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## Kelso v. Rybachek, 912 P.2d 536 (Alaska 1996)

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emption in areas traditionally regulated by the states. Regulation of a state's lands typically falls within the traditional functions of the state.

As state regulation is not preempted by the MMPA, the state is capable of restricting visitation and prohibiting hunting by Native Alaskans. Without just compensation, the court concluded that a proscription of these state freedoms would be unconstitutional, violating the Fifth Amendment, and thus construed the MMPA not to preempt state law.

*Chip Cutler*

**Kelso v. Rybachek, 912 P.2d 536 (Alaska 1996)** (holding that the State is not required to support its decision not to downgrade water uses and was reasonable in its adoption of regulations governing reclassification of water).

On January 31, 1983, the Livengood/Tolovana Mining District ("Miners") applied to the Alaska Department of Environmental Conservation (the "Department") to reclassify streams for industrial uses, thus lowering the classification standards for the streams. The Department denied the petition. The Environmental Protection Agency, however, had revised its regulations requiring a State to perform a use attainability analysis ("UAA") before reclassifying waters to eliminate assigned uses.

The Miners appealed the denial of reclassification to the superior court. The court held that pursuant to the new federal guidelines, "prior to any reclassification the State must conduct a [UAA] and must have appropriate regulations for the conducting of such analysis." The court ordered the Department to promulgate appropriate regulations and conduct a UAA on the waters that the Miners had petitioned.

The Department complied with the court order and enacted regulations that required at least one hearing and compliance with federal reclassification regulations before any reclassification of state waters. The Department then proceeded to conduct a UAA on the waters the Miners had petitioned for reclassification. The Department conducted field surveys, water quality analyses, habitat observation, and biological surveys. On three streams, the Department found that attainability was inconclusive because of lack of information. Where they found suitable fish habitat but did not actually observe fish during the study, fish use was deemed attainable. The Department then determined that the streams had, "'existing' and 'attainable' uses requiring more stringent controls than the industrial classification." Furthermore, the Department conducted public hearings on the reclassification of the water. Based upon the UAA and the hearings, the Department made a final decision on the reclassification of the waters and submitted it to the Department of Law. The Department of Law made further revisions and subsequently submitted it to the Lieutenant Governor's office. On January 9, 1990, the final decision was

transmitted.

Stanley and Rosalie Rybachek had resided on the patented mining property for more than 30 years. They appealed the Department's 1990 decision partially denying the petition for reclassification and challenged the validity of the regulations promulgated by the Department.

The superior court held that the department adopted regulations in compliance with the previous order and in compliance with proper procedure. The superior court questioned, however, the procedures for maintaining designated uses in the UAA where the study results were inconclusive, and remanded to the Department for further clarification and data. The superior court was concerned with the fact that the Department could fail to collect certain data and then deny reclassification based upon that lack of data. The court said this was a "restrictive inference."

The State appealed the order of remand and the Rybacheks cross-appealed claiming error in the findings by the superior court: "(1) that the Department had promulgated a proper reclassification regulation; and (2) that certain waters were appropriately not reclassified."

The Alaska Supreme Court applied the "reasonable and not arbitrary" standard to agency rule making. The supreme court stated that, "[t]he Department has discretion to determine the extent and scope of any UAA that it decides to perform, as long as it complies with 40 C.F.R. [Section] 131 and other applicable state and federal statutes and regulations." The supreme court held that neither state nor federal regulations required the State to provide information in support of a decision to maintain a designated use and therefore, "[t]he Department is not obligated by state or federal law to support its decision not to downgrade water uses so long as the decision is reasonable and not arbitrary."

The supreme court then addressed the validity of the regulations promulgated by the Department. The court stated that the State had wide discretion in enacting water quality regulations and the Department was vested with the power to establish water quality standards and various classes of water. The court held that, "[g]iven the EPA oversight, the Department reasonably adopted as Alaska's standard the EPA regulation governing reclassification . . . [t]hus we conclude that the regulation is reasonable and not arbitrary."

The court reversed the trial court's order for remand to the Department and affirmed the remaining issues.

*Christine Wise-Ludban*

## CALIFORNIA

**Galante Vineyards v. Monterey Peninsula Water Management District**, 60 Cal. App. 4th 1109 (Cal. Ct. App. 1997) (holding that adequacy ob-