MEMORANDUM

State of Alaska

Department of Law

TO:	Daniel S. Sullivan, Commissioner; Don Perrin, Project Management and Permit Coordinator, Department of Natural Resources	DATE: FILE NO.: TEL. NO.:	June 15, 2011 661080104 269-5249
FROM:	John T. Baker Sr. Assistant Attorney General	SUBJECT:	Izembek Proposed Exchange: Reservation of Public Trust Submerged Lands

I. Introduction and Summary

You have asked whether recent state legislation[1] authorizing the Department of Natural Resources (DNR) to exchange certain land adjacent to Izembek National Wildlife Refuge requires DNR to convey or disclaim public trust submerged lands in that area to the United States. The precise question asked was whether language in that legislation ("Notwithstanding any other provision of law, the Department of Natural Resources shall convey all right, title, and interest of the state to certain land adjacent to the Izembek National Wildlife Refuge") includes disclaiming the state's interest in certain submerged lands within the area.

The short answer to your question is "no." Although DNR reports the U.S. Fish and Wildlife Service (USFWS) is asserting that the above-quoted language includes all submerged interests, we cannot infer intent to convey public trust submerged land and water interests. Further explanation follows, given the significance of the interests, the legislation, and the proposed exchange.

II. The Special Character of *Illinois Central* Public Trust Lands

Submerged lands subject to the public trust doctrine have a different, special character than other lands owned by the State. As the U.S. Supreme Court held in its landmark decision in *Illinois Central Railroad Co. v. Illinois*,[2] each state receives the beds of navigable waters and tidelands at statehood in its sovereign capacity, as a matter of federal constitutional law including the equal footing doctrine, "*in trust* for the people of the State that they may enjoy the navigation of the waters, carry on commerce over

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[1] Chapter 119, SLA 2010, Temporary and Special Acts and Resolves, SCS CSHB 210(RES), also referred to as "House Bill 210" or "HB 210."

[2] 146 U.S. 387 (1892).

them, and have liberty of fishing therein freed from the obstruction or interference of private parties."[3] In *Illinois Central*, the U.S. Supreme Court declared:

> [Although discrete] grants of parcels of lands under navigable waters . . . for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining [may be permissible,] the abdication of the general control of the state over lands under the navigable waters of [a significant area] is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. *The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost*, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.[4]

The Court held that the State of Illinois was free to revoke a prior state grant to the railroad company of about 1,000 acres of submerged land beneath the waters of Lake Michigan, because the state had no power to validly convey such land in the first place.[5] Although a general public interest (railroad development) might be served by conveying those lands, the particular type of public interest in navigation or fisheries meant to be protected and furthered by that special trust was not.[6]

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[3] *Id*. at 434-37, 452, 456-57 (emphasis added); s*ee also Utah Div. of State Lands v. United States*, 482 U.S. 193, 195-96 (1987) (also noting that through the 1953 Submerged Lands Act, Congress added the beds of coastal waters extending three miles seaward of the tidelands (from mean low tide) to the submerged lands the states, including Alaska, received)).

[4] *Id*. at 452-53 (emphasis added).

[5] *Id*. at 454, 463-64.

[6] *Id*. at 455-56. *See also CWC Fisheries, Inc. v. Bunker*, 755 P. 2d 1115, 1117-20 (Alaska 1988) (describing the *Illinois Central* public trust doctrine and its application to Alaska lands and waters).

In *CWC Fisheries, Inc. v. Bunker*,[7] the Alaska Supreme Court applied the twin rules that before any grant or proposed grant of public trust submerged lands free of the trust may be found, the grant must: (1) satisfy the "promotion of trust purposes" exception or the "non-impairment" exception stated in *Illinois Central Railroad* and (2) "the legislature's intent to so convey it *must be clearly expressed or necessarily implied* in the legislation authorizing the transfer. If any interpretation of the statute which would retain the public's interest in the tidelands is reasonably possible, we must give the statute such an interpretation."[8]

In that case the court concluded that the Alaska statute at issue did not convey the submerged lands free of the public trust. It determined that the statute did not express a clear legislative intent to do so and that such an intent could not be "necessarily implied" from the statute and conveyance purposes it authorized, which were not restricted to either exception in *Illinois Central*.[9] Instead, the court found:

> Indeed, article VIII, section 3 of the Alaska Constitution, which was in effect at the time AS 30.05.820 was enacted, explicitly provides that
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> > [w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.
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> At least in the absence of some clear evidence to the contrary, we will not presume that the legislature intended to take action which would, on its face, appear inconsistent with the plain wording of this constitutional mandate.[10]

The Alaska court observed that even a fee simple conveyance of submerged lands satisfying "the strictures of *Illinois Central*" might "nonetheless run afoul of article VIII, section 3" of Alaska's Constitution.[11] As discussed below, under *CWC Fisheries* an

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7 755 P.2d 1115 (Alaska 1988).

8 *Id*. at 1119 (emphasis added; citations omitted).

9 *Id*. at 1119-20.

10 *Id*. at 1120.

11 *Id*. at 1120 n.10.

interpretation of House Bill 210 as retaining the public's interest in submerged lands is reasonably possible, and therefore mandated.[12]

III. House Bill 210

In House Bill 210 the legislative intent[13] is unclear regarding the precise lands and interests authorized for exchange. Section 4 of the legislation refers to conveying all right, title and interest of the state in "certain land," described generally as "Township 53 South, Range 85 West, Seward Meridian, and Township 54 South, Range 85 West, Seward Meridian, and totaling 43,000 acres more or less."[14] However, two townships actually total about 46,080 acres, or approximately 23,040 acres each.

According to legislative committee minutes, the legislature was chiefly guided by maps of the area.[15] Those maps show exterior boundary lines drawn around the two areas. Most of a section of land in the northwest corner of T. 53 S. underlies marine and tidal waters excluded from the boundary line, which suggests an intention to exclude public trust submerged lands.[16] The maps also show almost four sections in the southwest corner of T. 54 S. (south of T. 53 S.) as already belonging to the federal government and included within the Izembek National Wildlife Refuge and Wilderness. Deletion of those two segments lying outside the drawn boundaries, encompassing roughly 3000 acres total, apparently explains the "43,000 acres more or less" referred to in Section 4 of the Alaska legislation.

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12 *Id*. at 1119.

13 The Alaska Supreme Court has stated:

> In construing the meaning of a statute, we look to the meaning of the language, the legislative history, and the purpose of the statute in question. "The goal of statutory construction is to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others."

Muller v. BP Exploration (Alaska) Inc., 923 P.2d 783, 787 (Alaska 1996) (quoting from *Tesoro Alaska Petroleum Co. v. State*, 746 P.2d 896, 905 (Alaska 1987)).

14 Sec. 4, Ch. 119, SLA 2010.

15 House Res. Comm. Minutes at 6 (Apr. 8, 2009).

16 It is also noteworthy that Section 3 of the state act, which authorizes the retention and placement of other state lands within the Izembek State Game Refuge, specifies "including the tide and submerged land," whereas Section 4, broadly describing "certain lands" for exchange, contains no such specification. Sec. 4, Ch. 119, SLA 2010. This also indicates an intention to exclude submerged lands from the exchange.

In its October 20 correspondence, the USFWS opined that "neither the maps nor the descriptions of land to be exchanged" in P. L. 111-11, which HB 210 Sec. 1 references, "are specific enough to conduct the EIS for the land exchange." The USFWS consequently requested DNR to "disclaim all rights, title, or interest in submerged lands beneath any inland navigable waters located within State . . . land included in this exchange," as the USFWS described that land in its letter, in order to clarify intent.[17] That acknowledgement and request by the USFWS underscores the fact that legislative intent to convey the public trust submerged lands was not clearly expressed.[18]

Review of the legislative committee minutes and additional information provided to us also reveals that the special character of public trust submerged lands within those mapped lines was never brought to the attention of the Alaska Legislature, nor apparently considered by it or the state administration as part of the exchange.[19] Without the legislature being made aware of those lands' special trust character and conveyance constraints, it cannot be concluded the legislature clearly or necessarily intended to convey them free of the State's public trust responsibilities, as the *Illinois Central* and *CWC Fisheries* decisions require.

General language "notwithstanding any other provision of law" in the legislation does not alter these conclusions, to the extent its inclusion is uninformed,[20] apparently

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[17] This request by the USFWS is itself unclear, since it does not specify whether its reference to "inland navigable waters" is intended to include tidelands, which often extend inland. Under the federal case law, including *Illinois Central*, those lands covered by the "ebb and flow of the tide" are public trust lands which became state-owned as an incident of statehood regardless of whether actually susceptible to navigation. *Illinois Central,* 146 U.S. at 435-37; *Utah Div. of State Lands*, 482 U.S. at 195-96; *Alaska v. Ahtna, Inc. & United States*, 891 F.2d 1401 (9th Cir. 1989).

[18] *CWC Fisheries*, 755 P.2d at 1119 (requiring grant of public trust submerged lands be "clearly expressed").

[19] The committee minutes for the state legislation make no mention of public trust submerged lands, or submerged lands generally, in the context of the state exchange. Nor was the subject raised in other written and oral communications of which we are aware. For example, Mr. Perrin, who was involved throughout the exchange negotiations and federal and state legislation, and John Katz, Director of State/Federal Relations and Special Counsel to Governor Parnell in Washington, D.C., report that the issue of disclaiming submerged lands never arose during discussions with state and federal officials, including the USFWS, or during the federal and state legislative processes.

[20] Whereas a legislature is generally presumed to enact new legislation with a knowledge of existing law pertinent to it, that rule is generally applied to reconcile

directed at other provisions of law,[21] and not clearly intended with respect to public trust lands situated within the two townships.[22] In *James v. State*,[23] the Alaska Supreme Court

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statutes, rather than disregard other law unless the new legislation does so by explicit identification. *Bjornsson v. U.S. Dominator, Inc*., 863 P.2d 235, 239 (Alaska 1993); *Peter v. State*, 531 P.2d 1263, 1267-68 (Alaska 1975). The application of the presumption to interests not brought to the legislature's attention is doubtful, especially where those interests are of constitutional dimension which the legislature has only very limited authority to alienate. Even where confronted with "notwithstanding any other provision or rule of law" language in recent legislation, the Alaska Supreme Court has construed that phrase as *not* excluding the application of other general laws, including other statutes, not identified or necessarily intended to be excluded by the context of the entire recent legislation. *FDIC v. Laidlaw Transit, Inc*., 21 P.3d 344, 350-54 (Alaska 2001); a*ccord* 1995 Inf. Op. Att'y Gen., 1995 WL 488493 (May 26; 661-95-0719).

[21] Minutes of the House Resources Committee on April 8, 2009 and the Senate Resources Committee on April 8, 2010 reveal that the authorizations HB 210 sought for DNR were legislative approval of the unequal values of the proposed land exchange – otherwise prohibited by AS 38.50 – and the inclusion of other state lands within the Izembek State Game Refuge. *See, e.g*., Senate Res. Comm. Minutes at 12, 14-16 (Apr. 8, 2010); House Res. Comm. Minutes at 9-10 (Apr. 8, 2009). That record supports the conclusion that the provision in Sec. 4 of the legislation that DNR "shall convey all right, title, and interest of the state" to "certain land" within the two townships as part of the exchange "[n]otwithstanding any other provision of law" is best understood as intending to waive those provisions of AS 38.50 which otherwise apply to exchanges of state land. *Id*.; *FDIC v. Laidlaw*, 21 P.3d at 350-54; *Bjornsson*, 863 P.2d at 239; *Peter*, 531 P.2d at 1267-68; Inf. Op. Att'y Gen., 1995 WL 488493 (May 26; 661-95-0719). This conclusion is further supported by Sec. 5 of the bill, which provides: "EXCHANGE OF LAND NOT SUBJECT TO AS 38.50. The exchange of state land under sec. 4 of this Act is not subject to AS 38.50, including any requirement that relates to the valuation or equalization of land." Sec. 5, Ch. 119, SLA 2010.

[22] Minutes of the Senate Resources Committee considering HB 210 on April 8, 2010 reflect Representative Edgmon at one point stating "submerged and tidelands are involved as part of the overall transaction as well; so [DNR] needs to be able to consummate that." April 8, 2010 Senate Res. Comm. Minutes at 12. But it is later clarified that this comment was in the context of "approval by the legislature for adding 3,000 acres of state tide and submerged lands in Kinzarof Lagoon, at the head of Cold Bay, to the state game refuge." *Id*. at 15. That action did not involve any conveyance or proposed conveyance of those lands from the state to the United States or reduce those lands' public trust character or state ownership and control over them.

concluded that a similar exterior boundary delineating the Tongass National Forest 100 years ago constituted a "boundary of convenience" which did not include public trust submerged lands absent clear intent to do so, which was missing.[24]

In addition, the announced purposes of the proposed exchange do not meet the criteria of the *Illinois Central* or *CWC Fisheries* decisions. At the heart of the exchange, the State would trade most of two townships, to be added to the federal Izembek refuge, for approximately 206 acres of federal land presently within that refuge, in order to provide a more dependable, overland route from King Cove to the all-weather airport at Cold Bay, where large planes can land in the area's frequent poor weather conditions.[25] According to Representative Edgmon, the legislation's sponsor, its intent is "primarily for health and safety purposes."[26] The Legislature's overwhelming support for the legislation underscores its worthwhile public purposes. However, those roadway, health and safety purposes, as well as the national refuge and wilderness purposes to which the land received by the United States would become dedicated, are unrelated to the purposes of navigation, commerce, fishing, and public use of water bodies intended to be protected by the public trust doctrine.

IV. The Requested Disclaimer Within the Two Townships

Not all submerged lands shown among the acreage within the map lines referred to by the legislature qualify as public trust doctrine lands under the rule of *Illinois Central Railroad*. Only those lands covered by the "ebb and flow of the tide" (i.e., tidelands) or

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[23] 950 P.2d 1130, 1139 (Alaska 1997).

[24] *Id*. at 1139; a*ccord, Utah Div. of State Lands*, 482 U.S. at 197-98, 202-08; *Montana v. United States*, 450 U.S. 544 (1981) (public trust submerged lands within boundary of area described for reservation or conveyance and not specifically excluded still not part of the federal conveyance or reservation).

[25] House Res. Comm. Minutes at 5-6, 8-11 (Apr. 8, 2009); Senate Res. Comm. Minutes at 12 (Apr. 8, 2010).

[26] House Res. Comm. Minutes at 5 (April 8, 2009). Representatives of King Cove Corporation (KCC) also testified before the Alaska Legislature that, although the land the corporation was giving back to the United States is a significant portion of KCC's ANCSA entitlement, doing so was "reluctantly accepted as the price for having a modest road to the Cold Bay airport through the Izembek Refuge," which the residents of King Cove had been working toward "for more than a decade." *Id*. at 5, 14-15. The State administration also testified that the disparate acreage the State was proposing to exchange was part of that price and required legislative authorization given the disparity in value. *Id*. at 9.

by such freshwaters as are "navigable"[27] come within the *Illinois Central* rule.[28] However, based on information from DNR, it appears several lakes, streams and tidal areas within at least T. 53 S. are tidally influenced or otherwise navigable for title under the federal test. They include the Cathedral River, North Creek, some other coastal streams (including several over 150 feet wide in places), and several large lakes (including one exceeding 500 acres).

The unconditional conveyance of such large areas of public trust land, probably totaling over 1000 acres, appears impermissible and unintended under the strictures of *Illinois Central*, especially as applied by the Alaska Supreme Court in *CWC Fisheries*. Although the *Illinois Central* decision arose in the context of an attempted conveyance to private parties, it has since been interpreted as applying to any conveyance or attempted conveyance of submerged lands covered by the public trust doctrine announced in that case. As stated in a May 9, 1989 published informal opinion of the Alaska Attorney General:

> We believe that considerations identical to those noted by the Alaska Supreme Court [in *CWC Fisheries*] with respect to conveyances to private individuals under AS 38.05.820(c) apply to conveyances of tidelands to municipalities under AS 38.05.820(b).[29]

There is no reason to treat a state conveyance or attempted conveyance of such public trust lands to the United States less restrictively. Indeed, in that instance there may be more reason to prohibit the conveyance, or to at least make the conveyance expressly subject to that public trust and expressly enforceable by the State, including against the United States. Whereas the case law is clear that conveyances to private parties normally remain subject to the State's public trust interest [30] and clear enough that the same rule applies to state conveyances to municipalities,[31] the law is unclear on whether a conveyance of public trust lands from a state to the federal government

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27 *I.e.*, useful for boating, under the federal test enunciated in such cases as *Alaska v. Ahtna, Inc. & United States*, 891 F.2d 1401 (9th Cir. 1989).

28 146 U.S. at 435-37.

29 Inf. Op. Att'y Gen., 1989 WL 266861 (May 9; 663-89-0360).

30 *CWC Fisheries*, 755 P.2d at 1118.

31 Inf. Op. Att'y Gen., 1989 WL 266861 (May 9; 663-89-0360) ("The short answer . . . is the [tidelands] patent [to the municipality] did not 'convey' the state's public trust responsibilities. Those responsibilities are inherent in state sovereignty and not subject to conveyance.").

remains subject to the public trust – at least where that trust is not expressly made a condition of the conveyance. For instance, in *District of Columbia v. Air Florida*, the federal circuit court stated:

> Traditionally, the [public trust] doctrine has functioned as a constraint on states' ability to alienate public trust lands and as a limitation on uses that interfere with trust purposes. * * * There has, however, been no parallel development of the doctrine as it pertains to federally-owned waterbeds [not held in trust for a future state], such as the portion of the Potomac at issue here. To our knowledge, neither the Supreme Court nor the federal courts of appeals have expressly decided whether public trust duties apply to the United States.[32]

In the case of the occupied and municipal tideland tracts addressed in *CWC Fisheries* and in the 1989 informal opinion of the Alaska Attorney General, the conveyances had already occurred years before, pursuant to specific statutes in which the Alaska Legislature clearly authorized the conveyance of public trust submerged lands, but for non-trust purposes. In that instance, the Alaska court applied the established rule that any such "attempted conveyance" free of the public trust "will pass only 'naked title to the soil,' subject to continuing public trust 'easements'" enabling continued use by the public for public trust purposes.[33] However, in this instance, the legislature has not clearly authorized the conveyance of the public trust lands, even subject to the public trust.

Thus, the requested conveyance by DNR to the United States of *Illinois Central* public trust lands, not apparently in aid of those public trust purposes and likely resulting in their impairment, appears impermissible, absent clear authorization and findings by the Alaska Legislature satisfying the requirements of the decisions in *Illinois Central* and *CWC Fisheries*. We therefore conclude that DNR does not have authority to convey the tidelands or beds of navigable waters subject to the *Illinois Central* and *CWC Fisheries* public trust restrictions within the two townships at issue.

V. The Requested Disclaimer Outside the Two Townships

The foregoing analysis applies with even greater force to the request by the USFWS in its October 20, 2010 letter that the State also "disclaim all rights, title, or interest in submerged lands beneath any inland navigable waters located within . . . KCC

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32 750 F.2d 1077, 1083-84 (D.C. Cir. 1984).

33 755 P.2d at 1118.

land included in this exchange." DNR responded, by correspondence dated December 8, 2010, that the state does not agree to disclaim any of its right, title, and interest in the beds of navigable waters within the areas KCC agreed to exchange.

We concur. Those public trust lands and waters were also obtained by the State at statehood as part of its equal footing right. They could not legally be included as part of the subsequent United States conveyances to KCC.[34] Arrangements between KCC and the USFWS were also not part of the Alaska legislation.[35] We understand the USFWS may no longer be pursuing this claim.

VI. Additional Considerations

It is worth noting that application of the conclusions in this memorandum, without additional legislative involvement, puts the United States in the same position with respect to the portions of the two townships slated for exchange as it is already in with respect to other state lands and waters within the exterior boundaries of the Izembek National Wildlife Refuge. The first federal withdrawal of land that was later made part of the Izembek National Wildlife Refuge was on December 6, 1960, by Public Land Order 2216 creating the Izembek National Wildlife Range.[36] Because that action came after Alaska became a state on January 3, 1959, the navigable waters and beds within the Range, including tidelands and any lands underlying marine waters three miles seaward of Alaska's coastline, were already owned by the State and subject to the public trust doctrine. For example, as the USFWS recognizes, Izembek Lagoon within the original Range boundaries is state land, which the State has since designated as part of the Izembek State Game Refuge, but still subject to state ownership and the public trust doctrine.[37]

Thus, the existing federal refuge is already subject to state-owned public trust inholdings, much as the two township areas slated for exchange will be under this analysis. That result is consistent with the apparent intent of the exchange and with the

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34 *Alaska v. Ahtna, Inc. & United States*, 891 F.2d 1401 (9th Cir. 1989).

35 House Res. Comm. Minutes at 5-6, 9 (Apr. 8, 2009). Representative Edgmon indicated that a tidal area, "to the left of where it says 'hovercraft site'" (a site apparently on KCC upland) on the map being used by the House Resources Committee, would also be transferred to the federal government, but that reference is unclear and giving up state tideland in that area (or elsewhere) is nowhere mentioned in HB 210.

36 *See* information on the refuge's history at the USFWS weblink, http://izembek.fws.gov/establishment.htm.

37 *Id*.

decision in *Illinois Central*, wherein the U.S. Supreme Court recognized the right and responsibility of each state to hold "the absolute right to all their navigable waters, and the soils under them, for their common use."[38]

VII. Conclusion

The passage of House Bill 210 did not authorize DNR to disclaim its ownership or public trust responsibilities in the submerged lands and waters encompassed by the *Illinois Central* and *CWC Fisheries* decisions, either within or outside of the two townships addressed by that legislation.

[38] 146 U.S. at 456.