

MUTINY AGAINST THE MMPA: A LOOK AT ALASKA SB 60

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ABSTRACT

In an attempt to curb the detrimental effects of a ballooning sea otter population, a new bill proposed in the Alaska State Senate seeks to amend the Alaska fish and game statutes by placing a bounty of \$100 on sea otters lawfully taken by Alaska Natives. This Note studies the conflicting nature of the proposed bill, SB 60, with the current version of the Marine Mammal Protection Act, examining the enforceability of the provision in light of precedent from the Alaska Supreme Court and a liberal interpretation of the MMPA. The Note ultimately concludes that SB 60, as written, is precluded by the MMPA and therefore unenforceable.

INTRODUCTION

On February 20, 2013, Senator Bert Stedman introduced Senate Bill 60 (“SB 60”) in the Alaska State Senate.¹ The bill is a proposed amendment to the fish and game statutes that would place a bounty on sea otters taken by Alaska Natives. The text of the bill states:

The department shall pay a person \$100 for each sea otter:

- (1) the person lawfully takes under 16 U.S.C. 1361-1421h (Marine Mammal Protection Act); and
- (2) for which the person submits proof of taking satisfactory to the department.²

Both proponents and opponents of SB 60 have responded strongly.

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* J.D., Tulane University School of Law, expected 2014; B.A., Creative Writing, Seattle University, 2008. I grew up primarily in rural Alaska and am still personally impacted by issues of law such as this one in my home state. Thanks are due first, foremost, and always to my father. I would also like to thank Professor Craig Senn, not only for his assistance with editing this note, but for our conversations, which have left me a wiser and better man. Additionally, I am indebted to Mr. Scott A. Brandt-Erichsen, for affording me the leeway to pursue this project, as well as his assistance in my professional development.

1. ALASKA S. JOURNAL, 28th Leg., 1st Sess. 0347 (Feb. 20, 2013).

2. *Id.*

The bill's sponsor, Senator Stedman, argued with convincing evidence that the explosion of the sea otter population in Southeast Alaska in recent years has devastated the divefishing industry, resulting in millions of dollars of lost revenue.³ Senator Stedman represents District Q in the State Senate, which covers all of Southeast Alaska. The bill was supported by local fishermen,⁴ an industry group,⁵ and the city of Craig, Alaska.⁶ Written testimony from proponents provided anecdotal evidence supporting the information presented in Senator Stedman's sponsor statement.⁷

Opponents of the bill claim that incentivizing Native take of sea otters will negatively impact tourism,⁸ may affect salmon populations,⁹ and may indirectly contribute to global warming.¹⁰ Additionally, the bill as currently written may be in conflict with the Marine Mammal Protection Act ("MMPA")¹¹ and thus be unenforceable.

This Comment first introduces the legal context of SB 60. It then examines and interprets the MMPA, as well as some of its pertinent legislative history. Next follows a discussion of two Alaska Supreme Court cases that may affect a lower court's interpretation of the MMPA in determining whether SB 60 can be legally enacted and enforced. Finally, this Comment discusses the potential legality of the proposed bounty through the lens of precedent and a liberal reading of the

3. SEN. BERT K. STEDMAN, 28TH LEG., SPONSOR STATEMENT, SB 60 – BOUNTY ON SEA OTTERS (Alaska 2013), available at http://www.alaskasenate.org/Docs/sponsors_or_statements/SB60_sponsor_statement_stedman.pdf [hereinafter SPONSOR STATEMENT]; Letter from Max Worhatch to Sen. John Coghill, Jr., Alaska S. Judiciary Comm. (Mar. 17, 2013), available at http://www.legis.state.ak.us/basis/get_documents.asp?session=28&docid=6254 [hereinafter Worhatch Letter].

4. Letter from Carl Porter to Alaska S. Judiciary Comm., available at http://www.legis.state.ak.us/basis/get_documents.asp?session=28&docid=6256; Worhatch Letter, *supra* note 3.

5. Letter from Kathy Hansen, Exec. Dir., Se. Alaska Fisherman's Alliance, to S. Res. Comm., Alaska State Leg. (Mar. 12, 2013), available at http://www.legis.state.ak.us/basis/get_documents.asp?session=28&docid=3592.

6. City of Craig, Res. 13-06 (adopted Mar. 7, 2013), available at http://www.legis.state.ak.us/basis/get_documents.asp?session=28&docid=3037.

7. See *supra* notes 3–5 (describing the reasons they support SB 60).

8. E-mail from Tina M. Brown, President, Alaska Wildlife Alliance, to Members of the Alaska State S. Res. Comm. (Mar. 13, 2013, 13:43 AKDT), available at http://www.legis.state.ak.us/basis/get_documents.asp?session=28&docid=3411 [hereinafter Brown Letter].

9. See E-mail from Patricia O'Brien to Sen. Cathy Giessel, S. Res. Comm., Alaska State Leg. (Mar. 15, 2013, 11:56 AKDT), available at http://www.legis.state.ak.us/basis/get_documents.asp?session=28&docid=3643 ("The value of the kelp forest is not yet fully understood, but it is known that kelp forests are a nursery for many fin fish including salmon and rock fish.").

10. *Id.*; Brown Letter, *supra* note 8.

11. 16 U.S.C. §§ 1361–1423h (2012).

MMPA, concluding that SB 60, as currently written, is probably too broad to pass constitutional muster.

I. THE BACKGROUND AND LEGAL CONTEXT OF SB 60

This Section examines several background issues influencing the debate on SB 60. First, it provides a discussion of the history of the sea otter in Southeast Alaska, the current trends and recent history of the divefishing industry, and the theoretical indirect impact sea otters have on global warming. The Section then looks at potential legal conflicts to SB 60, including the MMPA's preemption clause, the Native exemption to the MMPA, and Alaska precedent.

A. The History of the Sea Otter

The history of the sea otter in Southeast Alaska is a turbulent one. Alaska Natives have always harvested the otter,¹² but commercial exploitation of otters did not begin until the arrival of Russian fur traders in 1741.¹³ It is estimated that between 500,000 and 1 million otters were killed for their fur between the years 1741 and 1911.¹⁴ Consequently, otters were completely eliminated from the Southeast Alaska region.¹⁵ When otters were granted protection under the International Fur Seal Treaty of 1911,¹⁶ the commercial pressure on the species was greatly reduced.¹⁷ In 1965, after a fifty year absence, the Alaska Department of Fish and Game transplanted 412 otters from other areas of the state to the Southeast, where the animals were kept under state management.¹⁸ When the MMPA was signed into law in 1972, it transferred management of the sea otter from the State to the federal government.¹⁹

12. U.S. FISH & WILDLIFE SERV., CONSERVATION PLAN FOR THE SEA OTTER IN ALASKA 4 (1994) [hereinafter 1994 PLAN].

13. *Id.*

14. *Id.*

15. *Id.* at 7.

16. International Fur Seal Treaty of 1911, July 1, 1911, 37 Stat. 1542. This treaty has since been superseded by the Interim Convention on Conservation of North Pacific Fur Seals, Oct. 14, 1957, 8 U.S.T. 2284.

17. See 1994 PLAN, *supra* note 12, at 5 (explaining that in the last 80 years the sea otters have "repopulated most of their former range in Alaska").

18. *Id.* at 5, 7.

19. *Id.*

i. Sea Otter Impact on Fisheries

Otters feed primarily on “sessile and slow-moving invertebrates such as abalone, clam, crab, mussel, and sea urchin,”²⁰ and so the fifty year absence of the otters (combined with a depleted population for an unknown period of time prior to that absence) likely created an unnaturally high shellfish population in Southeast Alaska.²¹ Because otters do not have a protective layer of blubber like other marine mammals,²² they require a tremendous amount of food to sustain their high metabolism.²³ In captivity, otters will consume up to 25% of their body weight per day.²⁴ With males weighing between seventy and ninety pounds and females averaging forty to sixty pounds, a large sea otter population demands a large food source.²⁵

In 1994, the otter population in Southeast Alaska was estimated to be around 7,000 and growing at a rate of 20% per year.²⁶ The Fish and Wildlife Service (“the Service”) recognized that “[s]ome form of management may be necessary or desirable to minimize sea otter predation on shellfish in areas where such predation might preclude commercial, subsistence, or recreational fisheries that have developed in the absence of otters.”²⁷ However, no action was ever taken by the Service.

The current population of otters in Southeast Alaska is estimated to be around 21,500.²⁸ A population of that size can have potentially devastating effects on the local ecosystem and economy.²⁹ For example, a sea otter population of 21,500 consumes approximately 127 million pounds of shellfish per year.³⁰ Compare that to the commercial harvest

20. *Id.* at 8.

21. *Id.* at 3-4.

22. MCDOWELL GRP., SEA OTTER IMPACTS ON COMMERCIAL FISHERIES IN SOUTHEAST ALASKA 8 (2011) [hereinafter MCDOWELL REPORT].

23. *Id.*

24. *Id.*

25. *Id.*

26. 1994 PLAN, *supra* note 12, at 7.

27. *Id.* at 22.

28. SPONSOR STATEMENT, *supra* note 3; *see also* VERENA GILL, U.S. FISH & WILDLIFE SERVICE, SEA OTTERS IN SOUTHEAST ALASKA; THEIR CURRENT POPULATION STATUS & CAUSES OF MORTALITY 7 (2013), *available at* http://www.uas.alaska.edu/arts_sciences/naturalsciences/biology/sea_otter_symposium/files/VerenaGill.pdf (estimating current population at between 21,793 and 25,712).

29. *See* SPONSOR STATEMENT, *supra* note 3 (stating that continued growth of the sea otter population “jeopardiz[es] hundreds of jobs and tens of millions of dollars in economic activity for the region”).

30. *Id.*

for dive and Dungeness crab in 2010, which totaled only 5.9 million pounds—a mere 5% of the amount of potential otter consumption.³¹ A report issued in 2011 estimated the total shellfish value lost to sea otter predation since 1995 to be \$28.3 million.³² Losses in 2011 alone were \$2.23 million in the sea cucumber fishery, and \$2.0 million in the geoduck clam fishery.³³

ii. *Sea Otter Impact on Global Warming*

Opponents of SB 60 cite a study published in 2012 that links sea otters to a decrease in the amount of carbon in the atmosphere.³⁴ The report offers convincing evidence that otters indirectly reduce global warming. Sea otters eat large quantities of sea urchins, which in turn feed on kelp.³⁵ Because kelp has a “high rate of uptake of atmospheric [carbon dioxide], it stands to reason that sea otters might well increase the rate of [carbon] sequestration through their positive indirect effect on kelp.”³⁶ This logic lends some support to the idea of a carbon credit market for kelp farming.³⁷

The report concludes that the amount of carbon sequestered indirectly by sea otters in the form of increased amounts of kelp is valued somewhere between \$205 million and \$408 million.³⁸ However, distribution of that payout would be a regulatory nightmare, and likely significantly reduce the actual value received. Furthermore, there would be massive regulatory problems with management of the farms, especially with respect to precisely who would maintain the kelp forests.

While there are many uncertainties with regards to feasibility, kelp farming presents an interesting alternative for residents of Southeast Alaska. Rather than fighting the otters for what little shellfish are available, a fisherman could potentially become a kelp farmer and sell credits on a market. This option could create jobs and money for the Southeast while preserving, and likely increasing, the number of otters.

31. *Id.*

32. MCDOWELL REPORT, *supra* note 22, at 1.

33. *Id.* at 2.

34. See generally Christopher C. Wilmers et al., *Do Trophic Cascades Affect the Storage and Flux of Atmospheric Carbon? An Analysis of Sea Otters and Kelp Forests*, 10 FRONTIERS ECOLOGY & ENV'T 409 (2012).

35. *Id.* at 410.

36. *Id.*

37. See *id.* at 413 (“An alluring idea would thus be to sell the [carbon] indirectly sequestered by the sea otter . . .”).

38. *Id.*

B. Legal Context of SB 60

As it is currently written, there are a number of reasons why SB 60 would likely be unenforceable. For one, the language of the bill does not limit the take area to the problem region of the Southeast, but rather it includes the entire state, which exacerbates enforcement issues. For instance, the Southwest otter population has declined by more than 50% since the mid-1980s,³⁹ and was listed as threatened under the Endangered Species Act in 2005.⁴⁰ Otters in this part of the state face a much different reality than those in the overpopulated Southeast, and SB 60 fails to recognize this difference.

In addition, there are problems regarding the interplay between SB 60 and the MMPA. The remainder of this Section examines two relevant provisions of the MMPA and two Alaska Supreme Court cases that may affect how SB 60 is read in light of the MMPA.

i. Section 1371(b): The Native Exemption

Section 1371(b) of the MMPA provides an exemption to the moratorium on takings by Alaska Natives established in § 1371(a). The exemption applies to takings done “for subsistence purposes” or “for purposes of creating and selling authentic native articles of handicrafts and clothing,” so long as the taking “is not accomplished in a wasteful manner.”⁴¹ A legal memorandum from the Legislative Affairs Agency advises that “[p]roviding a bounty, and thus incentivizing the taking of sea otters for reasons other than subsistence and artisanal purposes, is likely to be interpreted as contrary to both the purposes and objectives of Congress in enacting the MMPA.”⁴² However, the exemption section can also be read as allowing activities that generate money necessary to live. Such a reading would mean there is no conflict with the language of section 1371(b) and the provisions of SB 60.

39. U.S. FISH & WILDLIFE SERV., SOUTHWEST ALASKA DISTINCT POPULATION SEGMENT OF THE NORTHERN SEA OTTER (*ENHYRA LUTRIS KENYONI*) – DRAFT RECOVERY PLAN iii (2010), available at http://alaska.fws.gov/fisheries/mmm/sea_otters/pdf/draft_sea_otter_recovery_plan_small_file.pdf [hereinafter DRAFT RECOVERY PLAN].

40. Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Southwest Alaska Distinct Population Segment of the Northern Sea Otter (*Enhydra lutris kenyoni*), 70 Fed. Reg. 46,366 (Aug. 5, 2009).

41. 16 U.S.C. § 1371(b)(1)–(3) (2012).

42. Memorandum from Alpheus Bullard, Legislative Counsel, Div. of Legal & Research Servs., Legislative Affairs Agency, on Establishing a Bounty on Sea Otters, to Sen. Bert Stedman (Dec. 6, 2012), available at http://www.legis.state.ak.us/basis/get_documents.asp?session=28&docid=3436.

Regulations promulgated by the National Oceanic and Atmospheric Administration define subsistence use as “the use of marine mammals taken by Alaska Natives for food, clothing, shelter, heating, transportation, and *other uses necessary to maintain the life of the taker* or those who depend on the taker to provide them with such subsistence.”⁴³ The “other use” catch-all category may allow for activities like those authorized by SB 60. Alaska Natives in the Southeast cannot exist entirely on the animals they harvest. Many low-income residents depend on the animals they kill for the majority of their caloric intake, but they still need money to buy diapers for their children, to pay their heating bill, or to put gas in their boats and ammunition in their rifles.

The legislative history of the MMPA supports this reading of “other uses.” During the floor debates on the MMPA in March of 1972, Senator Ted Stevens said, “The Alaska Native needs cash. If he is to have the choice to live where his people have dwelt for centuries, he must be permitted to make a living there.”⁴⁴ Precedent also supports this reading. In *United States v. Clark*,⁴⁵ an Alaska Native was prosecuted for a violation of § 1371 for killing nine walruses, taking the meat from one but only the oosik and ivory from the others.⁴⁶ Although the Ninth Circuit found that this particular taking was wasteful,⁴⁷ the court held that “[g]iven the legislative history and the statutory text . . . the exemption is properly viewed as protecting subsistence hunting and use of mammal parts for a limited cash economy, so long as neither use is wasteful.”⁴⁸

SB 60 requires that Alaska Native hunters comply with all aspects of the MMPA, which means their take cannot be wasteful. The bill does not alter these statutory requirements in any way—it only provides an extra incentive to take the animals. As long as the hunter makes some use of the parts of the animal he takes (which in the case of sea otters is likely only the pelt and skull), then § 1371(b)(1) of the MMPA should not be a bar to SB 60.⁴⁹

Section 1371(b)(2) does not likely raise any additional issues. This section requires that the taking be done “for the purposes of creating

43. 50 C.F.R. § 216.3 (2013) (emphasis added).

44. 118 CONG. REC. 840 (1972).

45. 912 F.2d 1087 (9th Cir. 1990).

46. *Id.* at 1088.

47. *Id.* at 1090.

48. *Id.* at 1089.

49. Sea otters, unlike walruses, do not have a large amount of edible meat or blubber. Thus, taking only the pelt and skull would likely not be deemed wasteful.

and selling authentic native articles of handicrafts and clothing.”⁵⁰ The operative word in this clause is “purposes.” If the pelt is used to create some “authentic article,” no conflict between the MMPA and SB 60 should arise. Again, receipt of the bounty requires compliance with the MMPA, and thus no bounty will be paid if the animal is taken for the sole purpose of collecting \$100. The bounty merely gives the hunter more financial leeway in creating his “authentic native articles.” There would be no rush to quickly and sloppily transform the hide into a handicraft and bring a substandard product to market. The bounty does not alter the artisanal purpose for which the otter is taken; rather, it affords someone taking otters for this purpose a small financial cushion.

A liberal reading of these two sections of the MMPA, when examined through the lens of legislative history and precedent, may allow for a bounty on sea otters that are otherwise taken in accordance with the Act.

ii. Section 1379: Federal Preemption

Section 1379 of the MMPA will most likely render SB 60 unenforceable. Section 1379(a) provides that “[n]o State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species . . . of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species . . . to the State.”⁵¹ “Take” is broadly defined under the MMPA as “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture or kill any marine mammal.”⁵²

Section 1379(a) has been found to preempt numerous other state laws even when those laws were more protective than the MMPA.⁵³ Thus, a law like SB 60, which incentivizes takes, would likely be found in conflict with the MMPA and would consequently be preempted. However, a potential and interesting loophole to MMPA enforcement in Alaska comes from a case in which local land use regulations were found to trump the MMPA.

50. 16 U.S.C. § 1371(b)(2) (2012).

51. *Id.* § 1379(a).

52. *Id.* § 1362(13).

53. *See* UFO Chuting of Hawaii, Inc. v. Smith, 508 F.3d 1189 (9th Cir. 2007) (preempting regulations pertaining to how much distance a boat must keep between themselves and whales, later overturned by an act of Congress); Fouke v. Mandel, 386 F. Supp. 1341 (D. Md. 1974) (invalidating a state ban on fur importation); People of Togiak v. United States, 470 F. Supp. 423 (D.D.C. 1979) (invalidating regulations pertaining to walrus hunting).

a. *The Arnariak Wrinkle*

*State v. Arnariak*⁵⁴ held that the preemption clause of the MMPA did not trump local land use regulations.⁵⁵ In *Arnariak*, Adam and Marie Arnariak were charged with violations of an administrative hunting regulation.⁵⁶ This regulation, pertaining to Round Island (a part of the Walrus Islands Game Sanctuary), prohibited both entry onto the island without a permit as well as the unauthorized discharge of a firearm once on the island.⁵⁷ The lower courts dismissed the charges on the grounds that the regulations were preempted by the MMPA and therefore invalid.⁵⁸ The State appealed.⁵⁹

The Alaska Supreme Court held the MMPA was not “intended to preclude the State from barring entry onto state property and from barring the discharge of firearms on state property.”⁶⁰ The court cited a line of takings cases and held that “[a] governmental attempt to require public access to private property is unconstitutional and invalid unless the government first follows the condemnation process and pays just compensation.”⁶¹ Although “relating to” when used in a preemptive clause is usually read broadly,⁶² the question of “[w]hether the phrase ‘relating to the taking’ extends to regulations protecting marine mammals on state-owned land is a question which cannot be conclusively answered merely by reference to [§ 1379(a)].”⁶³ According to the court, the answer required consideration of the legislative history of the MMPA, which states that the committee responsible for drafting the Act did not intend to “foreclose effective state programs and protective measures such as sanctuaries.”⁶⁴

In light of the statute’s ambiguous language and legislative history, the court abided by the canon that “statutes should be construed to avoid an unconstitutional result,”⁶⁵ and held that the “clear statement doctrine ‘counsels that a . . . court should not apply a federal statute to

54. 941 P.2d 154 (Alaska 1997).

55. *Id.* at 158.

56. *Id.* at 156.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *See id.* at 158 (“We are aware that Congress’s use of the phrase ‘relating to’ in an express preemption clause has been held to suggest a broad scale preemption.”).

63. *Id.* at 157.

64. *Id.* (quoting H.R. REP. NO. 92-707, at 28 (1971), reprinted in 1972 U.S.C.C.A.N. 4144, 4161) (emphasis omitted).

65. *Id.* at 158.

an area of traditional state concern unless Congress has articulated its desire in clear and definite language to alter the delicate balance between state and federal power by application of the statute to that area.”⁶⁶ Because state land use regulations are a “traditional state function,”⁶⁷ the court held that language in the MMPA was not so clear as to definitively express a Congressional goal of preventing the State from “ban[ning] certain activities in state wildlife sanctuaries.”⁶⁸ Consequently, the local regulation at issue was not preempted by the MMPA and the Arnariaks could be tried for their violation.⁶⁹

Justice Rabinowitz’s concurrence took a different path in reaching the same result. He concluded that § 1379(a) *did* preempt the Alaska regulations, but that it had “effect[ed] an uncompensated taking in violation of the Fifth Amendment of the United States Constitution.”⁷⁰ Justice Rabinowitz quoted language from the same House Report as the majority, which read, “[i]f U.S. activities are impaired by reason of a failure to own the necessary lands or interests therein, the Secretary must thereupon suspend the program and notify the Congress, recommending such additional legislation [as] is deemed necessary.”⁷¹ In Justice Rabinowitz’s mind, “[t]his passage indicates Congress was aware of the Act’s possible Constitutional infirmity” and Congress was “unsure of whether the proposed legislation would run afoul of Fifth Amendment property rights,” but that Congress went ahead with the law anyway, leaving the issue for courts to resolve.⁷² Unlike the majority, who strained to construe the law in a manner that avoids the constitutional issue, Justice Rabinowitz felt “the intention of the Congress [was] revealed too distinctly to permit [him] to ignore it because of mere misgivings as to power.”⁷³ He thus concluded that the MMPA contravenes the Fifth Amendment, and that “[e]ven under a liberal reading of the Supreme Court’s takings cases, the fact that Alaska permits tourists to enter Round Island to shoot pictures does not allow Congress to require Alaska to permit others to enter to shoot walrus.”⁷⁴

The holding and reasoning in *State v. Arnariak* provides a potential

66. *Id.* (alteration in original) (quoting *Totemoff v. State*, 905 P.2d 954, 966 (Alaska 1995)).

67. *Id.* (quoting *EEOC v. Wyoming*, 460 U.S. 226, 239 (1983)).

68. *Id.*

69. *Id.*

70. *Id.* (Rabinowitz, J. concurring).

71. *Id.* at 159 (quoting H.R. REP. NO. 92-707, at 29 (1971), *reprinted in* 1972 U.S.C.C.A.N. 4144, 4161).

72. *Id.*

73. *Id.* at 160 (Frankfurter, J., dissenting) (quoting *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 478 (1957)).

74. *Id.*

exception to the enforcement of the MMPA in Alaska. If the State can promulgate land use regulations that create a clear property right in Alaska Natives for the taking of sea otters, the courts may allow SB 60 to stand.

b. The Navigable Waters of Alaska and Totemoff

Because sea otters are a “completely marine species,”⁷⁵ the question becomes: to what extent can Alaska govern hunting and fishing in the state’s navigable waters? Under *Totemoff v. State*,⁷⁶ the answer is, in the absence of a clear statement to the contrary, fully.⁷⁷

In *Totemoff*, the Alaska Supreme Court was asked to determine whether the Alaska National Interest Land Conservation Act (“ANILCA”) preempted a state law that banned hunting with the aid of an artificial light.⁷⁸ The hunter’s skiff at the time of the shooting was in navigable waters belonging to the State, while the deer he killed was on federal lands.⁷⁹ The court found that “[e]ven if ANILCA does protect customary and traditional means and methods, thereby preempting state enforcement of the anti-spotlighting regulation against Totemoff on federal lands, the State still has criminal jurisdiction if ANILCA does not apply to the navigable waters from which Totemoff shone his spotlight on the deer.”⁸⁰

The court gave several reasons why navigable waters are not subject to ANILCA, and found that “the federal government has no authority based on the navigational servitude or the reserved water rights doctrine to regulate hunting and fishing in Alaska’s navigable waters.”⁸¹ The first reason given by the court was that Alaska was granted an “interest in fish and wildlife located in navigable waters which precludes federal regulation of such fish and wildlife,” under the Submerged Lands Act of 1953.⁸² That Act gave the State of Alaska “ownership of, title to, and management power over the following: lands beneath the navigable waters of Alaska, the navigable waters themselves, and fish and other marine life located in Alaska’s navigable

75. DRAFT RECOVERY PLAN, *supra* note 39, at 19.

76. 905 P.2d 954 (Alaska 1995).

77. *See id.* at 973 (“The State . . . has the power to enforce its hunting and fishing laws against subsistence users on federal land, so long as those laws do not conflict with federal laws or regulations.”).

78. *Id.* at 957–58.

79. *Id.* at 957.

80. *Id.* at 961.

81. *Id.* at 964.

82. *Id.*

waters.”⁸³ The second reason, similar to the reason employed in *Arnariak*, was rooted in the clear statement doctrine. Because states “have traditionally had the power to govern hunting and fishing in their navigable waters,” the court held that the regulation of such activities is a “traditional concern of the states.”⁸⁴ Similar to the holding in *Arnariak*, because the Act did not have “unmistakably clear language” that Congress intended to shift the allocation of power between state and federal governments,⁸⁵ the State retained criminal jurisdiction over Totemoff for violating state hunting regulations on state navigable waters.⁸⁶

II. POSSIBLE APPLICATION OF EXISTING LAW TO SB 60

The two cases discussed above illustrate that the Alaska Supreme Court looks for a “clear statement” from Congress when finding that federal law preempts state law and regulations. In *Totemoff*, the court found that the State retained full jurisdiction over navigable waters because such jurisdiction had been granted to the State in the Submerged Lands Act and because there was no clear statement in ANILCA to “alter this traditional allocation of state and federal power.”⁸⁷ Similarly in *Arnariak*, the court held that there was no clear statement in the MMPA regarding federal preemption of state land use regulations.⁸⁸ This Section will examine and evaluate the potential legal arguments on both sides of the issue of whether the MMPA would preempt SB 60.

A. Preempting a Mutiny

Despite the use of the typically broadly construed phrase “relating to” in § 1379(a) of the MMPA, the *Arnariak* court refused to apply this preemption to state-owned lands (which the court held are treated similarly to privately-owned property for Fifth Amendment purposes).⁸⁹ Would an Alaska court be willing to extend this logic to the State’s

83. *Id.* (citing 43 U.S.C. §§ 1301-56 (1988)).

84. *Id.* at 966.

85. *Id.*

86. *See id.* at 968 (holding that because regulating hunting and fishing in navigable waters is a traditional area of the states, navigable waters are generally not public lands under ANILCA absent unmistakably clear language intending to alter the allocation of power and therefore the State had jurisdiction over Totemoff).

87. *Id.* at 966.

88. *State v. Arnariak*, 941 P.2d 154, 158 (Alaska 1997).

89. *Id.*

navigable waters? After *Totemoff*, it seems possible but very unlikely.

The key difference between *Arnariak* and SB 60 is that the regulation in *Arnariak* restricted otherwise legal activities, while SB 60 permits otherwise illegal activities. The court in *Arnariak* determined that Congress did not intend “to preclude the State from limiting access to, or the discharge of firearms on, state property.”⁹⁰ It is unlikely that a court would chose to extend *Arnariak* in the opposite direction; that is, allowing the State to permit activity on its navigable waters that is otherwise barred by the MMPA.

Similarly, although “[r]egulation of hunting and fishing [in navigable waters] is a traditional concern of the states,”⁹¹ the right to allow public users of those waters to hunt on them is not a right of the same caliber as a private property owner’s right to exclude. Allowing Alaska Native hunters to take otters in accordance with SB 60 would not likely create the same constitutional concerns for a court that requiring private landowners to permit Native takes on their land would.

There is the possibility, however slight, that a court following *Arnariak* may refuse to apply preemption, either by failing to find a “clear statement” that Congress intended to regulate the area of hunting and fishing in navigable waters, or, alternatively, by following Justice Rabinowitz’s logic in his *Arnariak* concurrence and finding that section 1379(a) creates a taking by preventing the State from using its navigable waters as it sees fit.

It is unlikely a court will act according to the first possibility and find no “clear statement.” The very title of the MMPA includes the words “marine mammal,” which, by definition, involves regulating the navigable waters of the states, and the phrase “relating to” in statutes “has been held to suggest a broad scale preemption.”⁹² The combination of these two factors weighs heavily against a court finding no “clear statement.” The court in *Arnariak* supported its no “clear statement” finding by holding that preemption was contrary to the purposes of the MMPA.⁹³ Here, it is unclear whether a bounty on sea otters under SB 60 conflicts with the purposes of the MMPA:⁹⁴ at least in the Southeast, it may not.

As to the second possibility, in which the court finds an unconstitutional taking, this too does not seem to be a likely outcome. In

90. *Id.*

91. *Totemoff v. State*, 905 P.2d 954, 966 (Alaska 1995).

92. *Arnariak*, 941 P.2d at 158 (discussing the statutory language).

93. *Id.* at 157–58.

94. *See id.* at 157 (quoting H.R. REP. NO. 92-707, at 11 (1971), *reprinted in* 1972 U.S.C.C.A.N. 4144, 4144) (“The purpose of this legislation is to prohibit the harassing, catching and killing of marine mammals.”).

the *Arnariak* decision, the court held that the state regulation was not preempted by the MMPA in order to avoid an unconstitutional taking.⁹⁵ The bounty established by SB 60 should not present the same problem because SB 60 would not create a property right, which is required to show a Fifth Amendment taking.⁹⁶ Within the framework of *Kaiser Aetna v. United States*,⁹⁷ a bounty is probably not an “expectanc[y] embodied in the concept of ‘property’” sufficiently important to require the government to condemn it and provide compensation.⁹⁸

Because there is no property right at issue here, it is very unlikely that a court would agree with Justice Rabinowitz and find that the MMPA as applied to a sea otter bounty is an unconstitutional taking. SB 60, as currently written, would thus likely be preempted and invalidated.

B. Paying the Bounty

While a court would probably not find the same constitutional concerns with SB 60 as with the regulation in *Arnariak*, there are some similar arguments that support the bill’s legality. Just as “the regulation of state lands is a traditional state function,”⁹⁹ so too have states “traditionally had the power to govern hunting and fishing in their navigable waters.”¹⁰⁰ Because the *Arnariak* court found that, despite evidence to the contrary, “Congress has not manifested in the MMPA in clear and definite language a desire to displace the State’s ability to ban certain activities in state wildlife sanctuaries,”¹⁰¹ another Alaska court might find the same lack of “clear and definite language”¹⁰² regarding bounty regulation on the State’s navigable waters. The typically broad preemption found in the phrase “relating to” has been limited by *Arnariak* and does not apply to local land use regulations in Alaska.¹⁰³ A court might be willing to extend that logic to regulations pertaining to navigable waters. While “[t]he power to regulate commerce comprehends the control for that purpose, and to the extent necessary,

95. *See id.* at 158 (holding that the MMPA did not preempt the state regulation and the constitutional issue need not be decided).

96. *See United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945) (holding that the takings clause of the Fifth Amendment only requires compensation when private property is taken for public use).

97. 444 U.S. 164 (1979).

98. *Id.* at 179–80.

99. *Arnariak*, 941 P.2d at 158.

100. *Totemoff v. State*, 905 P.2d 954, 966 (Alaska 1995).

101. *Arnariak*, 941 P.2d at 158.

102. *Id.* (quoting *Totemoff*, 905 P.2d at 966).

103. *Id.*

of all the navigable water of the United States,”¹⁰⁴ the power to regulate navigation only “confers upon the United States a dominant servitude.”¹⁰⁵ Similar to the issue in *Totemoff*, where the court found fishing and hunting in navigable waters to be a traditional domain of the states, a court reviewing SB 60 might find that the MMPA lacks the requisite “unmistakably clear language” that would lead the court to “alter this traditional allocation of state and federal power.”¹⁰⁶

Delving deeper into the purpose of the MMPA potentially provides some support for the sea otter bounty. The purpose of the MMPA is articulated within the Act itself: “the primary objective . . . should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population *keeping in mind the carrying capacity of the habitat.*”¹⁰⁷ Optimum sustainable population is defined as “the number of animals which will result in the maximum productivity of the population of the species, *keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.*”¹⁰⁸ The current rate of sea otter population growth is as high as 12–14% per year in Southeast Alaska.¹⁰⁹ This growth has already had drastic, negative impacts on the surrounding marine ecosystem.¹¹⁰ Numerous other marine species have become depleted to the point where their commercial harvest is no longer allowed, and this has resulted in millions of dollars of lost revenues.¹¹¹

The bounty established by SB 60 could actually improve the health of the ecosystem by limiting the amount of otters in the area preying on other species and in turn leading to greater biodiversity. In managing marine mammals, one must keep in mind “the carrying capacity of the habitat and the health of the ecosystem.”¹¹² A bounty on sea otters in Southeast Alaska, which would regulate a population that is growing at an incredible rate and is contributing to the degradation of the health of the ecosystem, might not be at odds with the MMPA’s purpose.

As mentioned previously, the legislative history of the MMPA might support a court’s finding that the bounty is valid under § 1371.

104. *United States v. Rands*, 389 U.S. 121, 122–23 (1967) (internal quotation marks omitted).

105. *Id.* at 123 (internal quotation marks omitted).

106. *Totemoff*, 905 P.2d at 966.

107. 16 U.S.C. § 1361(6) (2012) (emphasis added).

108. *Id.* § 1362(9) (emphasis added).

109. SPONSOR STATEMENT, *supra* note 3.

110. MCDOWELL REPORT, *supra* note 22, at 1–4, 15.

111. *Id.*

112. 16 U.S.C. § 1362(9).

Senator Stevens expressly stated during the Senate debate on the MMPA that “the Alaska Native needs cash.”¹¹³ Since Senator Stevens made that point in 1972, the Alaska Native’s need for cash has only become more pronounced. While it may no longer be the case that “the only industry that the Alaska Native can count on to support himself and his family is one based upon full utilization of the ocean mammals,”¹¹⁴ the ocean mammal industry is still an important one. Just as “snowmobiles have largely replaced dog sleds,”¹¹⁵ cash has long since replaced barter and trade between individual Alaska Natives. SB 60 therefore comports with Senator Stevens’ original vision for the Native exemption to the MMPA by providing a means for Alaska Natives to earn cash.

CONCLUSION

While *Arnariak* provides an interesting loophole to MMPA enforcement in Alaska, SB 60 does not manage to squeeze through it. In order to circumvent the MMPA, a bill would have to create some form of property right in sea otters for Alaska Natives, which SB 60 currently does not. The language of the bill is too broad, and its enforcement would almost certainly be in conflict with § 1379(a) of the MMPA.

If Senator Stedman were to revise the bill to create a property right in sea otters, the Alaska Supreme Court might be willing to extend *Arnariak* and either construe the MMPA as not preempting state law, or, follow Justice Rabinowitz’s logic and hold that the MMPA is unconstitutional in this situation. Wording the bill in a way that creates a property right would be incredibly difficult, as courts have held that there is no right in assigned fishing quotas,¹¹⁶ and thus it is likely that effective management of Southeast Alaska’s sea otter population will ultimately need to take another path.

113. 118 CONG. REC. 8401 (1972) (statement of Sen. Ted Stevens).

114. *Id.*

115. *Id.*

116. *See, e.g.,* Am. Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1383 (Fed. Cir. 2004) (holding that a fishing vessel’s owner did not have the right to fish for mackerel in the United States Exclusive Economic Zone).