaimed, vacant, and federally owned. The total entitlement is 28% of the entire area of the state, an amount roughly the size of the entire State of California.[13]

B. ANCSA

Early in the state selection and conveyance process, many Alaska Natives claimed that some of their lands were being wrongly taken from them by the state. They asserted their ownership of substantial portions of Alaska territory on the theory that they had occupied these

8. Alaska Statehood Act of 1958, Pub. L. No. 85-508, § 6(a), 72 Stat. 339 (codified as amended at 48 U.S.C. note preceding § 21 (1982)).

9. 43 U.S.C. §§ 1601-1629 (1982 & Supp. III 1985).

10. The state may select from any lands that are "vacant, unappropriated and unreserved." Alaska Statehood Act of 1958, Pub. L. No. 85-508, § 6(a), 72 Stat. 339 (codified as amended at 48 U.S.C. note preceding § 21 (1982)). The Natives may select from lands withdrawn for that purpose by the Secretary of the Interior. ANCSA, 43 U.S.C. §§ 1610(a), 1611 (1982).

11. Alaska Statehood Act of 1958, Pub. L. No. 85-508, § 6(a), 72 Stat. 339. As of April 6, 1987, approximately 83 million acres had been conveyed. DEPARTMENT OF THE INTERIOR, ALASKA STATE OFFICE, INFORMATION BULLETIN No. AK 87-127 (Apr. 1987).

12. Typically, the federal government granted the new state sections 16 and 36 of each township. See Chapter XII (Grants to States on Admission into the Union) in P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (Public Land Law Review Commission, 1968).

13. Only two states received a greater percentage of their total area — Florida (62%) and Louisiana (38%) — much of which was in the form of swamp-land grants. *Id.* at 316 ("It should be remembered that at the time the swamplands were given these and other states, it was thought that they would be more of a liability than an asset."). By comparison, Arizona received 14% of its total area, New Mexico 16%, and Utah 14%. *Id.*

areas since time immemorial. Eventually the courts held that the land occupied by the Natives was indeed unavailable for selection by the state.[14] Since the boundaries of the lands claimed by the Natives under aboriginal ownership were not defined precisely, the state selection process was delayed, pending a resolution of the question of Native aboriginal land claims.

The United States Congress resolved the issue with the passage of the Alaska Native Claims Settlement Act ("ANCSA") in 1971.[15] In exchange for extinguishment of all aboriginal Native land claims, ANCSA provided a one-time payment of $962 million to Alaska Natives and the right to select 44 million acres of federal land.[16] As provided by ANCSA, a system of Native-owned corporations was established to administer the land and financial capital. There are thirteen regional corporations, twelve within specific geographical areas and one at large.[17] In addition, there are more than 200 village corporations, composed of traditional village populations of twenty-five or more inhabitants.[18] Under ANCSA, each regional and village corporation is entitled to select a certain quantity of federal land according to a complex formula based on population and geographical size.[19]

III. THE SECTION/CONVEYANCE PROCESS

A. Navigability and the Equal Footing Doctrine

The state and the Native corporations make their selections from federal lands withdrawn for that purpose by the Secretary of the Interior. The federal government then conveys the selected lands to the grantee.[20] Where the land is dry, this process of selection and conveyance is fairly straightforward. It becomes more complicated when the

14. Alaska v. Udall, 420 F.2d 938, 940 (9th Cir. 1969), *cert. denied sub nom.* Alaska v. Hickel, 397 U.S. 1076 (1970) (Indian use of land selected by the state pursuant to the Statehood Act could constitute a condition that would remove the status of such lands as "vacant, unappropriated and unreserved"); Aguilar v. United States, 474 F. Supp. 840, 843 (D. Alaska 1979) (use and occupancy prior to state selection gave Native claimants a preference right over the state).

15. Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629 (1982 & Supp. III 1985)); *see also* Edwardsen v. Morton, 369 F. Supp. 1359, 1371 (D.D.C. 1973) (until action by Congress to extinguish rights of Alaska Natives in lands claimed on the basis of use and occupancy, such claims remain an encumbrance on the land and fee remains in the United States).

16. 43 U.S.C. §§ 1603, 1605, 1611 (1982).

17. *Id.* § 1606(a), (c).

18. *Id.* § 1610(b).

19. *Id.* §§ 1611, 1613.

20. Technically, the issuance of a patent conveying title from the United States to a grantee follows a survey of the territory selected. Most of Alaska's territory has yet to be surveyed, and, in lieu of a patent, the federal government issues to the Natives a

selected lands contain rivers, lakes, and streams. First, whether an area of inland submerged land is available for selection at all depends upon whether the surface waters are navigable.[21] If the waters are navigable, historically, title to the bed vested in the state automatically upon statehood under the "Equal Footing Doctrine."[22] Derived from Article IV, section 3 of the United States Constitution, which provides for the admission of new states into the Union, the Equal Footing Doctrine requires that new states be admitted on an "equal footing" with other states; that is, with the same degree of sovereignty possessed by the original thirteen states.[23] Since the original states held title to the submerged lands under all navigable waters within their borders,[24] the Equal Footing Doctrine has been held to require that, upon admission, each new state automatically acquires title to the submerged lands beneath its inland and tidal navigable waters.[25] In other words, title to lands beneath navigable waters within the state's boundaries is held by the state, not through a grant from the federal government, or by an act of Congress, but rather as result of what has been held to be the constitutional requirement of equal footing.[26]

Not all submerged lands beneath navigable waters automatically became the property of the state, however. Regardless of the navigability of the water above, submerged lands that were withdrawn from entry at the time of statehood may remain in federal ownership.[27]

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so-called "interim conveyance" following selection, which conveys full title, subject to a later survey to delineate the boundaries more precisely in the patent. *See* 43 C.F.R. § 2650.0-5(h) (1986) (ratified by ANCSA, 43 U.S.C. § 1621(j)(1) (1982)). Similarly, conveyance of unsurveyed lands to the state are deemed "tentatively approved," pending final survey and patent. *See* 43 U.S.C. § 1635.

21. United States v. Oregon, 295 U.S. 1, 14 (1935).

22. *See* Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 228-29 (1845).

23. *Id.*

24. *Id.*; *see also* Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 413-16 (1842).

25. *Pollard's Lessee,* 44 U.S. (3 How.) at 229; *see also* Shively v. Bowlby, 152 U.S. 1, 50, 58 (1894). The Submerged Lands Act, ch. 65, 67 Stat. 29 (1953) (codified as amended at 43 U.S.C. §§ 1301-1356 (1982)), ratified the Equal Footing Doctrine by quitclaiming all lands beneath navigable water to the respective states to a line three miles distant from the coast. This statute was passed in response to the "Tidelands cases," in which the Supreme Court held that the United States, not the individual states, held title to the submerged coastlands up to the high-water mark. United States v. California, 332 U.S. 19 (1947); United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950). The Act is made applicable to Alaska by the Alaska Statehood Act of 1958, Pub. L. No. 85-508, § 6(m), 72 Stat. 339 (codified as amended at 48 U.S.C. note preceding § 21 (1982)).

26. *See* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977).

27. *See, e.g.,* United States v. Alaska, 423 F.2d 764, 766 (9th Cir.), *cert. denied,* 400 U.S. 967 (1970) (property withheld, conveyed, or withdrawn by the federal government prior to statehood did not pass to the state); *see also* Utah Div. of State Lands v. United States, ___ U.S. ___, 107 S. Ct. 2318 (1987).

Similarly, if the submerged lands were the subject of a prior grant by the federal government, such as to a Native tribe, then that grant supersedes any claim by the state under the Doctrine of Equal Footing.[28] Otherwise, as required by the Equal Footing Doctrine, all submerged lands beneath navigable waters pass to the state upon statehood.

As a result of the Equal Footing Doctrine, land beneath navigable water (1) cannot be selected by a Native corporation and (2) need not be selected by the state (since title was transferred upon statehood). Thus, in most cases the Equal Footing Doctrine requires exclusion from a federal land grant of all submerged land beneath navigable bodies of water located within the parcels conveyed.[29] Moreover, this submerged acreage is not charged against the state's total federal land entitlement, since the state already possesses title.[30] The definition of navigability thus assumes critical importance in the determination of the ownership of the natural resources that are located beneath Alaska's waters.

B. Land Beneath Navigable Waters: The Federal Test for Navigability

The language of the general federal test for navigability is not particularly complicated. First formulated in 1870 in *The Daniel Ball,*[31] a case involving federal admiralty jurisdiction, the test is essentially a common-sense evaluation of whether the water body can support commercial trade and travel by boat.[32] However, just how this traditional navigability test is to be applied in the unique Alaskan geographical context is the source of much contention. Bodies of water appear in many different forms in Alaska. Streams and rivers emanate from the forward edges of huge glaciers; thousands of small lakes pockmark the wilderness, most of which are accessible only by floatplanes that "puddle-jump" from one back country area to another. Most of these water bodies are frozen for the greater part of the year and are used for trade and travel in ways that differ from those traditional in the lower forty-eight. For example, dogsled and snowmobile trails often follow frozen river beds. To complicate matters further,

28. *See, e.g.,* Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).

29. 43 C.F.R. § 2650.5-1 (1986); *see also* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 376 (1977) ("[T]he Federal Government has no power to convey lands which are rightfully the State's under the equal-footing doctrine.").

30. Organized Village of Kake v. Egan, 174 F. Supp. 500, 502-03 (D. Alaska 1959).

31. The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870).

32. Brewer-Elliot Oil & Gas Co. v. United States, 260 U.S. 77, 86 (1922); *see also* United States v. Utah, 283 U.S. 64, 76 (1931); United States v. Holt State Bank, 270 U.S. 49, 56 (1926).

many of the aqueous areas in Alaska are marshy or criss-crossed with braided streams.

Because the conditions typically found in Alaska are unlike those in the lower forty-eight states, where the definition of navigability evolved, the applicability of the traditional definition of navigability to the circumstances found in Alaska is problematic. The stakes involved in the resolution of these problems are very high indeed. The fate of potentially millions of acres of submerged land, rich in natural resources, hangs in the balance.

C. Lands Beneath Non-Navigable Waters: The New "Chargeability" Policy

The second major issue of contention in the selection and conveyance process is the question of how submerged lands beneath *non*-navigable waters are to be counted against selection entitlements. Lands beneath *navigable* waters, as we have seen, were segregated from the selected area and were not included in the land transferred because, under the Equal Footing Doctrine, title to those lands had already passed to the state. Until 1983, the policy of the Department of the Interior as enunciated by the Bureau of Land Management ("BLM")[33] was to include the submerged lands beneath non-navigable waters in the area conveyed and to charge the selector,[34] whether the state or a Native corporation, for the acreage.

In August of 1983, then Secretary of the Interior James Watt announced a change in the BLM policy regarding the "chargeability" of submerged lands. Without preparing an Environmental Impact Statement or providing for a period of notice and comment, the Secretary issued a "change in policy" and "waiver of interim regulations" that substantially changed the way submerged lands beneath non-navigable waters were to be charged against the entitlements of both the state and the Native corporations.[35]

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33. The Bureau of Land Management is the agency within the Department of the Interior responsible for the administration of the land selection/conveyance process.

34. 38 Fed. Reg. 14,221 (1973) (codified at 43 C.F.R. § 2650.5-1 (1986)).

35. The new policy was promulgated in 48 Fed. Reg. 54,483 (1983). It might be maintained that the change in policy did not constitute rulemaking subject to the requirements of the Administrative Procedure Act, 5 U.S.C. §§ 500, 553 (1982). Nonetheless, a proposed rulemaking was published subsequently in the Federal Register, 49 Fed. Reg. 31,475 (1984), allowing for public comment, and a final rulemaking, 50 Fed. Reg. 15,546 (1985). Arguably, these post-hoc actions cure any procedural infirmities, but these issues are by no means beyond dispute. *See also* The Wilderness Soc'y v. Carruthers, Civ. No. 84-1823 (D.D.C. Jan. 30, 1986) (action by two environmental organizations claiming, inter alia, that failure of the Department of the Interior to prepare an environmental impact statement prior to promulgation of the Department's new chargeability policy was a violation of the Administrative Procedure Act, ANCSA, and the Alaska Statehood Act).

Under the new policy, the submerged acreage beneath non-navigable lakes in excess of fifty acres and non-navigable streams in excess of three chains[36] in width are no longer charged against state or Native entitlements.[37] Rather, the BLM is required to follow standard surveying practice as outlined in the Manual of Survey Instructions,[38] according to which "meanderable"[39] bodies of water — that is, all large bodies of water, whether navigable or not — are segregated from the area surveyed, and the segregated area is excluded from the area for purposes of calculating the acreage to be conveyed.[40]

The new policy provides that the submerged lands beneath all meanderable bodies of water are segregated out of the area conveyed by federal patent. As a result, the ownership of these submerged lands comes into question.[41] Under the Equal Footing Doctrine, land beneath *navigable* bodies of water becomes the property of the new state. But what of lands beneath water that is not navigable? According to the present Department position, title to submerged lands beneath meanderable non-navigable bodies of water passes to the grantee of the adjacent fastlands by operation of law. The selector is not charged for the submerged land that, when surveyed, is segregated out of the parcel of land conveyed.[42] In other words, under the new policy the selector will get the submerged lands free, without having to expend any entitlement rights.

Although the state, the Native community, and the Department seem to agree that the submerged acreage is acquired by the selector of the adjacent fastlands by operation of law, just what law applies to accomplish this result is unclear. Many argue that the Alaska common law of riparian rights applies,[43] whereas others point to federal

36. A chain is a survey device to measure distance. As used here, it refers to the traditional length of a Gunther's chain which was 66 feet. Thus, three chains are 198 feet. A modern chain is a metal tape 100 feet long, divided into tenths of a foot instead of inches.

37. 43 C.F.R. § 2650.5-1(3) (1986).

38. BUREAU OF LAND MANAGEMENT, MANUAL OF INSTRUCTIONS FOR THE SURVEY OF PUBLIC LANDS OF THE UNITED STATES § 3-115 (1973) [hereinafter MANUAL OF SURVEY INSTRUCTIONS].

39. Meandering refers to the survey practice of following the sinuosities of the water body; that is, the survey plat delimits the high-water mark of the meandered water body.

40. *See infra* notes 234-36 and accompanying text.

41. More precisely stated, the question is: Are those submerged lands that are segregated for the purposes of chargeability also segregated from the area for the purposes of conveyance, and thus not transferred by the grant itself?

42. MANUAL OF SURVEY INSTRUCTIONS, *supra* note 38, § 7-51 ("The Government's conveyance of title to a fractional subdivision fronting upon a nonnavigable body of water, unless specific reservations are indicated in the patent, carries ownership to the middle of the bed *in front of* the basic holding.").

43. *See infra* text accompanying notes 267-75.

law, either as borrowing state law, or as provided by federal statute passed early in this nation's history.[44]

Whatever the legal theory, the practical effect of the new policy is a substantial increase in the amount of land to be transferred from federal ownership in Alaska, a result strongly opposed by many environmentalists.[45] By contrast, the Department of the Interior takes the view that it has simply redefined what is meant by "wet land" for purposes of calculating chargeability.[46] The Department asserts that this change was necessary to bring its practices in Alaska into conformity with those in the lower forty-eight.[47]

As many of the selections by both the state and the Native corporations include numerous large, non-navigable bodies of water, the practical consequence of the new policy is to increase substantially both state and Native entitlements to federal lands. Estimates of the increase range from 783,000 acres to just under 2,000,000 acres.[48] Some Native corporations may even be permitted to make additional selections from "conservation system unit" lands — parks, refuges, and wilderness areas — protected by the Alaska National Interest Lands Conservation Act ("ANILCA").[49]

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44. *See infra* text accompanying notes 276-300.

45. *See, e.g.,* Wilderness Soc'y v. Carruthers, Civ. No. 84-1823 (D.D.C. Jan. 30, 1986).

46. *See* Letter from J. Steven Griles, Ass't Sec'y, United States Department of the Interior to Hon. James McClure, Chairman, Committee on Energy and Natural Resources, United States Senate (Feb. 6, 1986), *reprinted in* S. REP. No. 234, 99th Cong., 2d Sess. 4, 5 (1986) [hereinafter Letter to Senate Committee on Energy and Natural Resources].

47. *Id.* at 6.

48. Memorandum from the Director of the Alaska Department of Natural Resources to the Director of the Bureau of Land Management, Alaska State Office (May 1, 1987). The lower figure is the estimate of the Alaska Department of Natural Resources, and the higher figure is that of the Bureau of Land Management. The difference between the two estimates is explained by the different assumptions used for the definition of navigability: the more inclusive the definition, the smaller the consequence of the new policy, since fewer areas of submerged land will be affected. Should the liberal standard of navigability used in the recent Gulkana River decision, Alaska v. United States, 622 F. Supp. 455 (D. Alaska 1987) (finding most of the Gulkana River navigable for title purposes despite BLM determination of non-navigability), be applied throughout Alaska, it would significiantly decrease the amount of meanderable but non-navigable water in Alaska.

49. Regarding the availability of areas designated by ANILCA as conservation system units ("CSUs") for selection by underselected villages, the House report indicates that such statutory protection would probably *not* preclude selection of such areas. Specifically the report states:

> This section gives the Secretary of the Interior the necessary authority to withdraw available lands for Village Corporation selection in those instances where it is determined a Village Corporation has not selected sufficient land to obtain its full entitlement. The Secretary is to make every effort to rewithdraw available land for underselected Villages from the original Village and

Resolution of the two issues of navigability and chargeability will determine the disposition of potentially millions of acres of valuable Alaska land. Despite their importance, the legal doctrines relating to these two issues are not particularly clear. Therefore, their importance to the controversies over submerged land in Alaska warrants a more thoughtful consideration.

In particular, two points should be considered. First, with regard to contests over the federal test of navigability for title purposes, it is important to recognize that a state may define navigability as it wishes for its own internal purposes, including the regulation of the uses to which its waters and the submerged lands beneath them may be put. Accordingly, the legal battles over *ownership* of Alaska's submerged lands may tend to obscure the more basic, and more important, question of land *use* control.

Second, with regard to the chargeability of submerged land beneath non-navigable water, the appropriateness of applying Alaska's riparian rights doctrine to this question so as to favor the owner of the adjacent uplands is not unassailable. The presence of significant federal interests in preserving Alaska's natural resources in federal ownership may call for a federal rule to protect those interests.

IV. FEDERAL NAVIGABILITY DOCTRINE

A. History and Evolution

The federal test for navigability is, on its face, uncomplicated. Nevertheless, the interpretation of the language in the test varies according to the legal context in which the test is employed. In particular, courts have used the navigability test to determine federal maritime jurisdiction, to delimit congressional power under the commerce clause to regulate activity on water,[50] and to determine title to

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deficiency withdrawals. Lands considered available for rewithdrawal would include all lands within those withdrawals which was [sic] considered public land and available for withdrawal at the time the ANSCA was passed in 1971, *irrespective of classification of the land subsequent to passage of the ANSCA.*

H.R. REP. No. 97, 96th Cong., 1st Sess., 322 (1979) (emphasis added).

50. Presently, navigability for commerce clause purposes appears to be waning in importance as the general commerce power of the Congress has expanded. *See, e.g.,* Utah Div. of State Lands v. United States, — U.S. —, 107 S. Ct. 2318 (1987) (title to navigable lake); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (jurisdiction of the Corps of Engineers to regulate dredge and fill of wetlands not limited by navigability of surface waters) (*see infra* notes 84-89 and accompanying text); Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941 (1982) (interstate transfer of ground water subject to regulation by Congress under the commerce clause).

submerged lands. Unfortunately, not all of the results of its application in those various contexts are readily reconcilable. As one commentator characterized the term: " 'Navigable' is a word of art, perhaps even of sorcery. . . . The concept is confusing, slippery, unpredictable, antique, and irrelevant to today's problems."[51]

Drawing from the common law in England, early American courts deemed navigable only water subject to the ebb and flow of the tides.[52] This rule reflected the fact that England has few major inland waters. In 1870, the United States Supreme Court recognized that conditions on this side of the Atlantic are significantly different from England with respect to the number and size of inland waterways. Consequently, the Supreme Court adopted a "navigable-in-fact" test:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.[53]

Originally, this navigability test applied only to determine the limits of admiralty jurisdiction. Since then, courts have come to apply the test in two other areas: to determine the scope of congressional regulatory powers on water bodies under the commerce clause, and to settle questions of title to submerged lands. The application of the test in these contexts is not uniform, however, and the distinctions among them are often murky.[54] Nevertheless, it is important to note that the federal courts have expanded the definition of navigability in order to encompass the changing uses of America's waters.

1. *Admiralty jurisdiction.* Under the original Judiciary Act of 1789,[55] the admiralty jurisdiction of the federal courts extended to "waters which are navigable from the sea by vessels of ten or more tons burthen. . . ."[56] At first, the Supreme Court adhered to the English common law tidal test of navigability in admiralty jurisdiction cases.[57] In 1845, Congress enacted a statute extending admiralty jurisdiction to vessels on the Great Lakes of "twenty tons burden and

51. Johnson, *Public Trust Protection for Stream Flows and Lake Levels,* 14 U.C. DAVIS L. REV., 233, 250 n.66 (1980).

52. *See* Barney v. Keokuk, 94 U.S. 324, 336 (1876).

53. The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).

54. *See infra* notes 121-23 and accompanying text.

55. The Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789) (codified as amended in scattered sections of 28 U.S.C. (1982)).

56. *Id.* § 9, 1 Stat. 73, 77.

57. The Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825).

upwards . . . employed in business of commerce and navigation between ports and places in different States and Territories upon the *lakes* and *navigable waters connecting said lakes*. . . ."[58]

In 1851, the Supreme Court examined the question of jurisdiction in a case involving a collision between the schooner *Cuba* and the steamship *Genesee Chief* on Lake Ontario. The Court rejected the English tidal test and held that there was federal jurisdiction to hear the case.[59] The Court did not, however, formulate an alternative definition of navigability. Neither did it simply uphold the constitutional authority of Congress to extend by statute the admiralty jurisdiction of the federal courts to include the Great Lakes. Rather, the Court held that such jurisdiction existed over those and other navigable, non-tidal waters throughout the nation due to their public nature.[60] The Court based its conclusion on the view that, under English law, it was the public use of certain waters, rather than the influence of the tides upon them, that established navigability.[61] In the opinion, the Court noted that "[i]n England . . . tide-water and navigable water are synonymous terms, and tide-water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones. . . ."[62]

Continuing its logic, the Court held the public nature of navigable waters was the basis for its jurisdiction in admiralty over them. According to the Court, "[i]f the water was navigable it was deemed to be public; and if public, was regarded as within the legitimate scope of the admiralty jurisdiction conferred by the Constitution."[63]

Based on this holding in the *Genesee Chief,* the Supreme Court developed in an 1870 case, *The Daniel Ball,*[64] the navigability-in-fact test used today. The *Daniel Ball* decision extended federal admiralty jurisdiction to include the Grand River, a navigable river wholly within the State of Michigan which flows into Lake Michigan. In contrast to the tidal test, the Court deemed this flexible, case-by-case approach better suited to the extensive public use of American waters for commercial navigation in inland, non-tidal areas.[65]

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58. Act of Feb. 26, 1845, ch. 20, 5 Stat. 726 (codified as amended at 28 U.S.C. § 1873 (1982)) (emphasis added).

59. The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 456 (1851).

60. *Id.* at 457.

61. *Id.* at 455.

62. *Id.*.

63. *Id.* at 457.

64. The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870); *see supra* notes 52-54 and accompanying text.

65. The Court stated:

> The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of

The furthest reach of admiralty jurisdiction based on navigability was in *The Robert Parsons,*[66] a 1903 Supreme Court case. In that case, the Court extended its admiralty jurisdiction to a horse drawn barge solely engaged in intrastate commerce on the Erie Canal, a water body made navigable by artificial means. The Court based its decision on the fact that the Erie Canal "form[s] . . . a continuous highway for commerce. . . ."[67]

This brief history reveals that the central principle applied by the Court in extending its admiralty jurisdiction to cover waters previously considered non-navigable was not the potential use of such waters for interstate commerce, but rather their public nature as avenues for interstate and intrastate trade and travel.

2. *Commerce Clause Jurisdiction.* The public nature of navigable waters also has been central to the Supreme Court's analysis in delimiting Congress' commerce clause jurisdiction. In the landmark case of *Gibbons v. Ogden,*[68] Chief Justice Marshall affirmed one of the traditional constitutional bases of the power of Congress to legislate in the area of interstate commerce by holding that "commerce" includes navigation. Thus, when the State of New York attempted to issue a license that purported to grant exclusive rights to commerce on a navigable waterway contrary to a federal license, the Court held that the New York license was invalid.[69] As the Supreme Court explained in the subsequent case of *Gilman v. Philadelphia,*[70] the constitutional power to regulate commerce implies a public interest in and legislative jurisdiction over navigable waters:

> Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress.[71]

> waters. . . . Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity.

The Daniel Ball, 77 U.S. (10 Wall.) at 563.

66. The Robert W. Parsons, 191 U.S. 17 (1903).

67. *Id.* at 26; for comments on the "highway" test, *see infra* notes 107-111 and accompanying text.

68. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

69. *Id.* at 239-40.

70. Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1865).

71. *Id.* at 724-25.

In addition to underpinning Congress' commerce clause jurisdiction, the right of the public to use navigable waterways for navigation gives rise to what is referred to as a navigational servitude.[72] Under this doctrine, any property interest in lands beneath navigable waters is held *subject to* the public right of navigation.

> Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a *public navigable water,* his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. *It is a qualified title, a bare technical title,* not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by *the public right of navigation.*[73]

Because riparian landholders adjacent to navigable waters own subject to a navigational servitude, the Supreme Court has ruled that even intensive regulation of the uses of such riparian lands and waters does not constitute a "taking" of private property without due process of law.[74] The cases that apply the definition of navigability for commerce clause purposes typically involve a challenge by a riparian owner to federal regulation of the uses of his adjacent submerged lands. These challenges fall into two subcategories: those in which the plaintiff contests a regulation as beyond the jurisdiction of Congress (Congress lacks constitutional authority for its action), and those claiming that, while lawful, the regulation entails a "taking" that requires either compensation or nullification of the regulation. For example, in *United States v. Appalachian Power*,[75] the United States sought to enjoin construction of a dam by the defendant power company on the ground that it was an impediment to navigation prohibited by the Rivers and Harbors Act.[76] The Court noted that the power of the United States to regulate commerce upon its waters "is as broad as the needs of commerce."[77] Justice Reed added that:

> The flow of a navigable stream is in no sense private property; "that the running water in a great navigable stream is capable of private

72. *See, e.g.,* United States v. Twin City Power Co., 350 U.S. 222, 224-25 (1956).

73. Scranton v. Wheeler, 179 U.S. 141, 163 (1900) (emphasis added); *see also* Gibson v. United States, 166 U.S. 269, 271-72 (1897).

74. United States v. Kansas City Life Ins. Co., 339 U.S. 799, 808 (1950) ("When the Government exercises this servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone."); *see also* United States v. Cherokee Nation of Oklahoma, — U.S. —, 107 S.Ct. 1487, 1490 (1987); United States v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 312 U.S. 592, 596-97 (1941).

75. United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).

76. Rivers and Harbors Appropriation Act of 1899, ch. 425, §§ 9, 10, 30 Stat. 1151 (codified as amended at 33 U.S.C. §§ 401, 403 (1982)).

77. *Appalachian Elec. Power Co.,* 311 U.S. at 426.

ownership is inconceivable." Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion.[78]

Two recent cases illustrate current trends in the relationship of navigability to commerce clause jurisdiction. In *Kaiser Aetna v. United States,*[79] the Supreme Court drove a wedge between the traditionally linked navigational servitude and the power of Congress to regulate navigation.[80] The case involved the private development of a previously non-navigable lagoon into a navigable marina. The Army Corps of Engineers insisted that the marina be open for use by the general public. The Supreme Court affirmed the power of the Corps to require public access to the marina,[81] with the proviso that if such access were to be required, the federal government would have to invoke its power of eminent domain and pay just compensation.[82] Although this factual situation is unusual, the holding indicates that the old rule that imposing a navigational servitude involves no constitutional taking is no longer sacrosanct.[83]

The second case, *United States v. Riverside Bayview Homes,*[84] involved a challenge to the jurisdiction of the Corps of Engineers under the Clean Water Act[85] to regulate dredge and fill operations in an area of land beneath non-navigable waters. The developer directed the attention of the court to the specific language in the Clean Water Act amendments of 1972 which indicate that the Act applies to "navigable waters."[86] The Court ruled, however, that the jurisdiction of the Corps was not limited by the navigability of the surface waters, but rather extended to all "waters of the United States," according to the statutory definition of "navigable waters" under the Clean Water Act.[87] The legislative history of the Clean Water Act Amendments showed that Congress expected the reach of the Act to be to the fullest

78. *Id.* at 424 (citation omitted).

79. 444 U.S. 164 (1979).

80. *See generally* Gelin, *No Surprises Please: The Quest for Certainty in the Application of the Navigational Servitude as an Illusion,* 18 LAND & NAT. RESOURCES DIV. J. 2, 12-13 (1981).

81. *Kaiser Aetna,* 444 U.S. at 174.

82. *Id.* at 180.

83. In particular, the Court noted that public access would "result in an actual physical invasion of the privately owned marina," *id.* and that the conduct of the federal officials had led to "the fruition of a number of expectancies . . . that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property," *id.* at 179.

84. 474 U.S. 121 (1985).

85. 33 U.S.C. §§ 1251-1376 (1982).

86. *Id.* §§ 1311, 1344, 1362.

87. *See id.* § 1362(7); *Riverside Bayview Homes,* 474 U.S. at 131 ("these findings establish that respondent's property is a wetland adjacent to a navigable waterway . . . . it is part of the 'waters of the United States'. . . .").

extent possible.[88] Accordingly, the Court did not confine the Corps' jurisdiction to navigable waters under the traditional federal definition, but upheld the regulation of the wetlands at issue under the more expansive reach of the commerce clause.[89]

The opinions of the Supreme Court in these and other recent cases may indicate that the expansion of legislative jurisdiction under the commerce clause has reached the point as to eliminate the significance of navigability for commerce clause purposes.[90] There is, however, no universal consensus on this point, and debate continues over the continued importance of navigability for commerce clause purposes.[91] In any event, it is important to note that the courts construe the navigability test more broadly in commerce clause cases than in admiralty jurisdiction or title cases.

3. *Title to Submerged Lands.* The issue of the public nature of navigable waters arose in the title context even before the cases involving ownership of submerged lands under the Equal Footing Doctrine.[92] In 1842, for example, a dispute over rights to oyster beds in Raritan Bay in New Jersey precipitated a suit in ejectment by a riparian owner who derived his title from an English royal grant.[93] The defendant asserted his right to use the beds under an 1824 state statute

88. *See, e.g.,* Natural Resources Defense Council, Inc. v. Calloway, 392 F. Supp. 685, 686 (D.D.C. 1975) (discussing congressional intent behind the Clean Water Act).

89. Interestingly, no case was cited to support this expansive view of the Corps' jurisdiction, nor was any explanation given of a constitutional theory to support the Corps' permit system. Rather, the Court saw the issue purely as one of statutory interpretation, to be decided "[p]urged of its spurious constitutional overtones." *Riverside Bayview Homes,* 474 U.S. at 129. The Court's logic appears to be that, because denial of a permit would not constitute a taking, the only issue left to decide was the interpretation of the interchangeable use of "navigable waters" and "waters of the United States" in the Clean Water Act, 33 U.S.C. §§ 1344(a), 1362(12) (1982). But the definition adopted by Congress, and its implied assertion of jurisdiction, is not *per se* necessarily a constitutional declaration of the reach of its powers. The expanded jurisdiction of the Corps was upheld in Wyoming v. Hoffman, 437 F. Supp. 114 (D. Wyo. 1977).

90. *See, e.g.,* Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941 (1982); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

91. For example, the language of *Riverside Bayview Homes* is ambiguous on this point. In that case, the Court wrote that "these findings establish that respondent's property is a wetland adjacent to a navigable waterway. . . . it is part of the 'waters of the United States'. . . ." 474 U.S. at 131. But the phrase "adjacent to a navigable waterway" may be interpreted several ways. It may imply that some nexus with the navigable waterway is still required. Alternatively, it may mean that the Act applies to *all* "waters of the United States," as the statutory definition would seem to imply.

92. *See supra* notes 22-30 and accompanying text; *see also* United States v. Utah, 283 U.S. 64 (1931); United States v. Holt State Bank, 270 U.S. 49 (1926); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922).

93. Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367 (1842).

authorizing private use of the submerged lands of the bay for raising oysters. The United States Supreme Court upheld the right of the defendant oysterman on the grounds that the English Crown could not convey title to the submerged lands at issue. Rather, title remained in the New Jersey state government to use as it saw fit. This holding became an underpinning for the later Equal Footing Doctrine cases, in that it established the specific rights each state derived as sovereign of its territory. Writing for the Court, Chief Justice Taney explained:

> For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters *and the soils under them* for their own common use, subject only to the rights since surrendered by the Constitution to the general government.[94]

At least two modern commentators have shown that Justice Taney was probably incorrect in his view that the English crown was powerless to convey the submerged lands into private ownership.[95] Nevertheless, the case established henceforth each state's right to ownership in its sovereign capacity of the submerged lands beneath navigable waters within its borders and the right of the public to use the navigable waters and the submerged lands for their common benefit. It was a short step from this ruling to the requirement under the Equal Footing Doctrine that upon admission to the Union each state has title to the submerged lands beneath all the navigable waters within its borders.[96]

Following the pattern of the early admiralty jurisdiction cases, the test for navigability applied initially in these early title cases was the English tidal test.[97] As in admiralty cases, the courts eventually adopted the navigability-in-fact test in title cases as well.[98] It was not, however, until the 1920's that the Supreme Court finally settled that navigability in title cases between a state and the United States over

94. *Id.* at 410 (emphasis added).

95. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance and Some Doctrines that Don't Hold Water,* 3 FLA. ST. U. L. REV. 511, 589-90 (1975); Rosen, *Public and Private Ownership Rights in Lands Under Navigable Waters: The Governmental/Proprietary Distinction,* 34 U. FLA. L. REV. 561, 572-74 (1982). Both are thorough and scholarly treatments of the navigability issue.

96. *See* Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 228-29 (1845). It can be argued that *Pollard's Lessee* was wrongly decided, in that the sovereign power to *control* the use of navigable waters and the submerged lands beneath is legally distinct from their *ownership* by the state.

97. *See, e.g., id.* at 218.

98. Barney v. Keokuk, 94 U.S. 324, 338 (1876).

submerged lands was a federal question to be decided by the federal test.[99]

B. Modern Federal Navigability Doctrine

1. *The Test for Title Purposes.* In order to be deemed navigable under federal law, the *Daniel Ball* test requires that the waters in question be "used, or . . . susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[100] As currently applied, this test may be broken down into five key elements that relate to five specific aspects of the water body in question, the first implied from the Equal Footing Doctrine, the others explicit in the *Daniel Ball* language.

a. Measured at the time of statehood. To ascertain whether the submerged lands in question vested in the state under the Equal Footing Doctrine, a court must determine the navigability of the surface water at issue as of the time the state was admitted into the Union.[101] The condition of the water at the time of the suit is irrelevant.[102]

b. Susceptible of being used. The *Daniel Ball* test refers to waters "used, or . . . susceptible of being used," for trade and travel on water.[103] From this reference, the courts have developed a two-step test in title cases. The first step is an analysis of historical and contemporary evidence of actual use of the waterway at the time of admission to statehood. If such historical documentation is unavailable or incomplete, the court then considers empirical evidence regarding the geography of the waterway to determine its *capability* for use as a means of transportation and commerce. For example, in ruling for the State of Utah on a question of title to submerged lands beneath the upper portions of the Colorado River, the Supreme Court outlined this two-step evaluation process in a consideration of the susceptibility of the waterway for navigation. The specific language of the Court may

99. No Supreme Court case had expressly addressed the issue until the three cases decided between 1921 and 1931: Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922); United States v. Holt State Bank, 270 U.S. 49 (1926); and United States v. Utah, 283 U.S. 64 (1931). Before that line of cases, most state courts assumed that title to submerged land was a question to be decided by state law, even if it involved a claim by the United States. Johnson & Austin, *Recreational Rights and Titles to Beds on Western Lakes and Streams,* 7 NAT. RESOURCES J. 1, 8-9 (1967).

100. The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).

101. Utah v. United States, 403 U.S. 9 (1971); Shively v. Bowlby, 152 U.S. 1 (1894).

102. *See, e.g.,* United States v. Oregon, 295 U.S. 1 (1935); Oklahoma v Texas, 258 U.S. 574 (1922).

103. 77 U.S. (10 Wall.) at 563.

be relevant to determine navigability in sparsely populated areas in Alaska:

> The question of that susceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial question. The Government insists that the uses of the rivers have been more of a private nature than of a public, commercial sort. But, assuming this to be the fact, it cannot be regarded as controlling when the rivers are shown to be capable of commercial use. *The extent of existing commerce is not the test.* The evidence of the actual use of streams, and especially of extensive and continued use for commercial purposes, may be most persuasive, but where conditions of exploration and settlement explain the infrequency or limited nature of such use, *the susceptibility to use as a highway of commerce may still be satisfactorily proved. . . .*
>
> Utah, with its equality of right as a State of the Union, is not to be denied title to the beds of such of its rivers as were navigable in fact at the time of the admission of the State either because the location of the rivers and the circumstances of the exploration and settlement of the country through which they flowed had made recourse to navigation a late adventure, or because commercial utilization on a large scale awaits future demands.[104]

In the Alaska context, then, the courts may well find many waterways navigable as a matter of law, even though as a matter of fact there is no evidence of commercial use. The critical factor is the susceptibility of such use.

c. In its ordinary condition. The *Daniel Ball* test expressly refers to the capability of the waters for navigation "in their ordinary condition."[105] This element of the test contains an inherent semantic confusion. Does "ordinary" refer to their *usual* condition, or to the *natural,* unimproved condition? In Alaska many of the bodies of water at issue are frozen for most of the year, and some even remain frozen the year round. Therefore, this distinction between usual and natural could make a considerable difference to the disposition of submerged land in Alaska.

The Supreme Court has used this distinction to differentiate the application of the test in two of the contexts in which the test for navigability is used: title purposes and commerce clause purposes. The navigability test for commerce clause purposes permits a court to consider improvements in a waterway that aid navigability, whereas, for

104. United States v. Utah, 283 U.S. 64, 82-83 (1931) (emphasis added); *see also* The Montello, 87 U.S. (20 Wall.) 430, 441 (1874) ("The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use.").

105. 77 U.S. (10 Wall.) at 563.

title purposes, the test is applied to the waterway in its unimproved state.[106]

d. As a highway for commerce. The fourth major element of the *Daniel Ball* test is the evaluation of the waters as "highways for commerce, over which trade and travel are or may be conducted."[107] The Supreme Court emphasized this factor in its ruling in *Utah v. United States*[108] on the navigability of the Great Salt Lake to determine ownership of its submerged lands. The evidence presented in the Master's Report indicated that most of the transportation on the waters of the lake took place before the date of statehood, and involved flatboats used by ranchers either for carrying livestock from one section of upland to another or to and from certain islands. In the words of the Court, "the business of the boats was ranching and not carrying waterborne freight."[109] Nonetheless, the Court went on to say, "[w]e think that is an irrelevant detail. The lake was used *as a highway and that is the gist of the federal test.*"[110] Applying the "highways for commerce" element of the test, the Court held the lake to be navigable because, at the time of statehood, the water could have afforded passage to boats in general use on inland navigable bodies of water. Consequently, the Court held that title to the submerged lands beneath the Great Salt Lake had vested in the State of Utah.[111]

e. In the customary modes of trade and travel on water. The language used in the Master's Report in the Great Salt Lake case reflects the thrust of the fifth element of the *Daniel Ball* test regarding "customary modes of trade and travel on water."[112] This element was the focus of recent litigation in the federal district court in Alaska involving Slopbucket Lake, a small lake in Alaska accessible only by floatplane.[113] The State of Alaska asserted that, despite its isolation and lack of use for commercial boating, the lake was nonetheless navigable for title purposes. In support of its position, the state directed the court to an early navigability case in which the Supreme Court wrote

106. *See infra* notes 117-23 and accompanying text; *see also* Economy Light & Power Co. v. United States, 256 U.S. 113, 118 (1921).

107. 77 U.S. (10 Wall.) at 563.

108. Utah v. United States, 403 U.S. 9, 10 (1971).

109. *Id.* at 11.

110. *Id.* (emphasis added).

111. *Id.*

112. 77 U.S. (10 Wall.) 557, 563 (1870).

113. Alaska v. United States, 563 F. Supp. 1223 (D. Alaska 1983), *aff'd,* 754 F.2d 851 (9th Cir.), *cert. denied,* 474 U.S. 968 (1985). The name of the lake derives from the practice of those who camp on a small ithsmus between two lakes, one of which was substantially larger than the other. The larger was kept pristine, the smaller being used for the dumping of its namesake. 754 F.2d at 852.

that a river was navigable in fact "[i]f it [is] capable in its natural state of being used for purposes of commerce, *no matter in what mode the commerce may be conducted. . . .*"[114]

The district court judge concluded, however, that floatplane use was not a "customary mode of trade and travel on water" and, consequently, irrelevant to the determination of navigability.[115] On appeal, the Court of Appeals for the Ninth Circuit affirmed the ruling of the district court, but focused on the "highways" element rather than the "customary modes" element of the navigability test. The appellate court said that the lake served as "a terminus or launching point for floatplanes, not 'a *channel* for useful commerce.' The floatplanes go to and from the lake; they do not travel on the water."[116]

For a waterway to be held navigable under federal law for title purposes it must satisfy each of these five elements of the *Daniel Ball* formulation. The determination in federal law whether a body of water is navigable for commerce clause purposes differs from the test for title purposes in several important respects.

2. *The Test of Navigability for Commerce Clause Purposes.* Although both the commerce clause and title tests use the language of *The Daniel Ball,* there are certain distinctions between the two as applied in particular cases. These distinctions must be kept in mind because precedential cases in one context may not be applicable to the other.

First, the commerce clause navigability test is applied *as of the time of the suit,* not as of the time of admission to statehood.[117] Indeed, a waterway that was non-navigable at the time of admission of a state may later be found navigable for commerce clause purposes.[118] Second, an affirmative determination of commerce clause navigability is indelible: once a body of water has been determined to be navigable and thus subject to regulation by Congress, subsequent changes in the character of the water body have no effect on the extent of congressional jurisdiction.[119]

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114. *Id.* at 1227 (quoting The Montello, 87 U.S. (20 Wall.) 430, 441-42 (1874) (emphasis added)).

115. "[F]loatplane activities on Slopbucket Lake are not modes of conducting commerce on water for the purpose of determining navigability for title. Such activities are legally irrelevant to the navigability determination." *Id.* at 1228.

116. Alaska v. United States, 754 F.2d 851, 854 (9th Cir.), *cert. denied,* 474 U.S. 968 (1985) (citation omitted).

117. United States v. Appalachian Elec. Power Co., 311 U.S. 377, 408 (1940).

118. *Id.* at 408.

119. *Id.*

Third, and most important, the commerce clause test is more inclusive than the test for title purposes because it allows for "improvements" that render navigable an otherwise non-navigable waterway. As the Supreme Court explained in *United States v. Appalachian Electric Power Co.,* "[t]he power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic."[120]

These three differences between the two tests may be particularly important in Alaska, where unique circumstances strain the parameters of the traditional definition of navigability and where such large areas of submerged lands are at stake. Yet, in a recent Interior Board of Land Appeals case involving a river in Alaska, this distinction was overlooked. The case involved the navigability for title purposes of the Matanuska River, used mainly for white water rafting. In his opinion, the Administrative Law Judge cited inapposite commerce clause cases to support a questionable ruling on title, that the river was navigable, and, thus, the submerged land was state owned.[121]

It should be noted that the position asserted by the United States regarding the navigability of a water body varies depending upon the particular legal posture of each case. When the issue involves navigability for title purposes, the United States typically takes the position that the waterway is not navigable, and hence, title to the submerged lands did not vest in the state under the Equal Footing Doctrine, but rather remains in the United States.[122] In commerce clause cases, by contrast, the United States usually attempts to show the opposite — that the waterway is navigable — to establish congressional jurisdiction over the waterway.[123]

3. *The Unique Alaska Context.* In addition to the complexities already explored, the application of the traditional definition of navigability in the Alaska context raises further questions. What, for instance, is the "ordinary" condition of a body of water that is frozen much of the year? Should a court factor in the portion of the year that the water is liquid? Are frozen bodies of water nonetheless "susceptible" to navigation, since boats would float on the water when not frozen?

Also, most of Alaska's inland lakes are in very remote areas, accessible only by floatplane. Many have never been used by traditional

120. *Id.*

121. Interior Board Land Appeals Op. No. 82-1133 (August 18, 1983). This opinion by the Administrative Law Judge has not been adopted by the Department of the Interior.

122. *See, e.g.,* United States v. Utah, 283 U.S. 64 (1931).

123. *See, e.g.,* United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940); Economy Light & Power Co. v. United States, 256 U.S. 113 (1921).

watercraft such as boats or canoes. Should a court consider the inherent navigability of a water body independent of its isolation? In what sense would such a water body be "susceptible" of navigation if, for all practical purposes, commercial navigation is impossible?

Moreover, in Alaska, frozen stream and river beds are often used for travel by dog sled and snowmobile. Are such forms of locomotion "customary modes of trade and travel on water"? These are typical questions that arise in trying to apply the traditional navigability criteria to the unique circumstances found in Alaska.

Recognizing its unique position, the State of Alaska has been quite aggressive in asserting a much more inclusive definition of navigability than that typically applied by the BLM. The cases being brought by the state seek to stretch the traditional definition of navigability to cover new circumstances not contemplated by the Supreme Court in *The Daniel Ball.* The state has claimed, for example, that both floatplane and dogsled are "commerce" for purposes of title navigability, though the relevance of floatplane use was recently decided adversely to the state.[124] It remains to be seen how the courts will interpret these issues.[125] Although it may not be readily apparent, in deciding such cases, courts are in fact dealing with much more fundamental jurisprudential questions. For example, should water and submerged lands as natural resources be opened to private ownership and exploitation, or should they remain protected for public use and enjoyment?[126]

V. THE ORIGINS OF THE PUBLIC VERSUS PRIVATE WATERS DISTINCTION

In the broader context of the jurisprudential relationship between the individual and the state pertaining to waters and submerged lands, the concept of navigability has played a key role. Reduced to its fundamentals, the distinction between navigable and non-navigable waters is that navigable waters are "public" and non-navigable waters are

124. *See supra* notes 113-16 and accompanying text.

125. Recently much of the Gulkana River was deemed navigable, on the erroneous theory that the phrase "trade and travel" on water in the federal definition uses a disjunctive "or," allowing a finding of navigability to be based entirely upon the water's capability to sustain travel only, without any other potential commercial use. Alaska v. United States, 662 F. Supp. 455 (D. Alaska 1987).

126. An additional hurdle facing the state on the issue of title to submerged lands arose in the case of Block v. North Dakota *ex rel.* Board of Univ. and School Lands, 461 U.S. 273 (1983). In *Block,* the Supreme Court held that state claims to submerged land could only be brought under the Quiet Title Act, 28 U.S.C. § 2409a(f) (1982), and such claims were subject to laches and a 12-year statute of limitations. In 1986, Congress removed this obstacle with the creation of a statutory exception to this statute of limitations solely for Alaska lands claims. 28 U.S.C. § 2409a (1982).

"private."[127] One court has noted that "[t]he division of waters into navigable and nonnavigable is but a way of dividing them into public and private waters, — a classification which, in some form, every civilized nation has recognized. . . ."[128]

The public nature of navigable waters derives from two principles of early Roman law: *dominium* and *imperium. Dominium* referred to proprietary ownership, *imperium* to the authority of the Roman state to control, among other things, the use of certain lands and waters.[129] Roman law perceived the state as having the requisite *imperium* to exercise regulatory control over navigable waters, but not over those that were non-navigable. Navigable waters were considered common to all and the property (*dominium*) of none.[130] As Justice Frankfurter explained in his dissenting opinion in *United States v. California* concerning the ownership of California's tidelands: "To speak of 'dominion' carries precisely those overtones in the law which relate to property and not to political authority. Dominion, from the Roman concept of *dominium,* was concerned with property and ownership, as against *imperium,* which related to political sovereignty."[131]

Under this principle of Roman law, the government operates in two different capacities with respect to land use: as landowner exercising *dominium* and as land regulator exercising *imperium.*[132] Under Roman law, natural resources were considered to be common to all, as "res communes." As stated in the Institutes of Justinian: "By the law of nature then the following things are common to all men; air, running water, the sea, and consequently the shores of the sea."[133] The seas and their shores were considered to be held in common, and hence their use was regulated by the state, but they could not be subject to jus privatus or private ownership. Furthermore, this concept of res communes implied usufructuary rights in the public (jus publicum) to these resources.[134]

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127. *See* 1 R. CLARK, S. CIRIACY-WANTRUP, W. HUTCHINS, C. MARTZ, S. SATO, & A. STONE, WATERS AND WATER RIGHTS § 36.4(A) (1st ed. 1967) [hereinafter CLARK].

128. Lamprey v. Metcalf, 52 Minn. 181, 199, 53 N.W. 1139, 1143 (1893).

129. United States v. California, 332 U.S. 19, 43-44 (1947).

130. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 MICH. L. REV. 471, 475 (1970) (quoting R. LEE, THE ELEMENTS OF ROMAN LAW, 109-10 (4th ed. 1956)).

131. 332 U.S. at 43-44.

132. United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915); *see also* Kleppe v. New Mexico, 426 U.S. 529, 540 (1976) ("Congress exercises the powers both of a proprietor and of a legislature over the public domain.").

133. JUSTINIAN, INSTITUTES § 2.1.1 (J.T. Abdy & B. Walker trans. 1876).

134. *See* Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 393 N.E.2d 356 (1979). "The jus privatum/jus publicum distinction in regard to shoreland property was carried over to the new world, so that the company's ownership

The English common law has assimilated these Roman law concepts. Borrowing from the Roman notion of resources "common to all" or "res communes," Lord Bracton declared the shores of the sea to be "common to all" and inalienable.[135] In pre-feudal England, property law was uncomplicated. Ownership was complete and sustained by right of arms.[136] The English crown had exclusive rights to all the property it owned, subject to no public rights. Indeed, property rights emanated solely from the sovereign, and the common law required that all property be owned by someone in particular.[137] Rights in the public in general were unheard of in early times.

With a small provision in the Magna Carta, however, the notion developed that crown ownership was subject to certain public rights. Chapter 33 of the original Charter of 1215 required the removal of "fish-weirs" from the bottoms of large rivers.[138] Fish-weirs were fish traps permanently fixed to the river bottom at the mouth. They greatly reduced upstream fishing and interfered with navigation.[139] This unassuming provision in the Magna Carta banning fish-weirs spawned the more general principle that a grant of submerged lands by the king did not confer an exclusive right of fishery to the grantee. Rather, the grant was subject to a right to fish, held in common by the public.

Eventually, these public usufructuary rights to fish evolved into a doctrine that the sovereign held title to the lands beneath navigable waters in two capacities. The first of these capacities was as the governmental authority charged with the duty to protect public usufructuary rights in fishing and navigation (jus publicum). The second was as the proprietary owner of the submerged lands with all of the attendant rights of a private landowner (jus privatum), subject to the rights of the public.[140]

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was understood to consist of a jus privatum which could be 'parcelled out to corporations and individuals . . . as private property' and a jus publicum 'in trust for public use of all those who should become inhabitants of said territory. . . .' " *Id.* at 633-34, 393 N.E.2d at 359 (quoting Commonwealth v. City of Roxbury, 75 Mass. (9 Gray) 451, 483-84 (1857)).

135. 2 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 39-40 (S. Thorne trans. 1968). This assertion of their inalienability was recently called into question. *See* Rosen, *supra* note 95.

136. Rosen, *supra* note 95, at 564.

137. *Id.* at 565 n.20.

138. *See generally* J. HOLT, MAGNA CARTA (1965). For a thorough, scholarly, and insightful treatment of the development of the law of navigability, see MacGrady, *supra* note 95.

139. Rosen, *supra* note 95, at 565-66 n.25.

140. "[T]he *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the King's subjects; as the soil of an highway is, which though in point of property it may be a private man's freehold, yet it is charged

Following British common law, in the American Colonies a landowner's title was not exclusive where the water was navigable, but was subject to public usufructuary rights.[141] As Chief Justice Taney wrote in *Martin v. Waddell's Lessee,* "the previous habits and usages of the colonists have been respected, and they have been accustomed to enjoy in common, the benefits and advantages of the navigable waters for the same purposes, and to the same extent, that they have been used and enjoyed for centuries in England."[142] By contrast, lands beneath non-navigable waters were held without being subject to any rights in the public.[143]

By the end of the nineteenth century, the Supreme Court had characterized this distinction as giving rise to a "public trust" in lands beneath navigable waters. In *Illinois Central Railroad Co. v. Illinois,*[144] generally regarded as the seminal case in this area, the Supreme Court invalidated an act of the Illinois legislature transferring title to submerged lands beneath a navigable portion of Lake Michigan to a railroad company. The Court voided the grant on the grounds that the state was powerless to alienate the submerged lands to the detriment of the public interest.[145]

This so-called "Public Trust Doctrine" has been persuasively championed by Professor Sax, a legal scholar in the area of natural resource law.[146] Unfortunately, the doctrine has been misunderstood, partly owing to Sax's rather cavalier expansion of it. Although Professor Sax and others have sought to couch the Public Trust Doctrine in

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with a public interest of the people, which may not be prejudiced or damnified." M. HALE, DE JURE MARIS (1786), *quoted in* Shively v. Bowlby, 152 U.S. 1, 12 (1894); *see also* Wilson, *The Public Trust Doctrine in Massachusetts Land Law,* 11 B.C. ENVT'L. AFF. L. REV. 839, 844 (1984).

141. Whether state or federal law controls on the title to submerged lands beneath non-navigable bodies of water adjacent to a federal grant is open to question. *See infra* text accompanying notes 250-51.

142. Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 414 (1842).

143. *E.g.,* Arnold v. Mundy, 6 N.J.L. 1 (1821). In this case, the New Jersey court recognized that submerged lands in England were owned mostly by private persons, but nonetheless declared that under English common law "navigable waters in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water . . . are common to all the citizens, and . . . the property . . . is vested in the sovereign . . . not for his own use, but for the use of the citizen." *Id.* at 76-77; *see* Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367 (1842). For an extensive discussion of the possible misconceptions in the Public Trust Doctrine deriving from this case, see Rosen, *supra* note 95, at 571-72.

144. 146 U.S. 387 (1892).

145. *Id.* at 453. This assumption is open to question. *See generally* Rosen, *supra* note 95.

146. The seminal article on this topic is Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 MICH. L. REV. 471 (1970).

administrative law terms,[147] strictly as a matter of property law the doctrine applies only to submerged lands beneath navigable waters and a state's trust duties under the doctrine is a matter of state, not federal, common law.[148] Neither does the doctrine prohibit the alienation of all lands beneath navigable waters. Rather, it only requires that the sale be in the public interest, in whatever way a state may choose to define that term.[149] While there may be a general trust duty in the federal government toward its public lands, such a doctrine cannot be implied from the holding in *Illinois Central.*[150]

To sum up, in each of the three lines of cases that hinge upon a definition of navigability — determining admiralty jurisdiction, delimiting the reach of the commerce clause, and settling questions of title to submerged lands — the distinction between navigable and non-navigable waters reflects a basic distinction between public versus private rights. The public nature of navigable waters results in the following five consequences at the federal level:

1. Admiralty jurisdiction lies in the federal courts;
2. Title to submerged lands is in the state as sovereign;
3. The submerged lands are burdened with a public trust;
4. A navigational servitude attaches;
5. Congress may regulate under the commerce clause.

Each of these five legal consequences reflects the public nature of navigable waters. This public nature distinguishes them from waters that are non-navigable and hence "private" under the federal definitions.

The Public Trust Doctrine upheld in *Illinois Central* provides an important linchpin in linking two aspects of the "publicness" of the submerged lands beneath navigable waters: ownership by the state

147. "Sax reasoned that the public trust doctrine tests the validity of government action as a matter of administrative law, rather than as a question of *res communes* property doctrine." Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases about the Environment,* 64 CORNELL L. REV. 761, 811 (1979).

148. *See* CLARK, *supra* note 127, § 36.4(A).

149. For one state's treatment of alienation of submerged lands subject to a public trust, see State v. Superior Court of Lake County, 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696, *cert. denied sub nom.* Lyon v. California, 454 U.S. 865 (1981); City of Berkeley v. Superior Court of Alameda County, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied sub nom.* Santa Fe Improvement Co. v. City of Berkeley, 449 U.S. 840 (1980); City of Long Beach v. Mansell, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970); Amigos de Bolsa Chica, Inc. v. Signal Properties, Inc., 142 Cal. App. 3d, 190 Cal. Rptr. 798 (1983), *appeal dismissed,* — Cal. 3d —, 734 P.2d 987, 236 Cal. Rptr. 151 (1987); Orange County v. Heim, 30 Cal. App. 3d 694, 106 Cal. Rptr. 825 (1973). The Public Trust Doctrine as applied to submerged lands beneath navigable waters is to be distinguished from the federal doctrine involving a duty to protect and preserve the public lands. *See* Sierra Club v. Department of the Interior, 376 F. Supp. 90 (N.D. Cal. 1974).

150. For a provocative discussion of Sax's treatment of the Public Trust Doctrine as administrative rather than property law, see Coquillette, *supra* note 147.

and usufructuary rights in the public. The Court held that state ownership of submerged lands beneath navigable waters must be for the purpose of providing public use and benefit.[151] But state ownership is not the only means of protecting the usufructuary rights of the public. Although both state ownership and public usufructuary rights follow from a finding of navigability, they are analytically distinct. Unfortunately, in the current grab for land in Alaska, the distinction between these two concepts has been obscured. As we have seen, under the Equal Footing Doctrine, submerged lands beneath navigable waters are owned by the state in trust for the people. Interestingly, however, to protect public usufructuary rights, the state need not own the submerged lands, nor is it constrained to adopt the federal test for navigability, but may fashion its own.

VI. STATE NAVIGABILITY DOCTRINE

Under state law, as under federal law, navigability serves generally to divide those waters and submerged lands in which the public has state-enforced usufructuary rights and those which are subject to private ownership and control.[152] Thus, determination of navigability under state law separates "public" waters from "private" waters with attendant consequences for the submerged lands.[153]

A. The Four State Legal Contexts

With the exception of admiralty jurisdiction, which is entirely within the purview of federal law, the contexts in which navigability plays a key role at the federal law level have analogues in state law: to resolve questions of title to submerged lands and to delimit state legislative jurisdiction. In addition to those two contexts, at the state level navigability analysis is relevant in two other legal contexts: first, public usufructuary rights and the Public Trust Doctrine. It should be noted that although these four uses of navigablity under state law are interrelated, they are nevertheless conceptually distinct. Second, as under federal law, definitions of navigability at the state level may vary depending upon the particular context in which the analysis is employed.

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151. Illinois Cent. Ry. Co. v. Illinois, 146 U.S. 387, 436-37 (1892).

152. *See* Comment, *Water Recreation — Public Use of "Private" Waters,* 52 CALIF. L. REV. 171 (1964).

153. *See, e.g.,* Lamprey v. Metcalf, 52 Minn. 181, 53 N.W. 1139 (1893); *see also* Webb v. Board of Comm'rs of Neosho County, 124 Kan. 38, 40, 257 P. 966, 967 (1927). "The terms 'public waters' and 'navigable waters' are ordinarily synonymous. The term 'private waters' is ordinarily used to designate nonnavigable waters." *Id.* (quoting Piazzek v. Drainage Dist. No. 1 of Jefferson County, 119 Kan. 119, 237 P. 1059 (1925)); *see also* Diana Shooting Club v. Husting, 156 Wis. 261, 272, 145 N.W. 816, 820 (1914).

Prior to the twentieth century, there was a simple correlation in most states among navigability, title ownership, state regulatory jurisdiction, and public usufructuary rights. Typically, lands beneath navigable waters were owned by the state subject to state legislative regulation, and public usufructuary rights in navigable waters were protected by the state courts.[154] By contrast, if a water body was not navigable, title to the submerged lands was in the riparian owner; the state legislature had no authority to regulate, and the private owner was able to prevent the public from trespassing on his property. As public uses of state waters became more extensive, state courts' rulings regarding the legal significance of navigability created distinctions among the four contexts. Unfortunately, all too often the courts created more confusion than they resolved.[155]

1. *Title to Submerged Lands.* Prior to the *Brewer-Holt-Utah* line of cases, most states considered navigability for title purposes to be a question of state law.[156] Today, it is settled that federal law controls on the issue of the extent of submerged land beneath *navigable* waters that passes to the state upon statehood,[157] and state law controls on questions of subsequent ownership.[158] In most states, navigability divides those water bodies, the submerged lands of which are owned by the state, from those owned by the riparian.[159] For example, in Colorado, title to land under non-navigable lakes and streams is vested in the proprietors of the adjacent lands. These proprietors legally may exclude from such bodies of water members of the public who wish to use them for recreational purposes.[160]

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154. CLARK, *supra* note 127, § 36.4(A).

155. Johnson and Austin note in this regard, "There are probably few areas of law in which similar problems have arisen in the several states where the courts have split so widely, or based their decisions on such diverse theories. Furthermore, there is often little, if any reference by the courts of one state to the decisions on similar issues in other states." Johnson & Austin, *supra* note 99, at 34.

156. *See supra* notes 22 and 92 and accompanying text.

157. Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977); *see also* Barney v. Keokuk, 94 U.S. 324 (1876).

158. *See, e.g.,* State v. Adams, 251 Minn. 521, 89 N.W.2d 661 (1957), *cert. denied,* 358 U.S. 826 (1958). According to the Minnesota Supreme Court:

> [T]he conclusion is inescapable that what Minnesota owned in its sovereign capacity as a state upon admission to the Union and what was retained by the United States as part of the public domain *clearly involves a Federal question.* Whatever we may have assumed the law to be prior to United States v. Holt State Bank . . . it is clear that since that decision the waters over which Minnesota may assert ownership as an incident of statehood due to their navigability must be determined under Federal law.

Id. at 559, 89 N.W.2d at 686 (emphasis added).

159. *See* CLARK, *supra* note 127, § 42.2(B).

160. People v. Emmert, 198 Colo. 137, 143, 597 P.2d 1025, 1027 (1979).

2. *Legislative Jurisdiction.* The state definition of navigability has also been used to determine the scope of the legislative jurisdiction of a state to regulate public activity in state waters. Early in our country's history, many states regulated the construction of dams on rivers and streams for mills and irrigation.[161] Today, state regulation is broader and extends to the construction of hydroelectric power plants[162] and other structures,[163] and to recreational uses.[164] The use of navigability to delineate waters subject to state regulation is not, however, always consistent from state to state, or even within a given state. In some cases, statutes providing for regulation are limited to "navigable waters," while in others they are not. In Connecticut, for example, the Commissioner of Environmental Protection is authorized to regulate "[a]ny structure, fill, obstruction or encroachment placed in the tidal, coastal or navigable waters of the state . . .,"[165] whereas, he is authorized to regulate "[a]ll dams, dikes, reservoirs and other similar structures . . . which, by breaking away or otherwise, might endanger life or property . . ."[166] with no mention of a limitation to navigable waters.

Today, the power of the state, under the general police power, to regulate the uses of water and submerged lands is generally recognized to reach beyond "public" waters as traditionally defined.[167] Indeed, as one Wisconsin Conservation Commission official remarked, "If a perch can swim in it — even on his side like a flounder — it's navigable, and we'll take charge."[168] As a reflection of the breadth of state

161. *See* TRELEASE, WATER LAW 407 (2d ed. 1974) (discussing the mill dam statutes of New England). Note in this regard an opinion of the Massachusetts Supreme Judicial Court from the early 19th century:

> [T]he right to build a dam for the use of a mill was under several implied limitations. One was to protect private rights, by compelling him to make compensation to the owners of land above, for, and damages occasioned by, overflowing of their lands: another was to protect the rights of the public to the fishery . . . . Therefore every owner of a water-mill or dam holds it on the condition, or perhaps under the limitation, that a sufficient and reasonable passage-way shall be allowed for the fish.

Stoughton v. Baker, 4 Mass. 521, 528 (1808). *But cf.* Diana Shooting Club v. Husting, 156 Wis. 261, 270, 145 N.W. 816, 819 (1914) ("The extent of the right of a state to regulate and control navigable waters and the soil beneath them, and to declare what waters are navigable, has not been clearly defined.").

162. *See, e.g.,* Muench v. Public Serv. Comm'n, 261 Wis. 492, 53 N.W.2d 514 (1952).

163. *See, e.g.,* CONN. GEN. STAT. ANN. § 25-76 (West Supp. 1987).

164. *See, e.g.,* CAL. HARB. & NAV. CODE § 660 (West 1978) (time of day use restrictions, speed zones, special use areas, sanitation, and pollution control measures); *see also* Menzer v. Village of Elkhart Lake, 51 Wis. 2d 70, 186 N.W.2d 290 (1971) (ordinance prohibiting use of motor boats on Sundays in summer upheld).

165. CONN. GEN. STAT. ANN. § 22a-362 (West 1985).

166. *Id.* § 22a-401.

167. *See* TRELEASE, *supra* note 161, at 407.

168. *Id.*

police power, some states have simply expanded their definition of navigability to include virtually all waters of the state and thus allow for extensive regulatory control.[169]

3. *Public Usufructuary Rights.* In most states the navigability of a waterway gives the public certain rights to traditional uses of the water.[170] A Kentucky court opinion provides an example of this interrelation: "In and on a navigable stream, the title of riparian owners up to the ordinary high-water mark, and particularly of the bed and islands therein, is a qualified one, for it is subject to the dominant rights of the public in the stream."[171] This language is strikingly similar to that describing the federal navigational servitude in *Scranton v. Wheeler.*[172]

Historically, courts limited these rights to commercial uses such as fishing and navigation, which followed the pattern set at the federal level.[173] The finding that a public usufructuary right exists is not, however, necessarily constrained by the same definition of navigability as that used to determine title to submerged lands.[174] For example, in 1849, the Maine Supreme Court upheld the public's right to use a freshwater river for driving logs, notwithstanding that under Maine law, riparian owners on each side owned to the thread (center) of the stream.[175]

As public uses of water bodies expanded, judicial protection of public usufructuary rights broadened along with them. Beginning with cases from the late 1800's,[176] state courts increasingly included

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169. For example, note Wisconsin's statutory declaration of waters deemed to be navigable:

> (1) Lakes — All lakes wholly or partly within this state which are navigable in fact are declared to be navigable and public waters, and all persons have the same rights therein and thereto as they have in and to any other navigable or public waters.
>
> (2) Streams — . . . [A]ll streams, sloughs, bayous and marsh outlets, which are navigable in fact *for any purpose whatsoever,* are declared navigable to the extent that no dam, bridge or other obstruction shall be made in or over the same without the permission of the state.

WIS. STAT. ANN. § 30.10 (West Supp. 1987) (emphasis added).

170. *See* Johnson & Austin, *supra* note 99, at 34.

171. Natcher v. City of Bowling Green, 264 Ky. 584, 586, 95 S.W.2d 255, 257 (1936).

172. Scranton v. Wheeler, 179 U.S. 141, 163 (1900) ("whether the title to the submerged lands of navigable waters is in the State or in the riparian owners, it was acquired subject to the rights which the public have in the navigation of such waters").

173. CLARK, *supra* note 127, § 37.4(B).

174. *Id.* § 37.4(B) n.69.

175. Brown v. Chadbourne, 31 Me. 9 (1849).

176. *See* Johnson & Austin, *supra* note 99, at 36.

recreational activities among the public usufructuary rights that superseded the property rights of riparian owners. In *Attorney General v. Revere Copper Co.*,[177] for example, the Supreme Judicial Court of Massachusetts held that the owner of both sides of a "Great Pond" could not preclude most uses by the public, including fishing, bathing, boating, and cutting ice. Public recreational uses of navigable waters have been upheld in many other states.[178]

In some states the right to recreational use is extended to waters, the beds of which are under private ownership.[179] A provision in the Wyoming Constitution declares that waters within the boundaries of the state are the property of the state.[180] This provision has been interpreted by that state's courts as creating a public right of navigation in all waters, irrespective of the traditional navigability of the water body as a matter of law or the ownership of the bed.[181]

4. *State Public Trust Doctrine.* To say that the public has certain usufructuary rights in the navigable waters of a state implies a duty in the sovereign to protect those rights. State courts that enjoin activities

177. 152 Mass. 444, 25 N.E. 605 (1890).

178. *See* Southern Idaho Fish and Game Ass'n v. Picabo Livestock Co., 96 Idaho 360, 362, 528 P.2d 1295, 1297 (1974) (boating, swimming, hunting, and all recreational purposes); Lamprey v. Metcalf, 52 Minn. 181, 200, 53 N.W. 1139, 1143 (1893) (sailing, rowing, fishing, fowling, bathing, skating, and other purposes that cannot be enumerated or anticipated); Wilbour v. Gallagher, 77 Wash. 2d 306, 316, 462 P.2d 232, 239 (1969), *cert. denied,* 400 U.S. 878 (1970) (fishing, boating, swimming, water skiing, and other related recreational purposes); *see also* Kern River Public Access Comm. v. City of Bakersfield, 170 Cal. App. 3d 1205, 217 Cal Rptr. 125 (1985); Droste v. Kerner, 34 Ill. 2d 495, 217 N.E.2d 73 (1966), *cert. denied,* 385 U.S. 456 (1967); Bott v. Commission of Natural Resources, 415 Mich. 45, 327 N.W.2d 838 (1982); Treuting v. Bridge and Park Comm'n of Biloxi, 199 So. 2d 627 (Miss. 1967); Galt v. State Dept. of Fish, Wildlife and Parks, — Mont. —, 731 P.2d 912 (1987); Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 471 A.2d 355, *cert. denied,* 469 U.S. 821 (1984); Thomas v. Sanders, 65 Ohio App. 2d 5, 413 N.E.2d 1224 (1979); Oregon Shores Conservation Coalition v. State Fish and Wildlife Comm'n, 62 Or. App. 481, 662 P.2d 356 (1983); State v. Bleck, 114 Wis. 2d 454, 338 N.W.2d 492 (1983).

179. *See, e.g.,* Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914) (right to hunt). This case was based upon a previous ruling in Willow River Club v. Wade, 100 Wis. 86, 76 N.W. 273 (1898) (upholding the right to fish in "navigable waters," where the definition of navigable was expanded to include waters capable of floating logs at certain seasons of the year, and carrying rowboats, although the stream was not meandered and was so shallow that in some places boats had to be pushed over the bottom).

180. WYO. CONST. art. 8, § 1.

181. Day v. Armstrong, 362 P.2d 137 (Wyo. 1961). *Contra* Hartman v. Tresise, 36 Colo. 146, 84 P. 685 (1905), *followed in* People v. Emmert, 198 Colo. 137, 141, 597 P.2d 1025, 1027 (1979) ("[W]e do not feel constrained to follow the trend away from the coupling of bed title with the right of public recreational use of surface waters. . . .").

in derogation of these public rights often characterize their ruling as upholding a "public trust" in navigable waters and the submerged lands beneath them.[182] Historically, the trust protected the public rights of navigation and fishery, although several states expanded it considerably to include other public uses.[183] Notwithstanding the recent controversy in the literature regarding the existence and content of the Public Trust Doctrine,[184] early state court decisions often referred to it quite forthrightly. For example, in *Cook v. Dabney,*[185] after review of a claim that occupation of the submerged lands would interfere with access to navigable waters, the Oregon Supreme Court voided certain deeds from the state to alluvial deposits in the Willamette River. The court held that title to the lands under navigable waters vested in the state subject to the public's rights of navigation and fishing.

> To all intents and purposes the title of the state was *burdened with a trust,* so to speak, in favor of those two occupations. It would have no right or authority so to dispose of the subjacent lands in a manner calculated to prejudice or impede the exercise of those rights. It was never intended by any of the legislation concerning the alienation of state lands that the state should sell the beds of the navigable streams in a way to interfere with their navigability.[186]

Some states have extended the Public Trust Doctrine in favor of navigation, commerce, fishing, and bathing to apply both to beaches[187] and, more recently, to wetlands, in favor of conservation.[188] New

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182. *See* 2 NICHOLS, THE LAW OF EMINENT DOMAIN § 5.32 (rev. 3d ed. 1978) ("the state does not own the public navigable waters and the submerged bed beneath them in its proprietary capacity, but holds them as sovereign in trust for the people").

183. *See infra* notes 187-89 (public trust cases).

184. *See, e.g., The Public Trust Doctrine in Natural Resource Law and Management: A Symposium,* 14 U.C. DAVIS. L. REV. 181 (1980).

185. 70 Or. 529, 139 P. 721 (1914), *appeal dismissed,* 242 U.S. 660 (1916) (navigable waters are public waters and thus should inure to the benefit of the public).

186. *Id.* at 532, 139 P. at 722 (emphasis added).

187. *See, e.g.,* Whaler's Village Club v. California Coastal Comm'n, 173 Cal. App. 3d 240, 220 Cal. Rptr. 2 (1985), *cert. denied,* 476 U.S. 1111 (1986); City of Daytona Beach Shores v. State, 483 So. 2d 405 (Fla. 1985); Hawaii County v. Sotomura, 55 Haw. 176, 517 P.2d 57 (1973), *cert. denied,* 419 U.S. 872 (1974); Idaho Forest Indust., Inc. v. Hayden Lake Watershed Improvement Dist., 112 Idaho 512, 733 P.2d 733 (1987); Bell v. Town of Wells, 510 A.2d 509 (Me. 1986); Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 471 A.2d 355, *cert. denied,* 469 U.S. 821 (1984); Caminiti v. Boyle, 107 Wash. 2d 662, 732 P.2d 989 (1987), *cert. denied,* — U.S. —, 108 S. Ct. 703 (1988); W. H. Pugh Coal Co. v. State, 105 Wis. 2d 123, 312 N.W.2d 856 (1981).

188. Marks v. Whitney, 6 Cal. 3d 251, 259-60, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972); *see also* Muench v. Public Serv. Comm'n, 261 Wis. 492, 53 N.W.2d 514 (1952).

Jersey has recently held that the Public Trust Doctrine applies to access rights on certain privately owned beaches.[189]

Often state courts do not clearly specify the precise basis of the power of the state to regulate the uses of public waters and their submerged lands. It may be articulated as a function of state ownership of the submerged lands, as the jurisdiction of the state legislature, or as a public usufructuary right which the state has a duty to protect as a public trust.[190] Nevertheless, whatever the articulated basis, it is clear that at the state, as well as the federal level, navigable waters are considered "public" in a way non-navigable waters are not.[191]

B. The Evolution of State Definitions of Navigability

As public uses of water bodies changed, state definitions of navigability typically changed to accommodate them. To protect the expanded public usufructuary interests, state courts came to consider "navigable" as a matter of law those waters that supported the new public uses. As a consequence, many state definitions are now far more inclusive than the federal navigable-in-fact formulation of *The Daniel Ball.*

Like the federal courts, most state courts adopted the English common law in the period following the formation of the Union, including the ebb and flow test for navigability.[192] Pennsylvania was one of the first to replace the English test, long before the federal courts

189. Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 471 A.2d 355, *cert. denied,* 469 U.S. 821 (1984) (holding that a "quasi-public" beach owners association could not deny access to the general public). *See* Fellig, *Pursuit of the Public Trust: Beach Access in New Jersey from* Neptune v. Avon *to* Matthews v. BHIA, 10 COLUM. J. ENVTL. L. 35 (1985); Negris, *Access to New Jersey Beaches: The Public Trust Doctrine,* 20 COLUM. J.L. & SOC. PROBS. 437 (1986).

190. For an excellent compilation and analysis of the approaches of the various states to the question of the protection of public usufructuary rights, see generally H. ALTHAUS, PUBLIC TRUST RIGHTS (1978) (prepared for the Portland, Or., Regional Solicitor, U.S. Dept. of the Interior). In reference to the various state court rulings upholding the public use of waters, Johnson and Austin note that "[t]here are probably few areas of law in which similar problems have arisen in the several states where courts have split so widely, or based their decisions on such diverse theories." Johnson & Austin, *supra* note 99, at 34.

191. *See, e.g.,* National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 435, 658 P.2d 709, 719, 189 Cal. Rptr. 346, 356, *cert. denied,* 464 U.S. 977 (1983); United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n, 247 N.W.2d 457, 461-63 (N.D. 1970). *See also* Johnson & Austin, *supra* note 99, at 34; Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right,* 14 U.C. DAVIS. L. REV. 195 (1980).

192. Stevens, *supra* note 191, at 201. In fact, English courts probably included several non-tidal rivers as navigable. *Id.*

did.[193] Some states developed a more expansive definition of navigability based upon commercial uses of waterways. For example, a number of states with important timber industries developed a "saw log" test under which waterways that could float saw logs were considered navigable, thus upholding a public right to transport logs in navigable waterways.[194]

Lamprey v. Metcalf is generally recognized to be the first case to include the recreational use of waterways in a state definition of navigability.[195] The Minnesota Supreme Court found that the federal test, with its focus on "trade and travel on water," did not sufficiently protect new public recreational uses of that state's waters.[196] Accordingly, it simply expanded the state's definition to include recreational use. The specific language of the court is worthy of note:

> Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit.
>
> Many, if not the most, of the meandered lakes in this state, are not adapted to, and probably will never be used to any great extent for, commercial navigation; but they are used — and as the population increases, and towns and cities are built up in their vicinity, will be still more used — by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated. To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated.[197]

As in Minnesota, the definition of navigability adopted by a state in many instances determines the usufructuary rights to be protected. For example, Idaho combines the commercial and recreational tests into one rule: "[a]ny stream which, in its natural state, will float logs

193. Carson v. Blazer, 2 Binn. 474 (Pa. 1810) (riparian owner of land on the Susquehanna River had no exclusive right of fishery in navigable waters opposite his land).

194. *E.g.,* Collins v. Gerhardt, 237 Mich. 38, 211 N.W. 115 (1926); Guilliams v. Beaver Lake Club, 90 Or. 13, 175 P. 437 (1918); *see also* CLARK, *supra* note 127, § 42.2B and cases listed at n.34.

195. Lamprey v. Metcalf, 52 Minn. 181, 53 N.W. 1139 (1893).

196. *Id.* at 199, 53 N.W. at 1143 (referring to The Daniel Ball test); *see supra* text accompanying notes 52-54.

197. 52 Minn. at 199-200, 53 N.W. at 1143; *see also* Guilliams v. Beaver Lake Club, 90 Or. at 27, 175 P. at 441 ("The vessel carrying a load of passengers to a picnic is in law just as much engaged in commerce as the one carrying grain or other merchandise.").

or any other commercial or floatable commodity, or is capable of being navigated by oar or motor propelled small craft, for pleasure or commercial purposes, is navigable."[198]

The definitions of navigability adopted by the various states are not always consistent from one legal context to the next. The definition applied in title cases may differ from that used to delimit the area of protected public usufructuary rights, so that waters may be navigable for public usufructuary purposes even though the beds are privately owned. For example, in Wisconsin, the state supreme court protected the public's right to hunt ducks on a shallow river. The Wisconsin court held that, although the bed was privately owned, the river was navigable nonetheless because it was used by the public.[199]

Whatever definition of navigability a state may adopt, the fundamental principle underlying the state court decisions is that navigability reflects the public nature of the water. That public nature, as a legal concept, in turn implies sovereign authority to control use by the public, the existence of public usufructuary rights, and the existence of a duty to protect those rights.[200]

C. Protection of Submerged Lands: Ownership, Regulatory Control, and Public Rights

A review of the evolution of the term navigability within the various states, as well as in the federal courts, demonstrates that the question of ownership of submerged lands has become less important as the basis for both public usufructuary rights and sovereign regulatory power. Prior to 1926, states typically "lumped together" the issues of title to submerged lands and the right to public use.[201] Early state courts were likely to find that where the submerged lands were state-owned — that is, where the waters above were navigable for title purposes — the public had a right to use the waters and the submerged lands for certain purposes.

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198. Southern Idaho Fish & Game Ass'n v. Picabo Livestock, Inc., 96 Idaho 360, 362, 528 P.2d 1295, 1297 (1974).

199. Diana Shooting Club v. Husting, 156 Wis. 261, 271-72, 145 N.W. 816, 820 (1914) (Rock River held navigable: used for rowboats, depth varied seasonally from eight inches to two feet, and occasionally dry); *see also* Bohn v. Albertson, 107 Cal. App. 2d 738, 238 P.2d 128 (1951) (owner of the bed beneath a water body made navigable by a break in a levee could reclaim flooded land but, until such time, could not prevent the public from fishing or boating).

200. *See, e.g.*, Welder v. State, 196 S.W. 868 (Tex. Civ. App. 1917) (examination of navigability for title purposes). "Behind all definitions of navigable waters lies the idea of public utility. Waters, which in their natural state are useful to the public for a considerable portion of the year are navigable." *Id.* at 873. *See supra* text accompanying notes 154-55 (discussing state navigability analysis in the 19th century).

201. Johnson & Austin, *supra* note 99, at 36.

Conversely, if the beds were privately owned, the public had no such rights.[202] The Minnesota decision of *Lamprey v. Metcalf*[203] illustrates this conflation of the two issues of title and public usufructuary rights. The court perceived its task as finding a basis for protecting the public's ability to use the lake for recreational purposes.[204] Previous Minnesota decisions had indicated that public rights only followed state ownership, which in turn followed navigability.[205] These previous decisions, however, only considered public commercial activities and did not protect lakes used exclusively for recreational purposes.[206]

The Minnesota court solved its dilemma by altering the definition of navigability to include public pleasure boating. South Dakota[207] and North Dakota[208] followed a similar pattern by adopting a "pleasure boat" test.[209] In some cases, courts candidly reveal that they have manipulated the definition of navigability so as to include other public purposes that they seek to protect.[210]

These early cases reflect the misconception that a state must own the submerged land in order to regulate public activity on the water body above it. The view that ownership is required to protect the public interest collapses two aspects of state sovereignty: proprietary and legislative, or *dominium* and *imperium* to use the Roman concepts.[211] In several recent cases, the United States Supreme Court has turned

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202. *Id.*

203. 52 Minn. 181, 53 N.W. 1139 (1893).

204. The importance of the question, both to the public and to riparian owners, is apparent, when we consider that there are many thousands of such lakes in this state, which, although most of them may not be adapted for navigation, in its ordinary, commercial sense, have been, from the earliest settlement of the state, resorted to and used by the people as places of public resort, for purposes of boating, fishing, fowling, cutting ice, etc., and the further fact that observation teaches that the waters of many of these lakes are, from natural causes, slowly but imperceptibly receding, so that a part of what was their bed, when surveyed, has, or in time will, become dry land. The right of the public to use these lakes for the purposes referred to, as well as the right of riparian owners to these relicted lands, and . . . their right of access to the water . . . [is] the question [here].

Id. at 191, 53 N.W. at 1140.

205. *Id.* at 198, 53 N.W. at 1143.

206. *Id.*

207. Hillebrand v. Knapp, 65 S.D. 414, 274 N.W. 821 (1937).

208. Roberts v. Taylor, 47 N.D. 146, 181 N.W. 622 (1921).

209. *See* Johnson & Austin, *supra* note 99, at 37.

210. *See, e.g., Hillebrand*, 65 S.D. at 417, 274 N.W. at 822 ("In the early history of the common law the rights of the public in navigable waters were confined to navigation. But the term 'navigable' has been extended and includes waters that are not navigable in the ordinary sense. . . . [W]hether or not waters are navigable depends upon the natural availability of waters for public purposes taking into consideration the natural character and surroundings of a lake or stream.").

211. *See supra* text accompanying notes 129-34.

away from state ownership as the basis for a state's power to regulate its natural resources. In *Hughes v. Oklahoma,*[212] which involved state control of interstate commerce in wildlife, the Court reversed its previous holding in *Geer v. Connecticut*[213] that a state's power to regulate in the area of natural resources was based on state ownership. In the recent case of *Sporhase v. Nebraska* ex rel. *Douglas,*[214] the Court struck down a ban by the State of Nebraska on the export of groundwater as an impermissible burden on interstate commerce. Citing *Hughes v. Oklahoma* and other wildlife cases, the Court once again rejected the state ownership theory. The Court wrote that, "[t]he public ownership theory [is] 'but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.' "[215]

In the area of public usufructuary rights to water, most state courts today also recognize that the public interest in waters and submerged lands is not limited to those areas that are state owned.[216] Since, however, navigability is still considered the legal divider between "public" and "private" waters, state courts have redefined the term to encompass this expanding definition of the public interest in aqueous areas.[217] In addition, following the modern trend in both state and federal courts away from a requirement of state ownership as basis for state protection of natural resources, courts today typically engage in a less constrained, more open balancing of the public and private interests involved.[218] Both these trends, more expansive state definitions of navigability and a de-emphasis on title as the legal basis upon which a state may protect submerged lands, indicate that those engaged in contests over title to these areas may misconstrue the underlying and more significant question of who is to *control* the uses to which these areas may be put.

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212. 441 U.S. 322 (1979).

213. 161 U.S. 519 (1896).

214. 458 U.S. 941 (1982).

215. *Id.* at 951 (citations omitted).

216. *See* Johnson & Austin, *supra* note 99, at 37-44 for a survey of western states that uphold public usufructuary rights in waters where the beds are privately owned.

217. *See supra* text accompanying notes 202-10.

218. *See, e.g.,* Organized Village of Kake v. Egan, 174 F. Supp. 500, 504 (D. Alaska 1959) ("The state regulates and controls wildlife resources and fisheries. . . . This was originally based on the concept of ownership. . . . This theory has to some extent been repudiated and the modern concept contemplates that state control is founded upon the power to regulate in the state the protection of these resources for all the people."). *See infra* text accompanying notes 226-27 (discussing de-emphasis on title as a basis for regulation).

VII. CONTROL OF THE USE OF ALASKA'S SUBMERGED LANDS

A. Alaska's Expansive Definition of Navigability

As has been seen, a state is free to adopt its own definition of navigability to provide a legal basis for regulatory jurisdiction,[219] subject, of course, to federal regulation and supremacy. In addition, a finding of navigability typically results in the creation of certain usufructuary rights in the public under state common law.[220] These rights might well be recognized by the Alaska state courts, which would provide another avenue for protection of Alaska's waters and submerged lands.

Regarding control of use and access to public waters, the State of Alaska has, by constitutional and statutory provisions, established its own definition of navigable waters. This definition is far more inclusive than the federal definition set forth in *The Daniel Ball.* Specifically, section 38.05.965(12) of the Alaska Statutes defines navigable waters in the following way:

> any water of the state forming a river, stream, lake, pond, slough, creek, bay, sound, estuary, inlet, strait, passage, canal, sea or ocean, or any other body of water or waterway within the territorial limits of the state or subject to its jurisdiction, that is navigable in fact for any useful public purpose, including . . . commercial navigation, floating of logs, landing and takeoff of aircraft, and public boating, trapping, hunting waterfowl and aquatic animals, fishing, or other public recreational purposes.[221]

Article VIII, section 14, of the Alaska Constitution provides for a public right of access to all "navigable" or "public" waters of the state:

> Free access to the navigable or public waters of the State, *as defined by the legislature,* shall not be denied any citizen of the United States or resident of the State, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes.[222]

In addition, Article VIII, section 3, of the Alaska Constitution provides for the common use of all natural resources: "Wherever occurring in their natural state, fish, wildlife, *and waters* are reserved to the people for their common use."[223] Finally, section 46.15.030 of the

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219. Donnelly v. United States, 228 U.S. 243, 262 (1913) ("[W]hat shall be deemed a navigable water within the meaning of the local rules of property is for the determination of the several States.").

220. *See supra* notes 170-71 and accompanying text. In his announcement of the change in chargeability policy, Secretary Watt noted that "State ownership, of course, ensures public control and public access." United States Dep't of the Interior, Office of the Sec'y, Press Release (Aug. 22, 1983) [hereinafter Announcement of Sec'y Watt].

221. ALASKA STAT. § 38.05.965(12) (1984).

222. ALASKA CONST. art. VIII, § 14 (emphasis added).

223. *Id.* § 3.

Alaska Statutes reserves all the waters of the state for the common use of the public: "Wherever occurring in a natural state, the water is reserved to the people for common use and is subject to appropriation and beneficial use and to reservation of instream flows and levels of water. . . ."[224]

Based upon these constitutional and statutory provisions, the State of Alaska has the power to ensure access to and regulate the use of its waters, independent of both the federal definition of navigability and ownership of the submerged lands. This regulatory jurisdiction for the public benefit attaches even where the submerged lands are privately owned or are owned by the federal government,[225] unless a federal statute controls their use.

B. The De-Emphasis on Title as the Basis for Protection of the Public Interest in Alaska's Submerged Lands

As the policy issues surrounding public and private waters have been more clearly articulated, the traditional grounding of public and private rights solely in proprietary ownership has become less critical. In the language of certain recent state court decisions, the underlying public interest in the water is the pivotal issue, rather than traditional questions of navigability or title. For example, in *People v. Mack*,[226] a case involving public recreational rights to waters over privately held land, a California appellate court stated that "it is extremely important that the public not be denied use of recreational water by applying the narrow and outmoded interpretation of 'navigability.' "[227]

Even courts that retain an emphasis on the historical connection between title and navigability have expanded the definition of navigability to provide greater protection of public rights and hold that title to submerged lands beneath navigable waters is held subject to those public rights. In a case from 1936, the Oregon Supreme Court expressed this more flexible approach to the nature of public usufructuary rights in certain waters, independent of title and navigability in the traditional sense:

> While we have held that Blue Lake is not a navigable body of water in the sense that title to the bed thereof would pass to the state upon admission to the Union, it is *navigable in a qualified or limited sense*. . . .

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224. ALASKA STAT. § 46.16.030 (1982).

225. Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664, 677 (D. Alaska 1977) ("the State owns or controls the land beneath navigable waters, and the people of the State have the right to use the water itself on non-navigable rivers and streams").

226. 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971); *see also* Bohn v. Albertson, 107 Cal. App. 2d 738, 238 P.2d 128 (1951). *See supra* note 199.

227. People v. Mack, 19 Cal. App. 3d at 1045, 97 Cal. Rptr. at 451.

> . . .
>
> There are hundreds of similar beautiful, small inland lakes in this state well adapted for recreational purposes, but which will never be used as highways of commerce in the ordinary acception of such terms. . . . *Regardless of the ownership of the bed, the public has the paramount right to the use of the waters* of the lake for the purposes of transportation and commerce.[228]

These recent developments show that many state courts have reassessed the historical reliance upon title as the basis for state regulatory control over waters and the submerged lands.[229] Concommitantly, courts are also reconsidering the grounding of public usufructuary rights in the navigability of the water.[230]

Whether the state courts in Alaska will follow this trend away from a focus on navigability to determine the appropriate use of water bodies and their submerged lands is, of course, conjectural. But even if Alaska courts were to adhere to the traditional concept of navigability as determinative of state regulatory jurisdiction and public usufructuary rights, Alaska has established a very broad definition of navigability in its constitution, which would include most of the waters of the state that might be used by the public. Alaska's expansive definition of navigability may provide a basis for state regulation of the valuable natural resources beneath the state's waters without risking a "taking." In this situation, Alaska courts might hold that private owners acquired the submerged lands subject to the usufructuary rights of the public.

This analysis of state definitions of navigability reveals two principles: one, a state may define the term navigability differently than the federal courts; and, two, a determination of navigability extends governmental authority over, as well as public usufructuary rights in, the

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228. Luscher v. Reynolds, 153 Or. 625, 634-36, 56 P.2d 1158, 1162 (1936) (emphasis added).

229. *See supra* text accompanying notes 201-18. The reassessment of regulatory jurisdiction is reflected at the federal level as well. *See, e.g.,* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (Corps of Engineers' regulations could extend Corps' regulatory authority over wetlands adjacent to navigable waters); Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 954 (1982) (groundwater in a state is an article of commerce and subject to congressional regulation); Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979) ("Congress has extensive authority over this Nation's waters under the Commerce Clause."); *see also* Alaska v. United States, 563 F. Supp. 1223, 1226 (D. Alaska 1983), *aff'd,* 754 F.2d 851 (9th Cir.), *cert. denied,* 474 U.S. 968 (1985) ("A finding of navigability is no longer even necessary in order for Congress to be able to regulate commerce on a waterbody.") (citing *Kaiser Aetna,* 444 U.S. at 173-74).

230. *See supra* text accompanying notes 201-18. Colorado is a notable exception in its refusal to follow other states in upholding public boating rights over privately held lands beneath non-navigable waters. *See* People v. Emmert, 198 Colo. 137, 597 P.2d 1025 (1979).

submerged lands independent of their ownership. These two principles place any contest over title to Alaska's submerged lands in a different light. If the motivation of the State of Alaska is simply to *own* more real estate, for whatever reason, then indeed the contests over navigability are appropriate to determine ownership of the submerged lands according to the Equal Footing Doctrine. If, however, the primary motivation of the state is to protect Alaska's lake and stream beds from undesirable economic exploitation and degradation, other avenues of land use control are available to protect Alaska waters.

In Alaska, as elsewhere, legitimate private ownership, with its attendant rights to enjoyment and exploitation, must exist side by side with public usufructuary rights in valuable natural resources. Rather than engaging in zero-sum contests for ownership, at least in the case of Alaska's submerged lands, perhaps a better balance of those interests can be achieved by applying Alaska's expansive definition of "navigable waters."

VIII. CHARGEABILITY

A. The Disposition of Lands Beneath Non-Navigable Water Bodies

Prior to the recent change in policy by the Department of the Interior, lands beneath non-navigable water bodies in Alaska were treated as fastlands. They were included as part of the grant from the United States, and their acreage was deducted from the selector's remaining entitlement.[231] In 1983, under then Secretary James Watt, the Department of the Interior changed that policy so that much of the land beneath non-navigable bodies of water is no longer charged against the selector's entitlement.[232]

1. *The New Interior Policy.* Under the new Department of the Interior policy, Alaska water bodies are treated according to the guidelines set forth in the Manual of Survey Instructions.[233] Essentially unchanged since the mid-nineteenth century, the Manual is issued by the BLM as a set of instructions for and guidelines to surveys conducted by its personnel. The Department did not, however, apply the Manual to surveys in Alaska until 1983.

231. *See* 38 Fed. Reg. 14,218 (1973) (codified at 43 U.S.C. § 2650.5-1(b) (amended 1983)).

232. 48 Fed. Reg. 54,483 (1983) (amending 43 C.F.R. § 2650.5-1(b)). The "interim waiver of regulations" promulgating the new policy was published on Dec. 5, 1983.

233. Alaska Native Selections, 43 C.F.R. 2650.5-1(2) (1986); MANUAL OF SURVEY INSTRUCTIONS, *supra* note 38, §§ 3-120, 3-121.

The Manual specifies that lakes in excess of fifty acres and streams greater than three chains in width are to be "meandered" and segregated from the area surveyed.[234] Meandering is the process of outlining large water bodies (both navigable and non-navigable) on the area surveyed so that the wet acreage included within the meander line can be segregated from the area surveyed for the purpose of calculating the acreage conveyed. Under the new policy, the meandering criteria in the Manual distinguish those areas that are "wet" and not charged, from those that are "dry" (or contain water bodies under fifty acres or three chains in width) which *are* charged.[235]

It is also part of the new policy that the grantee of land that contains submerged land beneath meanderable, but non-navigable water receives title to those lands, notwithstanding their segregation from the area surveyed and nonchargeability to the grantee.[236] That is, all the submerged land beneath meanderable water bodies — whether navigable or not — is to be segregated from the area surveyed, and following conveyance of the fastlands, the area under those large bodies of water passes to the grantee without charge.

CHART 1

WATER BODY

GRANTEE	Navigable	Non-Navigable Meanderable	Non-Navigable Non-Meanderable
State	1	2	3
Native	4	5	6

1. State takes under the Equal Footing Doctrine	Not Charged
2. State takes under new chargeability policy	Not Charged
3. State takes as part of the grant	Charged
4. State takes under the Equal Footing Doctrine	Not Charged
5. Native takes under new chargeability policy	Not Charged
6. Native takes as part of grant	Charged

234. 43 C.F.R. 2650.5-1 (1986); MANUAL OF SURVEY INSTRUCTIONS, *supra* note 38, § 3-115 ("the traverse of the margin of a permanent natural body of water is termed a meander line"). Segregation has two consequences. First, the acreage is not counted as fastland for which the grantee will be charged. Second, the land is, in fact, *not* included in the grant. Title to the segregated submerged lands then becomes a matter to be determined under applicable law.

235. MANUAL OF SURVEY INSTRUCTIONS, *supra* note 38, §§ 3-115, 3-120, 3-121.

236. *See* H.R. 2629, 100th Cong., 1st Sess., 133 CONG. REC. 6940-44 (1987) (describing the chargeability policy of the Interior Department).

2. *The Riparian Rights Question.* Under the new policy (in conjunction with the operation of the Equal Footing Doctrine), the United States would never retain an interest in land beneath meanderable water. It is beyond dispute that the Equal Footing Doctrine determines the disposition of title to land beneath navigable water. As to the transfer of title to segregated land beneath non-navigable water from the United States to a federal grantee, there is apparent agreement among the state, the Native community, and the Department of the Interior that the grantee receives the submerged land by operation of law. There is, however, disagreement over what law governs the transfer of title to these submerged lands. Several theories have been proposed. Many state officials, leaders in the Native community, and administrators in the Department of the Interior assert that Alaska's state riparian rights law applies.[237] Under that doctrine of state common law, the grantee of a parcel bordering on a non-navigable body of water also receives title to a portion of the adjacent submerged lands.[238] Others believe that federal statutory law applies, with the same result as under state riparian rights law.[239] In apparent acknowledgement that the law is ambiguous on this point, the legislation pending before Congress to ratify the new policy provides that the United States simply quitclaim its interest in any submerged land beneath meanderable, non-navigable bodies of water in Alaska.[240]

Whatever the legal theory, the effect of the new policy is that the United States waives all ownership rights in the submerged lands beneath meanderable bodies of water in Alaska. Thus, the BLM need not determine the navigability of these water bodies prior to conveyance of the submerged land by the federal government.[241] Rather, this waiver leaves the state and the Natives to settle between themselves

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237. *See infra* note 252 and accompanying text.

238. *See, e.g.,* Riparian Rights in State Selections under the Alaska Statehood Act (Memorandum from the Attorney General of the State of Alaska to the Commissioner of the Dep't of Natural Resources (Aug. 6, 1982)) [hereinafter Memorandum from the Alaska Att'y Gen'l].

239. MANUAL OF SURVEY INSTRUCTIONS, *supra* note 38, § 7-51 ("The Government's conveyance of title to a fractional subdivision fronting upon a nonnavigable body of water, unless specific reservations are indicated in the patent, carries ownership to the middle of the bed *in front of* the basic holding."). For an example of application of federal law in granting riparian title to submerged lands formerly under title of the United States, see Oklahoma v. Texas, 261 U.S. 345 (1923). *See also* 43 U.S.C. § 931 (1982) ("in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both").

240. H.R. 2629, 100th Cong., 1st Sess., 133 CONG. REC. 6940-44 (1987) (passed by the House of Representatives on August 3, 1987); S. 1493, 100th Cong., 1st Sess. (1987) (pending before the Senate).

241. H.R. 2629, 100th Cong., 1st Sess. § 901(a)(3), 122 CONG. REC. 6940 (1987) ("the Secretary is not required to determine the navigability of a lake, river, or stream

any remaining questions of navigability as pertains to ownership of submerged lands. If the state should consider a certain water body to be navigable, it may assert its claim in any action to challenge the title of a Native corporation or other federal grantees.

In addition, the new policy would have retroactive effect by requiring recalculation of the acreage of all previous state and Native conveyances.[242] The remaining entitlements must also be recalculated to reflect the new chargeability policy. Estimates of the resulting increases, combining both state and Native allowances, vary from 783,000 acres, estimated by the Alaska Department of Natural Resources, to 1,895,000, estimated by the Bureau of Land Management.[243]

3. *Issues Raised by the New Policy.* The Department of the Interior has offered two main explanations for the change in the chargeability policy. First, use of the Manual of Survey Instructions in Alaska would bring BLM's treatment of submerged lands in that state in conformance with the historical practice in the lower forty-eight states.[244] Second, treating all meanderable water bodies similarly would greatly reduce federal involvement in litigation over their navigability.[245]

Many environmentalists, however, oppose the new Interior policy.[246] These groups argue that permitting the grantee to receive acreage beneath large, meanderable, but non-navigable bodies of water in Alaska without a deduction of the acreage from remaining selection entitlements amounts to a "give-away" of a large area of valuable public land.[247] Of particular concern to the environmentalists are those Native villages adjacent to or inside "conservation system units" ("CSUs"), which are parks and refuges established by ANILCA.

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which because of its size or width is required to be meandered. . . ."). It is not specified in the legislation whether the Secretary must determine the navigability of non-meanderable bodies of water. While normally this omission would not pose a problem, under the liberal navigability standard of the Gulkana River decision, Alaska v. United States, 622 F. Supp. 455 (D. Alaska 1987), some non-meanderable bodies of water may nonetheless be deemed navigable for title purposes. *See supra* note 48.

242. Letter to Senate Committee on Energy and Natural Resources, *supra* note 46, at 5.

243. Memorandum from the State Director, United States Department of the Interior, to the Director, Alaska Department of Natural Resources, United States Department of the Interior (May 1, 1987). *See supra* note 48.

244. *Id.* at 6.

245. *Id.*

246. Both the Wilderness Society and the Sierra Club have filed suit against the Interior Department. The Wilderness Soc'y v. Carruthers, Civ. No. 84-1823 (D.D.C. filed Jan. 30, 1986). *Carruthers* is currently on appeal to the Court of Appeals for the District of Columbia Circuit on the issue of standing.

247. *Id.* at 11.

Under ANCSA, such "underselected" villages may select lands within CSU's to reach their full entitlement.[248]

The change in the Department of Interior's chargeability policy presents three separate questions regarding the disposition of submerged lands beneath meanderable, non-navigable bodies of water in Alaska. First, should the Manual of Survey Instructions be applied in Alaska, so that meanderable bodies of water, whether navigable or not, are segregated out of the area to be conveyed? Second, if these submerged lands are segregated out, should title pass nonetheless to the grantee of the adjacent fastlands? Third, if title does pass, should the grantee be charged for the acreage?[249]

Careful consideration of these three questions requires examination of a more fundamental issue: whether state or federal law applies to settle questions of the disposition of submerged lands included in a federal land grant. More specifically, what is the relationship between state and federal law regarding the lands transferred from the United States to a grantee? Is the United States a mere landowner in a given state, whose property transfers are governed by state law, or is there a federal interest sufficient to warrant the application of federal law? Can the operation of state law divest the federal government of its property?

In a sense, the choice of law question hinges on the way one conceives ownership of these submerged lands. If title to the submerged area is simply a riparian right incidental to the ownership of adjacent fastlands, like use of the water itself, then it would seem appropriate that state law should determine rights incidental to property within that state.[250] By contrast, if title to the submerged lands is seen as a question of the extent of a grant of federal property to a grantee, then federal law is more appropriate to determine this issue because it involves significant federal interests.[251]

It is the view of this author that the traditional rule which recognizes the applicability of state law — that is, that ownership of the submerged lands beneath non-navigable bodies of water is a right incidental to the ownership of the adjacent fastlands under state law —

248. ANCSA, 43 U.S.C. § 1621(e) (1982); *see also* ANILCA, Pub. L. No. 94-487, § 1302(a), 94 Stat. 2371, 2474 (codified as amended at 16 U.S.C. § 3192(a) (1982)) ("[T]he Secretary is authorized, consistent with other applicable law in order to carry out the purposes of this Act, to acquire by purchase, donation, exchange, or otherwise any lands within the boundaries of any conservation system unit . . . ."). *See supra* note 49 and accompanying text.

249. The House Bill and pending Senate Bill answer the first two questions in the affirmative and the third in the negative. *See supra* note 7.

250. *See* Meanderable Waterbody Analysis, Alaska Dep't of Natural Resources, Division of Land & Water Management (Sept. 20, 1984).

251. *See* Announcement by Sec'y Watt, *supra* note 220.

may be inappropriate in the unique Alaska context. This traditional rule overlooks the unique legislative context, specifically the Statehood Act, ANCSA, and ANILCA, in which the federal government has sought to dispose of its interest in Alaska submerged lands. In contrast, earlier dispositions of federal lands in the lower forty-eight states occurred when the national economy was largely agrarian and submerged lands were considered worthless. Such is not the case in modern-day Alaska.

B. Submerged Lands and Federalism: The Question of Applicable Law

Whether one supports the new chargeability policy depends, in part, upon one's view of the applicable law. The State of Alaska and accordingly many in the Native community take the position that state law controls on the question of the riparian rights of a federal grantee.[252] Under Alaska common law, the riparian owner of land bordering a non-navigable body of water also owns part of the adjoining submerged land, usually to the center line of a stream or in a wedge to the center of a lake.[253] Applying this state law, the federal grantee obtains title to the submerged lands not by selection and grant from the federal government, but by virtue of the operation of a state legal doctrine. Since ownership of the submerged lands is by operation of law, it follows that the grantee should not be charged for the acreage.

The acquisition of these "additional" submerged lands by operation of state law depends upon the validity, indeed the supremacy, of state riparian rights vis-a-vis the federal government. One might look instead, however, to the language of the federal grant to determine the extent of submerged land intended to pass to the grantee. Under settled federal law, sovereign grants are generally to be strictly construed against the grantee.[254] Even without invoking such a rule of construction, according to the express language of the grant, the adjacent submerged lands would not pass to the grantee, as these lands would have been segregated from the area granted as required by the Manual of Survey Instructions.[255]

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252. *See, e.g.*, Memorandum from the Alaska Att'y Gen'l, *supra* note 238.

253. ALASKA STAT. § 09.25.040(4) (1983) (codifying the common law midpoint rule).

254. United States v. Grand River Dam Auth., 363 U.S. 229, 235 (1960) ("all federal [lands] grants are [to be] construed in favor of the Government lest they be enlarged to include more than what was expressly included"); *see also* Shively v. Bowlby, 152 U.S. 1, 10 (1894). Grants to Indian tribes are an exception to this general rule. Choctaw Nation v. Oklahoma, 397 U.S. 620, 634 (1970).

255. MANUAL OF SURVEY INSTRUCTIONS, *supra* note 38.

The position of the Department of the Interior is that federal law applies to determine the riparian ownership rights of a federal grantee, but that in this instance, the riparian grantee nonetheless receives title to the adjacent submerged lands. According to the Department, since "1796 it has been the law" that a federal grantee takes to the center of a stream or lake.[256] For this proposition, the Department refers to a 1796 federal law that originally related to the disposition of rivers in the Northwest Territory,[257] as well as the case of *Hardin v. Jordan.*[258] According to the Department, it "has applied these principles consistently to land conveyances in both the lower forty-eight states and Alaska, except as to selections by the State of Alaska under the Alaska Statehood Act and to selections by Native Corporations under the Alaska Native Claims Settlement Act (ANCSA)."[259]

Although they come to the same conclusion — that the grantee receives but is not charged for the submerged lands beneath adjacent non-navigable water bodies by operation of law — the state and the Natives on the one hand, and the Department of the Interior on the other, evidently take quite different views as to the question of applicable law. However, even if it were possible, the mere resolution of the choice of law question will not settle the issue of chargeability. There are several additional points regarding the relationship between the federal government, the state, and the federal grantee on the issue of title to submerged lands in Alaska beneath non-navigable waters that one must also consider. Four different viewpoints are suggested here. First, one may view federal and state law as operating *sequentially,* so that even if federal law controls on the question of the transfer of property from the United States to a federal grantee, state law may be seen to determine relative rights between property owners in that state once the transfer has taken place.[260] Second, the issue can be seen as one of *construction,* to ascertain the intent of the grantor. If that intent is not clear, then courts often look to state law for guidance with regard both to the extent of the property transfer and to incidental

256. Letter to Senate Committee on Energy and Natural Resources, *supra* note 46, at 4.

257. Act of May 18, 1796, ch. 55, 1 Stat. 464 (1800) (codified as amended at 43 U.S.C. § 931 (1982)).

258. 140 U.S. 371 (1891).

259. Letter to Senate Committee on Energy and Natural Resources, *supra* note 46, at 4. It should be noted that since the rule of Hardin v. Jordan, 140 U.S. 371 (1891) is usually interpreted to mean that state law governs in such instances, it would appear inconsistent for the Department to cite both *Hardin* and the Act of May 18, 1796, to support its position, at least with regard to the choice of law issue. *See infra* note 267 and accompanying text.

260. Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 370-71 (1977).

rights associated with the granted property.[261] Third, the Statehood Act and ANCSA both can be seen as being in the nature of a *contract* for the transfer of federal land. Thus, change in the method of calculating the acreage transferred would be an alteration affecting the contractual terms. Fourth, it is appropriate to look to the legislative history of the Alaska Statehood Act and ANCSA to determine the *intent of Congress* regarding the transfer of federal land adjacent to non-navigable bodies of water in Alaska. Such an investigation might clarify the intent of the grantor (the United States) regarding the disposition of these lands, obviating the need to look to state law for clarification. These four points will be considered further after a discussion of the choice of law question.

C. Transfer of Federal Property: Analysis of the Choice of Law Issue

The more general question of the relative applicability of federal and state law has always been subject to varying interpretations, particularly on the issue of federal common law.[262] From the days of *Swift v. Tyson,*[263] through *Erie Railroad Co. v. Tompkins,*[264] to *City of Milwaukee v. Illinois I,*[265] and *II,*[266] the Supreme Court has struggled with the task of reconciling competing state and federal laws in our dual-sovereign federalist system of government. With regard to the issue of the extent of the property transferred from the federal government to a grantee where the lands in question are adjacent to a non-navigable body of water, there are three basic and diverging views on the issue of the applicable law. Simply put, one view holds that state law controls, another that federal law controls, and a third, a variation of the second, that federal law adopts state law in this instance. Each view has a coherent logic, but the analytic distinctions among them are not often clearly recognized by the courts that are called upon to decide this issue. Consequently, court opinions are often both confused and confusing. The next section will attempt to clarify the basic dispute and offer a recommendation for the preferred position — that

261. *See infra* note 300 and accompanying text.

262. For an admirable clarification of some of the underlying issues, see Field, *Sources of Law: The Scope of Federal Common Law,* 99 HARV. L. REV. 883 (1986).

263. 41 U.S. (16 Pet.) 1 (1842) (holding that federal courts could announce federal "general" law if no state statute existed on the subject).

264. 304 U.S. 64 (1938) (holding that in diversity cases federal courts should apply state substantive law and federal procedural law, and that "[t]here is no federal general common law"). *Id.* at 84-85.

265. 406 U.S. 91 (1972) (holding that federal common law applies in cases involving interstate water pollution).

266. 451 U.S. 304 (1981) (holding that federal common law in interstate water pollution cases was superseded by the Clean Water Act Amendments of 1972).

federal law (not as defined by the state) should control on the issue of the extent of real property transferred by a federal grant.

1. *The State Law View.* Several Supreme Court pronouncements, most notably *Hardin v. Jordan*,[267] support the view that state riparian law controls the determination of ownership rights incidental to a federal grant of property that borders on water. Most of the Supreme Court cases cited in support of this proposition, however, involved lands bordering on *navigable* rather than non-navigable waters.[268] In such cases it is sensible to refer to state law, because under the Equal Footing Doctrine the state owns the submerged lands beneath its navigable waters.[269] In contrast, *Hardin v. Jordan*[270] is more immediately relevant because it concerned a federal grant of land bordering on a *non-navigable* lake.

Hardin was an action in ejectment brought by Mrs. Gertrude Hardin on the basis of her ownership of fractional lots within the rectangular boundaries of which were submerged lands beneath a non-navigable lake.[271] The federal survey referred to the lake in question as a "navigable lake," but the Court found that in fact it was not navigable for purposes of ascertaining title. To resolve the question whether the property of a federal grantee stopped at the edge of the water or extended to the center of the lake, the Supreme Court looked to Illinois law. Without citation, the Court provided the following sparse explanation for its choice of law: "This question must be decided by some rule of law, and no rule of law can be resorted to for the purpose except the local law of the State of Illinois."[272]

Regarding the matter of the "chargeability" of the submerged lands and the then current practices of the Bureau of Land Management, the *Hardin* Court noted:

> It has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them by

267. 140 U.S. 371 (1891).

268. *See* Shively v. Bowlby, 152 U.S. 1 (1894); Packer v. Bird, 137 U.S. 661 (1891); Barney v. Keokuk, 94 U.S. 324 (1877).

269. *See supra* notes 22-30 and accompanying text (discussing the Equal Footing Doctrine).

270. 140 U.S. 371 (1891).

271. Part of her property was in Illinois, part in Indiana. *See also* Hardin v. Shed, 190 U.S. 508, 518 (1903) (involving the section in Indiana).

272. 140 U.S. at 380. The same question of choice of law as applicable to the federal grant of riparian lands adjacent to a non-navigable lake was raised in Kean v. Calumet Canal and Improvement Co., 190 U.S. 452 (1903). The Court adhered to the precedent set in *Hardin,* that state riparian law would apply, over a vigorous and voluminous dissent.

> the quantity of upland granted, *no charge being made for the lands under the bed of the stream, or other body of water.*[273]

The opinion does not indicate, however, whether historically a riparian actually received title to the submerged lands for which he was not charged. In addition, in assessing the precedential value of *Hardin* to Alaska, it is worth considering that there may be a significant distinction between a small grant to a homesteader for farming and the millions of acres granted to the state and the Alaska Natives.

The view that state law controls on the issue of riparian rights incident to property transferred by the federal government assumes that, once title to the fastlands has passed, both the United States and the grantee are property owners within the boundaries of a given state. Accordingly, state law would decide the question of riparian rights. Adopting this view, federal and state law may be seen as operating sequentially, with federal law controlling on the question of the extent of the property transferred by the grant, and state law on the issue of the rights incidental to that transfer once it has taken place.[274] The Supreme Court articulated this principle as early as 1839 and reaffirmed it in the recent case of *Oregon* ex rel. *State Land Board v. Corvallis Sand and Gravel Co.*:

> We hold the true principle to be this, that whenever the question in any Court, state or federal, is, *whether* a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that *whenever*, according to those laws, *the title shall have passed,* then that property, like all other property in the state, is *subject to state legislation*; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.[275]

In the context of title to submerged lands, however, the rights "incidental" to the transfer of federal property are not usufructuary, but are by definition *ownership* rights that effectively result in a transfer of additional property. Thus, the distinction drawn by the Supreme Court — that title passes under federal law *after which* state law controls on questions of subsequent riparian rights — collapses. The riparian right at issue is not an "incidental" right that attaches with ownership; it is ownership itself of the adjacent submerged land.

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273. 140 U.S. at 380 (emphasis added).

274. *See* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 370-71 (1977).

275. 429 U.S. 363, 377 (1977) (quoting Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 517 (1839)).

The view that state law should control on questions of the extent of property transferred to a federal grantee as riparian owner is unsettling for two reasons. First, the application of state riparian law results in a further transfer of property from the United States to the federal grantee beyond that expressly contained in the grant. Such a result implies that state law can divest the federal government of its property. Second, were state law to control, determinations of the extent of a federal grant could vary from state to state and over time, depending upon the various states' laws of riparian rights. The extent of federal ownership, as well as that of federal grantees, would be uncertain.

2. *The Federal Law View.* In contrast to the *Hardin* view, some in the Department of the Interior have adopted the position that federal law controls in cases involving the transfer of federal property to a federal grantee.[276] There is a strong line of Supreme Court cases supporting this position,[277] most notable of which is *Borax Consolidated Ltd. v. City of Los Angeles,*[278] decided in 1935. *Borax* involved a question of the extent of a federal grant bordering on tidelands near Los Angeles. The specific language of the Court merits repeating:

> The question as to *the extent of this federal grant,* that is, *as to the limit of the land conveyed,* or the boundary between the upland and the tideland, is necessarily a *federal question.* It is a question which concerns the *validity and effect of an act done by the United States;* it involves the ascertainment of the essential basis of a *right asserted under federal law.*[279]

It is difficult to reconcile the *Borax* requirement that federal law applies to questions concerning the validity and effect of an act done by the United States with the *Hardin* rule that state law should apply to federal grants of property bordering on non-navigable bodies of

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276. Letter to Senate Committee on Energy and Natural Resources, *supra* note 46, at 4. *See also* MANUAL OF SURVEY INSTRUCTIONS, *supra* note 38, § 7-51. Although the Department of the Interior seems to rely on Hardin v. Jordan, 140 U.S. 371 (1891), as support for an inference that federal law controls on the extent of a federal land grant, one should note that the *Hardin* Court was applying state rather than federal law.

277. *See* United States v. Utah, 283 U.S. 64, 75 (1931) ("State laws cannot affect titles vested in the United States."); United States v. Holt State Bank, 270 U.S. 49, 55 (1926); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 87 (1922); Packer v. Bird, 137 U.S. 661, 669 (1891).

278. 296 U.S. 10 (1935).

279. *Id.* at 22 (emphasis added); *see also* United States v. Oregon, 295 U.S. 1, 27 (1935) ("The laws of the United States alone control the disposition of title to its lands."). A more recent case involving accretions to tidelands owned by a federal grantee whose predecessor in interest took before statehood, held that federal, not state, law controlled. Hughes v. Washington, 389 U.S. 290 (1967) (holding that *Borax* was dispositive of the issue).

water. Nevertheless, the essential question *Borax* raises is: what is federal riparian rights law? Two very different theories have been advanced. One looks to federal statutory law, the other to state common law.

a. Federal statutory law. On May 18, 1796, Congress enacted legislation regarding the disposition of the United States territorial lands northwest of the Ohio River, known as the Northwest Territory.[280] On the issue of the disposition of river beds, the current version of the statute, as amended to include other federal lands, reads: "All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of *any streams not navigable* belong to different persons, *the stream and the bed thereof shall become common to both.*"[281] Research reveals few judicial references to this statutory provision after 1900, possibly because federal courts adopted *Hardin*'s pronouncement that state common law controls. In 1869, the Supreme Court did discuss the statute extensively in *Railroad Co. v. Schurmeir,*[282] which involved a dispute over shoreland at St. Paul on the Mississippi River. The rationale of the Court's opinion is worthy of note, especially in contrast to that in *Hardin v. Jordan.*[283]

The case involved a dispute over an area which at low water was connected to the shore, at medium water was separated by a channel, and at high water was completely flooded. A federal survey drew a meander line some distance from what was considered the bank of the river, and the area in dispute lay between the meander line and the bank of the Mississippi. Without any consideration of the possibility that state law should apply, the Court looked to the Act of 1796 and announced the rule that:

> Proprietors, bordering on streams not navigable, unless restricted by the terms of their grant, hold to the centre of the stream; but . . . proprietors of lands bordering on navigable rivers, under titles derived from the United States, hold only to the stream, as the express provision is, that all such rivers shall be deemed to be, and remain public highways.[284]

As a basis for its ruling, the *Schurmeir* Court looked to the writings of Chancellor Kent,[285] concerning the classic distinction between

280. Act of May 18, 1796, ch. 55, 1 Stat. 464 (1800) (codified as amended at 43 U.S.C. § 931 (1982)).

281. *Id.* (emphasis added).

282. 74 U.S. (7 Wall.) 272 (1868).

283. 140 U.S. 371 (1891). It is uncertain why the *Hardin* Court did not mention the Act of May 18, 1796, in the opinion. *See supra* note 280.

284. 74 U.S. (7 Wall.) at 287.

285. 3 KENT, COMMENTARIES ON AMERICAN LAW 536-48 (11th ed. 1867).

navigable waters and non-navigable waters as public and private waters respectively.[286] According to Kent, if the body of water in question were navigable, it would remain open to public use, with the boundary of the federal grantee's property being the river bank.[287] The Court indicated that in making the distinction between navigable and non-navigable streams, Congress "intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream. . . ."[288] After finding the Mississippi to be a navigable stream for purposes of applying the Act of 1796, the Court held that the property of the federal grantee extended to the edge of the water, including the area in dispute.

The logic (and dicta) of the *Schurmeir* Court regarding the boundary of a federal grant bordering on a *non*-navigable water body was cited as authority in the case of *Indiana v. Milk.*[289] In construing the Swamp and Overflowed Land Grant Act of 1850,[290] the circuit court held that, although the federal survey did not include the bed of a large, non-navigable lake, the state, nonetheless, acquired title to the bed by virtue of its ownership of the riparian land. Rather than turning to state law, as did the *Hardin* Court, the *Milk* court looked to the Act of 1796 for guidance, and to the Supreme Court's interpretation of the Act in *Schurmeir*:[291] "In *Railroad Co. v. Schurmeir,* . . . this section was interpreted to mean that instead of the owners of opposite banks of a non-navigable stream being tenants in common of the bed, each held in severalty to the center of the stream."[292]

More importantly, the court considered the federal policy behind the Act of 1796 with regard to the question of the public interest, or lack thereof, in non-navigable waterways. The court noted that, "[n]o right was reserved by the Act of 1796 to the beds of non-navigable streams, because *the public had no interest in such streams,* and it was *not the policy of the government to be a land-owner in the states.*"[293]

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286. *See supra* text accompanying notes 182-91 (discussing this aspect of navigability).

287. 74 U.S. (7 Wall.) at 287 ("[T]he public, in cases where the river is navigable for boats and rafts, have an easement therein, or a right of passage, subject to the *jus publicum,* as a public highway.").

288. 74 U.S. at 289.

289. 11 F. 389 (C.C.D. Ind. 1882).

290. Ch. 84, 9 Stat. 519 (1850) (codified as amended at 43 U.S.C. §§ 981-84 (1982)).

291. 74 U.S. (7 Wall.) 272 (1868).

292. 11 F. at 393. An estate in severalty is one "held by a person in his own right only, without any other person being joined or connected with him. . . ." BLACK'S LAW DICTIONARY 493 (5th ed. 1979).

293. *Id.* at 393 (emphasis added).

The circuit court examined congressional policy behind passage of the Swamp Lands Act, and determined that, as with the Act of 1796, the federal government had no interest in retaining the beds of non-navigable waters:

> There were at this time, in many of the states, swamp and overflowed public lands *which were of no value to the government for any purpose,* present or prospective, unless drained. It had never been the policy of the government to reclaim such lands with a view to their sale. *They were unfit for cultivation and useless for habitation.*[294]

The approach of the *Milk* court is instructive. It looked to federal law to ascertain the *federal* interest in the lands at issue. Finding none, and finding no express reservation of the land in the grant, the court awarded title to the state.

b. The federal law adopts state law view. In addition to the state and federal law views, a third view, a corollary to the federal law view, is that a court should look to state law to ascertain the rights incident to lands transferred by federal grant, absent an expression of intent by the grantor. According to this view, state law is consulted not because it applies as between federal and state law, but rather because, when federal law is otherwise silent, it incorporates state law on the issue of property rights incident to the transferred land. The Supreme Court articulated this view in *United States v. Oregon,*[295] in which the Court interpreted the holding of *Hardin v. Jordan*[296] to support its holding. Pursuant to a state statute that vested title to all submerged lands within the boundaries of the state, the State of Oregon, in *United States v. Oregon,* had asserted its title claim to the submerged lands beneath non-navigable bodies of water adjacent to lands granted by the United States to a private grantee. The Supreme Court held that, in this instance, state law did not apply to divest the grantee of title to his submerged lands. The Court wrote that:

> It is insisted that after statehood local law controls the disposition of the title to lands retained by the United States underlying non-navigable waters within the state, and that the effect, upon the title to such lands, of the conveyances of the adjacent upland by the United States is to be determined by reference to state laws. In support of this proposition, reliance is placed upon language in the opinion in *Hardin v. Jordan* . . . which, however, refers in part to conveyances of uplands bounded on navigable waters (tide water,) and upon the decisions of certain state courts applying the rule contended for to lands underlying nonnavigable waters. . . .

294. *Id.* at 394 (emphasis added).
295. 295 U.S. 1 (1935).
296. 140 U.S. 371 (1891).

> It is true . . . that the disposition of such lands is a matter of the intention of the grantor, the United States, and "if its intention be not otherwise shown . . . its conveyance . . . [is] given effect in this particular according to the law of the state in which the land lies." This was the effect of the decisions in *Hardin v. Jordan . . . Mitchell v. Smale* . . . and *Kean v. Calumet Canal & Imp. Co.* . . . in which conveyances bounded upon the waters of a nonnavigable lake were, when construed in accordance with local law, held impliedly to convey to the middle of the lake.[297]

To apply the rule in *United States v. Oregon* to the situation in Alaska, the courts would look first to the intent of the grantor (the United States) as expressed in the granting statutes (the Statehood Act and ANCSA) and their respective legislative histories. If that federal intent were not clear, Alaska riparian law would apply as federal law to define the rights to the submerged lands incident to land transferred by federal grant.

The view that federal law applies, and that, absent any indications of intent of the grantor, federal law borrows state law to construe riparian rights in a property grant from the federal government, is conceptually distinct from the view that, ab initio, state law applies. The result may be the same — the application of state law — but the conceptualization of the essential relationship between the federal government and the laws of the individual states is quite different. *Hardin v. Jordan*[298] is sometimes used in a somewhat cavalier fashion to support both views, but the proposition that state law can divest the federal government of its property seems untenable. In a statement notable for its clarity on the point of the appropriate use of state law to construe a federal grant of land bordering on a non-navigable body of water, the Supreme Court provided the following guidance in *Oklahoma v. Texas*:[299]

> Where the United States owns the bed of a non-navigable stream and the upland on one or both sides, it, of course, is free when disposing of the upland to retain all or any part of the river bed; and whether in any particular instance it has done so *is essentially a question of what it intended.* If by a treaty or statute or the terms of its patent it has shown that it intended to restrict the conveyance to the upland or to that and a part only of the river bed, *that intention will be controlling*; [citations] and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular *according to the law of the State in which the land lies.*[300]

297. 295 U.S. at 26-27 (citations omitted).

298. 140 U.S. 371 (1891).

299. 258 U.S. 574 (1922).

300. *Id.* at 594-95 (emphasis added) (citing Hardin v. Jordan, 140 U.S. at 384; Mitchell v. Smale, 140 U.S. 406, 413-14 (1891)).

To apply this principle to the Alaska context, one would look first to congressional expressions of federal interest in the submerged land beneath Alaska's non-navigable water. By way of contrast, the historical policy of the federal government regarding public land in the lower forty-eight was to dispose of federally-owned submerged lands as basically valueless and irrelevant to the purposes of the grants in issue.[301] The situation is markedly different regarding submerged lands in Alaska, in which the Congress has shown a profound interest.[302] Thus, under the rule of *Oklahoma v. Texas,* courts should resort to state riparian law to settle questions of ownership only in the absence of expressions of congressional interest in maintaining ownership of Alaska's submerged lands.

IX. A PROPOSED PERSPECTIVE: THE FEDERAL INTEREST IN ALASKA'S SUBMERGED LANDS

Throughout the cases involving title to beds of non-navigable bodies of water adjacent to land transferred by federal grant, the courts seem to apply a general rule regarding choice of law. That rule is to look to the relative interests of the federal government and the state. If the federal interest is significant, federal law is applied; if no significant federal interest can be found, then state riparian law is applied.

In *Hughes v. Washington,*[303] the Supreme Court explicitly recognized this "federalness" rule. To resolve a question of riparian rights to accretion deposited on the shoreland owned by a federal grantee, the Court chose to apply federal, not state, law. The Court reasoned that the question was one which involved important federal interests and should, accordingly, be decided by a federal rule:

> [The question] deals with waters that lap both the lands of the State and the boundaries of the international sea. This relationship, at this particular point of the marginal sea, is *too close to the vital interests of the Nation* in its own boundaries to allow it to be governed by any law but the "supreme Law of the Land."[304]

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301. *See generally* P. GATES, *supra* note 12; *see also* Indiana v. Milk, 11 F. 389, 393 (C.C.D. Ind. 1882) ("No right was reserved by the act of 1796 to the beds of non-navigable streams, because the public had no interest in such streams, and it was not the policy of the government to be a land-owner in the states.").

302. *See infra* text accompanying notes 307-22 (discussing three areas of federal interest in Alaska lands).

303. 389 U.S. 290 (1967). Although *Hughes* addressed a question of riparian rights to accretion incident to lands granted prior to statehood, the principle appears nonetheless applicable as a general rule.

304. *Id.* at 293 (emphasis added). In his concurring opinion, Justice Stewart thought the issue should be resolved according to state law. Finding the state law,

Assuming, arguendo, that it is appropriate to apply federal law in the Alaska context, there still remains the issue of whether the courts should borrow Alaska's rule regarding riparian rights or apply a separate federal rule. The Supreme Court faced this issue in a similar situation involving riparian rights to accreted lands in *Wilson v. Omaha Indian Tribe.*[305] In that case the Court set forth a balancing test to determine the relative interests of the state and the federal government as a means of choosing the applicable law.[306]

In Alaska there are at least three separate areas of federal interest that one could argue ought to be recognized under federal law: the federal preservation interest, the federal contract interest, and the federal interest as expressed by congressional intent. Given these interests, the application of state law under the supposed "Hardin rule" may well be questioned.

A. The Federal Preservation Interest

As indicated in *Indiana v. Milk,*[307] historically the federal government has expressed little interest in the submerged lands beneath nonnavigable waters because such lands were seen as valueless; unfit for either transportation or cultivation. Since the policy of the federal government was to encourage settlement of the territory of the new states, and not to preserve federal ownership,[308] the application of state riparian rights to federal grantees was not inappropriate. By contrast, the federal government has an incontrovertible interest in the preservation of public lands in Alaska. This interest is evidenced by the extensive congressional debates over how best to preserve "national interest lands" under ANILCA.[309]

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declaring title to the beds of all navigable water bodies to be in the state, an unconstitutional taking, he came to the same conclusion as the majority, although by a different route. *Id.* at 295.

305. 442 U.S. 653 (1979).

306. *Id.* at 671-72 ("Controversies . . . governed by federal law, do not inevitably require resort to uniform federal rules. . . . Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.' " (citations omitted)).

307. 11 F. 389 (C.C.D. Ind. 1882).

308. *See generally* P. GATES, *supra* note 12.

309. For example, the Senate Committee on Energy and Natural Resources held 46 mark-up sessions during the 95th Congress and 12 in the 96th Congress before agreeing upon the language to be used in the report to the full Senate. S. REP. NO. 413, 96th Cong., 2d Sess. 134, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5070, 5078-79.

B. The Federal Contract Interest

One may view both the Alaska Statehood Act and ANCSA as *contracts* to which the United States is a party.[310] By these statutes, the United States agreed to transfer certain lands to the state and to the Natives.[311] Those agreements specify the quantity of land to which the recipients are entitled. The new policy of the Department of Interior is seen by some as giving the selector additional entitlements — to the derogation of the original legislative contracts between the United States and the State of Alaska, and the United States and the Natives.

C. The Federal Interest as Expressed by Congressional Intent

In addition to the preservation and contract interests, Congress has expressed its intentions regarding the disposition of Alaska's submerged lands in several other instances. Section 6(g) of the Alaska Statehood Act indicates that only exterior boundaries of the area to be conveyed to the state should be drawn:

> Where any lands desired by the State are unsurveyed at the time of their selection, the Secretary of the Interior shall survey the *exterior boundaries* of the area requested *without any interior subdivision thereof*; and shall issue a patent for such selected area *in terms of the exterior boundary survey*. . . .[312]

Considered in context of congressional awareness of the extraordinary size of the state grant,[313] this provision could well be seen to evince the expectation by Congress that meandering all water bodies would not be a part of the selection and conveyance process of lands to the state. Rather, it could be argued that all lands, both dry and submerged — except those beneath navigable waters that are subject to the Equal Footing Doctrine — should be included in the area conveyed and charged against the state's total selectable acreage.

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310. The Alaska Statehood Act states that "[a]s a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State. . . ." Pub. L. No. 85-508, § 4, 72 Stat. 339 (codified as amended at 48 U.S.C. note preceding § 21 (1982)). Likewise, ANCSA is also a contract between the federal government and Alaska Natives. The Natives agreed to relinquish their claims to aboriginal lands in exchange for a sum of money and the right to select a certain amount of federal land. The amounts of money and land agreed upon presumably reflect the relative value Congress placed on the land. *See generally* ANCSA, 43 U.S.C. §§ 1601-1629 (1982 & Supp. III 1985).

311. *See supra* notes 11-19 and accompanying text.

312. Alaska Statehood Act of 1958, Pub. L. No. 85-508, § 6(g), 72 Stat. 339, 342 (codified as amended at 48 U.S.C. note preceding § 21 (1982)) (emphasis added).

313. *See* H.R. REP. No. 624, 85th Cong., 1st Sess. 7, *reprinted in* 1958 U.S. CODE CONG. & ADMIN. NEWS 2933, 2939.

With regard to land grants to the Native corporations, ANCSA, like the Statehood Act, provides that "[n]o ground survey or monumentation will be required along meanderable water boundaries."[314] This provision indicates that the selection and conveyance process could proceed without the traditional meandering specified in the Manual of Survey Instructions. According to ANCSA, "only exterior boundaries of the selected or designated areas at angle points" need be surveyed, irrespective of any water bodies that lie within the section.[315] This provision seems to imply that Congress did not intend that submerged lands beneath non-navigable waters would be segregated out of the area surveyed for purposes of computing chargeability. Taken together, these two statutory provisions seem to indicate that, with regard to grants both to the state and the Natives, Congress intended that the *exterior* boundaries would comprise the ultimate boundaries of the selected tract, modified later, not by meandering per se, but rather, by the final on-the-ground survey required for the issuance of a patent. Furthermore, these provisions might well be interpreted as implying that all the acreage included within these exterior boundaries would be charged against the selector's entitlement.

ANILCA also provides several indicia of congressional intent regarding the chargeability of submerged lands beneath non-navigable waters. In section 901, Congress imposed a statute of limitations for suits by the state challenging BLM determinations of non-navigability.[316] Were it intended by Congress that submerged lands beneath navigable and non-navigable waters should be treated the same by the Department (that is, meandered and segregated out of the survey) there would have been no need for such a provision. In addition, the Senate Report accompanying ANILCA[317] contains the following language explaining section 909, which allowed the use of protraction diagrams in lieu of field surveys in patents issued under ANCSA:

> There is some possibility of error in the acreage within a tract shown by a diagram and what would be actually surveyed. . . . [G]enerally this is caused by water areas — streams, lakes, and coastal shore lines.
>
> Since there is this possibility of error in the acreage of an area, *any such loss or gain is born by the patentee.*[318]

314. 43 U.S.C. § 1612(a) (1982).

315. *Id.*

316. ANILCA, Pub. L. No. 96-487, § 901, 94 Stat. 2371, 2430 (1980) (codified as amended at 43 U.S.C. § 1631 (1982)).

317. S. REP. No. 413, 96th Cong., 2d Sess. 291, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5070, 5235.

318. *Id.* (emphasis added).

Once again, this expression of Congress supports the view that it considered the tracts selected to be bounded by external, rectangular boundaries, not by the meander lines of any water bodies within those boundaries.

The version of ANILCA passed by the House in 1979 contained a provision sponsored by Representatives Udall and Anderson under which submerged lands beneath meanderable, non-navigable water bodies would not be charged against the selector's entitlement.[319] A year later, the Senate expressly rejected the House provision.[320] In its stead, the Senate adopted a statute of limitations for any state challenge to a BLM determination of non-navigability.[321] The House conferees eventually agreed to the Senate provision and it was included in the final bill.[322] This outcome further supports the view that, to the extent Congress considered the issue, it assumed that the total acreage of land within the external boundaries of the tract, including submerged land, was to be subtracted from the selector's entitlement, not just the fastlands.

D. Submerged Lands Beneath Non-Navigable Waters in Alaska: Questionable Application of State Riparian Law

Even if the applicable judicial precedents were clear, the analysis of the question of the disposition of submerged lands beneath non-navigable water bodies in Alaska would remain complicated. Principles of federalism, shared powers, constitutional law, and federal policy are all involved in the analysis. The lack of clear direction from the courts only exacerbates the problem. Nevertheless, the following propositions regarding the application of some traditional legal theories to the troublesome Alaska context may aid in the analysis:

1. The principle, adopted in *Hardin v. Jordan,*[323] that state law should apply to settle questions of riparian rights associated with lands adjacent to non-navigable waters transferred by federal grant, is not necessarily appropriate to the Alaska context.
2. The federal statute of 1796 statement that "where the opposite banks of any stream not navigable shall belong to different persons,

319. H.R. 39 § 918, 96th Cong., 1st Sess., 125 CONG. REC. 11,459 (1979). The Udall-Anderson Amendment was, in part, an effort to avoid legal battles over title.

320. *See* 96th Cong., 2d Sess., 126 CONG. REC. 23,376-23,378 (1980) (remarks by Senator Tsongas on the legislative history of the submerged lands provisions of ANILCA).

321. 96th Cong., 2d Sess., 126 CONG. REC. 21,596, 21,597, 21,614 (1980). The statute of limitations was deemed necessary in order to solve the problem of any uncertainty to the title of submerged lands created by any possible state attempts to divest federal grantees by contesting a determination of non-navigability.

322. 96th Cong., 2d Sess., 126 CONG. REC. 21,891 (1980).

323. 140 U.S. 371 (1891).

the stream and the bed thereof shall become common to both"[324] is based upon an obsolete policy favoring the disposal of federal lands judged to be "valueless", and is not appropriate in the Alaska context.

3. The Alaska situation is distinguishable from other historic instances in the lower forty-eight states in that significant federal interests are at stake. This situation demands application of federal law to protect those interests.

4. Numerous indications of congressional intent support the position that federal lands in Alaska should be surveyed to determine only exterior rectangular boundaries, that the submerged lands beneath non-navigable waters should be included in the grant, and that the acreage should be subtracted from the grantee's entitlement.[325]

If these four propositions are accepted, one might well question the applicability of Alaska's state riparian law to federal grantees under the Alaska Statehood Act and the Alaska Native Claims Settlement Act. It certainly is not clear that the United States is *required,* given judicial precedent or statutory law, to apply the no-charge rule regarding submerged lands beneath non-navigable water bodies adjoining property transferred by federal grant in the Alaska context.

X. CONCLUSION

Despite their somewhat arcane and inaccessible nature, the twin issues of navigability and chargeability have been the source of heated battles among the various interest groups vying for control of the submerged lands in Alaska. Unfortunately, the principles at issue have not always been as clearly understood as they have been hotly contested. Regrettably, throughout the debate there has been an unfortunate emphasis on acquisition of property interests in a kind of zero-sum game, with the natural resources of the lands beneath Alaska's waters as booty.

The interests of the United States in these submerged areas and the resources beneath them have not always been zealously championed by those responsible for them. Specifically, this article has focused on two areas in which a clearer understanding of the law would provide greater protection for the public interest in Alaska's submerged lands. First, the state's regulatory authority over, and the public's usufructuary rights in, lands beneath those waters defined by the state as navigable renders inappropriate the current emphasis on contests over title as a means of regulatory control. Second, the recent change in policy regarding the non-chargeability of lands beneath

324. Act of May 18, 1796, ch. 55, 1 Stat. § 464 (1800) (codified as amended at 43 U.S.C. § 981 (1982)).

325. *See supra* text accompanying notes 212-322.

meanderable, non-navigable water bodies in Alaska may derogate significant interests of the United States in these lands. There are certainly ample opportunities for natural resource development, as well as preservation, in Alaska. Both are necessary as we move into the twenty-first century. The struggle over submerged lands in Alaska requires a flexible approach in which the myriad facets of natural resource law, including title, regulatory control, public usufructuary rights, and trust duty, are addressed separately and carefully, and not atavistically linked to outmoded quests for ownership. Legal theories that evolved during an earlier period in the development of public land law, particularly those that did not recognize the value of submerged lands, should not be applied unquestioningly to the unique Alaska context.