NO. 128, ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

STATE OF ALASKA,
***Plaintiff*,**

v.

UNITED STATES OF AMERICA,
Defendant.

REPORT OF THE SPECIAL MASTER ON SIX MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND ONE MOTION FOR CONFIRMATION OF A DISCLAIMER OF TITLE

GREGORY E. MAGGS
Special Master
Washington, D.C.

March 2004

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I. INTRODUCTION

This report concerns an original action brought by the State of Alaska against the United States to quiet title to submerged lands in the area of Southeast Alaska. Alaska's amended complaint includes four counts. Alaska has moved for partial summary judgment on counts I, II, and III, and the United States has moved for summary judgment on counts I, II, and IV. The United States also has moved for confirmation of a disclaimer of title with respect to lands at issue in count III.

This report recommends that the Supreme Court (1) grant summary judgment to the United States on counts I, II, and IV; (2) deny summary judgment to Alaska on counts I and II; (3) confirm the United States' proposed disclaimer; (4) dismiss count III for lack of jurisdiction; (5) dismiss Alaska's motion for summary judgment on count III as moot; and (6) order that Alaska take nothing on counts I, II, and IV of its amended complaint. These recommendations, if adopted, will end this litigation.

A. Procedure

On June 12, 2000, the Court granted the State of Alaska leave to file a bill of complaint against the United States. *See Alaska v. United States*, 530 U.S. 1228 (2000). Alaska's complaint asks the Court to quiet title to vast expanses of marine submerged lands under the authority of 28 U.S.C.

§ 2409a(a) (2000), a provision of the Quiet Title Act of 1972.[1] The submerged lands are located in the area of Southeast Alaska's Alexander Archipelago. This area includes over 1000 islands and is larger than many states. It extends about 500 miles from north to south and 100 miles from east to west, making this case one of the largest quiet title actions ever litigated. The dispute involves a geographical area that is different from those areas at issue in previous submerged lands cases involving the United States and Alaska.[2]

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[1]Under 28 U.S.C. § 2409a(a), the United States "may be named as a party defendant in a civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest." In *California v. Arizona*, 440 U.S. 59, 64-65 (1979), the Court held that § 2409a(a) waives the United States' sovereign immunity in quiet title actions. Another statutory provision, 28 U.S.C. § 1346(f) (2000), provides that "[t]he district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States." The Court has held that § 1346(f) does not divest the Court of jurisdiction over quiet title actions under § 2409a(a) otherwise within its original jurisdiction. *See California v. Arizona*, 440 U.S. at 66-68.

[2]*See United States v. Alaska*, 521 U.S. 1 (1997) [hereinafter *Alaska (Arctic Coast)*] (concerning submerged lands along the Arctic Coast of Alaska); *United States v. Alaska*, 503 U.S. 569 (1992) [hereinafter *Alaska (Norton Sound)*] (concerning submerged lands in Norton Sound near the city of Nome); *United States v. Alaska*, 422 U.S. 184 (1975) [hereinafter *Alaska (Cook Inlet)*] (concerning submerged lands in Cook Inlet). Alaska has a longer shoreline,

Alaska's claims rest on the Equal Footing doctrine and the Submerged Lands Act of 1953, 67 Stat. 29 (codified as amended at 43 U.S.C. §§ 1301-1315 (2000)). The Equal Footing doctrine says that new states enter the Union having the same sovereign powers and jurisdiction as the original thirteen states. *See Coyle v. Smith*, 221 U.S. 559, 572-73 (1911); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 228-29 (1845). Under this doctrine, a new state generally acquires title to the beds of inland navigable waters. *See Alaska (Arctic Coast)*, 521 U.S. at 5. The Submerged Lands Act of 1953 declares that states generally have title to all lands beneath inland navigable waters and beneath offshore marine waters within their "boundaries." 43 U.S.C. § 1311(a). A state's boundaries under the Act generally extend three geographical (*i.e.*, nautical) miles[3] from the coast line. *See id.* § 1301(b). Under both the Equal Footing doctrine and the Submerged Lands Act, the United States may prevent title to submerged lands from passing to a state at statehood by expressly retaining title to the lands. *See id.* § 1313(a); *Alaska (Arctic Coast)*, 521 U.S. at 35.

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including the shoreline of islands, than the entire rest of the United States. Perhaps for this reason, Alaska has become involved in more disputes over submerged lands than other states.

[3]A "geographical" or "nautical" mile (also sometimes called a "geographic" or "sea" mile) equals approximately 1.15 "statute" miles (also called "English" or "land" miles). Three nautical miles equals one marine league. *See United States v. California*, 381 U.S. 139, 180 n.4 (1965).

Alaska's amended complaint states four counts. *See* Amended Complaint to Quiet Title, *Alaska v. United States* (U.S. Dec. 14, 2000) (No. 128, Orig.); *Alaska v. United States*, 531 U.S. 1066 (2001) (granting leave to amend complaint). Count I alleges that the waters of the Alexander Archipelago are inland waters because they have been historically treated as inland waters. *See* Amended Complaint to Quiet Title, *supra*, ¶¶ 7-9. Count II alleges that the waters also qualify as inland waters because they lie within several juridical bays defined by the Alexander Archipelago's geographic features. *See id.* ¶ 25. As described more fully below, these counts claim that certain submerged lands located within these alleged inland waters, or within three nautical miles seaward of the limits of these alleged inland waters, passed to the State under the Equal Footing doctrine and Submerged Lands Act. *See* Amended Complaint to Quiet Title, *supra*, ¶¶ 15, 38.

Counts III and IV concern the possibility that the United States may have retained title to some of the submerged lands at issue and thus prevented them from passing to Alaska under the Equal Footing doctrine and the Submerged Lands Act. In count III, Alaska claims that the United States did not reserve or retain submerged lands located within the boundaries of the Tongass National Forest. *See* Amended Complaint to Quiet Title, *supra*, ¶ 44. In count IV, Alaska claims that the United States did not reserve or retain submerged lands located within the boundaries of the Glacier Bay National Monument (an area later expanded and now called the Glacier Bay National Park and Glacier Bay National Preserve). *See id*. ¶¶ 59-61.

On July 24, 2002, the parties filed six motions for partial summary judgment. Alaska asked for summary judgment on

counts I, II, and III, and the United States asked for summary judgment on counts I, II, and IV. On February 3 and 4, 2003, the Special Master heard oral argument on counts I, II, and IV. The Special Master stayed oral argument on count III because the United States announced its intention to disclaim ownership of certain submerged lands claimed by Alaska. On May 30, 2003, the United States filed an unopposed motion for confirmation of a proposed disclaimer and the dismissal of count III. *See infra* Appendix A (proposed disclaimer).

The Court now has before it the questions of whether to grant summary judgment on counts I, II, and IV and whether to confirm the United States' proposed disclaimer of title and dismiss count III. The Special Master recommends that the Court grant summary judgment to the United States on counts I, II, and IV, deny summary judgment to Alaska on counts I and II, confirm the United States' proposed disclaimer, and dismiss count III for lack of jurisdiction.

B. Terminology and Basic Principles

The law governing Alaska's claims comes mostly from Supreme Court precedents, the Submerged Lands Act, and a multilateral treaty called the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, [1964] 15 U.S.T. (pt. 2) 1607, T.I.A.S. No. 5639 [hereinafter Convention] (Exhibit US-I-7).[4] These sources of law employ a number of technical terms that require some initial explanation.

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[4]The United States signed the Convention on April 29, 1958, and the Convention entered into force on September 10, 1964. A portion of the Convention appears in Appendix B below.

The Convention uses the word "baseline" to refer to what United States courts and statutes typically call the "coastline" or "coast line." *See Alaska (Arctic Coast)*, 521 U.S. at 8; Submerged Lands Act, 43 U.S.C. § 1301(c). The baseline or coast line generally follows the "low-water line along the coast." Convention, *supra*, art. (3). *See also* 43 U.S.C. § 1301(c). In special circumstances, as discussed at considerable length in this report, the baseline may cross over the mouths of bays or rivers or may run from island to island in areas where a group of islands fringes the mainland. *See Alaska (Arctic Coast)*, 521 U.S. at 8, 11. In these special circumstances, the baseline is called a "closing line." *Id.* at 11.

The term "internal waters" under the Convention is synonymous with what courts in the United States have traditionally called "inland waters." *See United States v. California*, 382 U.S. 448, 450 (1966) (per curiam). Internal waters include all waters "on the landward side of the baseline," such as rivers, lakes, and bays. *See* Convention, *supra*, art. 5(1). The Convention contains a complicated geographic definition of a "bay." *See id.* art. 7(2)-(5) (reprinted below in Appendix B). The Court generally calls bays meeting this geographic definition "juridical bays." *See United States v. Maine*, 475 U.S. 89, 94 (1987) [hereinafter *Maine (Nantucket Sound)*]. The Convention also recognizes "historic bays," which are areas of water that may not meet the geographic definition of a bay but which have been historically treated like the internal waters of a bay. *See* Convention, *supra*, art. 7(6). The Court sometimes refers to historic bays as "historic inland waters" or "historic waters," perhaps to emphasize that they may not satisfy the geographic definition of a bay. *See Alaska (Arctic Coast)*, 521 U.S. at 11;

United States v. Louisiana (Louisiana Boundary Case), 394 U.S. 11, 75 & n.100 (1969).

A nation has complete sovereignty over its internal waters. *See Louisiana Boundary Case*, 394 U.S. at 22. The nation may regulate all activities within internal waters, and may exclude foreign vessels from passing through internal waters or even entering them. For example, absent a treaty to the contrary, the United States could exclude foreign ships from entering the Mississippi River or San Francisco Bay.

The term "territorial sea" under the Convention refers to what United States courts have traditionally called the "marginal sea." *See United States v. Maine (Rhode Island and New York Boundary Case)*, 469 U.S. 504, 513 (1985); *Louisiana Boundary Case*, 394 U.S. at 22. The territorial sea consists of waters lying immediately seaward of the baseline. *See* Convention, *supra*, art. 6. The Convention does not specify the breadth of the territorial sea. Prior to 1988, the United States generally took the position that its territorial sea had a breadth of three nautical miles. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 n.8 (1989). Since 1988, however, the United States has claimed a territorial sea of twelve nautical miles. *See* Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988).

The United States uses the "envelope of arcs of circles" method to determine the outer limits of its territorial sea. This method requires drawing arcs on a chart of the coast line from every point along the coast line. Each arc has a radius equal to the breath of the territorial sea (formerly three nautical miles, now twelve nautical miles). As the arcs partially overlap each other, the outermost arc segments define the limits of the

territorial sea. *See* G. Etzel Pearcy, *Measurement of the U.S. Territorial Sea*, 40 Dep't of State Bull. 963, 964 & fig. 1 (1959) (describing and illustrating the envelope of arcs of circles method) (Exhibit AK-102).

A coastal nation has sovereignty over its territorial sea. *See* Convention, *supra*, art. 1. Accordingly, within its territorial sea, a nation may exercise extensive control over the activities of foreign vessels. *See Louisiana Boundary Case*, 394 U.S. at 22. The nation, however, may not prevent foreign vessels from making "innocent passage" (sometimes called "free passage") through the territorial sea. *See id.*; Convention, *supra,* art. 15(1). The Convention explains that "[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State." *Id.* art. 14(4). For example, the United States might regulate fishing by foreign vessels in the territorial sea off the West Coast, but it could not bar foreign vessels from merely traveling through the territorial sea when sailing between Mexico and Canada.

Some older documents cited by the parties in this case use the term "territorial waters." This term may refer to the territorial sea, to internal waters, or to both depending on context. *See* 3 *Acts of the Conference for the Codification of International Law* 195, League of Nations Doc. C.351(b) M.145(b) (1930) (Exhibit AK-91) ("under American laws and regulations the expression 'territorial waters of the United States' includes other waters than those of marginal sea, for example, ports, harbours, bays, and other enclosed arms of the sea, as well as boundary waters."); 1 Aaron L. Shalowitz, *Shore and Sea Boundaries* 317 (1962) (Exhibit AK-311) (glossary entry for "territorial waters" says: "Includes the territorial sea

(marginal sea) and the inland waters of a country (lakes, rivers, bays, etc.). Sometimes used as synonymous with Territorial Sea.").

"High seas" are waters lying seaward of the limits of the territorial sea. *See* Convention, *supra*, art. 24(1). Traditionally, coastal nations had little power to regulate the conduct of foreign vessels on the high seas. *See Louisiana Boundary Case*, 394 U.S. at 23. The Convention, however, allows a coastal nation to exercise the control necessary to prevent "infringement of its customs, fiscal, immigration, or sanitary regulations" within a "contiguous zone" that may extend up to "twelve miles from the baseline from which the territorial sea is measured." Convention, *supra*, arts. 24(1)(a), 24(2). The United States currently claims a contiguous zone that extends an additional twelve miles beyond its territorial sea. *See* Proclamation No. 7219, 64 Fed. Reg. 48,701 (Aug. 2, 1999). The United States also claims a jurisdiction to regulate fishing within a 200-mile "Exclusive Economic Zone." Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983) (proclaiming the existence of this zone); 16 U.S.C. §§ 1802(11), 1811(a) (2000) (implementing this proclamation).

II. HISTORIC INLAND WATERS (Count I)

Count I of Alaska's amended complaint alleges that the waters of the Alexander Archipelago are historic inland waters. Both Alaska and the United States have moved for summary judgment on this count. For the reasons stated below, the Special Master recommends that the Court grant the United States' motion and deny Alaska's motion.

A. Overview

Appendix C contains a map of Southeast Alaska. The area depicted consists of numerous islands forming Alaska's Alexander Archipelago and a long strip of the Alaska mainland. On the map, a dark border surrounds the western side of the Archipelago. This dark border is a graphic representation of a collection of closing lines described by the United States in an arbitration with Britain known as the "1903 Alaska Boundary Tribunal." *See infra* part II.C.3 (discussing this arbitration at length).

In count I, Alaska seeks to quiet title to certain "pockets and enclaves" of submerged lands. These pockets and enclaves include submerged lands (marked in red on the map in Appendix C) lying landward of the 1903 closing lines but more than three nautical miles from the shores of the mainland and any island. *See* Amended Complaint to Quiet Title, *supra*, ¶ 7 & Exh. 1. The pockets and enclaves also include submerged lands (marked in dark blue on the map in Appendix C) situated in areas extending three nautical miles seaward of the 1903 closing lines but more than three nautical miles from the shores of the mainland or any islands. *See id.* ¶ 14 & Exh. 1. The United States estimates that, altogether, the pockets and

enclaves have a total area of approximately 777 square miles.[5] *See* U.S. Count I Memorandum at 2.

Alaska's claim that it now has title to these pockets and enclaves of submerged lands rests on the theory that waters landward of the 1903 closing lines are historic inland waters. *See* Amended Complaint to Quiet Title, *supra*, at ¶¶ 7-9. The Court has considered claims of this kind in a number of lawsuits. It has decided two cases concerning claims of historic waters off other portions of Alaska's coast. In 1975, the Court held that Cook Inlet, a 150-mile long indentation into the Alaskan coast leading to the city of Anchorage, is not a historic bay. *See Alaska (Cook Inlet)*, 422 U.S. at 188-204. In 1997, the Court similarly said (and Alaska conceded) that Stefansson Sound, an area of water lying off Alaska's Arctic Coast, is not a historic bay. *See Alaska (Arctic Coast)*, 521 U.S. at 11. Other

[5]While count I and count II address only these relatively small pockets and enclaves of submerged lands, counts III and IV together concern title to submerged lands that lie or may lie within the boundaries of the Glacier Bay National Monument and Tongass National Forest. Together, the Glacier Bay National Monument and the Tongass National Forest cover almost the entire area of the Alexander Archipelago, putting at issue title to more than 10,000 square nautical miles of submerged land. *See* Exhibit AK-160 (approximate acreage calculations for water areas in the northern and southern parts of the Alexander Archipelago, subject to various qualifications).

cases have addressed historic waters claims relating to the coast of California,[6] Florida,[7] Louisiana,[8] Massachu-

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[6]In 1964, the Court held that six bays and indentations off the California coast are not historic inland waters. These included: (1) the indentation from Point Conception to Point Hueneme; (2) San Pedro Bay; (3) the indentation from the southern extremity of San Pedro Bay to the western headland at Newport Bay; (4) Crescent City Bay; (5) San Luis Obispo Bay; and (6) Santa Monica Bay. *See California*, 381 U.S. at 143 n.3, 172-175. Special Master William H. Davis also had determined that Monterey Bay is not a historic bay, but the Court did not reach the issue because it held that Monterey Bay constitutes a juridical bay under the Convention. *See id.* at 173.

[7]In 1973, Special Master Albert B. Maris concluded that an area of the Gulf of Mexico southeast of a line from the Dry Tortugas to Cape Romano is not a historic bay. *See* Report of Albert B. Maris, Special Master at 46, *United States v. Florida* (U.S. Dec. 1973) (No. 52, Orig.) [hereinafter Florida Report]. All of the reports of special masters cited in this report, except the report in No. 84, Original, *Alaska (Arctic Coast)*, are collected in *The Reports of the Special Masters of the United States Supreme Court in the Submerged Lands Cases 1949-1987* (Michael W. Reed *et al.*, eds. 1991).

[8]In 1974, Special Master Walter P. Armstrong, Jr., rejected Louisiana's claim that waters of the Mississippi River Delta, including Caillou Bay and East Bay, are historic inland waters. *See* Report of Walter P. Armstrong, Jr., Special Master at 13-22, *United States v. Louisiana* (U.S. July 31, 1974) (No. 9, Orig.) [hereinafter Louisiana Report]. The Court overruled Louisiana's exceptions without opinion. *See United States v. Louisiana*, 420 U.S. 529 (1975).

setts,[9] Mississippi,[10] New York,[11] and Rhode Island.[12] The Court also has observed that the United States claims Chesapeake Bay and Delaware Bay as historic inland waters. *See Alaska (Cook Inlet)*, 422 U.S. at 186 n.1.

The Convention recognizes the existence of historic inland waters, but does not specify the criteria for identifying them. *See* Convention, *supra*, art. 6(1). In its precedents, however, the Court has stated the following test for historic inland water claims:

> [W]here a State within the United States wishes to claim submerged lands based on an area's status as historic inland waters, the State must demonstrate that the United States: (1) exercises authority over the area; (2) has done

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[9]In 1986, the Court held that Nantucket Sound did not constitute inland waters under a theory of "ancient title," a proposed variant on historic title. *See Maine (Nantucket Sound)*, 475 U.S. at 105. The United States acknowledged that Vineyard Sound is a historic bay. *See id.* at 91.

[10]In 1985, the Court held that Mississippi Sound is a historic bay. *See United States v. Louisiana (Alabama and Mississippi Boundary Case)*, 470 U.S. 93, 101-15 (1985).

[11]The United States acknowledged that Long Island Sound is a historic bay. *See Rhode Island and New York Boundary Case*, 469 U.S. at 509.

[12]Special Master Walter E. Hoffman concluded that Block Island Sound is not a historic bay. *See id.* at 509 n.5.

> so continuously; and (3) has done so with the acquiescence of foreign nations.

Alaska (Arctic Coast), 521 U.S. at 11 (citation omitted). "For this showing," the Court has elaborated, "the exercise of sovereignty must have been, historically, an assertion of power to exclude all foreign vessels and navigation." *Alaska (Cook Inlet)*, 422 U.S. at 197. The Court also has considered the "vital interests of the United States" in designating waters as historic inland waters. *Alabama and Mississippi Boundary Case*, 470 U.S. at 103.

In this case, Alaska seeks to demonstrate on the basis of proffered historical documents that the waters landward of the 1903 closing lines meet these requirements for historic inland waters. As discussed in detail below, Alaska alleges that the United States and Russia in the past treated these waters as inland waters by asserting the right to exclude foreign vessels from them. Alaska further alleges that assertion of this right to exclude foreign vessels was continuous from the early 1800s until the 1970s; that Britain, Canada, and other nations have acquiesced in the assertion of this right; and that the vital interests of the United States support treating the waters of the Alexander Archipelago as historic inland waters.

The United States argues that the documents do not show that the waters of the Alexander Archipelago are historic inland waters. It contends that, prior to Alaska's statehood, the waters lying within three miles of the shores of the mainland and the islands of the Archipelago were recognized as territorial sea. It says that waters lying more than three miles from the shore, including the waters overlying the pockets and enclaves of submerged lands at issue in count I, were considered high seas.

The United States maintains that it has not asserted the right to exclude foreign vessels from making innocent passage through these waters and that Russia generally did not assert this right before ceding Alaska to the United States in 1867. The United States also contends that Alaska cannot show a continuous assertion of authority over the waters or any kind of foreign acquiescence. Finally, the United States argues that recognizing the waters of the Alexander Archipelago as historic inland waters would not serve the vital interests of the Nation.

If Alaska is correct that waters lying landward of the 1903 closing lines are historic inland waters, then these closing lines would mark the State's "coast line" under the Submerged Lands Act. *See* 43 U.S.C. § 1301(c) (defining the coast line to follow the "line marking the seaward limit of inland waters"). Alaska's "boundaries" then would extend three nautical miles seaward from this coast line. *Id.* § 1301(b) (generally defining a state's boundaries to extend three geographical miles seaward from the coast line). Under the Submerged Lands Act and Equal Footing Doctrine, Alaska would have title to all unretained submerged lands lying within these boundaries.[13] *See*

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[13]The United States may prevent a state from acquiring title to submerged lands under either the Submerged Lands Act or the Equal Footing Doctrine by retaining title to the lands at the time of statehood. *See* 43 U.S.C. § 1313(a) (creating an exception for "all lands expressly retained by or ceded to the United States"); *Alaska (Arctic Coast)*, 521 U.S. at 34 (recognizing the same exception under the Equal Footing Doctrine). Counts III and IV address the question whether the United States retained submerged lands located within the Tongass National Forest or the Glacier Bay National Monument.

id. § 1311(a) (states have title to all submerged lands within their "boundaries"); *Alaska (Arctic Coast)*, 521 U.S. at 6 (Equal Footing doctrine independently grants states title to those submerged lands lying beneath inland navigable waters). The State's title would include all of the unreserved pockets and enclaves of submerged land at issue in this case because the pockets and enclaves all lie within these boundaries.

On the other hand, if the United States is correct that the waters landward of the 1903 closing lines are not inland waters, then the shores of the mainland and the islands in the Alexander Archipelago generally would mark Alaska's coast line. *See* 43 U.S.C. § 1301(c) (defining the coast line to follow "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea" where there are no inland waters). The State's boundaries then would extend three nautical miles from these shores. *See id.* § 1301(b). Although Alaska would have title to all unretained submerged lands within these boundaries, *see id.* § 1311(a), it would not have title to the pockets and enclaves of submerged lands at issue in this count. The pockets and enclaves lie more than three nautical miles from the shores of the mainland and islands, and thus would be located outside the State's boundaries.

Three additional points require mention. First, if Alaska does not have title to the pockets and enclaves of submerged lands at issue in this case, the United States would appear to hold the lands "for the public." *Id.* § 1332(3) (federal government holds the "outer Continental Shelf" for the public); *id.*

See infra parts IV & V.

§ 1331(a) ("outer Continental Shelf" includes submerged lands lying seaward of navigable waters). The United States, however, has not filed a counterclaim seeking title or other rights.

Second, this case might influence future identification of the baseline of the United States under the Convention. If the waters lying landward of the 1903 closing lines are historic inland waters, then these lines likely will mark the baseline. *See* Convention, *supra,* art. 7(6) (recognizing historic bays). On the other hand, if the waters of the Alexander Archipelago are not inland waters, then the baseline presumably will follow the shores of the mainland and the islands. *See id.* art. 3 (baseline follows "the low water line along the coast"). The Court, however, has recognized that variations may exist in the international and federal-state boundaries. *See Alaska (Arctic Coast)*, 503 U.S. at 588 n.11.

Third, if this case influences the identification of the baseline of the United States, it also would affect the character of the waters of the Alexander Archipelago. If Alaska prevails, all waters landward of the 1903 closing lines presumably would be inland waters subject to complete domestic sovereignty. On the other hand, if the United States prevails, these waters generally would be part of the territorial sea of the United States, and the United States and Alaska's authority over them would be limited accordingly.

B. Appropriateness of Summary Judgment

Count I requires the Court to determine the answers to several factual questions. As mentioned briefly above, these questions include (1) whether the United States and Russia historically asserted the right to exclude foreign vessels from

the waters of the Alexander Archipelago; (2) whether they asserted this right continuously; (3) whether they asserted it with the acquiescence of foreign nations; and (4) whether the vital interests of the United States support designating the waters as historic inland waters. *See Alaska (Arctic Coast)*, 521 U.S. at 11; *Alabama and Mississippi Boundary Case*, 470 U.S. at 103. In an effort to prove their respective positions on these questions, the parties have submitted many thick binders of documents as exhibits to their motions for summary judgment.

The numerous exhibits provide information about dozens of incidents in the waters' history. The exhibits include international treaties, statements made before international tribunals or in the course of international negotiations, and reports detailing the experiences of mariners plying the waters in the nineteenth and twentieth centuries. The exhibits also include historical accounts of the practices of Russia prior to its cession of Alaska to the United States in 1867, congressional reports and other documents, agency regulations, letters and memoranda of executive branch officials, geographical charts, and magazine articles. The documents come from many parts of the world over a 150-year period. The parties appear to have collected every kind of statement, in every possible form, regarding the historic status of the waters at issue.

Some agreement exists with respect to these exhibits. The parties do not dispute the text and other content of any of the documents presented. In addition, neither side has challenged any document's authenticity. The parties also assume that all

of the documents would be admissible as evidence if this case came to trial.[14]

The parties, however, also have strong disagreements about the exhibits. As described at length in part II.C immediately below, they vigorously dispute the meaning and import of nearly every document. Moreover, as explained in part II.D below, they also disagree about whether the exhibits as a whole prove the elements of Alaska's historic inland waters claim. Alaska contends that the exhibits answer the pertinent factual questions in its favor, while the United States of course asserts that they do not.

Despite these genuine disagreements, both parties have moved for summary judgment on count I. Their motions raise an important initial question about the appropriateness of resolving this case without a trial. A court generally cannot grant summary judgment unless the whole record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.

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[14]Much of the information presented by Alaska goes beyond what Alaska alleged in its amended complaint. Although a complaint need not plead all of a party's evidence, the United States objects that Alaska previously contended that the allegations in its complaint provided the basis for its legal claim. *See* U.S. Count I Reply at 5 (citing Alaska's Brief in Support of Motion for Leave to File a Complaint at 12-16, *Alaska v. United States* (U.S. Nov. 24, 1999) (No. 128, Orig.)). The United States, however, has not asked the Special Master to ignore any of the State's factual allegations. The Special Master therefore has considered all of the documents presented by Alaska.

R. Civ. P. 56(c). A substantial issue, therefore, is whether the parties' contrary views of the documentary evidence preclude summary judgment.

Having examined the record as whole, the Special Master concludes that summary judgment is an appropriate mechanism for resolving count I for three reasons. First, on nearly every relevant point, the parties do not dispute the material, historical facts. Rather, where disagreements exist, the parties generally contest the significance or proper interpretation of undisputed facts from the long history of the Alexander Archipelago's waters. To mention just one example, the parties fully agree that, in October 1880, the Commander of the *U.S.S. Jamestown* issued a report to the Secretary of the Navy that referred to certain "inland waters." *See infra* part II.C.2.c.(2). They disagree only about how to understand this report, disputing whether the report shows that federal officials recognized the waters of the Alexander Archipelago as inland waters in the legal sense, or whether the report used the term "inland waters" in a colloquial, non-legal sense to describe physically sheltered waters without concern for their legal status. Where the parties agree as to the historical facts but dispute their legal significance, "the controversy collapses into a question of law suitable to disposition on summary judgment." *Thrifty Oil Co. v. Bank of America Nat'l Trust & Savs, Ass'n*, 322 F.3d 1039, 1046 (9th Cir. 2002) (citations omitted).

Second, even on the few points as to which a factual dispute appears to exist, a closer look reveals that the problem is simply that the available historical evidence is less than complete and that the parties' dispute is still really over the interpretation of the available undisputed facts. For example, the parties discuss

an incident in which the United States Coast Guard, in 1924, seized the schooner *Marguerite* for violating the Alien Fishing Act. *See infra* part II.C.4.b.(1). The record leaves unclear exactly where the seizure occurred, and particularly whether at the moment of seizure the schooner was located more than three miles from any shore. That parties, however, do not dispute available historical facts about this 79-year-old incident.[15] They both cite and rely on the same written sources regarding the event. They merely dispute the best interpretation of these sources.

Third, the numerous binders of exhibits making up the record appear to include all of the evidence that the parties have been able to compile with regard to count I.[16] If a trial were held, the parties would present this same documentary evidence to the same decision maker. A trial therefore would serve little, if any, purpose. In this situation, the count is best resolved on

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[15]As counsel for Alaska observed at oral argument: "There are no material disagreements and with due respect to United States' counsel we believe on certain issues that they simply are not properly interpreting the historical record. . . . [T]he position of the MARGUERITE . . . [is] undisputed as a matter of the historical record." Tr. of Oral Arg. 23-24 (Feb. 3, 2003). "There is a dispute about assertions. We believe that the factual record is undisputed." *Id.* at 37.

[16]As counsel for the United States remarked at the oral argument on count I, the uncertainties in the case are "not unknowns that can be resolved by a trial, unfortunately. . . . [T]he Master has everything before him that . . . counsel have been able to come up with." *Id.* at 66-67.

the parties' motions for summary judgment. *See Useden v. Acker*, 947 F.2d 1563, 1572 (11th Cir. 1991) ("'If decision is to be reached by the court, and there are no issues of witness credibility, the court may conclude on the basis of the affidavits, depositions, and stipulations before it, that there are no genuine issues of material fact, even though decision may depend on inferences to be drawn from what has been incontrovertibly proved.'" (quoting *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1123-24 (5th Cir. 1978)); *TransWorld Airlines, Inc. v. American Coupon Exchange, Inc.*, 913 F.2d 676, 684 (9th Cir. 1990) ("[W]here the ultimate fact in dispute is destined for decision by the court rather than by a jury, there is no reason why the court and the parties should go through the motions of a trial if the court will eventually end up deciding on the same record.").[17]

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[17]At the very close of oral argument, counsel for Alaska did assert that, if summary judgment were not granted to Alaska, factual disputes would preclude the granting of summary judgment to the United States on count I. *See* Tr. of Oral Arg. 99, 106-107 (Feb. 4, 2003). Alaska's written submissions and the great bulk of Alaska's oral argument do not support this assertion. Alaska specifically said that there are "no material disagreements" between the parties, Tr. of Oral Arg. 23 (Feb. 3, 2003), and that such disputes as exist are disputes about "properly interpreting the historical record," *id.*, or "over the interpretation of the evidence," *id.* at 53. The Special Master respectfully concludes that Alaska's closing assertion was simply a fallback attempt to keep the case alive if the alternative would be to lose on summary judgment. A trial would serve no purpose because the Special Master already has before him all of the

C. Documents Submitted and Their Interpretation

The facts relevant to count I begin in the 1820s when Russia had sovereignty over Alaska. They extend through the cession of Alaska to the United States in 1867 and continue to Alaska's statehood in 1959. The facts end in the 1970s after the United States made international representations concerning Alaska's coast line. As described above, evidence of these facts comes from a wide variety of documents that the parties have submitted as exhibits to their summary judgment motions.

This portion of the report describes the documents presented by the parties. It also explains and resolves the parties' numerous and often substantial disagreements about the interpretation of these documents. Part II.D, which follows, then addresses the separate legal question of whether the record of all the documents, as they are individually interpreted here, suffices to establish either party's entitlement to summary judgment.

The Special Master regrets the lengthiness of the ensuing summary and analysis of the documents submitted as evidence. However, given the large volume of materials and the parties' extensive arguments about their interpretation, the Special Master sees no abbreviated alternative.

1. Period of 1821-1867

Russia had sovereignty over Alaska before the United States purchased the territory in 1867. *See* Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of all the Russias to the United States of

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materials that the parties would submit as evidence.

America, 15 Stat. 539 (1867). The Court addressed Russia's transfer of Alaska to the United States when the Court considered Alaska's claim to submerged lands within Cook Inlet. *See Alaska (Cook Inlet)*, 422 U.S. at 192 n.13. The Court held that, when Russia ceded Alaska to the United States, "[t]he cession was effectively a quitclaim." *Id.* Accordingly, the Court said, "the United States thereby acquired whatever dominion Russia had possessed." *Id*. § 2. Russia's assertion of sovereignty over the waters of the Alexander Archipelago therefore has relevance to Alaska's claim that these waters are historic inland waters.

a. The Russian Imperial Ukase

In 1821, Czar Alexander I of Russia received reports of "secret and illicit traffic" harming Russian subjects "on the Aleutian Islands and on the north-west coast of America" as Alaska was then called. *See* Ukase of Sept. 4, 1821, *reprinted in* 2 *Proceedings of the Alaskan Boundary Tribunal*, S. Doc. No. 58-162 (1903-1904) (English translation) [hereinafter *ABT Proceedings*] (Exhibit US-I-28). The Czar concluded that "the principal cause of these difficulties is the want of rules establishing boundaries for navigation." *Id*. To address this problem, the Czar issued a ukase (an imperial edict) stating: "It is therefore prohibited to all foreign vessels not only to land on the coast and islands belonging to Russia as stated above, but also, to approach them within less than 100 Italian miles [80.4 nautical miles]. The transgressor's vessel is subject to confiscation along with the whole cargo." *Id.*

This ukase did not remain in effect long. Russia's claim of a right to exclude all vessels from traveling within 100 Italian miles of the coast violated the then-common Cannon Shot Rule.

Under that rule, a coastal nation generally had sovereignty only over the waters within the range of cannon shot (about three nautical miles) from its shore. *See Cook Inlet*, 422 U.S. at 191 n.11. As the Court previously has observed, "shortly after it had been issued the ukase was unequivocally withdrawn in the face of vigorous protests from the United States and England." *Id.* at 191-192.

The withdrawal of the ukase led to negotiations between Russia and the United States and Russia and Britain. In 1822, during these negotiations, Russia ordered naval vessels carrying out the ukase's regulations to limit "their application to waters generally recognized by other powers as territorial." 2 *ABT Proceedings*, *supra*, at 14 (footnote omitted). In other words, Russia directed "'its officers to restrict their surveillance of foreign vessels to the distance of cannon shot from the shores.'" 1 John B. Moore, *A Digest of International Law* 926 (1906) (quoting a summary by Justice John Marshall Harlan, who served as an arbitrator at the 1902 United States-Russian Fur Seal Arbitration) (Exhibit US-I-15).

b. Treaties with the United States and Britain

In 1824, the negotiations following the withdrawal of the ukase produced a treaty between the United States and Russia. *See* Convention Between the United States of America and Russia, 8 Stat. 302 (1825) [hereinafter 1824 Treaty]. Article 3 of this treaty restricted new Russian and American settlements. It said:

> It is moreover agreed, that, hereafter, there shall not be formed by the citizens of the United States, or under the authority of the said States, any establishment upon the

> Northwest Coast of America, nor in any of the islands adjacent, *to the north* of fifty four degrees and forty minutes of north latitude; and that, in the same manner, there shall be none formed by Russian subjects, or under the authority of Russia, *south* of the same parallel.

Id. at 304 (emphasis in original). Article 4 then gave United States and Russian vessels certain rights for a period of ten years. It said:

> It is, nevertheless, understood, that, during a term of ten years, counting from the signature of the present convention, the ships of both powers, or which belong to their citizens or subjects, respectively, may reciprocally frequent, without any hindrance whatever, the interior seas, gulphs, harbours, and creeks [i.e., small bays],[18] upon the coast mentioned in the preceding article, for the purpose of fishing and trading with the natives of the country.

Id.

Alaska and the United States ascribe different meanings to article 4 of the 1824 Treaty. Alaska asserts that, through article 4, Russia was implicitly claiming, and the United States was tacitly conceding, that Russia would have the right to exclude United States nationals from all of the waters of the Alexander Archipelago upon the expiration of the ten-year period. *See* Alaska Count I Opposition at 8. The United States contends that article 4 has no such implication, but merely constitutes an

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[18]The parties agree that the term "creeks" meant small bays. *See* U.S. Count I Opposition at 8 n.2; Alaska Count I Reply at 9.

agreement that Americans could enter Russian marine territorial waters for ten years for the purposes of trade and fishing. *See* U.S. Count I Opposition at 8-9. In other words, according to the United States, the treaty embodied a limited 10-year waiver of Russia's right to regulate commercial activity within its territorial waters.

The Special Master agrees with the United States' interpretation of the 1824 Treaty for four reasons. First, article 4 authorizes navigation "for the purpose of fishing and trading with the natives." It does not address navigation for the purpose of innocent passage. The article therefore does not imply that Russia would have the right to exclude American vessels from making innocent passage after expiration of the ten-year period.

Second, Alaska's interpretation of article 4 rests upon the unjustified assumption that all of the waters of the Alexander Archipelago are "interior seas, gulphs, harbours, and creeks, upon the coast." *See* Alaska Count I Memorandum at 7-8; Alaska Count I Reply at 9-10. The term "coast" in Article 4 refers not just to the coast of the Alexander Archipelago but instead to "the coast mentioned in the preceding article." The preceding article, article 3, addresses the entire "Northwest Coast of America . . . *to the north* of fifty four degrees and forty minutes of north latitude." 8 Stat. at 304. It is implausible that the United States, having just objected to the ukase because it exceeded the accepted limit to territorial waters, would sign a treaty implicitly acknowledging that Russia had power to exclude foreign vessels beyond three nautical miles from the entire northwest coast. On the contrary, as the United States argues, *see* U.S. Count I Opposition at 9, a more reasonable interpretation is that article 4 recognized Russian sovereignty

over bodies of water having the shape of "gulfs" or "internal seas" only if they satisfied international rules for the delimitation of maritime boundaries. Some of the waters of the Alexander Archipelago lie more than three nautical miles (or a cannon shot) away from the shore. Therefore, contrary to Alaska's argument, article 4 does not imply that all the waters off the coast of the Alexander Archipelago are "interior seas, gulphs, harbours, and creeks."

Third, Alaska's view would contradict precedent. If Russia were implicitly claiming in article 4 the right to exclude access to all interior seas, gulfs, harbors, and creeks along the entire Alaskan coast, then Russia necessarily would have been claiming the right to exclude access to Cook Inlet. The Court, however, previously held that Russia did not exercise the right to exclude access to Cook Inlet. *See Alaska (Cook Inlet)*, 422 U.S. at 191-192.

Fourth, Alaska's position that Russia implicitly claimed a right to exclude all vessels from the Alexander Archipelago is inconsistent with a treaty that Russia made with Great Britain in 1825. *See* Treaty Between Great Britain and Russia, Signed at St. Petersburg, February 16/28, 1825 [hereinafter 1825 Treaty] (Exhibit US-I-16). Article 3 of the 1825 Treaty established a line of demarcation between Russia's Alaska territory and what is now British Columbia, which was then a British dominion.[19] *See id.* art. 3. Article 6 then said:

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[19]In the late 1700s, Britain secured the area that is now British Columbia in Canada. Britain continued to participate in Canadian governance until the late 20th century.

> It is understood that the subjects of His Britannic Majesty, from whatever quarter they may arrive, whether from the ocean, or from the interior of the continent, shall for ever enjoy the right of navigating freely, and without hindrance whatever, all the rivers and streams which, in their course towards the Pacific Ocean, may cross the line of demarcation upon the line of coast described in article three of the present convention.

Id. art. 6. Article 7 of the 1825 Treaty, like article 4 of the 1824 Treaty with the United States, granted Britain a ten-year right "to frequent, without any hindrance whatever, all the inland seas, the gulfs, havens, and creeks on the coast mentioned in article three for the purpose of fishing and trading with the natives." *Id.* art. 7.

Article 6 undisputedly applied to the Stikine River, which begins in British Columbia, crosses the Alaskan mainland, and then empties into the waters of the Alexander Archipelago. Under article 6, British vessels could use the Stikine River to pass through the Alaskan mainland when traveling from the Pacific Ocean to British Columbia, or vice versa. As the United States argues, *see* U.S. Count I Opposition at 9, a right to use the Stikine River "forever" would have no value unless British vessels also had a perpetual right to make innocent passage through the Alexander Archipelago to reach the Stikine River. Article 7 of the 1825 Treaty and the similarly worded article 4 of the 1824 Treaty therefore do not imply that Russia was claiming a right to exclude foreign vessels from making innocent passage through the waters of the Alexander Archipelago.

For these reasons, the Special Master concludes that Russia did not implicitly claim a right to exclude vessels from all the waters of the Alexander Archipelago in the 1824 Treaty with the United States or the 1825 Treaty with Britain.

c. The *Dryad* Incident

In 1834, an incident occurred involving the *Dryad*, a British vessel belonging to the Hudson Bay Company. A description of the incident appears in a report written by the United States' expert, Dr. Barry M. Gough, a professor of history at the Wilfred Laurier University in Waterloo, Ontario. *See* Barry M. Gough, *Report on International Navigation through the Waters of the Alexander Archipelago of Southeast Alaska* 17-23 (Jan. 7, 2002) (Exhibit US-I-2). Alaska cites Gough's report, and does not dispute its factual accuracy. *See* Alaska Count I Reply at 16.

According to Gough, the *Dryad* sailed from the Columbia River to the waters of the Alexander Archipelago. The vessel then navigated through the waters of the Alexander Archipelago, toward the Stikine River. The crew planned to take boats up the Stikine river into British Columbia. A Russian Brig commanded by an officer named Sarembo (also spelled Zarembo) stopped the *Dryad* near Fort Dionysius, an outpost near the mouth of the Stikine River in the area where the city of Wrangell now is located. Sarembo "warned that if the British attempted to proceed up the river in boats that he would make use of the force he had against them." Gough, *supra*, at 18. An officer of the *Dryad*, Peter Ogden, protested that the crew of the *Dryad* had the right to proceed up the river under article 6 of the 1825 Treaty. Sarembo, however, refused to relent, saying that

he had instructions from Baron Wrangell, the Governor of Russian Alaska, not to permit them to enter. The *Dryad* and its crew returned to the Columbia River. *See id.* at 19.

The British protested the incident to the Russian government with some success. Gough reports:

> In consequence of British diplomatic representations to St. Petersburg the Russian government disavowed Governor Wrangell's reading of the 1825 Convention. In [the] future [the Hudson Bay Company], and indeed all British traders on legitimate business, would not be interfered with. The Russians did not admit that the *Dryad* had been stopped by force or by threat of same. Language difficulties had led to the problem between Sarembo and Ogden.

Id. at 21.

The parties disagree about the meaning of these facts. Alaska says that the *Dryad* incident "cast doubt on Britain's right to navigate the waters of the Archipelago." Alaska Count I Reply at 16. The United States, in contrast, says that the Russians were not blocking entry into the Archipelago's waters, but entry into the Stikine River (in violation of the 1825 Treaty). *See* U.S. Count I Reply at 16 n.9.

The Special Master agrees with the United States' interpretation. Sarembo stopped the *Dryad* near the mouth of the Stikine River and would not allow the vessel to proceed further because he wanted to prevent its crew from taking boats up the Stikine River. The incident also does not define Russian policy with respect to navigation of either the Stikine River or the waters of the Archipelago because the Russian government in St. Peters-

burg did not admit that the incident had happened, and assured Britain that no interference would occur in the future.

d. Expiration of the Treaties

The rights of American vessels to fish and trade with natives under article 4 of the 1824 treaty expired in April 1834. The similar rights of British vessels under article 7 of the 1825 treaty ended in February 1835. A report subsequently prepared for the 1903 Alaska Boundary Tribunal summarizes what happened next. The report says that, as these treaties expired, Governor Wrangell gave oral and written notice to sea captains in Sitka that they could not proceed with "their trading voyages through the inland waters of the colony." 1 *ABT Proceedings*, *supra*, pt. 2, at 69 (Exhibit AK-13). Russia's minister in Washington then informed the State Department of the expiration of the treaty, and asked the State Department "to give public notice of the changed conditions." *Id.* at 70. Notice subsequently was published in the Globe newspaper. *See id.*

In addition to these actions, in March 1835, the report says that Governor Wrangell "took more active steps to exclude foreign traders from the 'Straits.'" *Id.* at 69. The report explains:

> Governor Wrangell sent the brig *Chichagoff*, under command of Lieutenant Zarembo, to Tongas, near the southern boundary line at 54° 40', for the purpose of intercepting foreign vessels entering the inland waters of the colony, to the masters of which he was to deliver written notice of the expiration of the treaty provisions, being furnished with six copies for American and three for British vessels.

Id. at 70 (footnote omitted).

The parties interpret this description of the facts in different ways. Alaska says that the "references to straits, inland waters, 54° 40', and exclusion from Russian possessions confirmed that Russia claimed the right to exclude foreign vessels from *all* the waters of the Archipelago." Alaska Count I Reply at 12-13 (emphasis in original). The United States argues that the quotations show that the *Chichagoff*'s purpose was to provide traders with notice of the expiration of the treaties, not necessarily to repel them or anyone else making innocent passage. *See* U.S. Count I Reply at 7.

The Special Master agrees with the United States' interpretation. The report does not indicate what constituted the "straits" to which it refers, and no clear basis exists for equating the "straits" with all the waters of the Alexander Archipelago. In addition, nothing in the report says that Governor Wrangell or the *Chichagoff* sought to prevent foreign vessels from making innocent passage through the waters of the Alexander Archipelago; on the contrary, the report focuses entirely on traders whose rights under article 4 of the 1824 and article 7 of the 1825 had expired. In addition, although the report says that Governor Wrangell took more active steps to "exclude" traders, it provides no examples.

e. The *Loriot* Incident

In 1836, an incident occurred involving an American vessel called the *Loriot*. John Forsyth, a State Department official in Washington, wrote a letter to G.M. Dallas, a member of the United States legation in St. Petersburg, describing the incident.

His letter bears quoting at length because the parties have read it in very different ways. The letter says:

> The American brig *Loriot*, [Richard] Blinn, master, sailed from the Port of Oahu on the 22d of August last [i.e., 1836], bound to the northwest coast of America, for the purpose of procuring provisions, and also Indians to hunt for sea otter on the said coast. It appears that she made the land called Forrester's Island on the 14th of September following, and on the 15th anchored in the harbor of Tuckessan, latitude 54° 55' north, and longitude 132° 30' west; that on the 18th a Russian armed brig arrived in the harbor of Tateskey, latitude 54° 45' north, and longitude 132° 55' west; that on the succeeding day the *Loriot* was boarded by officers from the Russian brig, who ordered the captain of the American vessel to leave the dominions of His Majesty the Emperor of Russia; that Captain Blinn then repaired on board the Russian brig, where the same orders were repeated to him by the commander; that on the 20th and 23d days of the same month these orders were reiterated; that on the 25th the *Loriot* was boarded by two armed boats from the Russian brig, and directed to get under weigh and proceed to the harbor of Tateskey; that on the 27th the armed boats again boarded the American brig, and compelled the captain to proceed to Tatesky; that when off that place, the weather being threatening, permission was asked of the Russian commander to enter the harbor with the *Loriot*, which request was denied, and Captain Blinn was again ordered to leave the waters of His Imperial Majesty; and that Captain Blinn, being prevented from procuring supplies or

> necessaries for his vessel and from obtaining any Indians (for the purpose of hunting sea otter), was finally obliged to abandon his voyage and return to the Sandwich Islands, where he arrived on the 1st of November of the same year.

Letter from John Forsyth to G.M. Dallas (May 4, 1837), *reprinted in Report of Secretary of State Thomas F. Bayard upon the Seal Fisheries in Bering Sea*, Sen. Ex. Doc. No. 50-106, at 232-233 (1889) [hereinafter *Seal Fisheries Report*] (Exhibit AK-11, at HW 12339-40).[20]

Dallas responded by writing a letter to Charles Robert, Count of Nesselrode. Nesselrode was Russia's Secretary of State directing the administration of Foreign Affairs, and had signed the 1824 treaty with the United States. *See* 8 Stat. at 302. In the letter, Dallas recognized that article 4 of the 1824 Treaty had expired but criticized the harshness and unfriendliness of Russia's treatment of the *Loriot*. *See* Letter from G.M. Dallas to Count Nesselrode (August 15/27, 1837), *reprinted in Seal Fisheries Report*, *supra*, at 235-236 (Exhibit AK-11, at HW 12342-43). Nesselrode investigated the incident, and responded: "It appears . . . that in notifying Mr. Richard Blinn to quit the shores where he was, the commander of the Russian brig did nothing more than conform with the instructions given to him at the expiration of the fourth article of the [1824] convention." Letter from Count Nesselrode to G.M. Dallas

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[20]The reproduction process has obscured some of the original page numbering of the copy of the *Seal Fisheries Report* submitted as an exhibit. In citing the report, the Special Master accordingly refers also to supplemental page numbering provided by Alaska.

(Feb. 23, 1838), *reprinted in Seal Fisheries Report*, *supra*, at 238 (Exhibit AK-11, at HW 12345). Further diplomatic correspondence followed. Russia adhered to its position, and refused to renew article 4 of the treaty. *See* Letter from Count Nesselrode to G.M. Dallas (Mar. 9, 1838), *reprinted in Seal Fisheries Report*, *supra*, at 245-46 (Exhibit AK-11, at HW 12352). The United States took no further action.

The parties dispute the meaning of these documents. Alaska interprets them to demonstrate that Russia both "claimed the right to exclude foreign vessels from *all* the waters of the Archipelago" and "*exercised* that right by expelling the United States vessel *Loriot* from the Archipelago." Alaska Count I Reply at 13 (emphasis in original). *See also* Alaska Count I Memorandum at 8; Alaska Count I Opposition at 9. The United States disagrees, saying that Russia objected only to the *Loriot*'s entering of two harbors—Tuckessan and Tateskey—and did not exclude the vessel from all the waters of the Archipelago. *See* U.S. Count I Opposition at 10.

The quoted excerpt of the letter from Forsyth to Dallas unambiguously establishes several facts: (1) the *Loriot* was asked to leave the harbor of Tuckessan in which it was anchored; (2) the *Loriot* was denied permission to enter the harbor of Tatesky; (3) the *Loriot* was not engaged in mere innocent passage through the waters of the Alexander Archipelago, but instead planned to hunt sea otters and trade with Indians; and (4) the *Loriot* left the waters of the Alexander Archipelago and returned to Hawaii because it did not have the supplies necessary for hunting.

Less clear from the letter is what the Russian officials meant when they twice ordered the *Loriot* to leave the waters of His

Imperial Majesty. These waters at a minimum included the harbors of Tuckessan and Tatesky. They also may have included some territory outside the harbors because the *Loriot* was denied permission to enter the Tatesky harbor and then, when it was outside the harbor ("off that place"), further ordered to leave the waters of His Imperial Majesty. But nothing in the letter confirms that "the waters of His Imperial Majesty" outside the harbor included all of the Alexander Archipelago; they may have included only waters within the distance of a cannon shot. Indeed, Nesselrode's February 1838 letter shows that Nesselrode believed that the Russian officials only had ordered the *Loriot* to leave the "shores." *Seal Fisheries Report*, *supra*, at 238 (Exhibit AK-11, at HW 12345).

f. State Department Notice to Mariners

On September 26, 1845, the Department of State published the following notice in the Daily Union newspaper in Washington, D.C.:

> The Russian Minister at Washington has informed the Secretary of State that the Imperial Government, desirous of affording official protection to the Russian territories in North America against the infractions of foreign vessels, has authorized cruisers to be established for this purpose along the coast by the Russian-American Company. It is, therefore, recommended to American vessels to be careful not to violate the existing treaty between the two countries, by resorting to any point upon the Russian American coast where there is a Russian establishment, without the permission of the governor or commander, nor to frequent the interior seas, gulfs, harbors, and creeks

> upon that coast at any point north of the latitude of 54° 40'.

2 *ABT Proceedings*, *supra*, at 250.

Alaska and the United States interpret this notice in different ways. Alaska describes the notice as an acquiescence that "marked full recognition by the United States of Russia's 'complete sovereignty' over the waters of the Archipelago." Alaska Count I Memorandum at 8. The United States, in contrast, says that the notice shows that the United States recognized Russian sovereignty over the mainland coast, not over the waters of the Archipelago. *See* U.S. Count I Opposition at 10-11.

The Special Master agrees with the United States' interpretation. The notice first tells Americans not to visit areas of Russian settlement on the land. This part of the warning does not address the legal status of any Alaskan waters. The notice then mentions the 1824 Treaty's provision regarding "interior seas, gulfs, harbors, and creeks." The Special Master previously has concluded that these phrases do not describe the entirety of the waters of the Alexander Archipelago, but instead those bodies of water along the entire Alaskan coast having the shape of gulfs, harbors, and so forth, and satisfying international rules for the delimitation of inland waters. *See supra* part II.C.1.b.

2. Period of 1867-1903

The United States, as noted above, gained sovereignty over Alaska in 1867. The parties have cited, in support of their respective positions, various documents produced during the next 36 years.

a. The 1871 Treaty with Britain

In 1871, the United States entered into a wide-ranging treaty with Great Britain. *See* Treaty Between the United States and Great Britain of May 8, 1871, 17 Stat. 863 (1873) [hereinafter 1871 Treaty]. Article 26 of the treaty addressed navigation of three rivers that start in Canada and then flow through Alaska to the sea. The United States granted Britain the right to use these rivers to cross Alaskan territory when traveling to and from Canada. Article 26 of the 1871 Treaty said:

> The navigation of the rivers Yukon, Porcupine, and Stikine, ascending and descending, from, to, and into the sea, shall forever remain free and open for the purposes of commerce to the subjects of her Britannic Majesty and to the citizens of the United States, subject to any laws and regulations of either country within its own territory, not inconsistent with such privilege of free navigation.

Id. at 872.

The United States contends that this provision contains an important implication. Although vessels can enter the mouth of the Stikine River only by traversing the Alexander Archipelago, the treaty contained no provision granting Britain the right to make passage through the Archipelago's waters. The United States argues that the absence of any provision permitting Britain to navigate the waters of the Alexander Archipelago implies that the United States was not claiming a right to exclude Britain, and that Britain did not believe that the United States had such a right. *See* U.S. Count I Opposition at 9-10.

The Special Master agrees with this interpretation of the 1871 Treaty.[21] As with the 1825 Treaty between Britain and Russia, granting British vessels the right to navigate the Stikine River to and from the sea would serve no purpose unless these vessels also had the right to cross the waters of the Alexander Archipelago. The United States and Britain must have assumed when they made the 1871 Treaty that British vessels were free to make innocent passage through those waters or they would have stated that right in the treaty.

b. Fur Seal Arbitration

In 1886, the United States seized several Canadian vessels in the Bering Sea, which lies between Alaska and Russia and connects the Pacific Ocean to the Arctic Ocean. The vessels had been hunting fur seals on the high seas, more than three miles from the shore, allegedly in violation of United States law. Britain objected that the United States had no right to regulate seal hunting on the high seas. In 1893, an international arbitral tribunal in Paris resolved the controversy in favor of Britain, and ordered the United States to pay damages.

During the course of the fur seal arbitration a British representative, Sir Charles Russell, addressed the effect of

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[21]As described more fully below, *see infra* part II.C.2.c.(5), Professor William Healy Dall, an expert on Alaskan geography, expressed the opposite view in an 1881 letter to Secretary of State Thomas F. Bayard. In the letter, Dall specifically asserted that the United States could exclude British vessels and thus render the British rights to navigate the Stikine River nugatory. The Special Master disagrees with Dall's interpretation.

article 4 of the 1824 Treaty between the United States and Russia. He said:

> [T]he importance of Article IV is that it gives a temporary advantage to the United States—that is to say, it gives to United States subjects rights of access to interior seas, to gulfs, to harbours, and to creeks, all of which, or the greater part of which, would be strictly territorial waters; and, therefore, to which, upon the general rule of international law, the United States would not have any right of access at all.

8 *Proceedings of the Tribunal of Arbitration Convened at Paris*, Sen. Exec. Doc. No. 53-177, pt. 13, at 142 (1895) (Exhibit AK-79).

The parties interpret this statement in different ways. According to Alaska, the statement shows that Britain recognized that "the waters of the Archipelago are inland, for the United States would have had a right to navigate them if they were either territorial seas or high seas as the United States now claims." Alaska Count I Memorandum at 28. The United States, in contrast, reads the quotation to say that the 1824 Treaty temporarily suspended Russia's power to exclude foreign vessels from Russia's inland waters but the quotation does not say that all the waters of the Alexander Archipelago are inland waters. *See* U.S. Count I Opposition at 27-28.

The Special Master agrees with the United States' interpretation. The Special Master previously has concluded that article 4 of the 1824 Treaty does not describe all the waters of the Alexander Archipelago, but instead only those bodies of water having the shape of gulfs, harbors, and so forth, and satisfying international rules for the delimitation of inland waters.

See supra part II.C.1.b. The quotation above does not suggest that Sir Charles Russell had a different interpretation.

c. Statements by Government Officials

Alaska and the United States have identified numerous statements about Alaskan waters that various government officials made during the 19th century. The parties disagree about the meaning of most of these statements.

(1) *Report on the Treaty of Cession with Russia.* In 1868, a report from the House Committee on Foreign Affairs identified advantages stemming from the acquisition of Alaska. One sentence of this 65-five page report said:

> The command of all bays and straits of the northwest coast, resorted to by the whale, will give very great advantages to our whalers, that need only be mentioned to be appreciated: fishing at all seasons, opportunities to winter and refit, depots for cargoes, and regularity in trans-shipping them to the east or to the Pacific ports.

Treaty with Russia, H.R. Rep. No. 40-37, at 33 (1868) (Exhibit AK-14).

The parties interpret this sentence in different ways. Alaska says that this sentence shows that the "the right to bar foreign vessels" from all the waters of the Archipelago "was seen as one of the benefits of the purchase" of the Alaska Territory. Alaska Count I Memorandum at 9. The United States disagrees, saying that the sentence does not specifically address the Alexander Archipelago, and that it concerns advantages to whalers "in terms of activities possible by virtue of landing rights" rather than exclusion of foreign vessels. *See* U.S. Count I Opposition at 12.

The Special Master agrees with the United States' interpretation. The phrase "command of all bays and straits" refers to command of whaling rights. Nothing in the quotation claims a right to exclude foreign vessels from making innocent passage.

(2) *Naval Reports*. In October 1880, the Commander of the *U.S.S. Jamestown* stationed in Sitka issued a monthly report to the Secretary of the Navy. One sentence of the report related the following information: "In September, taking advantage of the monthly visit of the steamer Favorite to trading posts on inland waters, I sent Lieut. F.M. Symonds to make as thorough examinations of the harbors and passes visited as the time at his disposal would permit, and to collect hydrographic knowledge of value." *Report of United States Naval Officers Cruising in Alaska Waters*, H.R. Exec. Doc. No. 47-81, at 2 (1882) [hereinafter *Naval Reports*] (Exhibit AK-15). Alaska cites this sentence as evidence that "United States officials consistently recognized the Federal Government's dominion over the waters of the Archipelago." Alaska Count I Memorandum at 9. Alaska notes that the commander in this sentence "referred to the 'inland waters' of the Archipelago, without in any way indicating that some of the waters of the Archipelago included the high seas." *Id.* at 10. The United States disagrees, saying that the letter appears to use the words "inland waters" in a non-legal sense to refer to unspecified sheltered waters. *See* U.S. Count I Opposition at 12. The Special Master concludes that the terms of the letter better support the United States' interpretation.

In 1880 and 1881, Navy Lieutenant Commander Rockwell wrote reports from Alaska. One report mentioned "inland waters" of the Alexander Archipelago. *Naval Reports*, *supra*,

at 41. Similarly, in 1880, Navy Commander L.A. Beardslee wrote various reports concerning the Alexander Archipelago. In the reports, he used the phrases "inland waters," "our waters," "Alaska waters," "United States waters," and "inland seas." *Report of Captain L.A. Beardslee*, S. Exec. Doc. No. 47-71, at 32, 61, 69, 74, 76, 83-84 (1882) (Exhibit AK-301). Alaska says that these words show that "government officials recognized the inland-water status of the Archipelago." Alaska Count I Opposition at 12.

The Special Master disagrees. As used by Rockwell and Beardslee, the references to "inland waters" and "inlands seas" appear to refer to the sheltered characteristics of the waters described rather than their legal status. The phrases "our waters," "Alaska waters," and "United States waters," in contrast, unmistakably indicate that Beardslee believed that the United States had some sovereignty over some waters, but the statements lack specificity. The Special Master sees no basis for inferring that the quotations mean that the United States was asserting a right to exclude foreign vessels from all of the waters of the Alexander Archipelago.

(3) *Military Reconnaissance Report.* In 1883, Army Lieutenant Frederick Schwatka led a party to visit native Alaskan tribes. In his report, he described the Alexander Archipelago. Part of his description said: "The inland passages of Alaska extend from Dixon Entrance to Cross Sound, a distance of about 330 miles . . . ." Frederick Schwatka, *Military Reconnaissance in Alaska* (1883), *reprinted in Letter from the Secretary of War*, S. Exec. Doc. No. 48-2, at 4 (1884) (Exhibit AK-302). Alaska contends that this statement also recognizes the "inland-water status of the Archipelago." Alaska Count I

Opposition at 12. The Special Master finds this conclusion unsupported. Schwatka's report appears to describe the physical condition of the waters rather than their legal classification.

(4) *Letter from Secretary of State Thomas F. Bayard*. In 1886, Secretary of State Thomas F. Bayard wrote a letter to Secretary of the Treasury Daniel Manning. *See* Letter from Thomas F. Bayard, Secretary, U.S. Dep't of State, to Daniel Manning, Secretary, U.S. Dep't of Treasury (May 28, 1886), *reprinted in* Brief for the United States in Answer to California's Exceptions to the Report of the Special Master, Appendix, at 13a-18a, *United States v. California* (U.S. Jun. 1964) (No. 5, Orig.) [hereinafter California Answer] (Exhibit US-I-6). The parties each consider the letter very important because it describes the official position of the State Department. The United States and Alaska, however, disagree about what the letter means.

The letter contains eleven paragraphs. In the initial paragraph, Bayard says that it would be desirable for the Departments of the Government to agree on the limits of the territorial waters of the United States on both the northeastern and northwestern coasts. *See id.* at 13a. The paragraph then indicates that the letter will provide the State Department's legal position on the question whether the United States may claim more than a three-mile belt of territorial sea on the northwest coast. *See id.* at 13a-14a. The initial paragraph says:

> What I have here to communicate bears, so far as concerns the Department over which you preside, on our own claim to a jurisdiction over territorial waters on the northwest coast beyond the three-mile zone. We resist

> this claim when advanced against us on the northeastern coast. What is now submitted to you is the question whether the principle asserted by us does not preclude us from setting up an extension, beyond this limit of our marine jurisdiction in the northwest.

Id.

Paragraphs 2 through 9 then recount historical instances in which the United States expressed its position on the territorial sea in the East. *See id.* at 14a-16a. This history, according to Bayard, showed that the United States consistently had claimed a territorial sea of only three nautical miles. Paragraph 10 concludes this summary by saying:

> We may therefore regard it as settled that, so far as concerns the eastern coast of North America, the position of this Department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles from low-water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely, at a distance of three miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign.

Id. at 16a.

Paragraph 11, the lengthy final paragraph of the letter, then makes several points. The paragraph first says that the United States has not taken this position "speculatively" but has

advanced it "when the question of peace or war hung on the decision." *Id.* The paragraph then explains that, in asserting the three-mile belt of territorial sea, the United States does not "deny the free right of vessels of other nations to pass, on peaceful errands, through this zone." *Id.* at 17a. The paragraph adds that fishing boats and other vessels have "the right not merely of free transit" but also the right "of relief, when suffering from want of necessaries, from the shore." *Id.* at 18a. The paragraph concludes by saying:

> These rights we insist on being conceded to our fishermen in the northeast, where the mainland is under the British sceptre. We can not refuse them to others on our northwest coast, where the sceptre is held by the United States. We asserted them, as is seen by Mr. Fish's instruction, above quoted of December 1, 1875, against Russia, thus denying to her jurisdiction beyond three miles on her own marginal seas. We can not claim greater jurisdiction against other nations, of seas washing territories which we derived from Russia under the Alaska purchase.

Id. at 18a.

The United States reads Bayard's letter as "explicitly stating that the U.S. claims only a three-mile territorial sea along the coast of Alaska." U.S. Count I Reply at 12. The letter, according to the United States, thus shows that the United States did not view the Alexander Archipelago as inland waters. *See* U.S. Count I Memorandum at 34.

Alaska disagrees. It asserts that in the first paragraph of the letter "Bayard acknowledged—as Alaska contends—'*our own claim* to a jurisdiction over territorial waters on the northwest

coast *beyond the three-mile zone.*'" Alaska Count I Opposition at 23 (quoting California Answer, *supra*, at 13a-14a (emphasis added by Alaska)). Alaska further believes that the letter does not reveal the general policy of the United States but addresses only fishing rights off the eastern coast of North America under an 1818 treaty with Britain. *See id.* at 24-25. Alaska says that Special Master William H. Davis interpreted Bayard's letter in the same manner in *United States v. California. See id.* at 24 (citing Report of Special Master at 15-16, *United States v. California* (U.S. Oct. 14, 1952) (No. 6, Orig.) [hereinafter California Report]).

The Special Master agrees with the United States's interpretation. The opening paragraph of Bayard's letter indicates that the letter will provide a legal statement on the question whether the United States could claim more than three nautical miles of territorial sea. The quoted portions of the letter show that Bayard believed that the United States had not made a claim to more than three nautical miles on the northeastern coast and should not make such a claim on the northwestern coast. Nothing in the letter reveals that the United States ever had made a claim to a jurisdiction extending more than three nautical miles in Alaskan waters.

Secretary Bayard's letter also does not have the limited focus of addressing fishing rights under the 1818 treaty with Britain. Instead, the letter by its own terms makes clear that Bayard is providing a statement of law "as to the limit of territorial waters on our northeastern and northwestern coasts." California Answer, *supra*, at 13a. The letter, moreover, addresses not only fishing rights, but also the rights of foreign vessels to make "free transit" through the territorial sea. *See id.* at 18a. The

letter further specifically applies this legal standard to Alaska. Special Master Davis's report does not say that Bayard's letter had only the limited focus that Alaska alleges. *See* California Report, *supra*, at 14-15.

(5) *Letter to Secretary of State Bayard*. In 1888, Professor William Healy Dall, an expert on Alaskan geography and a scientist who worked with the United States Geological Survey, met with Dr. George M. Dawson of Canada to discuss the boundary between Alaska and British Columbia. The two men were acting unofficially, but hoped to come up with a practical plan for settling on a boundary line. They agreed on several points, which Dall later reported in a letter to Secretary of State Thomas F. Bayard. One point concerned freedom of navigation. They agreed:

> [This freedom] should include the right or concession of the right of navigating the salt-water channels and so-called inland passages of the coast archipelagos and inlets in British Columbia and in Alaska, respectively, by citizens of the United States and subjects of Great Britain.
>
> There is no doubt that the navigation of these coast and territorial waters might be wholly or partly withheld by either power from the citizens and vessels of the other; thus materially curtailing or rendering nugatory the conceded right to navigate the navigable rivers which extend beyond the boundary into British territory, for Great Britain, and obliging vessels of the United States, bound for ports in Alaska, to take the exposed "outside passage" between the Straits of Fuca and the territorial waters of Alaska.

Letter from William H. Dall to Thomas F. Bayard, Secretary, U.S. Dep't of State (Feb. 13, 1888), *reprinted in Report on the Boundary Line Between Alaska and British Columbia*, S. Exec. Doc. No. 50-146, at 10 (1889) [hereinafter *Alaska Boundary Report*] (Exhibit AK-16 at HW12860). Although the discussion had occurred informally, the Secretary of State decided to publish Dall's letter and related correspondence, which he considered "of value as bearing upon a subject of great international importance." Letter from Thomas F. Bayard, Secretary, U.S. Dep't of State to President Grover Cleveland, *reprinted in Alaska Boundary Report*, *supra*, at 1 (Exhibit AK-16 at HW12851).

Alaska interprets Dall's letter to mean that Dall and Dawson viewed some or all of the waterways of the Alexander Archipelago as inland waters from which the United States had the right to exclude foreign vessels. *See* Alaska Count I Memorandum at 10. The United States does not disagree with this interpretation of Dall's letter, but merely disputes its importance. S*ee* U.S. Count I Opposition at 12-13. The Special Master considers below whether this letter and other exhibits suffice to establish Alaska's historic inland waters claim. *See infra* part II.D.1.b.

(6) *Report of Governor Knapp*. In 1889, District of Alaska Governor Lyman E. Knapp wrote a report to the Secretary of Interior complaining about the inadequate means of transportation available for the administration of justice. Governor Knapp said in the report:

> There are a great number of native villages situated at a distance from the mail-steamer routes, with no access to them except by canoe. In many instances, it has been

> impossible to serve processes for want of a light-draught vessel within the absolute and immediate control of the civil government . . . . A vessel of 100 tons capacity, thoroughly built and sea-worthy, with a wooden hull, filled with first class machinery, *adapted to our inland channels*, with accommodation for twenty to twenty-five passengers, carrying one or two 3-inch-bore breech-loading guns and perhaps a Gatling gun, would probably serve all ordinary purposes of the civil government when there is no unusual excitement or trouble.

Letter from John W. Noble, Secretary, U.S. Dep't of Interior to Sen. Orville H. Platt (Jan. 30, 1890) (emphasis added) (quoting report of Gov. Knapp), *reprinted in* S. Rep. No.51- 287, at 2 (1890) (Exhibit AK-17) *and in* H.R. Rep. No. 51-1203, at 2-3 (1890) (Exhibit AK-18).

Alaska notes that the quoted passage addressed the need for a vessel suited to Alaska's "inland channels," and did not indicate that "the waters of the Archipelago in fact contained high seas." Alaska Count I Memorandum at 10-11. The United States responds that Governor Knapp's statement does not claim of the right to exclude innocent passage within the Archipelago, but instead identifies a need for a vessel capable of operating in shallow and isolated waters. *See* U.S. Count I Opposition at 14. The Special Master concludes that the wording and context of the statement supports the United States' interpretation.

(7) *Report of the Treasury Secretary*. In 1897, Secretary of the Treasury John G. Carlisle reported to the Senate Commerce Committee that the Coast Survey had completed the work necessary for charting Alaska's "inland waters" but needed to

purchase a stronger vessel to handle the rough "outside" work. Vessel for Coast-Survey Service, S. Rep. No. 54-1507, at 1 (1897) (Exhibit AK-303). Alaska says that this statement recognizes the "inland-water status of the Archipelago." Alaska Count I Opposition at 12. The Special Master finds this conclusion unsupported. Carlisle's statement reflects the reality that the waters within the Alexander Archipelago are calmer than the unsheltered waters outside the Alexander Archipelago. It does not appear to address the proper legal characterization of the waters.

(8) *National Geographic Article*. John W. Foster served as Secretary of State from 1892 to 1893 and as an agent of the United States at the 1903 Alaska Boundary Tribunal. In 1899, he wrote an article about Alaska for *National Geographic* magazine. *See* John W. Foster, *The Alaskan Boundary*, 10 Nat'l Geographic 425 (1899) (Exhibit AK-299). In this article, he discussed the 1825 Treaty between Britain and Russia. Foster explained that the Treaty granted Russia a strip of territory along the coast separating British territory from the sea. *See id.* at 435. Foster said:

> [W]ith the strip of territory so established, all the interior waters of the ocean above its southern limit became Russian, and would be inaccessible to British ships and traders except by express license.

Id.

Article 7 of the 1825 Treaty, as explained in part II.C.1.b. above, granted a Britain a ten-year license to "to frequent, without any hindrance whatsoever, all the inland seas, the gulfs, havens, and creeks on the coast mentioned in article three for

the purpose of fishing and trading with the natives." 1825 Treaty, *supra*, art. 7. With respect to this provision, Foster said:

> This ten years' privilege is inconsistent with any other interpretation of the treaty than the complete sovereignty of Russia over, not only a strip of territory on the mainland which follows around the sinuosities of the sea, but also of the waters of all bays or inlets extending from the ocean into the mainland.

Foster, *supra*, at 439.

Alaska and the United States interpret these statements in different ways. Alaska reads Foster's statements to say that Russia had "'complete sovereignty' over all the waters of the Archipelago." Alaska Count I Opposition at 11. The United States, in contrast, says that Foster was referring to "Russian sovereignty over rivers and bays extending into the *mainland*—not to the Archipelago straits." U.S. Count I Reply at 7 (emphasis in original).

The Special Master agrees with the United States' interpretation. In the first quotation above, Foster refers to the "interior waters of the ocean." He does not say that all of the waters of the Alexander Archipelago are interior waters. In the second quotation above, Foster adverts more specifically to "the waters of all bays or inlets extending from the ocean into the mainland." This reference appears to address rivers and bays rather than all of the waters of the Alexander Archipelago.

(9) *Congressional Reports Addressing Navigational Aids*. Between 1900 and 1903, five congressional reports addressed the need for constructing lighthouse and fog signal stations in

Alaska.[22] These reports typically used the term "Alaskan waters" to describe waters in the Alexander Archipelago. For example, a Senate Commerce Committee report proposed an appropriation "for the establishment of aids to navigation in Alaskan waters, which appear to be imperatively demanded by the interests of navigation." *Light-Houses and Fog-Signal Stations, Alaska*, S. Rep. No. 56-170, at 2 (1900) (Exhibit AK-19). The report listed the locations for these aids as Eldred Rock, Ralston Point, Point Retreat, Point Gardner, Cape Ommaney, Point Stanhope, Fairway Island, Guard Island, Mary Island, Cape Fox, and Cape Fanshaw. *See id.* All of these locations lie within the Alexander Archipelago.

Alaska notes that these five reports refer to the "Alaskan waters" of the Archipelago, and do not mention that these

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[22] *See Light-Houses and Fog-Signal Stations, Alaska*, S. Rep. No. 56-170, at 2 (1900) (Exhibit AK-19) (proposing appropriation for "aids to navigation in Alaskan waters"); *Joint Light-Houses and Fog-Signal Stations on the Coast of Alaska*, H.R. Rep. No. 56-1187, at 2 (1900) (Exhibit AK-20) (same); *Light-House and Fog-Signal Stations in Alaska Waters*, S. Rep. No. 56-1909, at 1 (1901) (Exhibit AK-21) (addressing bill providing for lights and fog signals in "Alaskan waters"); *Additional Light-House, Etc., Alaska*, S. Rep. No. 57-70, at 2 (1902) (Exhibit AK-22, at HW 12980) (discussing additional proposed light house sites in "Alaskan waters," some in the Alexander Archipelago and some in Western Alaska); *Construction of Light-House and Fog-Signal Stations in Alaskan Waters*, S. Rep. No. 57-2382, at 1 (1903) (Exhibit AK-23) (same); *Light-House and Fog-Signal Stations in Alaskan Waters*, H.R. Rep. No. 57-3811, at 1 (1903) (Exhibit AK-24) (same).

waters contain high seas. *See* Alaska Count I Memorandum at 11. The United States responds that these reports do not claim that waters of Alexander Archipelago have the legal status of inland waters. *See* U.S. Count I Opposition at 14. Instead, the United States says, the reports use the term "Alaskan waters" for waters of both western and southeastern Alaska in a sense that means "the waters off Alaska generally." *Id*. The Special Master agrees with the United States.

(10) *Letter from a Collector of Customs*. In 1902, David H. Jarvis, a collector of customs located in Sitka, Alaska, wrote a letter to Secretary of Treasury Leslie M. Shaw. In the letter, Jarvis expressed his views on whether the port of entry for customs collection should be located in Sitka or Juneau. For Sitka, he identified this advantage: "It has a good harbor—is situated directly on the seacoast, with interior communication with the inland waters." Letter from D.H. Jarvis, Collector of Customs, U.S. Customs Serv. to L.M. Shaw, Secretary, U.S. Dep't of Treas. (Dec. 8, 1902), *reprinted in Removal of Port of Entry from Sitka to Juneau, Alaska*, H.R. Rep. No. 57-3883, at 2 (1903) (Exhibit AK-25).

Alaska cites this letter as further evidence that government officials "as a matter of course" viewed the waters of the Alexander Archipelago as inland waters. Alaska Count I Memorandum at 11. The United States responds that the collector's statement does not describe maritime jurisdiction, explaining that the statement simply means Sitka has connections to other towns by water routes within the Archipelago. *See* U.S. Count I Opposition at 14. Based on the entire text of the letter, the Special Master agrees with the United States' interpretation.

3. The 1903 Boundary Arbitration Tribunal

In 1903, an international arbitration panel called the Alaska Boundary Tribunal decided a dispute between the United States and Britain regarding the land boundary between southeastern Alaska and Canada. A record of the arbitration appears in a seven-volume Senate document. *See ABT Proceedings*, *supra*. In previous litigation between Alaska and the United States over title to submerged lands off Alaska's arctic coast, Special Master J. Keith Mann prepared a concise and accessible summary of these arbitral proceedings. *See* Report of the Special Master at 61-65, *United States v. Alaska* (Mar. 1996) (No. 84, Orig.) [hereinafter Alaska Report].

Alaska has identified three highly relevant statements by the United States at the arbitration. First, in a written submission to the tribunal, the United States described in detail its view of the "political coast" of the Alexander Archipelago. The United States said:

> The political coast line (since all arms of the sea not exceeding six miles, and in some cases more, in width, and all islands are practically treated as portions of the mainland) extends outside the islands and waters between them. In the present instance the political or legal coast line drawn southward from Cape Spencer would cross to the northwestern shore of Chichagof Island and follow down the western side of that island and of Baranof Island to Cape Ommaney; at this point it would turn northward for a short distance and then cross Chatham Strait to the western shore of Kuiu Island; thence again turning southward along that shore and along the outlying islets west of Prince of Wales Island, the line would

> round Cape Muzon and proceed eastward to Cape Chacon; thence following northward along the eastern shore of Prince of Wales Island to Clarence Straight it would cross the latter at its entrance and proceed southeastward to the parallel of 54° 40' at the point where it enters Portland Canal. Thus the political coast line of Southeastern Alaska does not touch the mainland between Cape Spencer and 55° of north latitude.

4 *ABT Proceedings*, *supra*, pt. 1, at 31-32 (Exhibit AK-26). The political coast line described in this quotation encloses the waters of the Alexander Archipelago. *See* Appendix C (depicting these closing lines)

Second, the United States explained its authority for drawing the political coast line between the islands on the outside edge of the Archipelago. At the time of the arbitration, the United States sometimes followed "a policy of enclosing as inland waters those areas between the mainland and off-lying islands that were so closely grouped that no entrance exceeded 10 geographical miles." *Alabama and Mississippi Boundary Case*, 470 U.S. at 106 (footnote omitted).[23] The islands named in the quotation above all lie within ten nautical miles of each other. Explaining this point, the United States said:

> The boundary of Alaska,—that is, the exterior boundary from which the marine league [of the territorial sea] is

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[23]The Court explained: "This 10-mile rule represented the publicly stated policy of the United States at least since the time of the Alaska Boundary Arbitration in 1903." *Id.* at 106-107. This policy, however, was not followed firmly and continuously. *See Alaska (Arctic Coast)*, 521 U.S. at 20-21.

> measured—runs along the outside edge of the Alaskan or Alexander Archipelago, embracing a group composed of hundreds of islands. When "measured in a straight line from headland to headland" at their entrances, Chatham Strait, Cross Sound, Sumner Strait and Clarence Strait, by which the exterior coast line is pierced, measure less then ten miles.

5 *ABT Proceedings*, *supra*, at 15-16 (Exhibit AK-8).

Third, the United States addressed the legal status of waters lying behind the closing lines described. During oral argument before the tribunal, Attorney Hannis Taylor, counsel for the United States, said:

> *[The political coast line] is an imaginary line which the law superimposes upon the physical coast line as a basis.* But for the purposes of international law, instead of following all the convolutions and sinuosities of the coast, it is permitted to go across the heads of bays and inlets, and it is in that particular that the rule of international law comes in as to the width of bays and inlets, either 6 or 10 miles. We are not encumbered with that question, because the British Case contends that they must be 10 miles, and we do not dispute it, and these inlets are 10 miles. So we are not encumbered with that question. It is a legal fiction imposed by the operation of law as an accessory, as Rivier puts it, to the political coast line. *The minute you establish it, the minute you fix it, all waters back of it, whether they are waters in the Archipelago there of Alexander or the Archipiélago de Los Canarios, of Cuba, they all became, as Hall says, saltwater lakes: they are just as much interior waters as the*

> *interior waters of Loch Lomond*, and there is no earthly principle, so far as reason is concerned, by which any human being could claim that there could be a political coast line back of a political coast line.

7 *ABT Proceedings*, *supra*, at 611 (Exhibit AK-27) (emphasis added) (argument of Hannis Taylor).

Alaska asserts that these statements show that the United States claimed the waters of the Alexander Archipelago as inland waters at the 1903 Alaska Boundary Tribunal. *See* Alaska Count I Memorandum at 11-15. The United States disagrees. It contends the quotations were not meant to assert a claim against the world that the waters of the Alexander Archipelago were inland waters. "Rather," it says, "the United States was simply responding, through the familiar technique of reductio ad absurdum, to the British arguments." U.S. Count I Motion at 27.

The United States' position requires some background to understand. The mainland coast in the area of the Alexander Archipelago contains a range of mountains called the Coast Mountains. The 1825 Treaty between Russia and Britain generally gave Russia a *lisière* or strip of land running along the coast, from the mainland shore to "the summit of the mountains . . . situated parallel to the coast."[24] Alaska Report, *supra*, at 62 n.22 (quoting 1 *ABT Proceedings*, *supra*, pt. 1, at 47). The treaty, however, said that whenever the summit was "more than

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[24]The 1825 Treaty was concluded in French. The quoted English translation comes from the Proceedings of the Alaska Boundary Tribunal. The original French version and a slightly different English translation appear in Exhibit US-I-16.

10 marine leagues [i.e., 30 nautical miles] from the ocean," the boundary would be "a line parallel to the windings of the coast, and which shall never exceed the distance of 10 marine leagues therefrom." *Id*. Put another way, Russian territory started at the shore and ended at the summit of the mountains or at a distance of ten leagues from the coast, whichever point was closer to the shore. Russia ceded all of this territory to the United States in the 1867 Treaty of Cession.

At the Alaska Boundary Tribunal arbitration, the parties generally agreed that measurement of the ten league distance should begin at the mainland's physical shore (as opposed to somewhere among islands located in the Archipelago). They disagreed, however, about where the ten league measurement should commence in areas where inlets of water cut far into mainland coast. A significant problem was Lynn Canal. Lynn Canal is the longest glacial fiord in the United States, opening near Juneau and stretching 100 miles into the mainland. Britain proposed drawing a closing line across Lynn Canal where it first narrows to ten miles in width (or alternatively to six miles) and then measuring ten leagues back from this closing line. *See id.* at 63-64. Part of Lynn Canal then would belong to Britain. Britain advocated these closing lines because they would increase British upland territory and would provide sites for ports on the mainland.

The United States successfully opposed the drawing of any closing line of the kind Britain desired across Lynn Canal. The United States argued that, under international law principles, closing lines are drawn across bodies of water only for designating political coast lines. In the course of making this argument, the United States described the political coast line of the

Alexander Archipelago in the statements quoted above. The United States contended that no legal basis supports drawing additional closing lines behind a political coast line. *See* 7 *ABT Proceedings*, *supra*, at 610-11.

The Special Master agrees with Alaska's interpretation of the three quotations. In the quoted statements, the United States clearly defined the political coast line of Southeast Alaska and explained the character of waters lying behind this political coast line. True, as both parties recognize, the political coast line was not at issue in the arbitration; the parties were arguing about how to measure ten leagues from the mainland shore for the purpose of applying the 1825 Treaty. The United States, however, chose to bolster its position by identifying what it considered the political coast line in the area. The detail of the quotations shows that the United States was expressing a considered analysis of the area, not merely speaking hypothetically for the purpose of showing a flaw in Britain's argument.

Others also have concluded that the United States was claiming the waters of the Alexander Archipelago as inland waters at the 1903 Alaska Boundary Tribunal. In the 1910 Atlantic Coast Fisheries Arbitration, Britain made the following statement: "In 1903, in the Alaskan Boundary Arbitration Case, the United States asserted that its boundary extended three miles beyond a line joining the islands which lie off the Alaska coasts." 8 *Proceedings in the North Atlantic Coast Fisheries Arbitration*, S. Doc. No. 61-870, at 86 (1912) [hereinafter *Atlantic Fisheries Arbitration*] (Exhibit AK-80). The United States disagreed with some aspects of Britain's interpretation of the United States' position at the 1903 Alaska Boundary Tribunal, but the United States did not dispute that it had

identified the political coast line as surrounding the islands in the Alexander Archipelago. *See* 10 *Atlantic Fisheries Arbitration, supra*, at 1091-94 (Exhibit AK-81).

In the *Fisheries Case (United Kingdom v. Norway)*, 1951 I.C.J. 116, the International Court of Justice considered the maritime boundary of Norway.[25] In their submissions to the Court, the United Kingdom and Norway each cited the position of the United States at the Alaska Boundary Tribunal. They both said that the United States had claimed at the arbitration that the boundary of Alaska runs along the outer edge of the Alexander Archipelago. *See* English Translation of Annexes to the Counter Memorial of the Government of the Kingdom of Norway at 219, ¶ 446, *Anglo-Norwegian Fisheries Case* (1950) (Exhibit AK-82); 1 Reply of the Government of the United Kingdom of Great Britain and Northern Ireland at 154-55, ¶ 336, *Anglo-Norwegian Fisheries Case* (1950) (Exhibit AK-83).[26]

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[25] The Court has relied on the *Fisheries Case* with respect to coast line issues. *See,e.g., Maine (Nantucket Sound)*, 475 U.S. at 99; *Alabama and Mississippi Boundary Case*, 470 U.S. at 102.

[26] Special Master J. Keith Mann criticized Norway for its assertion that the United States continued to follow this straight base line until 1950. *See* Alaska Report, *supra*, at 95-96. Special Master Mann concluded, and the Court later agreed, that the United States did not consistently treat waters landward of fringing islands as inland waters whenever openings to the sea were less then ten miles wide. *See id.* at 98; *Alaska (Arctic Coast)*, 521 U.S. at 10-11.

In addition, an internal memorandum apparently written in 1952 by a United States Department of Justice attorney supports Alaska's interpretation. The author of the memorandum analyzed the Alaska Boundary Tribunal proceedings and expressed a similar view of the United States' position. Although the memorandum did not necessarily reflect the official views of the Department of Justice, it said that "the United States explicitly stated that the waters inside the islands [of the Archipelago] were inland waters *because* none of the ocean entrances exceeded ten miles in width." U.S. Dep't of Justice, *Alaskan Boundary Controversy* 1 (*circa* 1952) (Exhibit AK-29) (emphasis in original).

The Special Master assesses below whether the United States' position at the 1903 Alaska Boundary Tribunal, when combined with information from other exhibits, suffices to establish Alaska's right to summary judgment on its historic inland waters claim. *See infra* part II.D.1.b.

4. Period of 1903-1959

Many of the documents submitted by the parties concern the period between the Alaska Boundary Tribunal in 1903 and Alaska's statehood in 1959. These documents relate to fishing regulations, international law conferences, and arbitrations and negotiations between the United States, Britain, and Canada.

a. North Atlantic Fisheries Arbitration

The 1910 North Atlantic Fisheries Arbitration addressed a dispute over a clause of the Treaty of October 20, 1818 between the United States and Great Britain. *See* California Report, *supra*, at 15-17 (describing this arbitration). In the treaty, the

United States renounced the right "to take, dry, or cure fish on, or within three marine miles of any of the coasts, bays, creeks or harbors of His Britannic Majesty's dominions in America." *Id.* at 16 (quoting treaty). At the arbitration, Britain argued that the treaty gave it the right to exclude American fishing from all bays regardless of their size. *See id.* at 16. The United States took the position that the treaty only covered bays having mouths six miles or less in width. *See id.*

The parties interpret this evidence in different ways. The United States says that its position at the 1910 North Atlantic Fisheries Arbitration shows that "even if Alaska were correct that the United States embraced 10-mile closing lines in the 1903 [Alaska Boundary Tribunal] arbitration, it promptly repudiated that position when the question of closing lines was squarely placed at issue." *See* U.S. Count I Memorandum at 35 (citation omitted). *See also* U.S. Count I Opposition at 28-29. Alaska says that the United States' position at the North Atlantic Fisheries Arbitration did not represent a general policy, but concerned only the quoted clause from the 1818 treaty. *See* Alaska Count I Opposition at 24-25. The State further asserts that Special Master William H. Davis reached the same conclusion when describing the 1910 North Atlantic Fisheries Arbitration in his report in *United States v. California*. *See id.* at 24 (citing *California Report*, *supra*, at 14-15).

The United States' has the better interpretation of the documents. Special Master Davis said that the 1910 North Atlantic Fisheries Arbitration "gave occasion for the United States repeatedly to assert its position as to the location of the baseline of the marginal belt." *California Report*, *supra*, at 15. Contrary to Alaska's interpretation, Special Master Davis does

not appear to have concluded that the United States limited its asserted position to the 1818 treaty.

b. Federal Fisheries Regulations

Alaska has endeavored to show that, prior to Alaska's statehood, the United States consistently asserted power to enforce fishing regulations against foreign nationals throughout the waters of the Alexander Archipelago, including the waters overlying the pockets and enclaves of the submerged lands at issue in this case. *See* Alaska Count I Memorandum at 15-21. An assertion of this power, Alaska contends, demonstrates that the United States viewed the waters of the Archipelago as inland waters. Before describing the exhibits that Alaska cites, the State's theory requires some explanation.

Alaska appears to start with the assumption that a coastal nation generally may not regulate fishing by foreign nationals on the high seas. *See supra* part I.B (discussing the distinctions between high seas, territorial sea, and inland waters). Alaska then infers that if the United States enforced fishing regulations on the waters overlying the pockets and enclaves of submerged lands, the United States could not have viewed the waters as high seas. Moreover, because the submerged lands lie more than three miles from shore, they also could not qualify as territorial sea. Accordingly, Alaska reasons, the United States must have viewed the waters as inland waters. *See* Alaska Count I Memorandum at 16.

The United States disagrees with Alaska's theory for two reasons. First, it asserts that a nation may establish historic inland waters only by asserting the power to exclude foreign vessels and navigation. Regulating fishing, in the United

States' view, does not suffice. *See* U.S. Count I Opposition at 18. Second, it asserts that, even if fishing regulations are relevant and probative, Alaska cannot show that the United States consistently enforced fishing regulations against foreign nationals within waters overlying the pockets and enclaves of submerged lands lying more than three miles from shore. *See id.* at 18-19.

This section of the report describes the exhibits regarding the enforcement of fishing regulations. The report assesses below their significance under the governing legal standards for historic inland waters. *See infra* part II.D.

(1) *The Marguerite Incident*. Shortly after the Alaska Boundary Tribunal arbitration, Congress enacted the Alien Fishing Act of 1906, 34 Stat. 263 (1906), to regulate fishing in the "waters of Alaska." In *Alaska (Cook Inlet)*, the Court decided not to rely on this Act in determining whether Cook Inlet contained inland waters. The Court stated:

> [The Alien Fishing Act] simply applied to "the waters of Alaska under the jurisdiction of the United States." 34 Stat. 263. The meaning of that general statutory phrase, as applied to Cook Inlet, can only be surmised, since there was not a single instance of enforcement to suggest that the Act was applicable to foreign vessels in the waters beyond the three-mile limit in lower Cook Inlet.

422 U.S. at 198. Alaska alleges that here, by contrast, the United States enforced the Alien Fishing Act against foreign nationals in waters of the Alexander Archipelago lying more than three nautical miles from any shore. Alaska cites the case of a Canadian vessel called the *Marguerite* as its only specific example. *See* Alaska Count I Memorandum at 17.

On July 22, 1924, the United States Coast Guard seized the schooner *Marguerite* for fishing or attempting to fish in the Alexander Archipelago in violation of the Alien Fishing Act of 1906. *See* Memorandum of Albert Nelson, Commanding Officer, the *Smith* to Commandant, U.S. Coast Guard (July 22, 1924) [hereinafter Coast Guard Report] (Exhibit AK-33). The Canadian master of the vessel denied that he was fishing in United States waters, but pleaded guilty to attempting to fish and paid a $100 fine. *See* Letter from Henry Chilton, British Envoy to Frank B. Kellogg, Secretary, U.S. Dep't of State at 1-2 (July 22, 1925) (Exhibit AK-34) [hereinafter British Inquiry]. The master later said that he paid the fine so that he could return to Canada before his fish spoiled. *See id.* The master then requested that British authorities file a protest. Britain inquired about the incident, *see id.*, and the United States responded that the seizure was proper because the master was attempting to fish "in that part of the waters of the Dixon Entrance which [is] within the jurisdiction of this Government." *See* Letter from Joseph C. Grew to Henry Chilton, Britsh Envoy at 1 (Dec. 23, 1925) [hereinafter Response to Inquiry] (Exhibit AK-35). Britain took no further action.

The record does not establish with clarity where the Coast Guard seized the *Marguerite.* The master of the vessel alleged that the incident took place more than five miles from land, which would put the vessel in a pocket or enclave within the Archipelago. *See* British Inquiry, *supra*, at 1. The United States, however, never agreed with this allegation.

The initial Coast Guard report said that the seizure occurred "seven miles W.S.W. of Tree Point, Alaska, and seven and one half miles north of the bound[a]ry line." Coast Guard Report,

supra, at 1. This report offers no help in pinpointing the location. As the United States demonstrates in its briefs and exhibits, the place described in the report does not exist. *See* U.S. Count I Opposition at 19. No point seven miles west southwest of Tree Point can be seven and a half miles north of the boundary line between Canada and the United States because Tree Point is less than seven and a half miles north of the boundary. *See Alaska Atlas and Gazetteer* 16-17 (2001) (DeLorme Publishing Co.) (map of scale 1:300,000 (1 inch = approximately 4.1 nautical miles) showing area near Tree Point) (Exhibit US-I-20).

When the State Department responded to Britain, it said that the seizure occurred "north of a line drawn from Yellow Rocks to Tree Point." Response to Inquiry, *supra*, at 1. This statement also does not clarify whether the incident occurred within a pocket or enclave because many points north of a line from Yellow Rocks to Tree Point lie within three miles of land. *See Alaska Atlas and Gazetteer*, *supra*, at 16-17 (Exhibit US-I-20). As a result, the available documents regarding the *Marguerite* incident do not establish that the United States enforced fishing regulations against foreign nationals in the pockets or enclaves more than three miles from the shore.

(2) *1926 and 1928 Fishing Regulations*. In 1926 and 1928, the United States Department of Commerce adopted fishing regulations concerning southeastern Alaska. *See Laws and Regulations for the Protection of Fisheries of Alaska* 19, U.S. Dep't of Commerce Circ. No. 251 (13th ed. 1926) (Exhibit AK-36); *Laws and Regulations for the Protection of Fisheries of Alaska* 19, U.S. Dep't of Commerce Circ. No. 251 (15th ed. 1928) (Exhibit AK-37). Alaska asserts that the United States

enforced these regulations against foreign nationals. *See* Alaska Count I Memorandum at 18. To support this proposition, the State cites comments made by former fishery enforcement officials before a 1972 Senate Committee studying the Alaska boundary. *See Provisional U.S. Charts Delimiting Alaskan Territorial Boundaries: Hearing Before the Committee on Commerce*, Serial No. 92-69 (Exhibit AK-38). These officials made broad statements to the effect that foreign fishing was prohibited everywhere in the Archipelago. One official said that the prohibition on foreign fishing covered "all waters extending 3 miles seaward from lines extending from headland to headland across all bays, inlets, passes, straits, and entrances in Southeast Alaska." *Id.* at 25 (affidavit of Fred Headlee). The officials mentioned several incidents involving foreign vessels, but the United States correctly points out that these incidents do not appear to have occurred within the pockets and enclaves at issue in this case. *See* U.S. Count I Opposition at 19 n.6.

(3) *Position of Department of Commerce*. Alaska asserts that in 1930 the Bureau of Fisheries (then part of the Department of Commerce) took the position that waters of the Archipelago lying between headlands less than ten miles apart were inland waters. It cites a brief telegram from the Bureau to an enforcement official saying: "Interior coastal waters cease to be International waters at and above place where distance from headland to headland is less then ten nautical miles Stop This means that central part Chatham Strait at least as far north as latitude Point Patterson is International waters except for area three miles from shore on each side Stop." Telegram from Radcliffe to Russell (Sept. 8, 1930) (Exhibit AK-39).

The United States, however, points out that the Department of Commerce soon stated a different view. In 1934, the Department confirmed that "Canadian fisherman may operate north of the line 'AB' so long as they remain outside the three mile limit."[27] *See* Letter from Daniel C. Roper, Secretary, U.S. Dep't of Commerce to Secretary, U.S. Dep't of State at 1 (Sept. 5, 1934) (Exhibit US-1-14). In 1934, Under Secretary of State William Phillips acknowledged the validity of this position, writing back:

> I have received your letter of September 5, 1934, and am gratified that you concur in the views expressed in my letter of August 29, 1934, that the waters north of a line from Cape Muzon to Portland Canal laid down by the Alaskan Boundary Tribunal in 1903 are high seas except within the three-mile limit.
>
> I appreciate your assurance that the Fishery laws and regulations will be enforced by the Bureau of Fisheries in conformity with the view that Canadian fishermen may operate north of line AB so long as they remain outside the three-mile limit.

Letter from William Phillips, Under Secretary, U.S. Dep't of State to Secretary, U.S. Dep't of Commerce at 1 (Sept. 13, 1934) (Exhibit US-I-14). The United States interprets this letter to show that the Secretary of State and Secretary of Commerce did not believe that the waters of the Alexander Archipelago

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[27]The AB Line is a line, designated at the Alaska Boundary Tribunal, running from Cape Muzon to Portland Canal. *See infra* part II.C.4.d.

were inland waters. *See* U.S. Count I Opposition at 2-3. The Special Master agrees with this interpretation.

(4) *Position of the Department of Interior*. From 1940 through 1956, Department of Interior regulations claimed jurisdiction over "all territorial waters" of Alaska. Fish & Wildlife Serv., U.S. Dep't of Interior, *Laws and Regulations for Protection of Fisheries of Alaska* 45 (1950) (Exhibit AK-52). *See also* Alaska Count I Memorandum at 19 nn. 6 & 7 (citing additional versions of the regulations claiming jurisdiction over "territorial, coastal and tributary waters"). In 1955, the Chief of the Branch of Alaska Fisheries within the Department of Interior, said that these waters included:

> All waters for a distance 3 miles seaward (1) from the coast and lines extending from headland to headland across all bays, inlets, straits, passes, sounds, and entrances, and (2) from the shores of any island or group of islands, including the islands of the Alexander Archipelago and the waters between such groups of islands and the mainland.

See Memorandum from Seton H. Thompson, Chief, Branch of Alaska Fisheries to Administrator, Alaska Commercial Fisheries, Juneau at 1 (Nov. 23, 1955) (Exhibit AK-59). The following year, the Department of Interior adopted this interpretation in a formal regulation. *See* 50 C.F.R. § 101.19 (1957) [Exhibit AK-60].

The second clause of this broad definition would include all the waters that Alaska claims as inland waters. Alaska, however, has not identified any instances in which the United States actually enforced these regulations against foreign nationals within the pockets and enclaves at issue in this case.

(5) *Co-ordination of Fisheries Regulations*. In 1957, Canada and the United States held a conference on the "Co-ordination of Fisheries Regulation." *See Alaska (Cook Inlet)*, 422 U.S. at 194-196 (describing this conference). The two countries discussed prohibiting their citizens from fishing with nets for salmon in international waters in the North Pacific. *See id.* at 194. During their negotiations, they agreed that "[t]he line described in the Alaska Fisheries Regulation [*i.e.*, 50 C.F.R. § 101.19 discussed above] was appropriate." *Summary of Proceedings* 7, Conference on the Co-Ordination of Fisheries Regulation Between Canada and the United States (1957) (Exhibit AK-63). The Court, however, previously has held that the United States and Canada agreed to this line for the purpose of fisheries management rather than defining the territorial sea. *See Alaska (Cook Inlet)*, 422 U.S. at 195-196 & n.16.

c. League of Nations Conference

In 1930, the League of Nations sponsored the Conference for the Codification of International Law which met in the Hague. The Court previously addressed this conference in *Alaska (Arctic Coast)*, 521 U.S. at 16-18. At the conference, the United States made proposals regarding the treatment of straits, bays, and waters surrounding fringing islands.

(1) *Straits Leading to Inland Waters Proposal*. One rule proposed at the 1930 conference concerned the treatment of straits leading to inland waters. The proposed rule applied to straits with entrances less than ten miles wide. In *Alaska (Arctic Coast)*, the Court described the proposed rule as follows:

> Where [such] a strait was "merely a channel of communication with an inland sea," rules regarding closing of bays would apply. . . . Under those rules, waters shoreward of closing lines less than 10 nautical miles in length would be treated as "inland" waters.

Alaska (Arctic Coast), 521 U.S. at 16 (quoting the proposal, citations omitted).

The parties interpret this proposal in different ways. Alaska asserts that, consistent with the United States' position at the 1903 Alaska Boundary Tribunal, the rule would require characterizing the waters of the Alexander Archipelago as inland waters. *See* Alaska Count I Opposition at 25. The United States, in contrast, believes that the rule would not apply to the Alexander Archipelago. It reasons that the Archipelago "consists of a network of straits providing multiple passages to and from the high seas," and not just straits that are merely channels of communication with inland waters. *See* U.S. Count I Memorandum at 36.

In the view of the Special Master, this proposal by itself does not answer the question whether the United States was adhering to the position taken at the 1903 Alaska Boundary Tribunal. As the United States says, a number of straits in the Alexander Archipelago connect one area of high seas to another area of high seas. For example, straits connect the Dixon Entrance to the Northern Gulf of Alaska. The Proposal, however, also does not repudiate the position of the United States at the 1903 Alaska Boundary Tribunal arbitration.

(2) *Assimilation Proposal*. Another proposal at the 1930 Conference said that the mainland and all islands would be assigned three-mile belts of territorial sea. If these belts

produced pockets of high seas completely surrounded by territorial sea, then the pockets would be "assimilated" to (i.e., treated as) the territorial sea. *Alaska (Arctic Coast)*, 521 U.S. at 16. The rationale was that isolated pockets of high seas would serve no useful purpose for navigation. *Id.*

The United States and Alaska interpret this proposal in different ways. The United States argues that this proposal repudiates the position that closing lines should join the outer islands of the Alexander Archipelago and that all waters behind those closing lines should be treated as inland waters. *See* U.S. Count I Memorandum at 35. It reasons that, under the proposal, closing lines would not be not drawn between islands. In addition, the waters surrounding the islands would not be treated as inland waters, but instead as the territorial sea.

Alaska disagrees. It says that the United States also proposed a rule at the conference for preserving historic inland waters claims. *See* Alaska Count I Opposition at 25-26. Accordingly, Alaska contends that the assimilation proposal did not repudiate any earlier claims that the waters of the Alexander Archipelago are inland waters. *See id.* at 26.

The Special Master agrees with the United States' interpretation. The United States did not claim at the 1903 Alaska Boundary Tribunal arbitration that the waters of Alexander Archipelago were historic inland waters. Instead, it simply said that they were inland waters based on a theory about drawing closing lines between islands. The proposal at the Conference, moreover, did not provide new grounds for thinking that the waters should have the status of historic inland waters. On the contrary, under the proposals, the United States would treat

most of the waters in the Alexander Archipelago as territorial sea.

d. A-B Line Negotiations with Canada

At the 1903 Alaska Boundary Tribunal, the United States and Britain drew a line at the southern end of the Alexander Archipelago which they called the "A-B line." The A-B line runs from near Cape Muzon on the southern tip of Prince of Wales Island to Portland Canal on the mainland. The United States and Canada agreed that islands and rocks north of the A-B line would belong to the United States, while islands and rocks south of the line would belong to Canada. *See Alaska Atlas and Gazetteer*, *supra*, 16-17 (Exhibit US-I-20) (showing a portion of this line and some of the islands and rocks that it separates).

In the 1930s and 1940s, the United States and Canada sought to settle the question whether the A-B line merely divided the islands and rocks between the two nations, or also fixed "the limits of sovereignty of all contiguous American and Canadian territory, including territorial waters as well as land." S. Whittemore Boggs, *Alaska-Canada Boundary at the Dixon Entrance* 2 (Jul. 24, 1933) (Exhibit AK-64) [hereinafter 1933 Boggs Memorandum]. Alaska has identified several statements and proposals made during negotiations over this question. Although the United States and Canada never concluded an agreement on the matter, Alaska interprets these statements to mean that the United States claimed the waters of the Alexander Archipelago as inland waters.

(1) *State Department Memorandum*. In 1933, State Department Geographer S. Whittemore Boggs wrote a long memoran-

dum regarding the negotiations over the A-B line. *See id.* In the memorandum, he noted that Canada claimed that its territory included two waterways lying immediately south of the A-B line called Dixon Entrance and Hecate Strait. Explaining why the United States should oppose this view, Boggs said:

> It can not be admitted, however, that the waters of Dixon Entrance and Hecate Strait are Canadian. The protection of American navigation rights of access to *important inland waters* of southeastern Alaska (especially through Dixon Entrance), and of American fishing rights in the waters of both Dixon Entrance and Hecate Strait outside the 3-mile limit, require that it be maintained that the waters of both bodies are high seas.

Id. at 33 (emphasis added). Boggs attached a map ("Map No. 1") designating the "inland navigation routes" of the Inland Passage leading through Dixon entrance into the Alexander Archipelago. This navigation route passes through waters in the Alexander Archipelago more than three nautical miles from any coast. *See id.* at 19 & Map No. 1 (included with Exhibit AK-64).

Alaska and the United States disagree about the meaning of these statements. Alaska asserts that the quotations, combined with the map, indicate that Boggs viewed the waters of the Archipelago as inland waters. *See* Alaska Count I Memorandum at 22. The United States disagrees. The United States says that the terms "Inland Passage" and "inland navigation routes" have no jurisdictional connotation but merely refer to the sheltered characteristics of the waters. *See* U.S. Count I Opposition at 25. In addition, the United States says that even if Boggs correctly recognized that the Alexander Archipelago

contains some "important inland waters," his statement does not imply that he believed that all of the waters of the Archipelago were inland waters. *See id.*

The Special Master agrees with the United States' arguments. In addition, the Special Master sees another ground for rejecting Alaska's interpretation of the 1933 Boggs Memorandum. Specifically, Alaska has overlooked a second map ("Map No. 2") depicting Boggs's view of the American and Canadian "Territorial Waters." Map No. 2 shows that Boggs supported the three-mile arcs-of-circles method of measuring the territorial sea and that he did not regard the waters of the Alexander Archipelago as inland waters. In his memorandum, Boggs explained Map No. 2 as follows:

> Accompanying Map No. 2 has drawn upon it in a continuous blue line the limits of American territorial waters, and in a broken red line the limits of Canadian territorial waters, as it seems to me they ought to be drawn. These lines are envelopes of arcs of circles of three nautical miles radius.

See 1933 Boggs Memorandum, *supra*, at 19-20. Map No. 2, as Boggs says, contains dark arcs surrounding the islands in the Alexander Archipelago. *See id.* Map No. 2 (included with Exhibit AK-64). The map does not designate all of the waters of the Alexander Archipelago as inland waters.

(2) *Proposed United States-Canada Convention*. In 1938, Boggs and State Department Assistant Legal Adviser William R. Vallance met with Canadian officials for further discussions about the boundary. *See* S. Whittemore Boggs & William R. Vallance, *Report Regarding Conferences Concerning the United States-Alaska-Canada Boundary Held in Ottawa, June*

27-29, 1938 (Jul. 30, 1938) (Exhibit AK-65). During their meetings, they discussed a draft of a proposed treaty or convention. One article of this draft said that "the waters of Dixon Entrance have been under the exclusive jurisdiction of the high contracting parties." *Id.* at 24. The article then said that each party granted the other party "the right to fish, to transport cargoes of every nature in ships registered under the flag of the high contracting party," and said that "their ships, including war vessels, shall at all times have complete freedom of transit and entry or departure with respect to said waters." *Id.* at 24-25.

A later draft prepared by Boggs modified the first sentence of the same article to say that "the waters of the Dixon Entrance constitute historic waters which are under the exclusive jurisdiction of the high contracting parties." S. Whittemore Boggs, *Draft Article for Proposed U.S.-Canada Boundary Convention* 1 (June 24, 1939) (Exhibit AK-66). In 1940, the United States prepared another draft agreement or understanding. One clause said:

> Having in mind the measures being taken jointly and severally by the two Governments for the defense of the northern half of the Western Hemisphere, the Government of the United States and the Government of Canada agree that, *should either country hereafter declare that the doctrine of historic waters shall be applied to any part of [the] waters contiguous to the coasts of Alaska or British Columbia*, within the various bays, straits, sounds, entrances, and inlets, *such waters shall continue to be open to the vessels, aircraft, and nationals of the two countries* . . . .

Proposed Note from the American Minister at Ottawa to the Canadian Secretary of State for External Affairs at 1 (Sept. 28, 1940) (Exhibit AK-69, at HW 00402) (emphasis added). Canada responded in 1943 with a counter-proposal, containing the same provision. *See* Letter from Lewis Clark, U.S. Legation to J.D. Hickerson, U.S. Dep't of State (May 5, 1943) (including Canadian draft) [hereinafter Canadian Counter-Proposal] (Exhibit AK-70 at HW 00424). Although both the United States and Canada at the time seemed eager to settle the matter, no agreement was ever reached.

Alaska asserts that the quotations above "provided that the United States and Canada *would claim* as historic waters" the bays, straits, sounds, entrances, and inlets contiguous to Alaska and British Columbia. Alaska Count I Memorandum at 23 (emphasis added). The Special Master disagrees with this interpretation. The last version of the proposed convention says that "should" either nation claim the waters as historic waters, then both nations still would permit navigation. The text does not say that either nation actually did claim or in the future would claim the waters as historic waters.

In addition, as Alaska itself concedes, *see id.* at 25, the United States and Canada never formally agreed to a final convention. Thus, whatever the persons working on the drafts may have agreed, their views did not necessarily reflect the position of their governments. Foreign nations, moreover, may not have known of their views.[28]

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[28]The record does not reveal when the drafts of the proposal became public. An unexplained notation at the bottom of Alaska's exhibits indicates that they became declassified in 1999.

(3) *Definition of Dixon Entrance and Adjacent Waters*. In 1944, in response to the United States' proposals regarding the A-B line, Canada made a counter-proposal. This counter-proposal contained a definition of Dixon Entrance and its adjacent waters. The definition said:

> It is further agreed that the waters of the Dixon Entrance include the waters south of the line AB and north of a line drawn between the Canadian Geodetic stations Tow Hill on Graham Island and Stephens on Stephens Island; and that, for the purpose of this Agreement, the *adjacent waters* include the waters of Revillagigedo Channel South of the lighthouse on Mary Island; and of Clarence Strait south of Wedge Island; and of Cordova Bay south of Kaigani Point; and of Hecate Strait south of a line drawn between Tow Hill and Stephens; and the waters between a straight line from Cape Muzon and Langara Point and the high seas.

See Canadian Counter-Proposal, *supra,* at 2 (emphasis added) (Exhibit AK-70, at HW 00425).

Alaska notes that the State Department contemplated two changes to this definition. First, State Department Geographer Boggs proposed in an internal memorandum that the term "adjacent waters" should be changed to "national waters." Memorandum of S. Whittemore Boggs at 1 (Aug. 1, 1944) (Exhibit AK-74, at HW 00495) [hereinafter 1944 Boggs Memorandum]. Alaska contends that the term "national waters" means inland waters. *See* Alaska Count I Memorandum at 24 (citing 1 Aaron Shalowitz, *Shore and Sea Boundaries* 303 (1962)) .

The Special Master disagrees with this interpretation. Boggs worried that the term "adjacent waters" might prove confusing because some of the waters were territorial sea and some were not. *See* 1944 Boggs Memorandum, *supra*, at 1. He said: "While we do not define 'national waters,' and while I do not believe that there will be found in international law any clear definition of the term which is applicable here, at least we eliminate some of the ambiguity." *Id*. This statement makes clear that he was not equating the terms "adjacent waters" with "inland waters."

Second, internal State Department documents discussed removing references to some of the islands mentioned in the quotation above. After tentatively endorsing their removal, Boggs changed his mind. In a very brief note affixed to one proposed draft, he wrote:

> I readily agree with Mr. Hackworth's suggestion that the references to Mary Island, Wedge Island, and Kaigani Point be restored. It seemed to me merely superfluous because the envelopes of arcs of three-mile radius close off territorial waters to the south of each of these three. There is no objection whatever to including them, especially as Mr. Hackworth wants to make sure *that there is no basis for Canadian nationals entering waters farther north*. Geographically, I do not see how there can really be any possibility of such an interpretation, but certainly there is no harm in making it foolproof.

Memorandum of S. Whittemore Boggs, Geographer, U.S. Dep't of State at 1 (Aug. 26, 1944) (Exhibit AK-76 at HW 00487) (emphasis added). Alaska says that this memorandum shows that "Boggs necessarily considered all the waters of the

Archipelago 'farther north' of Wedge Island to be inland waters." Alaska Count I Memorandum at 25.

The Special Master also disagrees with this interpretation. Although Boggs mentions waters "farther north," the context does not indicate whether he meant all of the waters of the Archipelago, or just some of them. In addition, Boggs could not speak for the United States government by attaching informal comments to a proposed convention that the United States ultimately never entered.

e. Position of the State Department

The State Department had several important occasions to express its views on the waters of the Alexander Archipelago in contexts other than negotiations over the A-B line.

(1) *Tariff Commission*. In 1930, State Department Geographer Boggs met with an official of the U.S. Tariff Commission to discuss the boundaries of the United States and Alaska for the purpose of a Tariff Commission investigation. Following the meeting, Boggs wrote a memorandum describing their conclusions. In the memorandum, he said:

> It was agreed that for the purposes of the investigation being made by the Tariff Commission, it would be best to represent the limit of American territorial waters as the envelope of the arcs of circles drawn from all points on the Alaskan coast, including such envelopes as overlap the straight line from Cape Muzon to the mouth of the Portland Canal [*i.e.*, the AB line], except where they overlap the arcs of circles similarly drawn from Canadian land.

S. Whittemore Boggs, *Alien Fishing in Territorial Waters and on the High Seas* 3 (Aug. 5, 1930) (Exhibit US-I-9).

The United States and Alaska disagree about the meaning of this statement. The United States says that the statement shows that Boggs did not treat the waters of the Alexander Archipelago as inland waters, but instead used arcs of circles to surround islands and the mainland with belts of the territorial sea. *See* U.S. Count I Memorandum at 36 & n.18. Alaska, in contrast, says that the letter represents the Tariff Commission's point of view for the purposes of the study, and not a statement of the United States' position on the territorial sea. *See* Alaska Count I Opposition at 28.

The Special Master agrees with Alaska's interpretation. Boggs phrased his summary in a way suggesting that he did not want to make a general statement in this memorandum about the territorial jurisdiction of the United States. He said that the representation of the limit of territorial waters was "for the purposes of the investigation being made by the Tariff Commission."

(2) *Coast Guard*. In 1952, the Coast Guard asked the State Department to answer questions about Alaska. In response to one of the questions, Boggs wrote:

> With reference to "Question 1", it is the position of this Government that the territorial waters of Alaska are everywhere the waters within the envelope of arcs of circles whose radius is 3 nautical miles measured outwardly from the coast line, including all islands—properly from the intersection of the line of the low-water datum with the shore. They will therefore not include some of the waters measured "3 miles seaward

> from a line connecting headland to headland regardless of distance between them," as assumed in "Question 1".

Letter from S. Whittemore Boggs, Geographer, U.S. Dep't of State to Vice Admiral O'Neil, Commandant, U.S. Coast Guard at 1 (Aug. 1, 1952) (Exhibit US-I-10).

The United States and Alaska disagree about the meaning of this statement. According to the United States, this statement shows that Boggs believed that (a) 10-mile closing lines should not be drawn to enclose inland waters; (b) the waters of the Archipelago are not straits leading to inland waters; and (c) the waters also are not historic inland waters. *See* U.S. Count I Memorandum at 37. Alaska, in contrast, says that Boggs's meaning is ambiguous because he used the word "territorial waters" rather than "territorial sea." It asserts that the term "territorial waters" can refer to both inland waters and the territorial sea. *See* Alaska Count I Opposition at 29.

The Special Master agrees with Alaska that the term "territorial waters" may include both the territorial sea and inland waters. *See supra* part I.B. The quotation in Boggs's letter, however, reveals that Boggs advocated using an arcs of circles measurement for the "territorial waters." Measuring the waters in this manner would have served no purpose if Boggs believed that the islands could be joined by closing lines and that all the waters behind those lines could be treated as inland waters. For this reason, the Special Master agrees with the United States' interpretation of Boggs's letter.

(3) *Diplomatic Correspondence with Norway*. In 1949, in diplomatic correspondence, the United States told Norway that it was adhering to the proposals that it had made at the 1930 League of Nations Conference in the Hague. *See* Alaska

Report, *supra*, at 78-79 (quoting the United States' statement). Special Master J. Keith Mann concluded that this memorandum showed that the "Hague proposals became the official international position of the United States." *Id.* at 79. As explained above, those proposals do not support the view that the United States was claiming the waters of the Alexander Archipelago as inland waters. *See supra* part II.C.4.c.

f. Hearings on Statehood Legislation

Alaska became a state on January 3, 1959. Alaska contends that statehood legislation contemplated that Alaska would gain full jurisdiction over the waters of the Alexander Archipelago. *See* Alaska Count I Memorandum at 26. Alaska supports this contention by citing several statements made by Senator Guy Cordon during a committee hearing on the Alaska Statehood Act. To ensure that the boundaries of Alaska would include territorial waters, Senator Cordon proposed saying in the Act: "The State of Alaska shall consist of all the territory, together with territorial waters appurtenant thereto, now included in the Territory of Alaska." *Hearings before the Sen. Comm. on Interior and Insular Affairs on S. 50, A Bill to Provide for the Admission of Alaska into the Union*, 83d Cong. 222 (Exhibit AK-78) [hereinafter *ASA Hearings*]. This statement became section 2 of the Alaska Statehood Act. *See* Alaska Statehood Act, Pub. L. 85-508, § 2, 72 Stat. 340, 340-341 (codified at 48 U.S.C. Note Prec. § 21) [hereinafter ASA]. Senator Cordon specified that Alaska's boundaries would extend to the "3-mile limit that this country has contended for always." *ASA Hearings*, *supra,* at 223. As a result, Senator Jackson later said

Alaska would include "everything there is up there, as far as the overall boundary lines are concerned." *Id.* at 282.

The Special Master disagrees with Alaska's interpretation. These comments do not prove that Senator Cordon, Senator Jackson, or anyone else viewed all of the waters of the Alexander Archipelago as inland waters. The comments do not appear to focus on the Alexander Archipelago and do not specify exactly where the boundaries of Alaska would lie.

Moreover, in part of the hearing that Alaska does not cite, Elmer F. Bennett, a legislative counsel from the Department of Interior, called the problem of historic bays to Senator Cordon's attention. Bennett said: "You have one additional problem, as brought out in your record here, in that the historic bays are considered as part of Territorial waters, and the State Department apparently has refused to recognize any of the bays in Alaska." *Id.* at 223. Senator Cordon responded: "If we attempt in this or any act of this kind to go into that field, gentlemen, it will be a year from some Thursday when we could report any kind of bill." *Id*. Even if legislative history of this kind has relevance, Senator Cordon apparently did not wish to express any view on whether Alaskan waters included historic inland waters. Others may have shared his view.

g. General Policy Regarding Coastal Islands

Alaska asserts that prior to statehood, the United States adhered to a general policy that coastal islands less than ten nautical miles apart enclose inland waters. *See* Alaska Count I Memorandum at 31. The State relies on the *Alabama and Mississippi Boundary Case*, 470 U.S. at 106 (footnote omitted), and other sources to establish the existence of this policy.

See Alaska Count I Memorandum at 31-36. Alaska acknowledges that this policy, by itself, does not demonstrate that the waters of Alexander Archipelago are historic inland waters. *See id.* at 31. It contends, however, that this ten-mile policy provides "powerful confirmation of the body of evidence demonstrating the United States has continuously claimed dominion over the waters of the Archipelago and has done so with the acquiescence of foreign nations." *Id*. The United States argues that the Court rejected the predicate for this contention in *Alaska (Arctic Coast)*. *See* U.S. Count I Opposition at 17.

The Special Master agrees with the United States. In the *Alabama and Mississippi Boundary Case*, the Court considered the status of the waters of Mississippi Sound. In its analysis, the Court said that, prior to adopting the Convention, the United States had a general policy "of enclosing as inland waters those areas between the mainland and off-lying islands that were so closely grouped that no entrance exceeded 10 geographical miles." 470 U.S. at 106. The Court ultimately concluded that Mississippi Sound contained historic inland waters. *See id.* at 115. In *Alaska (Arctic Coast)*, however, the Court characterized the quoted statement from the *Alabama and Mississippi Boundary Case* as incorrect dicta. The Court said that the statement was not controlling because the *Alabama and Mississippi Boundary Case* had relied on specific assertions of sovereignty rather than on the supposed ten-mile policy in reaching its holding. *See* 521 U.S. at 13-14. Moreover, after examining a variety of evidence including contrary positions taken at the 1930 League of Nations Conference, the Court concluded that the United States did not have a "firm and

continuing 10-mile rule" for inland waters. *See id.* at 20. Given that the asserted ten-mile policy never firmly existed, the policy cannot confirm that the United States considered the Alexander Archipelago to contain inland waters.

h. United Nations Studies

The United States has cited two United Nations studies to support its position that other nations did not consider the waters of the Alexander Archipelago to be inland waters.

(1) *Study of Archipelagos*. In 1958, the United Nations sponsored a Conference on the Law of the Sea. In preparation for the conference, Mr. Jens Evensen of Norway prepared a study of the treatment of archipelagos for the United Nations. In a section entitled "State Practice Concerning Coastal Archipelagos," Evensen described the position of the United States as follows:

> This country has been one of the staunchest advocates of the view that archipelagos, including coastal archipelagos, cannot be treated in any different way from isolated islands where the delimitation of territorial waters is concerned. Thus, according to information received, the practice of the United States in delimiting, for example, *the water of the archipelagos situated outside the coasts of Alaska is that each island of such archipelagos has its own marginal sea of three nautical miles*. Where islands are six miles or less apart the marginal seas of such islands will intersect. But not even in this case are straight baselines applied for such delimitation.

Jens Evensen, *Certain Legal Aspects Concerning The Delimitation of The Territorial Waters of Archipelagos* 24, United

Nations Conference of the Law of the Sea, A/CONF.13/18 (Nov. 29, 1957) (emphasis added) (Exhibit US-I-3).

Several facts concerning this document are undisputed. First, Evensen believed that the waters of the Alexander Archipelago were not inland waters. Second, the report was not stating the official views of the United Nations Secretariat. Third, the United States did not object or otherwise indicate disagreement with report. Fourth, Evensen did not cite any sources or indicate the authority for his observations. *See* U.S. Count I Memorandum at 37-38; Alaska Count I Opposition at 29-31; U.S. Count I Reply at 13-14. The Special Master assesses the legal significance of Evensen's views below. *See infra* part II.D.1.a.

(2) *Study of Historic Bays*. In 1957, the Secretariat of the United Nations prepared a study of historic bays. *See* Secretariat, United Nations, *Historic Bays*, A/CONF.13/1 (Sept. 30, 1957) (Exhibit US-I-13). This study describes numerous historic bays around the world, including Chesapeake Bay and Delaware Bay. *See id.* at 4-5. The study, however, does not identify the waters of the Alexander Archipelago as a historic inland bay.

5. Post-Statehood Period from 1959-Present

Alaska became a state in 1959. The United States and Alaska have identified various post-statehood documents and other materials that they consider helpful to their positions.

a. The *Organized Village of Kake* Decision

The parties have cited the decision in *Organized Village of Kake v. Egan*, 174 F. Supp. 500 (D. Alaska, Terr., 1st Div.

1959), *aff'd sub nom. Metlakatla Indian Community, Annette Island Reserve v. Egan*, 362 P.2d 901 (Alaska 1961), *vacated in part*, 369 U.S. 45 (1962), *and aff'd in part sub nom. Organized Village of Kake v. Egan*, 369 U.S. 60 (1962). This case concerned the powers of the newly admitted State of Alaska and the federal government to regulate salmon fishing. Alaska attempted to ban the use of fish traps for taking salmon for commercial purposes "in all the coastal waters of the state." 174 F. Supp. at 504. Certain native Alaskan communities claimed authority, derived from orders of the Secretary of Interior, to operate such traps, and they sought an order enjoining state officials from enforcing the fish trap ban against them. *See Metlakatla Indian Community*, 362 P.2d at 902. The United States participated in the case as *amicus curiae*. *See id.* The trial court held that the Secretary of Interior had no authority to create an exception to the fish trap ban and dismissed the plaintiffs' action. *See Organized Village of Kake,* 174 F. Supp. at 505.

The parties have observed that the trial court made the following oral ruling in the case:[29]

> I find the following statements of the law determinative of the issues in this case. The state owns the tidelands and controls all areas wherein traps were threatened to be installed. In other words, the proposed trap sites are located in inland waters over which the State of Alaska has dominion.

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[29]The trial court made its decision orally because of the urgency of time, attempting to "do as well as possible" under the circumstances. *Id.* at 501.

Id. at 502. Citing the quoted statement, Alaska says that the trial court "declared that the waters of the Archipelago are 'inland waters over which the State of Alaska has dominion.'" Alaska Count I Memorandum at 37.

The United States disagrees. It notes that the trial court subsequently explained in its ruling that Alaska had acquired title to the lands through the Submerged Lands Act's cession of submerged lands beneath the three-mile territorial sea. *See* U.S. Count I Opposition at 31 (citing 174 F. Supp. at 502). The United States concludes that the reference to the Submerged Lands Act shows that the trial court was using the term "inland waters" to mean "both inland waters proper and territorial seas." *Id.*

The language used by the trial court in its oral opinion is ambiguous. Later proceedings in the case, however, resolved this ambiguity. Although neither party addresses these later proceedings in its briefs, the trial court subsequently made supplemental findings of fact, and the case then went to the Alaska Supreme Court and the United States Supreme Court, both of which issued written opinions.[30]

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[30]The *Kake* case has a very unusual procedural history. At the time of the trial court's decision, July 2, 1959, Alaska had just become a state and did not have a fully organized judiciary. The trial court was "to a significant degree the creature of two sovereigns acting cooperatively to accomplish the joint purpose of avoiding an interregnum in judicial administration in the transitional period." *Metlakatla Indian Comm., Annette Island Reserve v. Egan*, 363 U.S. 555, 558 (1960). Because the Supreme Court of Alaska did not yet exist, the plaintiffs appealed directly to the United States Supreme

The trial court's supplemental findings of fact merit extensive quotation because they directly address the status of the waters of the Alexander Archipelago. The trial court's "Supplemental Finding of Fact No. 1" said:

> The waters of the Alexander Archipelago, State of Alaska, which lie to the landward of a line drawn from Cape Spencer lighthouse at the entrance of Cross Sound, and following generally the sinuosities of the coast, that is, the meander line of mean low water, and *bridging headlands and bays as the line is drawn in a general southeasterly direction past Cape Bartholomew, Cape Muzon, and eastward through Cape Chacon* and ending at a line drawn from the northermost extremity of Pt. Mansfield, Sitklan Island, 040° true, to where it intersects

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Court. On June 20, 1960, the Court reserved decision on the merits of the case and directed the plaintiffs to pursue appeals to the newly formed Supreme Court of Alaska. *See id*. at 562-63; *Metlakatla Indian Comm., Annette Island Reserve v. Egan*, 362 P.2d at 902. The case proceeded to the Supreme Court of Alaska and later returned to the United States Supreme Court.

These peculiar post-trial proceedings are difficult to find. Normal search procedures for case history in the WESTLAW electronic database do not reveal them (although normal search procedures do produce the subsequent history on LEXIS). Perhaps for this reason, the parties in their briefs did not cite or discuss the published opinions by the Supreme Court of Alaska or the United States Supreme Court. The United States first called this subsequent history to the Special Master's attention in a letter dated January 20, 2004. The letter provides only a citation of the later opinions; it does not discuss their content.

> the mainland, as more particularly described in 33 C.F.R. 82[.]275[31] *are all inland waters and historic bodies of water*. Because of historic, social, and geographic considerations, of which this court takes judicial notice, and based also on a consideration of the record in this case, I find:
>
> That geographically and geologically the Alexander Archipelago is part of a long mountain range which extends from the southern tip of the so-called Panhandle of Alaska's general land mass in a northwesterly direction, and includes the St. Elias Mountains, the Wrangell Mountains, and the Talkeetna Mountains in South central Alaska;

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[31]The cited regulation, 33 C.F.R. § 82.275, was promulgated by the Coast Guard on January 15, 1952, for the purpose of "establish-[ing] a definite line of demarcation between the inland waters and the high seas in southeastern Alaska." 17 Fed. Reg. 717 (1952). The regulation specified a demarcation line that ran along the outside of the Alexander Archipelago. Apart from a minor change in the spelling of one place name in 1966 and the substitution of "Light" for "Lighthouse" and "Light Station," *see* 31 Fed. Reg. 10319, 10323 (1966), this regulation appears to have remained in force for at least 25 years. The demarcation line determined the application of vessel piloting rules. *See* 17 Fed. Reg. at 717. Neither party has cited this regulation in its briefs. The Special Master notes that the Court held in *Louisiana* that a similar inland water demarcation line, also established as a navigational aid, did not serve as a territorial boundary. *See* 394 U.S. at 17-22.

> That the main mass of igneous rocks which intruded the older sediments forms the core of this general land mass. The resulting topography, formed by erosion of the complex fault patterns and contacts between different rock types, and a later partial inundation, is a series of long, narrow arms of the sea, which have encroached upon the general land mass without actually altering its original coastline facing the open sea;
>
> That the general land mass of the Alexander Archipelago retains its mountain-range character with elevations ranging from 2,000 to 6,000 feet, and that the present arms of the sea were at one time river valleys which have been eroded by glacial action, creating the long, narrow fiords which exists today as inland waterways, the only substantial means of surface transportation throughout the Archipelago.
>
> That the historical economy of the area involved is primarily oriented to a marine way of life in which the inland waters furnish the primary, and in many areas, the only industry. Said waters are in every respect a necessary and intimate part and parcel of the territory of the State of Alaska.

Metlakatla Indian Community, 362 P.2d at 926 n.112 (quoting the trial court's Supplementary Findings of Fact) (emphasis and footnote added by the Special Master).

The trial court may have based its conclusion that the waters of the Alexander Archipelago are historic inland waters in part on an affidavit submitted by Edward L. Keithahn, the Curator and Librarian of the Alaska Museum and Library in Juneau,

Alaska. Based on his "intimate acquaintance with Alaskan history," Keithahn deposed:

> That . . . the waters of the Alexander Archipelago from Dixon Entrance to Cape Spencer are waters over which first Russia, then the United States have exercised sovereignty which has not been successfully challenged for over 100 years; [and]
>
> That the exercise of such sovereignty first by Russia and subsequently by Alaska and the United States over said lands and waters, as well as the historic background of the area have led to the conclusion that the said waters are historic bodies of water and inland waters of Alaska.

Affidavit of Edward L. Keithahn, *reprinted at* Transcript of Record, *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), at 75-76.

The Supreme Court of Alaska agreed with the trial court's determination that the waters of the Alexander Archipelago are historic inland waters. In the course of a lengthy opinion that primarily concerned other matters, the Supreme Court of Alaska quoted the trial court's finding of fact and said:

> Geographically and geologically the Alexander Archipelago of Southeastern Alaska has been determined to be a part of a long mountain range commencing with the Talkeetna Mountains in Southcentral Alaska, extending southeasterly to include the Wrangell and St. Elias Mountains. A partial inundation of the southeastern portion of the range resulted in the creation of arms of the sea and inland waterways without actually altering the original coastline facing the open sea. The trial court made Finding of Fact No. 1 based on the affidavit and

> attached exhibits of the Commissioner of Natural Resources of the State of Alaska. This finding establishes to our satisfaction that all of appellants' trap sites were located within the coastline and in inland waters of the state.

362 P.2d at 926-27 (footnotes omitted).

The United States Supreme Court affirmed the decision of the Alaska Supreme Court with regard to one of the native Alaskan communities but vacated and remanded with regard to another. *See Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) (affirming); *Metlakatla Indian Community, Annette Islands Reserve v. Egan*, 369 U.S. 45 (1962) (vacating and remanding). The Supreme Court's opinions do not address the issue of whether the Alexander Archipelago contains historic inland waters.

Based on the entire history of the *Kake* case, the Special Master agrees with Alaska that the trial court determined that the waters of the Alexander Archipelago are inland waters in the legal sense. More importantly, although the State does not cite the decision in its briefs, the Supreme Court of Alaska came to the same conclusion. The Special Master assesses the legal significance of these decisions below. *See infra* part II.D.1.b.

b. The *United States v. California* Brief

In *California*, 381 U.S. 139 (1965), the Court considered the limits of inland waters in the area of seven coastal indentations

off the coast of California.[32] In a lengthy brief submitted to the Court, the United States addressed the Alexander Archipelago in two places. First, the United States responded to California's argument that the United States had endorsed closing lines greater than ten nautical miles in length within the Alexander Archipelago. The United States asserted that "[n]one of the closing lines actually described needs to exceed ten miles in length." California Answer, *supra*, at 106 (Exhibit US-I-6).

Second, and more importantly, the United States discussed its policy regarding straits leading to inland waters. The policy resembles the proposal that the United States made regarding straits at the 1930 League of Nations Conference. *See supra* part II.C.4.c.(1). The United States said:

> Wherever the United States has insisted on the right of innocent passage through straits, denying them the status of inland waters, the claim has rested on the character of the strait as a passageway between two areas of high seas. No such right is claimed as to a strait leading only to inland waters. Such a strait is treated as a bay. Examples of this have already been discussed, including the straits leading into the Alaskan Archipelago (*supra*, pp. 105-107), straits leading to waters between Cuba and its encircling reefs and keys (*supra*, pp. 103-105), and

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[32]These indentations included Monterey Bay, San Pedro Bay, San Luis Obispo Bay, Santa Monica Bay, and waters located within segments of the coast from Point Conception to Point Hueneme and from the southern extremity of San Pedro Bay to the western headland at Newport Bay. *See* 381 U.S. at 213, apps. A-D (Black, J., dissenting) (illustrations depicting these areas).

> Chandeleur Sound (*supra*, p. 110; see also, *infra*, pp. 153-155).

California Answer, *supra*, at 130-131 (footnote omitted). The United States then said that this policy, even in its most liberal applications, would not apply to any of the waters at issue in *California*. *See id.* at 131 n.105.

The parties have different views about the meaning the second quoted excerpt. Alaska asserts that the quotation unequivocally shows that the United States viewed the waters of the Alexander Archipelago as inland waters. *See* Alaska Count I Memorandum at 37-38. The United States reads the quotation merely as saying that the United States has not insisted on a right of innocent passage for its vessels when they travel through foreign straits that resemble the straits leading into the Alexander Archipelago. *See* U.S. Count I Memorandum at 29-30. It adds that the statement "does not *claim* the waters of the Alexander Archipelago as a bay, or even indicate which of the many straits of the Archipelago would qualify as inland waters if 'treated as a bay' under the bay closing rules that were applied in 1953." *Id*. at 30 (emphasis in original). In addition, the United States says that the excerpt "mistakenly" identified the Archipelago as a place having straits leading only to inland waters. U.S. Count Opposition at 31. In fact, it asserts, the Archipelago contains passages between undisputed areas of high seas, such as the passages leading from Dixon Entrance to the Northern Gulf of Alaska. *Id.* at 31-32.

The Court did not address this excerpt in the *California* opinion. In the view of the Special Master, the passage does not claim that all of the waters of the Alexander Archipelago are inland waters. It does suggest, however, that the United States

believed that at least some of them could be treated as bays under the standards that the United States expected from other nations.

c. The Pearcy Charts

Under article 4 of the Convention, a nation may choose to connect fringing islands using straight baselines and then may measure the territorial sea from these straight baselines. Article 4(1) of the Convention says:

> In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

Convention, *supra*, art. 4(1). In 1959, State Department Geographer G. Etzel Pearcy cited the "archipelago along the southeast coast of Alaska" as a "clear-cut example" of a place where article 4 could apply. *See* Pearcy, *supra*, at 971. Using article 4, he prepared charts depicting Alaska's territorial sea. *See id.* at 963 (describing the project). These charts show the limit of the territorial sea as surrounding the islands of the Alexander Archipelago. *See* Exhibits AK-103 & AK-38 (Pearcy's charts of different portions of the Alexander Archipelago).

The United States considers these charts irrelevant. It asserts that Pearcy was merely showing what the territorial sea would look like if the United States adopted the Convention and decided to employ straight baselines under article 4 of the Convention. *See* U.S. Count I Opposition at 32. The United States, however, did not adopt the Pearcy charts. As the Court

recognized in *Alaska (Arctic Coast)*, the United States has never chosen to draw straight baselines under Article 4 in Alaska or anywhere else. *See* 521 U.S. at 10.

Alaska has a different view. It notes that, even though the United States did not adopt Pearcy's charts in a formal manner, the State Department gave copies of the charts to the Coast Guard and the Department of Interior. *See* Alaska Count I Memorandum at 38. Both of these agencies, it says, used the charts for enforcement purposes. *See id.* at 38-39. Alaska contends that their actual use constitutes an inland waters claim. *See* Alaska Count I Reply at 26-27.

Alaska cites five letters written by United States officials regarding the Pearcy charts. The earliest three letters merely indicate that federal officials might use the charts in the future. One says that the charts "supposedly have no 'official standing,'" but commends their study because "they obviously will be the [basis] for determining the limits" of federal enforcement. Letter from Ronald C. Naab, Fisheries Management Supervisor, BCF to Regional Solicitor, BCF at 1 (Dec. 19, 1963) (Exhibit AK-105). Another says that the charts were provided to "determine the fishery resources which would be affected by the adoption of a straight base line method of determining territorial seas" and concluded that, despite minor disagreements of interpretation, they "were determined adequate" for law enforcement purposes. Letter from Ronald C. Naab, Fisheries Management Supervisor, BCF to the Regional Director, BCF at 1, 2 (Apr. 17, 1964) (Exhibit AK-106). A third letter recognizes that the charts have "no 'official standing'" but says that "the charts will be used for enforcement purposes." Letter from Regional Director Harry L. Rietze, Regional

Director, BCF to Director, BCF at 1 (Feb. 4, 1964) (Exhibit AK-107).

Only two letters say anything about the actual use of the charts. In 1967, a letter from a Coast Guard officer to Pearcy, said: "These charts represented an 'exercise in baseline drawing' and did not represent an official delineation of the territorial sea. However, the charts were useful as a guide for Coast Guard operational commanders when carrying out law enforcement activities." Letter from Captain W.A. Jenkins, Chief, Law Enforcement Div., U.S. Coast Guard to G. Etzel Pearcy, Geographer, U.S. Dep't of State at 1 (Jun. 22, 1967) (Exhibit AK-104). Another letter, similarly, said: "the lines on these charts had no official status but rather were used exclusively to facilitate the task of the on-scene enforcement officials in ascertaining whether there was a reasonable basis for undertaking enforcement action." Letter from Vice Admiral T.R. Sargent, Acting Commandant, U.S. Coast Guard to Senator Ted Stevens at 2 (May 31, 1972) (Exhibit AK-117). The letters do not identify any specific enforcement actions or elaborate on how they served as a "guide." The Special Master considers below whether these letters, when combined with other evidence, suffice to demonstrate the legal requirements for historic waters. *See infra* part II.D.1.b.

d. Coastline Committee and Disclaimer

In 1970, the acting Legal Adviser of the Department of State formed an "Ad Hoc Committee on the Delimitation of the United States Coastline," commonly called the "Coastline

Committee."[33] *See Rhode Island and New York Boundary Case*, 469 U.S. at 522 n.15. The Coastline Committee had responsibility for determining the location and limits of the United States coast line and territorial sea. In 1971, the Coastline Committee published 155 charts covering all coastal states. *See* Ad Hoc Committee on the Delimitation of the United States Coastline, *Summary Report* 1 (1971) (Exhibit AK-115). These charts were distributed to foreign nations.

In preparing the charts, the Coastline Committee generally used the envelope of arcs of circles method to draw the territorial sea at a distance of three miles from the mainland. *See* Memorandum form Carl F. Salans, Acting Legal Adviser, U.S. Dep't of State to LOS Task Force Executive Group at tab B (Aug. 7, 1970) (Exhibit AK-116 at HW 01968). The Committee marked historic and juridical bays in some areas, but did not designate the waters of the Alexander Archipelago as historic inland waters. Instead, the charts depicted waters overlying the pockets and enclaves of submerged lands as high seas because they lie more than three miles from any shore. The United States continues to use these charts to this date.

Both the United States and Alaska view the publication of these charts as an official statement that the Alexander Archipelago does not contain historic inland waters. *See* Alaska Count I Memorandum at 42; U.S. Count I Memorandum at 38.

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[33]The committee members included Mr. Michael Reed, who now serves as an attorney for the United States in this case. Alaska has not asserted that accepting the Coastline Committee's written work as evidence in this case in any way would disqualify Mr. Reed.

As explained further below, however, they disagree about the legal consequence of this statement. *See infra* part II.D.1.a.

e. Legal Adviser's Memorandum

Congress held hearings on the Coastline Committee's charts in 1972. These hearings produced testimony and other evidence regarding the status of the waters of the Alexander Archipelago. Some of this evidence has been discussed above. *See supra* part II.C.4.b.(2). Alaskan officials generally did not approve of the way the charts treated the Alexander Archipelago. In a memorandum written in connection with the hearings, State Department Legal Adviser John R. Stevenson summarized the Alaskan sentiments:

> The charts use the arcs-of-circles method to depict the territorial sea and contiguous zone in the Alexander Archipelago, a group of large islands separated from each other and the mainland by narrow straits. Alaskans have reacted strongly to this approach, which they believe is inconsistent with what they consider the traditional treatment of the waters of the Archipelago as internal waters, and have urged that the federal government either use straight baselines to enclose the area as internal waters or assert an historic claim to that effect.

Memorandum from John R. Stevenson, Legal Adviser, U.S. Dep't of State to Ambassador McKernan *et al.*, *Baselines for the Alexander Archipelago: Background for September 1 Meeting* 1 (Aug. 30, 1972) (Exhibit AK-118).

The memorandum addressed various considerations. With respect to historic inland water status, it suggested that the

United States does not permit innocent passage through the waters of the Alexander Archipelago. The memorandum states:

> We understand informally from Coast Guard officers familiar with practice in Alaska that no right of innocent passage has generally been accorded in the Alexander Archipelago. Moreover, vessels entering the waters of the Archipelago *en route* to U.S. ports apparently have been required to give notice before entering those waters. There is apparently an exception in the "Ins[i]de Passage" along the Alaskan and Canadian coasts, where U.S. and Canadian vessels (only) transit freely.

Id. at 8. The parties agree that this memorandum describes a claimed right of exclusion. A subsequent memorandum for the State Department's Legal Adviser saw a "substantial question" whether sufficient evidence existed to justify a historic waters claim. *See* Memorandum from Charles N. Brower, U.S. Dep't of State to Ambassador McKernan *et al.*, *Baselines for the Alexander Archipelago* 1 (Jan. 16, 1973) [Exhibit AK-124]. The Special Master considers below whether these memoranda, when combined with other evidence, suffice to demonstrate Alaska's entitlement to summary judgment. *See infra* part II.D.1.b.

f. Transit by Foreign Vessels

The United States has presented information showing that foreign vessels have consistently made innocent passage through the waters of the Alexander Archipelago. *See* U.S. Count I Memorandum at 43-44. It relies on several sources, including a preliminary report by its expert, Professor Barry M. Gough. The United States emphasizes that this report shows

that vessels from nine nations have made free passage through the waters of the Alexander Archipelago since 1775.

(1) *Explorers, Fur-Traders and Whalers*. Gough's report identifies by name numerous vessels from Spain, Britain, France, and the United States that navigated the waters of the Alexander Archipelago from 1775 until 1867. *See* Gough, *supra*, at 5-33. These vessels engaged in exploration, fur-trading, and whaling. Looking at all the evidence, Gough concludes: "Such use caused Russian authorities concern, and these authorities or their representatives sometimes took measures to check such traffic or passage but found that such regulations as they enforced were suspended or nullified by their superiors." *Id.* at 41.

Alaska emphasizes that Gough's report identifies only British and American vessels during the period between 1834 and the 1867 Treaty of Cession. It notes that many of these vessels only visited Sitka, which lies on the outside of the Archipelago. In addition, Alaska points out that the presence of British vessels shows little because the Russian American Company leased its mainland possessions in Southeast Alaska to Britain's Hudson Bay Company in 1839. *See* Alaska Count I Opposition at 37-38.

(2) *Prospectors*. The Klondike is a region of Canada's Yukon Territory that lies north of Southeast Alaska. The discovery of gold in a tributary of the Klondike River caused a famous gold rush in 1897 and 1898. Some prospectors traveled through the waters of the Alexander Archipelago to reach Skagway, which lies at the north end of Lynn Canal. They then proceeded inland to the Klondike region. Gough's report identifies by name Canadian vessels that used this route. *See*

Gough, *supra*, at 38. Other prospectors took a different course. A map from the Klondike gold rush era shows that Canadian ships sailed from Vancouver, entered the waters of the Alexander Archipelago in the south, exited those waters at Sitka or Cross Sound, and then continued across the Gulf of Alaska and around the Alaska Peninsula to St. Michael's at the mouth of the Yukon River. *See Historical Atlas of the Pacific Northwest* 186 (Exhibit US-II-31 at 9). Canadian vessels transported minerals through the waters of the Alexander Archipelago to Canadian ports until at least the second half of the 20th century. *See* Gough, *supra*, at 39-40. Alaska stresses that Gough identifies only vessels from Britain and Canada and not from other nations. *See* Alaska Count I Opposition at 38-39 & n.12.

(3) *Tourists*. At end of the 1930s and start of 1940s, tourists sailed in Canadian vessels through the waters of the Alexander Archipelago to view Glacier Bay. In 1939, the Canadian Pacific Company and the Canadian National Railways operated steamship lines with regular routes to Alaska. *See* Earl A. Trager, Glacier Bay Expedition 6 (1939) (Exhibit US-I-21). In 1941, the Superintendent of the Glacier Bay National Monument reported that Canadian lines sailed past Glacier Bay. *See* Memorandum from Frank Been, Superintendent, Glacier Bay National Monument to Regional Director, National Park Service at 5 (1941) (Exhibit US-I-22 at US0000126); *see also* Exhibits US-I-23 *through* US-I-26 (memoranda and other documents from the National Park Service from 1946-1950 documenting other foreign vessels in the waters of the Glacier Bay National Monument). Gough's report also identifies cruise ships from other foreign countries. *See* Gough, *supra*, at 41. Alaska stresses that the first non-British or Canadian foreign

cruise ship identified by Gough did not make journeys into the Alexander Archipelago until 1973. *See* Alaska Count I Opposition at 39.

D. Assessment of the Documents as a Whole

With this understanding of the documents submitted, the question arises whether taken as a whole they establish either party's entitlement to summary judgment on Alaska's claim. The parties agree that Alaska has the burden of proving that the waters of the Alexander Archipelago meet the requirements for historic waters identified in part II.A. above. To reiterate, the Court has said:

> [W]here a State within the United States wishes to claim submerged lands based on an area's status as historic inland waters, the State must demonstrate that the United States: (1) exercises authority over the area; (2) has done so continuously; and (3) has done so with the acquiescence of foreign nations.

Alaska (Arctic Coast), 521 U.S. at 11 (citation omitted). The Court also has considered the "vital interests of the United States" in designating waters as historic inland waters. *Alabama and Mississippi Boundary Case*, 470 U.S. at 103.

The parties disagree about the necessary quantum of proof. Alaska asserts that "no special burden of proof applies here," apparently meaning that it must demonstrate its historic waters claim only by a preponderance of the evidence. Alaska Count I Opposition at 7. The United States, in contrast, says that historic waters claims always require special proof. *See* U.S. Count I Reply at 4-5. When they involve a federal disclaimer,

the United States says, historic waters claims require proof clear beyond doubt. *See id.*

The Court has not identified the exact quantum of proof required to sustain a historic waters claim. In *Alaska*, the Court described the elements of a historic waters claim as "strict evidentiary requirements." 521 U.S. at 11. This phrase appears to mean that a plaintiff must prove each requirement without any exceptions; it does not reveal any need to prove the requirements by extraordinary evidence. Other sources, however, have said that historic waters claims require special proof. *See, e.g.*, Gayl S. Westerman, *The Juridical Bay* 180 (1987) (saying that historic waters claims require "extraordinary proof"); Secretariat, U.N. General Assembly, *Juridical Regime Of Historic Water, Including Historic Bays* 7, ¶ 40, A/CN.4/143 (Mar. 9, 1962) [hereinafter *Juridical Regime*] (Exhibit US-I-4) (saying that the proof must be "rigorous" and the basis of title must be "exceptionally strong").

In *California*, the United States issued a disclaimer denying that the waters at issue constituted historic bays. *See* 381 U.S. at 175. The Court therefore had to determine the effect of the disclaimer. The Court said:

> We are reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt. But in the case before us, with its questionable evidence of continuous and exclusive assertions of dominion over the disputed waters, we think the disclaimer decisive.

Id. This statement makes clear that evidence beyond doubt can overcome a disclaimer, but that questionable evidence cannot. The statement, however, does not reveal whether any cases

might involve proof somewhere in between "questionable evidence" and evidence "clear beyond doubt," and whether such proof would defeat a disclaimer. In this case, however, the Court need not address the issue. As shown below, Alaska cannot prove its claim by even a mere preponderance of the evidence.

1. Exercise of Sovereign Authority

To demonstrate its claim, Alaska first must show that Russia and the United States historically exercised authority over the waters of the Alexander Archipelago. *See Alaska (Arctic Coast)*, 521 U.S. at 11. "For this showing," the Court has elaborated, "the exercise of sovereignty must have been, historically, an assertion of power to exclude all foreign vessels and navigation." *Alaska (Cook Inlet)*, 422 U.S. at 197. This assertion of power is required because a nation may exclude vessels from its internal waters, but must allow them to make innocent passage in its territorial sea. In this case, the facts show that Russia and the United States historically did not assert authority to exclude vessels from making innocent passage through the waters of the Alexander Archipelago. This conclusion becomes apparent by separating and analyzing the documents best supporting the positions of each party and then assessing the remaining documents.

a. Documents Best Supporting the United States

Several of the documents described above unambiguously support the United States' position that the United States and Russia historically did not assert the right to exclude foreign vessels from the waters of the Archipelago. First, Secretary of

State Thomas F. Bayard's letter to Secretary of the Treasury Daniel Manning in 1886 shows that the State Department did not see the waters of Southeast Alaska as inland waters. *See supra* part II.C.2.c.(4). This letter deserves substantially more weight than the other letters described from the same era. Not only did Secretary of State Bayard have more authority than lower level government officials, but his letter also specifically concerned the legal status of the Alexander Archipelago's waters. The letter, as noted above, said that the United States could not "claim greater jurisdiction" than three miles of marginal seas and that foreign vessels had the right to make "free transit." Officials who held this belief could not, and evidently did not, claim that the United States could exclude innocent passage through the waters.

Second, the letters between the Secretary of Commerce and Secretary of State in 1934 demonstrate that the Secretaries did not consider the waters of the Alexander Archipelago to be inland waters. Like Secretary of State Bayard's 1886 letter, these letters are directed specifically to the point at issue. They show that, when enforcement actions would turn on the legal status of the waters, the United States took the position that the waters were not inland waters, even though that was unfavorable to the United States' own interests. Again, officials who held these views could not, and did not, assert that the United States had a right to exclude foreign vessels.

Alaska argues that "internal, confidential correspondence" between government officials cannot constitute a disavowal of authority over the waters of the Archipelago. Alaska Count I Reply at 22. These letters, however, show more than a mere private understanding between two government agencies; they

indicate that their understanding guided enforcement. True, the Secretary of Commerce asked that the understanding not be publicly announced, so as not to encourage foreign vessels to explore the possibility of fishing in the pockets and enclaves, *see* Letter from Daniel C. Roper, Secretary, U.S. Dep't of Commerce to Secretary, U.S. Dep't of State at 2 (Sept. 5, 1934) (Exhibit US-1-14), but the agreement not to prevent Canadians from fishing outside the three-mile limit nonetheless indicates that the United States' actual, subsequent actions, which other nations could observe, would be consistent with the view that the pockets and enclaves were not inland waters. Combined with the 1886 letter, they show the State Department, at least, could not have "continuously" claimed that the waters of the Archipelago were inland waters.

Third, the United States has asserted without contradiction that no published list of the world's historic waters includes the waters of the Alexander Archipelago. *See supra* part II.C.4.h.2. The absence of any publication identifying the waters as historic waters gives credence to the view that the United States never made a sufficient assertion of authority to exclude foreign vessels from making innocent passage.

Alaska correctly asserts that inclusion in a list is not a requirement under the Court's precedents. *See* Alaska Count I Opposition at 45. It notes that Mississippi Sound did not appear on the United Nation's study of historic waters cited by the United States, but the Court nonetheless ruled that Mississippi Sound constitutes historic inland waters. *See id.* Yet, even if publication is not required, the absence of publication has significance in international disagreements about historic waters claims. For example, during the 1980s, in protesting historic

bay claims by Australia, the United States pointed out that none of the claimed bays was listed in the 1957 United Nations study. *See* J. Ashley Roach & Robert W. Smith, *United States Responses to Excessive Maritime Claims* 35-37 (2d ed. 1996) (Exhibit US-I-27); Clive R. Symmons, *Preliminary Expert Witness Report* 133 (Jan. 26, 2002) (Exhibit US-I-1). In addition, the Alexander Archipelago would be much harder to overlook than the Mississippi Sound; it covers eighteen times the area and has far more international traffic.

Fourth, and most significantly, publication of the Coastline Committee's 1971 charts indicated to the world that the United States was not claiming a right to exclude foreign vessels from the waters of the Alexander Archipelago. Alaska considers these charts irrelevant because, in its view, title to submerged lands in Alaska ripened in 1959 when Alaska became a state. *See* Alaska Count I Opposition at 40-41.

The Court has addressed the power of the United States to disclaim inland water status in three cases. In *California*, as noted above, the United States denied that any of the inlets at issue were historic waters. The Court held that the disclaimer was "decisive" given the "questionable evidence of continuous and exclusive assertions of dominion over the disputed waters." 381 U.S. at 175.

In the two other cases, the Court did not give decisive effect to a federal disclaimer. In the *Louisiana Boundary Case*, the Court said that it would not permit the United States to distort international law principles concerning historic inland waters "by denying any effect to past events." 394 U.S. at 77 (footnote omitted). The Court explained:

> It is one thing to say that the United States should not be required to take the novel, affirmative step of adding to its territory by drawing straight baselines [under article 4 of the Convention]. It would be quite another to allow the United States to prevent recognition of a historic title which may already have ripened because of past events but which is called into question for the first time in a domestic lawsuit. The latter, we believe, would approach an impermissible contraction of territory against which we cautioned in *United States v. California.*

Id. at 77 n.104.

Most recently, in the *Alabama and Mississippi Boundary Case*, the United States asserted that it had disclaimed the characterization of Mississippi Sound as historic waters by publishing the Coastline Committee's 1971 charts of the area. *See* 470 U.S. at 111-12. The Court disagreed. It said:

> We conclude that historic title to Mississippi Sound as inland waters had ripened prior to the United States' ratification of the Convention in 1961 and prior to its disclaimer of the inland-water status of the Sound in 1971. That disclaimer, issued while the Court retained jurisdiction to resolve disputes concerning the location of the coast line of the Gulf Coast States, is insufficient to divest the States of their entitlement to the submerged lands under Mississippi Sound.

Id. at 112.

This case resembles *California* more closely than it does the *Louisiana Boundary Case* or the *Alabama and Mississippi Boundary Case*. Here, as in *California*, the claim of historic waters rests upon "questionable evidence of continuous and

exclusive assertions of dominion over the disputed waters." 381 U.S. at 175. As explained immediately below, Alaska's best evidence does little to support its view that the United States continuously asserted that it had the power to exclude foreign vessels. The United States does not seek to deny the "effect of past events"—the concern of the Court in the *Louisiana Boundary Case*—but merely to argue that those events do not establish historic title. Finally, the United States did not issue the disclaimer during the course of ongoing litigation with Alaska; on the contrary, the 1971 charts disclaiming the inland water status of the Alexander Archipelago predate this litigation by nearly 30 years. For these reasons, the disclaimer is relevant, and it strongly supports the United States.

In addition to these strongly supportive documents, the Special Master believes that the 1825 treaty between Russia and Britain and the 1871 treaty between the United States and Russia also strongly support the United States' view. These treaties, as explained above, granted Britain a perpetual right to navigate the Stikine River. *See supra* parts II.C.1.b & II.C.2.a. As described above, affording Britain this right would have served no purpose unless the parties understood that Britain had the right to traverse the waters of the Alexander Archipelago to reach the mouth of the Stikine River. Only Professor Dall's letter to Secretary of State Bayard opposes this inference. *See supra* part II.C.2.c.(5). As explained immediately below, Dall's views on the legal interpretation of a treaty do not deserve great weight.

b. Documents Best Supporting Alaska

Various documents show some recognition of the waters of the Alexander Archipelago as inland waters. These documents, however, do not establish a sufficient assertion of power to exclude vessels from the waters of the Alexander Archipelago to establish Alaska's claim by the preponderance of the evidence.

First, Professor Dall's letter to Secretary of State Bayard unambiguously shows that Dall and a Canadian official believed that the United States could exclude foreign vessels from some navigation routes through the waters of the Alexander Archipelago. *See supra* part II.C.2.c.(5). The United States, however, argues that this informal discussion by two non-lawyers, hired for their scientific expertise, does not suffice to establish historic inland waters. *See* U.S. Count I Opposition at 13. Alaska responds that the Court cited similar statements in government documents in the *Alabama and Mississippi Boundary* case. *See* Alaska Count I Reply at 18 (citing 420 U.S. at 102-106).

The Special Master agrees with the United States. In the *Alabama and Mississippi Boundary Case*, the Court cited various government reports in concluding that Mississippi Sound includes historic inland waters. *See* 470 U.S. at 102-106. The Court, however, primarily relied on those documents in considering the vital interests of the United States. *See id.* That is a separate requirement, independent of the question of whether the United States asserted authority to exclude foreign vessels.

In *California*, the State argued that its state constitution declared, and a few state court decisions had held, that Califor-

nia had jurisdiction over indentations that it claimed as historic waters. *See* 381 U.S. at 172-173. The Court, however, ruled that this evidence did not suffice to establish a historic waters claim. The Court explained that "a legislative declaration of jurisdiction without evidence of further active and continuous assertion of dominion over the waters is not sufficient to establish the claim." *Id.* at 174 (footnote omitted). If state legislative declarations do not suffice, then informal discussions between scientists also should not.

Second, at the 1903 Alaska Boundary Tribunal, counsel for the United States described the political coast line of Southeast Alaska as a set of lines connecting the outer islands of the Alexander Archipelago. *See supra* part II.C.3. As explained above, the Special Master does not believe that the counsel was speaking merely hypothetically for the purpose of showing the absurdity of a British argument. *See id.* A separate question, though, is whether the statements are a legally sufficient assertion of authority to establish a historic waters claim.

The United States contends that government arguments in arbitral or judicial proceedings as a matter of law do not suffice to establish an assertion of sovereign authority. *See* U.S. Count I Memorandum at 22-24; U.S. Count I Reply at 9-10. It asserts that foreign nations realistically cannot review and evaluate all arbitral proceedings that might contain statements regarding inland water claims. *See* U.S. Count I Memorandum at 23. This position finds some support in *Alaska (Cook Inlet)*, where the Court stressed that the "adequacy of a claim to historic title" is measured internationally. 422 U.S. at 203. Assertions of sovereign authority over waters must give foreign nations realistically accessible notice.

As Alaska correctly asserts, however, a strict rule prohibiting consideration of government arguments in arbitral or judicial proceedings would conflict with the *Alabama and Mississippi Boundary Case*. *See* Alaska Count I Opposition at 17. In that decision, the Court determined that it previously had treated Mississippi Sound as inland waters in a 1906 precedent. *See* 470 U.S. at 107-109 (citing *Louisiana v. Mississippi (Louisiana and Mississippi Boundary Case),* 202 U.S. 1 (1906)). When the United States disputed the Court's interpretation of the 1906 precedent, the Court noted that the United States had interpreted the case in the same way in a brief that it had filed in 1958. The Court said:

> If foreign nations retained any doubt after *Louisiana v. Mississippi* that the official policy of the United States was to recognize Mississippi Sound as inland waters, that doubt must have been eliminated by the unequivocal declaration of the inland-water status of Mississippi Sound [in a brief filed] by the United States in an earlier phase of this very litigation.

Id. at 108-109 (footnote omitted). The Court thus not only relied on assertions by counsel in a legal brief, but also indicated that foreign nations should have taken notice of the brief.

Even if arguments in arbitral and judicial proceedings can help to establish historic water claims, their context must determine how much weight they have. In the *Alabama and Mississippi Boundary* case, although the Court cited the United States' brief, the Court did not suggest that the brief by itself would have sufficed to make Mississippi Sound a historic bay. On the contrary, the Court relied on its own precedent and said that the brief confirmed the claim. *See id.* Foreign nations can

be expected to know that the United States Supreme Court has the final authority to decide domestic boundary disputes. The Court's decisions, moreover, are readily accessible.

In this case, by contrast, the arguments of counsel before the 1903 Alaska Boundary Tribunal are not an adequate assertion of authority over the waters of the Alexander Archipelago. The status of the waters of the Alexander Archipelago was not at issue before the Tribunal. The Tribunal did not discuss the arguments of counsel or rule on their validity. The arguments take up only a few paragraphs in a seven volume record. For these reasons, it would be unrealistic to conclude that counsel's assertions at the tribunal should have made foreign nations (other than Britain) aware that the United States was asserting a right to exclude them.[34] By way of comparison, the United States properly asserts that it would be unrealistic to conclude that the United States would have notice of historic waters

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[34]At least one other nation subsequently learned what the United States argued at the 1903 Tribunal. Counsel for Norway found and cited the position of the United States in the *Fisheries Case*. *See* Alaska Report, *supra*, at 95 (describing Norway's argument in Counter-Memorial of Norway (U.K. v. Nor.), 1951 I.C.J. Pleadings (1 Fisheries Case) 477 (para. 446) (July 31, 1950)). The ability of one foreign nation to discover the United States' argument when litigating a related issue, however, does not mean that foreign nations should have known of the United States' position. The Court's decision in *California* indicates that whether a source gives foreign nations reason to know that the United States is claiming inland water status depends on the prominence and authoritativeness of the source. *See* 381 U.S. at 174.

claims based on similar arguments that Libya might make in an arbitration with Tunisia or North Korea might make in an arbitration with China. *See* U.S. Count I Memorandum at 23.

Third, Alaska has shown that federal fishery regulations have covered the waters of the Alexander Archipelago, including pockets and enclaves more than three miles from any shore. *See supra* part II.C.4.b. Alaska argues that if the United States asserted the right to enforce fishing regulations against foreign vessels in locations more than three miles from shore, those locations must been recognized as inland waters. *See* Alaska Count I Memorandum at 16. The State apparently reasons that the waters more than three miles from shore must have been considered either inland waters or territorial sea located within three miles of inland waters because the United States may not enforce fishing regulations against foreigners on the high seas. *See id.* (asserting that fishing regulations were enforced against foreign nationals beyond three nautical miles from shore and the "reason was that the waters of the Archipelago—regardless of their distance from the physical coast—were recognized as inland waters").

Alaska's argument has a very weak factual predicate. The laws and regulations cited by Alaska have broad enough language that they might have reached foreign vessels within all the waters of the Alexander Archipelago. As described above, however, Alaska presents no definite examples of actual enforcement of fishing regulations against foreign nationals within the pockets and enclaves. The location of the *Marguerite* incident remains unsettled. *See supra* part II.C.4.b.(1). Although the 1972 Congressional hearings contain general statements to the effect that the United States did enforce its

fishing regulations against foreign vessels, these statements do not identify any specific enforcement actions occurring more than three miles from shore. *See supra* part II.C.4.b.(2). In 1934, moreover, the Department of Commerce took the position that Canadian fishermen had a right to fish within the Archipelago so long as they remained more than three miles from shore. *See supra* part II.C.4.b.(3).

In any event, the factual question of whether the United States enforced its fishing regulations more than three miles from shore is, ultimately, immaterial. Historic inland water status must arise from "an assertion of power to exclude all foreign vessels and navigation." *Alaska (Cook Inlet)*, 422 U.S. at 197. The fishing regulations cited by Alaska controlled fishing, but did not purport to exclude all foreign vessels. Therefore, enforcement of fishing regulations in the pockets and enclaves, even if it actually occurred, would not directly show that the United States asserted that these waters were inland waters.

The Court has rejected the idea that the United States can regulate fishing only to the limit of its territorial sea. In *Alaska (Cook Inlet)*, the Court recognized that the "assertion of national jurisdiction over coastal waters for purposes of fisheries management frequently differs in geographic extent from the boundaries claimed as inland or even territorial waters." *Id.* at 198-99. The Court cited a presidential Proclamation from 1945 asserting power to establish fishing conservation zones within the high seas. *See id.* (citing Proclamation No. 2668, 59 Stat. 885 (Sept. 28, 1945)). Therefore, even if Alaska could prove the factual premise of its argument—that the United States enforced fishing regulations in the pockets and enclaves at

issue—this proof would not lead to the conclusion that the United States regarded the waters of the Archipelago as inland waters or territorial sea.

Alaska seeks to distinguish *Alaska (Cook Inlet*). It says that the Court in that case found that federal fisheries regulations did not establish inland water status "because there was no evidence that foreign vessels were treated differently from United States vessels." Alaska Count I Reply at 24. Alaska says that the present case differs because federal regulations prohibited foreign vessels from fishing in places where the regulations permitted United States vessels to fish. *See id*. The State again cites the Alien Fishing Act as an example.

Alaska's argument appears to rest on a brief passage in the *Alaska (Cook Inlet)* case, in which the Court said:

> Only one of the fishing regulations relied upon by the court, the Alien Fishing Act, treated foreign vessels any differently than it did American vessels. That Act, however, did not purport to apply beyond the three-mile limit in Cook Inlet.

422 U.S. at 197-198. In this passage, though, the Court was not suggesting that fishing regulations establish inland water status if they treat foreign vessels differently from United States vessels. On the contrary, the Court simply recognized that the Alien Fishing Act was the only law cited in the case that clearly applied to foreign vessels.

In the next paragraph, the Court said that its conclusion that enforcement of game and fish regulations could not establish historic inland water status was "not based on mere technicality." *Id.* at 198. The Court reiterated the point that nations frequently assert jurisdiction to enforce fishing regulations even

beyond their territorial waters. *Id.* at 198-99. This point did not appear to be limited to enforcement of fishing regulations against a nation's citizens. Accordingly, the Court would not recognize a nation's enforcement of fishing regulations in particular waters, even against foreigners, as sufficient proof that the nation regarded the waters as inland waters or even territorial sea.

Fourth, in *Organized Village of Kake v. Egan*, the trial court and the Supreme Court of Alaska concluded, that the waters of the Alexander Archipelago are historic inland waters. *See* 174 F. Supp. at 504 (trial court); 362 P.2d at 926-27 (Alaska Supreme Court). These court decisions, however, are not themselves part of the evidence supporting Alaska's historic inland waters claim. Alaska asserts that its claim matured prior to statehood, and these decisions came after that time. The decisions are relevant, at most, for the persuasive value of their examinations of the historical record.

The Court previously has determined that state supreme court decisions regarding historic inland waters claims are not controlling in original jurisdiction cases. In *California*, as previously noted, the Court rejected California's claim that Santa Monica Bay was a historic bay. *See* 381 U.S. at 173. The Court reached this conclusion even though the California Supreme Court had squarely decided in *People v. Stralla*, 96 P.2d 941 (Cal. 1939), that Santa Monica Bay was a historic bay.[35] *See California*, 381 U.S. at 174-75. *California* makes

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[35]The *Stralla* case concerned a criminal prosecution of defendants accused of operating a gambling ship in the waters of Santa Monica bay, but more than three miles from any shore. The court stated that

clear that the Court may conduct its own analysis of the history of the Alexander Archipelago.

The Supreme Court of Alaska gave much briefer consideration to the historic inland water issue in *Kake* than the California Supreme Court gave to the issue in *Stralla*, possibly because *Kake* dealt mostly with other issues, while *Stralla* turned solely on the question of California's jurisdiction over the waters of the alleged bay. The Supreme Court of Alaska's historical analysis consists of a single paragraph that paraphrases sentences from the trial court's factual finding, *see* 362 P.2d at 926-27; in contrast, the California Supreme Court's discussion of the status of the waters of Santa Monica Bay extends many pages, *see* 96 P.2d at 941-949. In addition, the Supreme Court of Alaska, like the California Supreme Court, made its decision before the United States had issued a disclaimer, and therefore it could not take the disclaimer into account. Accordingly, the Special Master concludes that the Supreme Court of Alaska's decision in *Kake*, like the California Supreme Court's decision in *Stralla*, is not persuasive. Determination of whether the waters of the Alexander Archipelago are historic inland waters must turn on an independent assessment of the historic documents presented in this case.

Fifth, in a brief filed in *United States v. California*, the United States said that straits in the Alexander Archipelago would be treated as bays under standards that the United States expected from other nations. *See supra* part II.C.5.b. Accord-

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the appeal presented "the single question whether the territorial jurisdiction of the state of California extends over the area of the waters known as Santa Monica bay." 96 P.2d at 942.

ing to Alaska, the brief shows that the United States continued to take the position that the waters of the Alexander Archipelago are inland waters after Alaska's statehood. *See* Alaska Count I Memorandum at 37-38. The United States says that the brief has no significance, asserting that it merely made an "inconsequential misstatement about a dubious delimitation principle that the U.S. suggested in 1930, never actually applied to the Archipelago, and abandoned upon signing the Convention." U.S. Count I Reply at 11-12.

The Special Master agrees with the United States that the *California* brief has little relevance. The brief was mistaken because, as explained above, it assumed that all of the straits in the Alexander Archipelago led only to inland waters when they in fact do not. The reference to the Alexander Archipelago played no role in *California* decision. The United States, moreover, was identifying standards that it would use for deciding whether to acquiesce in foreign inland waters claims; it was not using the standard to make its own claim.[36]

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[36]The Special Master also notes that, in *California*, the Court rejected California's claim that Santa Monica Bay was a historic bay even though, in the 1939 case of *People v. Stralla*, 96 P.2d 941, the United States Attorney had participated as *amicus curiae* supporting the position of the State. *See California*, 381 U.S. at 173 n.49. The Court said that it did "not consider this action so significant as to foreclose the United States in the controversy before us." *Id.* If the United States' express support for the position that certain waters are inland waters, in a case squarely presenting that issue, can later be disregarded, then the Court similarly should disregard a misstatement by the United States in a case not concerning the waters about which

Sixth, the State Department Legal Adviser wrote a memorandum in 1972 saying that the State Department understood from Coast Guard officers that no right of innocent passage has generally been accorded in the Alexander Archipelago. *See supra* part II.C.5.e. Alaska says that this statement shows that federal officials continued to show doubt about the correctness of the 1971 disclaimer. *See* Alaska Count I Memorandum at 42, 44.

This memorandum appeared after the 1971 disclaimer and therefore it could not establish a new historic waters claim. To the extent that Alaska is citing the memorandum for evidence of the United States' practice before 1971, the document has little, if any, value. The memorandum relies on informal statements made by unknown Coast Guard officers. The memorandum supports its statement that foreign vessels have no right of innocent passage by observing that foreign vessels must give prior notice before entering the waters. The United States, however, correctly notes that under the Convention foreign ships exercising the right of innocent passage may have to comply with notice requirements. *See* Convention, *supra*, art. 17 ("Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State . . . ."). Accordingly, a requirement that vessels entering waters of the Archipelago en route to United States ports must give notice before entering those waters does not mean that the United States is denying them innocent passage under the Convention.

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the misstatement was made.

c. All Other Documents

The other documents presented in the case do not support a historic waters claim. The Imperial Ukase of 1821 sought to exclude vessels from all waters within 100 Italian miles of the coast. *See supra* part II.C.1.a. The Court previously has held that the ukase did not establish historic inland water status because Russia withdrew the ukase after immediate protests by the United States and Britain. *See Alaska (Cook Inlet)*, 422 U.S. 191-192. Alaska has acknowledged that it cannot rely on the ukase. *See* Alaska Count I Opposition at 8.

Treaties made in 1824 and 1825 gave the United States and Britain rights to enter Russian marine territorial waters for ten years for the purposes of trade and fishing. For the reasons stated above, granting this right did not imply that Russia was claiming the power to deny innocent passage. *See supra* part II.C.1.b. The submissions concerning the *Loriot*, the *Dryad*, and the *Chichagoff* vessels likewise fail to show that Russia denied innocent passage throughout the waters of the Archipelago. *See supra* part II.C.1.c-e. Similarly, the State Department's notice to mariners published in 1845 does not show that the United States acknowledged that Russia had the right to exclude vessels from the waters of the Alexander Archipelago. The notice told Americans not to frequent the "interior seas, gulfs, harbors, and creeks upon" the northwest coast. The document does not show that all of the waters of the Alexander Archipelago are interior seas, gulfs, harbors, and creeks. *See supra* part II.C.1.f.

The various documents covering the period from 1867 to 1902 also do not establish that the United States exercised authority over the waters of the Alexander Archipelago as

inland waters. As described above, most of the documents from this era have little bearing on the case one way or another. While Alaska has shown that various government officials used phrases like "inland waters," they generally used the words in a non-legal sense and in a manner that did not cover all of the waters of the Alexandria Archipelago. *See supra* part II.C.2.c.

The records of the 1910 North Atlantic Fisheries Arbitration do not resolve the status of the waters of the Alexander Archipelago. *See supra* part II.C.4.a. The two proposals made by the United States at the 1930 League of Nations Conference in the Hague also do not show that the United States was claiming the waters of the Alexander Archipelago as inland waters. One proposal was that straits leading to inland waters would be treated as inland waters if their closing lines are less than ten miles wide. This proposal is inapplicable to much of the area in dispute because some of the straits in the Alexander Archipelago lead from areas of high seas to other areas of high seas. The proposal to assimilate pockets of high seas to the territorial sea does not support Alaska's position that the pockets and enclaves at issue in this case are inland waters.

The A-B line negotiations with Canada do not prove an inland waters claim. As explained above, the United States and Canada never formally agreed to any convention. Moreover, none of the documents presented by Alaska shows that the State Department or Canada viewed all of the waters of Alexander Archipelago as inland waters. *See supra* part II.C.4.d. The two nations furthermore did not make public assertions of a right to exclude. *See supra* part II.C.4.c. The various statements emanating from the State Department to the Coast Guard, to the Department of Interior, and to Norway also do not establish that

the United States asserted the power to exclude foreign vessels from the waters of the Alexander Archipelago. *See supra* part II.C.4.e. The same is true of the hearings on statehood legislation and the United States' general policies on coastal islands. *See supra* part II.C.4.f-g.

The Pearcy Charts do not support Alaska's claim. As noted above, the United States did not adopt the Pearcy charts. The letters written by United States officials do not identify any specific enforcement actions taken in reliance on these charts. Given this lack of specificity, they do not establish that the United States was claiming all of the waters behind the lines drawn on the charts as inland waters. *See supra* part II.C.5.c.

Gough's report and other documents show that foreign vessels have freely navigated the waters of the Alexander Archipelago for over 200 years. *See supra* part II.C.5.f. The United States considers the lack of exclusion of any foreign vessels significant. It contrasts this case to the *Alabama and Mississippi Boundary* case, which involved an out-of-the-way body of water avoided by foreign ships. *See* U.S. Count I Reply at 16. Alaska, however, correctly argues that the United States does not actually have to exclude foreign vessels from waters for those waters to constitute historic inland waters; instead, the United States merely has to assert the right to exclude them. *See* Alaska Count I Opposition at 34-35. In addition, the State properly contends that uninhibited usage of the waters proves very little because the United States never had reason to exclude foreign vessels that were coming to Alaska for the benefit of the area. *See id.* at 38-40.

d. Conclusion

The history of the Alexander Archipelago is long and involves many details. Consideration of the whole record, however, demonstrates that Alaska, at best, has uncovered and presented only "questionable evidence" that the United States exercised the kind of authority over the waters of the Archipelago that would be necessary to prove a historic waters claim. Such questionable evidence cannot, in accordance with *California*, overcome the United States' 1971 disclaimer. Even if the disclaimer were not at issue, and the question were simply whether Alaska could prove such exercise of authority by a preponderance of the evidence, the record demonstrates that Alaska could not do so. Upon the whole record, the Special Master concludes that Alaska cannot prove this essential element of its historic inland waters claim. This conclusion constitutes a sufficient basis for recommending that the Court award summary judgment to the United States on count I of the complaint.

2. Continuity of Exercise of Authority

The Court has said that, to establish historic title, a nation not only must have asserted authority, but also must have "done so continuously." *Alaska (Arctic Coast)*, 521 U.S. at 11. The foregoing analysis has concluded that the United States and Russia did not sufficiently assert authority over the waters of Alexander Archipelago. Accordingly, the United States and Russia could not have done so continuously. Yet, even if the Court disagrees, and concludes that Russia or the United States did assert authority to exclude foreign vessels, the requirement of long-term continuity would prevent the waters of the

Alexander Archipelago from having the status of historic inland waters.

The Convention does not specify how long a coastal nation must exercise authority over waters before they become historic inland waters. The Court also has not identified a definite number of years. Prior original jurisdiction cases, however, provide some guidance.

Three cases suggest that a period of more than 100 years would suffice. In the *Alabama and Mississippi Boundary* case, the Court held that a continuous assertion of authority for 168 years made Mississippi Sound a historic bay. *See* 470 U.S. at 102. Special Master Walter E. Hoffman similarly concluded that 192 years was long enough for Vineyard Sound to become a historic bay. *See* Report of the Special Master at 63, *United States v. Maine (Massachusetts Boundary Case)* (Oct. Term 1984) (No. 35, Orig.) [hereinafter Massachusetts Report]. Special Master Albert B. Maris said that 105 years would have sufficed for Florida Bay if other requirements had been met. *See* Florida Report, *supra*, at 42.

Two other cases have said that certain shorter periods do not suffice. Special Master Hoffman concluded that 53 years was too brief a period for Nantucket Sound. *See* Massachusetts Report, *supra*, at 69.3. Special Master Maris also ruled that oil leases made nine years before enactment of the Submerged Lands Act of 1953 were not remote enough in time to make Florida Bay a historic bay. *See* Florida Report, *supra*, at 46.

In this case, Alaska contends that the waters of the Alexander Archipelago had satisfied the requirements for historic inland waters at the time of statehood in 1959. *See* Alaska Count I Memorandum at 2. A later date presumably would not

allow Alaska to claim title to the submerged lands at issue under the Equal Footing Doctrine or the Submerged Lands Act. Certainly the claim could not have ripened after the 1971 disclaimer.

A deadline of 1959, however, does not leave much time for the establishment of historic inland water status. For example, even if the United States' arguments at the 1903 Alaska Boundary Tribunal had constituted a sufficient assertion of authority (and nothing prior had done so), that would leave only 56 years for the historic waters claim to ripen. That period resembles the period that was insufficient for the Nantucket Sound claim more than it resembles the much longer periods that were sufficient for the Mississippi Sound and Vineyard Sound claims.[37]

3. Acquiescence of Foreign Nations

The Court has held that the establishment of historic inland waters requires foreign nations to acquiesce in the assertion of authority to exclude their vessels. *See Alaska (Arctic Coast)*, 521 U.S. at 11. Given that Russia and the United States did not sufficiently assert authority over the waters of the Alexander Archipelago, it follows that foreign nations could not acquiesce. Some observations about the exhibits submitted nonetheless deserve comment.

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[37]If the Court were to conclude, contrary to the Special Master's recommendation, that Russia and the United States continuously asserted the right to exclude foreign vessels since 1824, the 135-year period between 1824 and 1959 would be long enough to satisfy the element of continuity.

First, Alaska has not produced any statement by the government of any nation confirming that it would acquiesce in exclusion of its vessels from the waters of the Alexander Archipelago. Alaska also has not presented any opinion from any expert in the law or policy of any foreign nation on the question whether the foreign nation would acquiesce.

Second, although the exhibits do not show any protest by foreign nations, this absence of protest proves very little in the circumstances of this case. The Court said in *Alaska (Cook Inlet)*: "In the absence of any awareness on the part of foreign governments of a claimed territorial sovereignty over [a body of water], the failure of those governments to protest is inadequate proof of the acquiescence essential to historic title." 422 U.S. at 200. Foreign nations had little basis for knowing that the United States was claiming the power to exclude foreign vessels for the reasons given above.

Third, Alaska says that Britain acquiesced in the seizure of the *Marguerite* for attempting to fish in violation of the Alien Fishing Act of 1906. *See* Alaska Count I Memorandum at 17. This contention lacks merit. Fishing regulations, as noted above, do not establish historic inland waters. Acquiescence in their enforcement, therefore, does not suffice. In any event, Britain immediately protested the seizure of the *Marguerite*; although Britain ultimately let the matter drop, it is difficult to see what else Britain realistically could have done to register its non-acquiescence.

Fourth, Alaska contends that Canada acquiesced in the United States' assertion of power during the Dixon Entrance negotiations and in discussions regarding salmon fishing. *See id.* at 25. As explained above, however, the documents do not

show that the United States and Canada formally agreed that the waters north of Dixon Entrance were inland waters. *See supra* part II.C.4.d. In any event, claims of jurisdiction to regulate fisheries do not amount to territorial claims.

Fifth, Alaska says that Britain and Norway's briefs in the *Fisheries Case* show that they acquiesced in the argument made by counsel for the United States at the 1903 Alaska Boundary Tribunal. *See* Alaska Count I Memorandum at 29-30. The briefs do not support this position. Although both parties cited the arguments made by counsel for the United States, they had no occasion to acquiesce in them. The *Fisheries Case* concerned whether Norway could draw straight baselines upon its coast, not whether the United States properly had drawn closing lines between islands located less than ten miles apart. Moreover, by the time of the *Fisheries Case*, the United States had endorsed contrary principles. *See supra* part II.C.3.

Sixth, Alaska argues that Britain endorsed the view that the United States could exclude vessels from the Alexander Archipelago during the 1893 Fur Seal Arbitration and 1910 Fisheries Arbitration. The Special Master, however, has rejected this interpretation of the documents. *See supra* parts II.C.2.b. & II.C.4.a. They therefore do not show acquiescence.

4. Vital Interests of the United States

In analyzing historic water claims, the Court has said that "a fourth factor to be taken into consideration is the vital interests of the coastal nation, including elements such as geographical configuration, economic interests, and the requirements of self-defense." *Alabama and Mississippi Boundary Case*, 470

U.S. at 102 (citations omitted). The parties disagree about the application of this fourth factor in this case.

Alaska contends that all the elements listed above support its claims. With respect to geographical configuration, Alaska says that the waters of the Alexander Archipelago bear a closer relationship to the coastal mainland than they do to the open seas. The State explains that the Archipelago has calm waters, shielded from ocean waves by its numerous islands. *See* Alaska Count I Memorandum at 46-47. As for economic interests, Alaska notes that the waterways within the Alexander Archipelago serve as the region's roads and that the inhabitants of the area have typically derived their living in one way or another from the sheltered waters. *See id.* at 47. On the issue of self-defense, Alaska says that effective efforts to protect Southeast Alaska must begin, and historically have begun, on the outer edge of the Alexander Archipelago. *See id.* at 47-49.

The United States has a different view. It says that the geographic configuration of the Alexander Archipelago counts against inland water status because the waters of the Archipelago are open at both ends and afford important international routes of travel. *See* U.S. Count I Opposition at 43. The United States contrasts the waters of the Archipelago to Mississippi Sound, which the Court described as a cul de sac little used by oceangoing vessels. *See Alabama and Mississippi Boundary Case*, 470 U.S. at 103. The United States argues that economic considerations do not bolster Alaska's claim because Alaska would not benefit from the power to exclude vessels from waters of the Alexander Archipelago; on the contrary, the area benefits from the innocent passage of foreign cruise ships. *See* Count I Opposition at 43. Most significantly, the United States

rejects Alaska's contention that the requirements of national defense support historic inland water status. The United States explains that, as the world's leading naval power, the United States has a national defense interest in consistently supporting freedom of navigation domestically and abroad. *See* U.S. Count I Memorandum at 2-4. The United States further asserts that Alaska and the Court must defer to its judgment of defense requirements. *See* U.S. Count I Reply at 22.

Based on these considerations, the Special Master concludes that recognizing the waters of the Alexander Archipelago as inland waters is not vital to the interests of the United States. The United States would not gain much of value from the power to exclude foreign vessels from making innocent passage through the waters. Treating the waters as part of the United States' territorial sea, moreover, would not prevent the United States from reaping the economic benefits of the region. It also would not prevent the United States from barring hostile foreign naval vessels. *See* Convention, *supra*, art.14(4) (stating that innocent passage does not include passage that is "prejudicial to the peace, good order or security of the coastal State").[38]

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[38]Perhaps the United States could have made similar arguments in the *Alabama and Mississippi Boundary Case.* The Court's opinion, however, suggests that the United States conceded that Mississippi Sound was an internal waterway of commercial and strategic importance, and instead argued unsuccessfully that the Court should not consider this importance in deciding whether Mississippi Sound was a historic bay. *See* 470 U.S. at 105.

5. The Tarr Inlet Problem

The United States has raised an additional obstacle to recognizing the waters of the Alexander Archipelago as historic inland waters. This obstacle involves the Grand Pacific Glacier and Tarr Inlet. In 1912, the Grand Pacific Glacier retreated into Canada, bringing the waters of Tarr Inlet to the Canadian border. *See infra* Appendix N (depicting Tarr Inlet in 1938 in the northwest quadrant of the map). The Grand Pacific Glacier eventually advanced back over the border, but not until 1961. *See* Bruce F. Molnia, *Corrections to, and Analysis of Professor James Beget's Geologic Origin and Scientific Classification of Islands and Bays, Straits, Sounds, Entrances, Channels, and Passages of Southeast Alaska* 4 (2002) (Exhibit US-II-42) [hereinafter Molnia Corrections Report]. As a result, from 1912 until 1961, the waters of the Archipelago touched the shores of both Canada and the United States.

The United States argues that these facts prevent the waters of the Alexander Archipelago from qualifying as historic inland waters of the United States under article 7(6) of the Convention. *See* U.S. Count I Reply at 19 n.11. The United States contends that article 7(6) cannot apply because article 7(1) of the Convention specifies that article 7 "relates only to bays the coasts of which belong to a single State." Canada and the United States, it contends, cannot share historic inland waters from which they can exclude foreign vessels.

Alaska objects that it has not had an opportunity to respond to this argument because the United States first advanced it in its reply brief. *See* Tr. Oral Arg. at 106 (Feb. 3, 2003). Although the United States mentioned the Grand Pacific Glacier in its opening brief, *see* U.S. Count IV Memorandum at

24 n.11, the United States did not argue that the Glacier's retreat into Canada from 1911 to 1961 precluded recognition of a historic bay. Alaska therefore asserts that the United States waived this line of argument.

The Special Master believes that additional briefing would be required to resolve the parties' competing contentions. Although article 7(1) would appear to preclude application of article 7(6), at least one influential source suggests that two nations in some instances jointly may form historic inland waters. *See Juridical Regime*, *supra*, at 20-21, ¶¶ 145-147. Alaska's contention that the United States waived the Tarr Inlet argument also does not have a simple answer. The ordinary rules of civil procedure serve only as a guide in matters referred to a special master. *See* Sup. Ct. R. 17.2. Perhaps a minor procedural default should not decide a large and important dispute between a state and the United States.

The Special Master, however, has not required additional briefing on these issues because additional briefing most likely would prolong the case while yielding little actual benefit. The Court can and should avoid reaching issues concerning Tarr Inlet by deciding that no historic bay exists for the all of the other reasons stated above. The Special Master therefore does not make a recommendation regarding the Tarr Inlet problem in this report.

E. Conclusion

For the foregoing reasons, the Special Master concludes that the documents submitted do not establish that the waters of the Alexander Archipelago constitute historic inland waters. The Court therefore should grant summary judgment to the United

States on count I, and deny summary judgment to Alaska. The decree should order that Alaska takes nothing on count I of its amended complaint.

III. JURIDICAL BAYS (Count II)

Count II of Alaska's amended complaint alleges that most of the waters of the Alexander Archipelago lie within four juridical bays. Alaska claims title to pockets and enclaves of submerged lands lying within three miles of the closing lines of these bays, but more than three miles from the shore of the mainland or any island. Both Alaska and the United States have moved for summary judgment on this count. For the reasons stated below, the Special Master recommends that the Court grant the United States' motion, and deny Alaska's motion.

A. Overview

A juridical bay is a body of water having geographic features that satisfy criteria specified in article 7 of the Convention. *See* Appendix B *infra* (reprinting article 7). The waters landward of a juridical bay's closing line are inland waters. *See* Convention, *supra*, art. 5(1). Accordingly, under the Submerged Land Act, "the closing line of the bay becomes part of the coastline, and a State's boundary generally extends three miles beyond that closing line." *Rhode Island and New York Boundary Case*, 469 U.S. at 514. *See also* 43 U.S.C. § 1301(c) (defining the coast line to follow the "line marking the seaward limit of inland waters"). Under the Submerged Lands Act and the Equal Footing Doctrine, a new state acquires title to unreserved submerged lands lying within these boundaries. *See id.* § 1311(a)(1) (states have title to lands beneath inland navigable

waters within their boundaries); *Alaska (Arctic Coast)*, 521 U.S. at 5-6 (Equal Footing doctrine independently grants states title to lands submerged beneath navigable waters).

In count II of Alaska's amended complaint, Alaska alleges the existence of four "juridical bays" in the area of the Alexander Archipelago. *See* Amended Complaint, *supra*, ¶¶ 26, 27. The State calls the two largest bodies of water "North Bay" and "South Bay," names created for the purpose of this litigation.[39] The other two bodies of water are "Sitka Sound" and "Cordova Bay." In total, these bays cover much the same area that Alaska alleges to constitute historic inland waters in count I. *See* Alaska's Unopposed Motion for Leave to File an Amended Complaint at 3-4 n.2, *Alaska v. United States* (Dec. 14, 2000)

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[39]In its amended complaint, Alaska originally used the names "North Southeast" and "South Southeast" for what it now calls North Bay and South Bay. Amended Complaint, *supra*, ¶ 27. For convenience, this report will use the shorter terms. The Special Master does not mean to imply that these bodies of waters satisfy the requirements for juridical bays merely by calling them "Bays."

Anticipating the possibility that South Bay might not satisfy the requirements of article 7, Alaska's amended complaint contains the following statement: "In the alternative, the area described above as [South Bay] comprises more than one juridical bay." Amended Complaint, *supra*, ¶ 32. Alaska cites this paragraph in its opening brief, but does not make any argument to support the theory that South Bay may consist of more than one juridical bay. *See* Alaska Count II Memorandum at 4 n.2. The Special Master therefore has not addressed this possibility.

(No. 128, Orig.) (noting that the areas are similar but not identical).

Alaska claims that title to the unretained submerged lands lying behind the closing lines of these juridical bays, and the unretained submerged lands extending three miles seaward of these closing lines, passed to Alaska at statehood under the Equal Footing doctrine and the Submerged Lands Act. *See* Amended Complaint, *supra*, ¶ 38. The United States denies that these bodies of water satisfy the requirements of juridical bays under article 7 of the Convention. In the view of the United States, Alaska generally has title only to unretained lands lying within three miles of the coast line of the mainland and any islands. Accordingly, the parties dispute title to pockets and enclaves of submerged lands lying landward of the closing lines of the alleged juridical bays or within three nautical miles seaward of these closing lines, but more than three nautical miles from the shores of the mainland or any island.

The parties agree that Alaska must prevail on two general issues to establish the alleged juridical bays. The first issue is whether numerous islands in the Alexander Archipelago can be "assimilated" to each other or to the mainland to form the sides of the alleged juridical bays. The second issue is whether the alleged juridical bays, if formed by the assimilation of islands, meet the requirements stated in article 7 of the Convention.

Alaska contends that it deserves summary judgment because it can prevail on both issues. *See* Alaska Count II Memorandum at 4-5. The United States has sought summary judgment solely on the grounds that Alaska cannot prevail on the assimilation of islands issue. *See* U.S. Count II Memorandum at 3-4.

In its opposition to Alaska's motion, however, the United States also has argued that North Bay and South Bay do not satisfy the requirements for a juridical bay. *See* U.S. Count II Opposition at 3, 41-43.

As with count I, an initial question is whether summary judgment is the appropriate means of resolving count II. Federal district courts grant summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In this case, both parties have asserted in their written submissions and at oral argument that count II involves no material issues of fact. *See* U.S. Count II Memorandum at 2-3; Alaska Count II Opposition at 3-4; Tr. Oral Arg. at 70, 94 (Feb. 4, 2003).

The Special Master agrees with this assessment. The United States and Alaska have based their competing arguments on information contained in surveys, charts, publications, affidavits, and other documents. They do not dispute the authenticity of these documents or what they say. Almost all of the parties' disagreements concern legal standards or the application of the law to facts. Their minor factual disagreements do not appear to affect the outcome of the case. In these circumstances, a trial would not aid resolution of this matter. As one counsel put it at oral argument, "The Master has a phenomenal amount of evidence in front of him that the parties have been able to collect. . . . I'm afraid that if you had a trial you would hear

more, but I don't know that it would be any more helpful." Tr. Oral Arg. at 70 (Feb. 4, 2003).[40]

B. Factual Summary

The following summary briefly describes the areas that Alaska alleges meet the requirements of juridical bays. More details follow in the subsequent legal analysis.

1. North Bay and South Bay

Appendix D contains a map presenting the simplest and clearest representation of the areas Alaska calls North Bay and South Bay. North Bay is the area surrounded by the land colored in green at the top of the map. South Bay is the area surrounded by land colored in purple at the bottom of the map.

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[40]The United States has suggested that, although there are no material questions of fact, the Special Master "might benefit from hearing testimony on the controlling legal principles, which rest, in important part, on international law." U.S. Count II Memorandum at 3. Parties may prove the content of the law of a foreign country through testimony by expert witnesses. *See* Fed. R. Civ. P. 44.1. Even if this principle extends to testimony about the interpretation of a multilateral convention ratified by the United States, *see United States v. Urfer*, 287 F.3d 663, 665 (7th Cir. 2002) (upholding exclusion of international law testimony), expert testimony does not appear necessary in this case. The United States and Alaska thoroughly have briefed the applicable rules of international law. They have not specified what additional guidance expert testimony might produce.

Both North Bay and South Bay contain islands, all of which are colored in light blue on the map.

North Bay and South Bay are extremely large. North Bay has an area of 5,593 square nautical miles and its mouth, measuring from Cape Spencer to Cape Decision, is 154 nautical miles wide. South Bay has an area of 4,949 square nautical miles, and its mouth, measuring from Cape Decision to Tree Point on Cape Fox, is 120 nautical miles wide. To give some sense of the scale of these immense bodies of waters, the entire state of Connecticut has an area of only 5,544 square miles or 4,186 square nautical miles; Connecticut is thus smaller than either North Bay or South Bay.

Bays typically are indentations of water into unbroken land masses. North and South Bay do not fit this usual pattern. On the contrary, Alaska claims that four closely spaced islands, called Kuiu Island, Kupreanof Island, Mitkof Island, and Dry Island can be "assimilated" or deemed to be connected to each other and to the mainland. If these islands are assimilated, they effectively would form a constructive peninsula extending from the mainland. This constructive peninsula, Alaska contends, serves at once as the southern headland of North Bay and the northern headland of South Bay.

As shown in Appendix E, the four islands making up the constructive peninsula lie in a row in the center of the Alexander Archipelago. Together they form an area of land extending 95 miles in length and up to 55 miles in width. The westernmost of the four islands is Kuiu Island. Kuiu Island is long and narrow, running from north to south with many deep indentations along its shoreline. The island has an area of 745 square miles, making it the 15th largest island in the United States and

roughly a dozen times the size of the District of Columbia. Kuiu Island has some inhabitants, but no large population centers.

The next island from west to east is Kupreanof Island. Kupreanof Island has a rectangular shape, with a large inlet called Duncan Canal cutting into its southern side. The island has an area of 1,089 square miles, making it the 12th largest island in the United States and giving it roughly the same land area as the state of Rhode Island. Kake, its principal village, has a year-round population of about 800.

The third island is Mitkof Island. Mitkof Island is mountainous and wooded, and has a triangular shape. It has an area of 211 square miles, making it the 29th largest island in the United States. The island has a town called Petersburg, with a year-round population of about 3,300.

Dry Island, a small island close to the Alaskan mainland, has an area of only 11 square miles. It has a trapezoidal shape, about 4 miles wide on its north east side and 2 miles wide on its south west side. Dry Island is unpopulated and undeveloped.

Several bodies of water divide these four islands from the mainland and from each other. More specific information about these waterways appears below in the analysis in parts III.C.3.a-d of this report. The details are deferred because the parties disagree substantially about how to assess and describe various basic facts about the intervening waters.

Keku Strait divides Kupreanof Island and Kuiu Island. Keku Strait runs from Point Macartney in the north to Point Barrie in the south. It has a length of 41 nautical miles. Its mouths are 9 nautical miles wide in the north and south. In the center of

Keku Strait is an 18 nautical mile section called Rocky Pass, which is rocky, narrow, and shallow.

Wrangell Narrows separates Mitkof Island and Kupreanof Island. Wrangell Narrows is approximately 15 nautical miles long. It is about 1 nautical mile wide at its mouths, but considerably narrower in its middle portion.

Frederick Sound divides the northern parts of Mitkof Island and Kupreanof Island from the mainland. Frederick Sound is over 40 nautical miles long, and 7 nautical miles wide at is mouth.

Dry Strait lies between Dry Island and the southern part of Mitkof Island. The channel between the two islands has a length of about 4 nautical miles. Dry Strait is nearly 1 mile wide at high tide, but mostly bare at low tide.

The North Arm of the Stikine River runs between Dry Island and the mainland and empties into Frederick Sound. (The Stikine River is discussed at some length above. *See supra* parts II.C.1.b-c & II.C.2.a.) The river has a total length of over 200 miles and is navigable for most of that distance. The small portion flowing past Dry Island is short, narrow, and shallow.

2. Sitka Sound

Alaska claims that Baranof Island, Partofshikof Island, and Kruzof Island form the sides of a bay called Sitka Sound. These three islands lie on the western edge of the Alexander Archipelago and are depicted on the chart in Appendix F. Baranof Island has a long narrow shape running 90 miles from north to south, and at its greatest width is about 22 miles from west to east. Baranof Island is the ninth largest island in the

United States. With an area of 1,607 square miles, it is slightly larger than New York's Long Island. The city of Sitka, located on Baranof Island, has a population of about 8,600. Partofshikof Island is much smaller. It has an elliptical shape, about 7 miles long and a few miles wide with a total area of about 12 square miles. Kruzof Island has a rectangular shape and an area of approximately 172 square miles.

Two bodies of water separate the three islands, each roughly as long as Partofshikof Island. Intervening between Kruzof Island and Partofshikof Island is Sukoi Strait or Inlet. This water starts out deep but becomes very shallow. At low tide, some of the land between the two islands is above water. Running between Kruzof and Partofshikof Island on one side, and Baranof Island on the other is Neva Strait. A portion of Neva Strait known as Whitestone Narrows, approximately 4600 feet in length, historically was shallow and dangerous. Subsequent projects, however, have improved the channel. More details about these waters appear in the analysis below. *See infra* parts III.C.3.e-f.

3. Cordova Bay

Alaska claims that Prince of Wales Island and Dall Island can be assimilated to form the sides of a fourth juridical bay called Cordova Bay. Appendix G contains a chart depicting these islands. Prince of Wales Island is the third largest island in the United States. With an area of 2,231 square miles, it exceeds both Delaware and Rhode Island in size. Prince of Wales Island is about 135 miles long and 45 miles wide and has a highly indented coast line. Dall Island lies to the west of Prince of Wales Island. Dall Island is the 27th largest island in

the United States with an area of approximately 254 square miles. It has a narrow shape about 50 miles long from north to south and five miles wide from east to west.

The eastern arm of Ulloa Channel and Tlevak Strait divide Dall Island from Prince of Wales Island. The total length of the waterway is approximately 7 nautical miles, depending on how it is measured. The entrance on the west is 2 nautical miles wide, and the entrance on the east is approximately 1.75 nautical miles wide. The passage diminishes in size at a place called Tlevak Narrows, which is about 300 yards long and 700 yards wide. Again, more details about these waters appear below. *See infra* part III.C.3.g.

C. Assimilation of Islands

As indicated in the summary of facts, Alaska's claims in count II requires assimilation of land forms in a total of seven places: (1) between Kuiu Island and Kupreanof Island; (2) between Kupreanof Island and Mitkof Island; (3) between Mitkof Island and Dry Island or the mainland; (4) between Dry Island and the mainland; (5) between Kruzof Island and Partofshikof Island; (6) between Baranof Island and both Kruzof Island and Partofshikof Island; and (7) between Prince of Wales Island and Dall Island.

Based on factors considered in prior cases, and on the resolution of various disputes about these factors, the Special Master has assessed each of these proposed points of assimilation. In the Special Master's view, assimilation may occur between Mitkof Island and Dry Island, and between Partofshikof Island and Kruzof Island, but not at any other location.

These two points of assimilation do not suffice to establish the juridical bays claimed by Alaska.

1. Factors Considered in Prior Cases

Three original jurisdiction cases have addressed the assimilation of islands for the purpose of creating juridical bays. In the *Louisiana Boundary Case*, 394 U.S. 11, the Court confronted the question whether islands off the coast of Louisiana in the Mississippi River Delta could be assimilated to the mainland for the purpose of forming the headlands of bays. *See id.* at 60-66) (footnote omitted). Although the Court recognized that islands generally play little role in delimiting bays, it said that "there is nothing in the history of the Convention or of the international law of bays which establishes that a piece of land which is technically an island can never be the headland of a bay." *Id.* at 61-62. In this regard, the Court observed:

> With respect to some spots along the Louisiana coast even the United States has receded from its rigid position [that islands may not be assimilated] and recognized that these insular configurations are really "part of the mainland." The western shore of the Lake Pelto-Terrebonne Bay-Timbalier Bay indentation is such a formation, and is treated by the United States as part of the coast.

Id. at 63.

The Court said a "realistic" and "common-sense" approach determines when islands may be assimilated. *Id.* at 63, 64. The Court then identified several factors to consider. It said:

> While there is little objective guidance on this question to be found in international law, the question whether a particular island is to be treated as part of the mainland

> would depend on such factors as its size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast.

Id. at 66. The Court indicated that this list of factors is "illustrative rather than exhaustive." *Id.* at 66 n.86. Elsewhere in the opinion, the Court identified an island's "origin . . . and resultant connection with the shore" as another factor to consider. *Id.* at 65 n.84.

The Court held, and Louisiana conceded, that the Isles Dernieres in Caillou Bay and the Chandeleur Islands in the Mississippi Delta did not qualify for assimilation. *See id.* at 67 & nn.87 & 88. It asked Special Master William P. Armstrong Jr. to determine whether other islands "which Louisiana has designated as headlands of bays are so integrally related to the mainland that they are realistically part of the 'coast' within the meaning of the Convention." *Id.* at 66. Special Master Armstrong considered and rejected each of Louisiana's claims that particular small islands and low-tide elevations should be assimilated to the mainland.[41] The Court subsequently adopted

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[41] *See* Louisiana Report, *supra*, at 36-37 (low water elevations in the area of Bucket Bend Bay not assimilable because they did not meet the criteria in *Louisiana*); *id.* at 38-39 (mudlumps in the area of Blind Bay not assimilable because of their insubstantial size and distance from the mainland); *id.* at 42 (islands in the area of Garden Island and Red Fish Bays not assimilable because they do not bear the requisite relationship to mainland); *id.* at 50-51 (Isles Dernieres in Caillou Bay not assimilable because the Court specifically said they were not in the *Louisiana Boundary Case*, 394 U.S. at 67 n.88);

Special Master Armstrong's report, rejecting Louisiana's exceptions. *See United States v. Louisiana*, 420 U.S. 529 (1975).

In a subsequent portion of the litigation, Special Master Armstrong concluded that Dauphin Island could be assimilated to the mainland, rendering Mississippi Sound a juridical bay. *See* Report of Walter P. Armstrong, Jr., Special Master at 16-18, *United States v. Louisiana* (Apr. 9, 1984) (No. 9, Orig.) [hereinafter Alabama and Mississippi Report]. The Court noted this conclusion when it reviewed the Special Master's report. *See Alabama and Mississippi Boundary Case*, 470 U.S. at 100. The Court, however, ultimately did not have to reach this issue because it affirmed the Special Master's alternative conclusion that Mississippi Sound is a historic bay. *See id.* at 101.

In the *Rhode Island and New York Boundary Case*, 469 U.S. 504, the Court considered whether Long Island Sound is a juridical bay. Long Island Sound lies between Long Island and the mainland coasts of New York, Connecticut, and Rhode Island. A major issue in the case was whether Long Island could be assimilated to Manhattan and the Bronx, even though it was physically separated by the waters of the East River.[42]

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id. at 52-53 (low tide elevations in the area of Atchafalaya Bay not assimilable because of their size and location).

[42]Despite its name, the East River is not actually a river. The Court has explained: "The East River is unusual. Technically, it is not a river; neither can it be regarded as simply a tidal strait, connecting the Atlantic Ocean to Long Island Sound. Rather, it is part of the complex Hudson River estuary system, affected by both

See id. at 514-20. *See also* Exhibit US-II-22 (East River, New York (chartlet)). Special Master Walter E. Hoffman recommended assimilating Long Island. *See* Report of the Special Master at 47, *United States v. Maine* (U.S. Oct. Term. 1983) (No. 35, Orig.) [hereinafter Rhode Island Report].

The United States filed exceptions to Special Master Hoffman's report. It argued that Long Island could not be assimilated. It took the position that islands should be treated as headlands only in a few special situations, including:

> when the island is separated from the mainland by a genuine "river"; when the island is connected to the mainland by a causeway; when the island is connected to the mainland by a low-tide elevation; or when, as in the *Louisiana Boundary Case*, the shoreline is deltaic in nature.

469 U.S. at 517. The Court, however, rejected this position, saying: "Given the variety of possible geographic configurations, we feel that the proper approach is to consider each case individually in determining whether an island should be assimilated to the mainland." *Id.* (footnote omitted).

Considering the factors listed in *Louisiana*, and other factors, the Court concluded that Long Island could be assimilated. The Court emphasized the following points: (1) Long Island and the mainland almost completely surround the water in Long Island Sound, creating a pocket of water. *See id.* at 518. (2) The western end of Long Island, closest to New York City, "helps

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tidal action and the fresh water flowing from the Hudson River." *Id.* at 519 n.11 (citation omitted).

form an integral part of the familiar outline of New York Harbor." *Id*. (3) The East River, which separates Long Island from Manhattan, before dredging had a shallow depth of 15 to 18 feet and a dangerous current. *See id.* (4) The size of the East River in terms of width and depth was very small in comparison to the 118-mile length of Long Island Sound. *See id.* at 518-19. (5) Long Island and the adjacent shore shared a common geological history, formed by deposits and sediments brought by sheets of ice 25,000 years ago. *See id.* at 519. (6) Long Island Sound is not a route of international passage; on the contrary, ships traveling between points north and south of Long Island Sound typically pass Long Island on its seaward side. *See id.*

In No. 52, Original, *United States v. Florida*, Special Master Albert B. Maris also addressed the assimilation of islands. He recommended that the Florida Keys below the Moser Channel should not be assimilated to the Florida Keys above the Moser Channel. *See* Florida Report, *supra*, at 46-47. He reasoned that the Moser Channel, which has navigable depths from 10 to 15 feet, "so far separates the lower Florida Keys from the upper Keys as to negate a finding that the former should be regarded as a further extension of the mainland." *Id.* at 47. Special Master Maris, however, concluded that the upper Florida keys were eligible for assimilation in an area of "very shallow water which is not readily navigable and nearly all of which is dotted with small islands and low-tide elevations." *Id.* at 39. The parties, however, did not press this view of the upper keys, and the Court did not rule on the issue. *See United States v. Florida*, 425 U.S. 791 (1976) (decree).

2. Preliminary Disagreements about Factors

The parties agree that these precedents identify factors to consider when deciding whether to assimilate islands to each other or to the mainland. They nevertheless contest various aspects of these factors. Accordingly, before using the factors to assess the disputed assimilation points, a number of preliminary disagreements require resolution.

a. Identity of Intervening Waters

In both the *Louisiana Boundary Case* and the *Rhode Island and New York Boundary Case*, the Court said that assimilation depends on characteristics of the "intervening waters." *Louisiana Boundary Case*, 394 U.S. at 66; *Rhode Island and New York Boundary Case*, 469 U.S. at 519. Alaska and the United States, however, disagree sharply about what constitutes the "intervening waters." This disagreement affects their analysis of nearly all of the points of assimilation.

Alaska argues that the relevant intervening waters between two land forms include only the waters that are "pinched," Alaska Count II Memorandum at 57, or in other words, only the waters where the opposing land forms "in fact come together," Alaska Count II Reply at 4. Alaska calls this area of water the "assimilation zone." Alaska Count II Memorandum at 13 n.5. For instance, as described above, a body of water called Keku Strait flows between Kuiu Island and Kupreanof Island. Keku Strait in its entirety has a length of 41 nautical miles and has an average width of about 4.5 nautical miles. Kuiu Island and Kupreanof Island, however, come very close together in an area called Rocky Pass. Rocky Pass is only 18 nautical miles in length, and has an average width of only .57 nautical miles

(1154 yards). Alaska views this small area as the relevant intervening waters between Kuiu Island and Kupreanof Island. *See id.* at 24. Accordingly, Alaska focuses its assimilation argument on the features of these "pinched" waters, and not on Keku Strait in its entirety.

The United States, in contrast, contends that the intervening waters include "the entire area across which the two land-forms of interest face one another." U.S. Count II Opposition at 7. For instance, under this definition, the United States would include all of the Keku Strait as the intervening waters between Kuiu Island and Kupreanof Island because the two islands face each other across the entire Strait. *See id.* at 16. As a result, the United States has a very different assessment of the features of the intervening waters.

Precedent offers little guidance on the question of how to delimit the intervening waters between two land forms. In the *Louisiana Boundary Case*, the Court and Special Master Armstrong did not specify the dimensions of the waters lying between the various islands that they considered. In the *Rhode Island and New York Boundary Case*, the Court and Special Master Hoffman treated the entire length of the East River as the intervening waters between Long Island and Manhattan and the Bronx. *See* 469 U.S. at 518-19; Rhode Island Report, *supra,* at 39-40. They did not, however, explain why they made this choice or give any definition of intervening waters.

The Special Master recommends that the Court now adopt the position of the United States for three reasons. First, Alaska's definition of intervening waters generally will produce uncertainty and the United States' definition generally will not. Alaska has offered no formal test for determining exactly where

two land forms "come together" or "pinch" the intervening waters. Accordingly, disagreements surely will arise about where the relevant intervening waters begin and end.

For example, as noted, Alaska regards the "intervening waters" between Kuiu Island and Kupreanof Island as being only the waters of Rocky Pass, not all the waters of Keku Strait. Rocky Pass, however, itself varies in width. Some parts of it, according to the exhibits, are over 2000 meters wide; the exhibits, however, indicate that for at least a mile the width of Rocky Pass is only about 400 meters or less. *See* AK-135 at HW 14382, HW 14383 (chartlets of Rocky Pass). If Alaska's general position regarding intervening waters were accepted, it would seem equally logical to regard the "intervening waters" between Kuiu Island and Kupreanof Island as being, not the whole 14-mile length of Rocky Pass, but only this one-mile stretch within Rocky Pass. Alaska offers no principles for deciding what to consider and what not to consider. Uncertainty of this kind surely will burden the Court in future coastal litigation. In addition, given that assimilation of islands may affect international borders, a vague standard may invite undesirable international controversies.

The United States' position has greater certainty because the United States has proposed using an objective method for delimiting intervening waters. In particular, the United States argues that the Court should use the "45-degree test" to identify the intervening waters. *See* U.S. Count II Opposition at 7-8. The 45-degree test says, in effect, that the open sea ends, and an inlet begins, when the shores of the two land forms bend more than 45 degrees away from the sea and toward each other.

Applying the 45-degree test to each end of intervening waters will establish where two opposing land forms face each other.

The Court explained the 45-degree test in the *Rhode Island and New York Boundary Case* when the Court approved using the test to establish the limits of a bay. The Court said:

> [The 45-degree test] requires that two opposing mainland-headland points be selected and a closing line be drawn between them. Another line is then drawn from each selected headland to the next landward headland on the same side. If the resulting angle between the initially selected closing line and the line drawn to the inland headland is less than 45 degrees, a new inner headland is selected and the measurement is repeated until both mainland-headlands pass the test. *See* P. Beasley, Maritime Limits and Baselines: A Guide to Their Delineation, The Hydrographic Society, Special Publication No. 2, pp. 16-17 (1977).

469 U.S. at 522 n.14. A more technical definition of the 45-degree test, illustrated with diagrams, appears in an influential paper written by Dr. Robert D. Hodgson and Dr. Lewis M. Alexander, both of whom have served as Geographer for the Department of State. *See* Robert D. Hodgson & Lewis M. Alexander, *Towards an Objective Analysis of Special Circumstances: Bays, Rivers, Coastal and Oceanic Archipelagos and Atolls, Law of the Sea Institute Occasional Paper No. 13* at 10-12 (Apr. 1972) (Exhibit US-II.16).[43]

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[43]Using the 45-degree test to determine the entrance to a bay, Hodgson and Alexander say: "On the chart [included by the Special Master as Appendix I to this report], the outermost points which may

Although the Court has applied the 45-degree test to delimit bays, it has not used the test for identifying intervening waters. Hodgson and Alexander, however, specifically advocate using the test for this purpose. *See id.* at 17 (saying that closing lines on each end of intervening waters "would, of course, be determined by the application of the 45˚ test as in the bay situation"). Their recommendation deserves weight because the Court relied generally on their paper in the *Rhode Island and New York Boundary Case* to define the headlands of a bay. *See* 469 U.S. at 522 n.14.

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delimit the character of a bay are chosen. In the illustration, these are marked A and B. A line is drawn between points A and B to serve as the first bay-closing line. The next inward—i.e., landward of Line A-B—headland point is selected on one shore (A_1) and connected with point A. The line A-A_1, in effect, marks the general direction of the intervening coast or shore. [If] the angle formed by B-A-A_1 is more than 45°, the A-A_1 shore faces onto the bay and, conversely, if less than 45°, it faces more onto the sea. In the event that the latter condition prevails, the procedure is repeated, i.e. the line is drawn from B-A_1 and a third headland point A_2 is selected to determine the angle of the shore direction to the bay-closing line. The procedure is repeated until an angle of 45° or greater is encountered. The procedure, of course, should be carried out for the opposite shore concurrently until both angles meet the test. The natural entrance points of the bay have been located. The landward shore faces onto the bay and the seaward shore faces away from the bay towards the sea. The points marking the line of separation have been found and with them the closing line of the bay." Hodgson & Alexander, *supra*, at 10. Following this passage, Hodgson and Alexander address various special cases and exceptions. *See id.* at 10-12.

Second, the uncertainty inherent in Alaska's approach could make identification of the "intervening waters" highly manipulable. A broader or narrower determination of what constitutes the "pinched" waters might alter the assimilation analysis under the factors identified in the *Louisiana Boundary Case* and the *Rhode Island and New York Boundary Case.* The United States rightly may worry that foreign nations could exploit the uncertainty in arguing for assimilation of islands that are not "realistically" parts of other land forms. *Louisiana Boundary Case,* 394 U.S. at 66.

Third, as a general rule, Alaska's approach would make assimilation substantially easier than the United States' approach. The "pinched waters" will always be smaller, and thus easier to ignore by assimilation, than the total waters between the facing shores of islands. In the *Rhode Island and New York Boundary Case*, the Court indicated that assimilation of an island to the mainland represents the "exceptional case," 469 U.S. at 517, and that "the general rule is that islands may not normally be considered extensions of the mainland for purposes of creating the headlands of juridical bays," *id*. at 519-20. The approach urged by Alaska therefore seems less supported than the method urged by the United States.

Although the Court should adopt the United States' definition of intervening waters on the basis of these considerations, Alaska makes several contrary arguments that deserve attention. Alaska principally justifies its position that the assimilation inquiry should focus on where the two land masses come together with the following reasoning:

> [I]f two land masses are *actually* connected by an isthmus of land . . . , they do not somehow become disconnected

> if there are bays on one or both sides of the isthmus, no matter how narrow that isthmus may be. Likewise, if two land masses separated by water are effectively or realistically connected at the place where they come together—no matter how narrow—it should be immaterial whether the intervening waters may also open into bays at one or both ends.

Alaska Count II Reply at 4 (emphasis in original).

The first sentence of this passage states an undisputed principle. For example, no one doubts that the northern part of Kuiu Island is connected to the southern part of Kuiu Island at its thin middle portion, regardless of the characteristics of the water on either side of the island. The second sentence also rings true; if two land masses are effectively connected at a place where they lie very close to each other, then the features of the water on either side of the effective connection also should not matter. But here the question is how to tell whether two land masses are effectively or realistically connected. Alaska's argument does not address this question.

Alaska also contends that the United States' position represents an "oversimplified or idealized vision of the coast [that] is divorced from the realistic view called for by the Court." *See* Alaska Count II Opposition at 28. This argument has less merit. In this case, the United States is not advocating per se rules for when assimilation may or may not occur as it did in the *Rhode Island and New York Boundary Case*. The question here is only how to define the intervening waters to permit individual consideration of the numerous factors identified in the Court's precedents.

Finally, Alaska contends that, in the *Rhode Island and New York Boundary Case*, the Court did not attempt to use the 45-degree angle test to define the intervening waters. Instead, the State says, the Court "focused its attention on the area where [Long Island] had the closest connection to the mainland." Alaska Count II Opposition at 26. These contentions are correct and they give the Special Master considerable pause. At bottom, however, the Special Master does not believe that the Court meant to establish a test for intervening waters when it looked at the characteristics of the East River. As noted above, the Court did not explain why it chose the East River as the intervening waters. The Court, moreover, said that assimilation depends on the "intervening waters" and did not qualify these words in any way. *See Rhode Island and New York Boundary Case*, 469 U.S. at 519. The Court did not speak of the "pinched intervening waters" or the "intervening waters where the land forms comes together." The Court also did not focus only on the narrowest portions of the East River.

b. Configuration or Curvature of the Coast

In the *Louisiana Boundary Case* and the *Rhode Island and New York Boundary Case*, as previously observed, the Court said that assimilation of an island depends in part on the island's "relationship to the configuration or curvature of the coast." *Louisiana Boundary Case*, 394 U.S. at 66; *Rhode Island and New York Boundary Case*, 469 U.S. at 516. Alaska and the United States partially agree about the import of this factor, but also partially disagree.

Alaska and the United States concur in the view that an island has a relationship to the configuration or curvature of the

coast that is conducive to assimilation when the island is separated from the mainland or another island by a "riverine" channel of water. *See* Alaska Count II Memorandum at 12; U.S. Count II Memorandum at 26. The two parties have independently cited an objective test, proposed by Hodgson and Alexander, for determining when a channel has this character. *See* Alaska Count II Memorandum at 12; U.S. Count II Memorandum at 30 n.12. Hodgson and Alexander state that, for assimilation to occur, a channel of intervening waters should have a length-to-width ratio of three-to-one. *See* Hodgson & Alexander, *supra*, at 20. Although Alaska and the United States disagree about the definition of intervening waters, *see supra* part III.C.2.a, they both apply this test when addressing the islands that Alaska seeks to assimilate in this case. *See, e.g.*, Alaska Count II Memorandum at 14, 27, 54, 57; U.S. Count II Memorandum at 30 n.12, 44.

The United States, however, contends that inquiry into an island's relationship to the configuration or curvature of the coast also should take into account another consideration. In particular, the United States advocates examining how adding the island to the coast line would alter the coast line's form. In its view, assimilation is more appropriate when the assimilated island would form a natural extension of the coast line, and less appropriate when the assimilated island would create a peninsula sticking out perpendicularly from the coast. *See* U.S. Count II Memorandum at 26-28. For instance, the United States contends that the configuration of a peninsula created by the assimilation of Kuiu Island, Kupreanof Island, Mitkof Island, and Dry Island weighs against assimilation because it

would jut directly out from mainland. *See id*. at 28. Alaska, in contrast, does not view this consideration as significant.

The Special Master agrees with the United States. In the *Rhode Island and New York Boundary Case*, the Court emphasized that Long Island's "north shore roughly follows the south shore of the opposite mainland." 469 U.S. at 518. Moreover, in addition to advocating the three-to-one ratio test that both parties accept, Hodgson and Alexander also say that assimilation should occur when adding the island to the mainland would produce a "natural prolongation of the two dimensional coastline formation as viewed on a nautical chart." Hodgson & Alexander, *supra*, at 17 (footnote omitted). In contrast, if a landmass lies perpendicular to the mainland, that configuration should weigh against assimilation. No precedent exists for assimilating islands that create peninsulas leading straight out from the mainland.

c. Size of an Island

In the *Louisiana Boundary Case* and the *Rhode Island and New York Boundary Case*, the Court said that the possibility of assimilating an island depends on the size of the island. *See Louisiana*, 394 U.S. at 66; *Rhode Island and New York Boundary Case*, 469 U.S. at 516. The parties in the present case have very different views about this factor. The United States argues that small islands are more readily assimilable than large islands. *See* U.S. Count II Memorandum at 24. Citing Hodgson and Alexander's influential paper, the United States explains that small islands are easier to assimilate because islands "fictionally treated as mainland should not 'dwarf the true proportions of the original bay feature and hence change its

entire character.'" *Id.* (quoting Hodgson & Alexander, *supra*, at 17).

Alaska, in contrast, argues that larger islands generally are easier to assimilate than smaller islands. *See* Alaska Count II Memorandum at 8. Alaska relies on a treatise by Michael W. Reed, which says "assimilation is more likely to be justified . . . the larger the island in comparison to the breadth of the intervening waterway." *Id.* (quoting 3 Michael W. Reed, *Shore and Sea Boundaries* 296 (2000)). Alaska, accordingly, draws very different conclusions about the possibility of assimilating the large islands in this case.

The available precedents offer some grounds for each view. On one hand, support for assimilation of small islands appears in the *Louisiana Boundary Case*, where the Court cited with approval the United States' treatment of the "small clumps of land" near the Lake Pelto-Terrebonne Bay-Timbalier Bay indentation as part of the coast. *Louisiana Boundary Case*, 394 U.S. at 63. On the other hand, support for assimilation of large islands comes from the *Rhode Island and New York Boundary Case*, where the Court approved the assimilation of Long Island, which is the tenth largest island in the United States, stretching 118 miles in length. *See* 469 U.S. at 518-519. In addition, Special Master Armstrong rejected assimilation of mudlumps "quite small in area" located off the coast of Louisiana because of their insubstantial size. *See* Louisiana Report, *supra*, at 38.

Taken together, these cases suggest that the absolute size of an island by itself offers little guidance on the question of assimilation. This conclusion, however, does not mean that size of an island is irrelevant. On the contrary, the size of an island

usually will affect consideration of other factors relevant to assimilation. For instance, the size (or length) of the island's facing shore directly determines the size and shape of the intervening waters between the island and the mainland. As explained previously, both the United States and Alaska have argued that an intervening channel of water generally should have at least a three-to-one ratio of length to width to permit assimilation. *See supra* part III.C.2.b. All else being equal, the longer the facing shores of the island and the mainland, the greater the ratio.

Similarly, the size of the island may determine the extent to which assimilation would alter the shape of the coast line. For example, a small island attached perpendicularly to the mainland would have less impact on the overall coast line than a large island similarly attached. Thus, depending on the configuration of the coast, a smaller island might be easier to assimilate.

d. Distance between Shores

Under the Court's precedents, the possibility of assimilating an island depends in part on the island's "distance from the mainland." *Louisiana Boundary Case*, 394 U.S. at 66; *Rhode Island and New York Boundary Case*, 469 U.S. at 516. This factor presents some difficulty because land forms generally have irregular shapes. As a result, the waters intervening between them do not have a constant width.

Both parties have dealt with this difficulty by relying on what they call the "average" width of the intervening waters. The two parties, however, calculate the average width in different ways. Alaska measures the width of intervening

waters at multiple locations, and then averages these measurements. The United States, in contrast, measures the width only at the two mouths of the intervening water.

The different measuring techniques naturally produce conflicting results. For example, both parties agree that Wrangell Narrows is the intervening water between Mitkof Island and Kupreanof Island. Alaska calculates the average width of Wrangell Narrows as 0.4 nautical miles (810 yards) based on 15 measurements of its width. *See* Alaska Count II Memorandum at 23 & Exhibit AK-135 at HW 14376, 14378-14380 (chartlets of Wrangell Narrows). The United States calculates the average width as "almost exactly" 1 nautical mile by averaging the widths only of its mouths. U.S. Count II Opposition at 19.

Alaska has the better approach. The more measurements taken at regular intervals, the closer an average of those measurements will approximate the actual average distance between the island and the mainland. The Court does not appear to have contemplated the limited measuring technique used by the United States.

e. Tide for Assessing the Intervening Waters

Under the Court's precedents, assimilation depends on the depth, width, and utility of the intervening waters. *See Louisiana Boundary Case*, 394 U.S. at 66; *Rhode Island and New York Boundary Case*, 469 U.S. at 516. These characteristics of the waters, however, may vary sharply with the changing tide. As the tide rises, the intervening waters become deeper, wider, and generally more useful for navigation. The opposite happens

when the tide falls. The differences matter in some instances because Southeast Alaska has large tidal ranges.

With respect to measuring the width of the water (*i.e.*, the distance between the island and the opposite shore), the parties' initial briefs showed some disagreement. Both parties, however, now share the view that widths should be measured at low water.[44] *See* Alaska Count II Opposition at 23; U.S. Count II Reply at 11. The Special Master agrees with this joint position of the parties.

With respect to measuring the "utility" of the intervening waters, disagreement about the appropriate tide persists. Alaska has emphasized the inability of ships to use intervening waters at low water. *See, e.g.*, Alaska Count II Memorandum at 21; Alaska Count II Reply at 11. The United States objects, arguing that waters have utility if mariners can use them at high tide regardless of whether they can use them at low tide. *See* U.S. Count II Opposition at 11-12. The United States explains that tidal "variations do not impair utility because mariners routinely

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[44]Alaska contends, more specifically, that widths should be measured at "mean lower low water." Alaska Count II Opposition at 23. Some low tides are lower than others. The term "lower low water" refers to the "lowest of the low waters (or single low water) of any specified tidal day due to the declinational effects of the Moon and Sun." National Oceanic & Atmospheric Admin., *Tide and Current Glossary* 14 (2000). The term "mean lower low water" refers to the "average of the lower low water height of each tidal day" observed over a multi-year period *See id.* at 16. The distinction between "low water" and "mean lower low water" does not appear to make a difference in this case.

adjust their activities—as they have done for centuries—to coincide with predictable changes." *Id.* at 12.

The Special Master agrees with the United States. Many natural factors, including storms, ice, darkness, and tides, may prevent mariners from navigating otherwise useful waters for temporary periods. Nothing in the *Louisiana Boundary Case* or the *Rhode Island and New York Boundary Case* suggests that these factors should affect assessment of the utility of the waters. Attempting to take them all into account, moreover, would make the assimilation inquiry almost unmanageable.

A similar disagreement exists with respect to the depth of the water. Alaska generally focuses on the depth at low water. The United States, in contrast, emphasizes the depth at high water. For example, Alaska notes that Wrangell Narrows had an unimproved depth of only 10 feet at low tide, while the United States notes that it had an unimproved depth at high tide of 31 feet. *See* Alaska Count II Memorandum at 20-21; U.S. Count II Opposition at 19.

To the extent that measurements of depth serve as a proxy for navigational utility, they should not occur only at low water. As explained immediately above, the utility of a waterway does not depend on tides. Mariners can and do adjust the timing of navigation to avoid low water.

By contrast, to the extent that the depth is being measured to gauge the total volume of water that must be ignored to join two land forms by assimilation, consistency requires measuring the depth of the water at low tide. As noted above, the parties agree that the width of intervening waters is determined at low tide. No useful assessment of volume could come from measuring the depth at a different time.

f. Social and Economic Connections

In the *Rhode Island and New York Boundary Case*, Special Master Hoffman concluded that social and economic ties between Long Island and the mainland favored assimilation. *See* Rhode Island Report, *supra*, at 45-46. He noted:

> On a daily basis there is an enormous movement of people from Long Island to the mainland and from the mainland to Long Island. Additionally, the western end of Long Island is physically connected to the mainland, either directly or indirectly through Manhattan or Staten Island, by twenty-six bridges and tunnels.

Id. at 45. The Court adopted Special Master Hoffman's recommendation on assimilation, even though the United States filed exceptions to the report, arguing against giving weight to these "current social and economic ties between Long Island and the mainland." *Rhode Island and New York Boundary Case,* 469 U.S. at 510.[45]

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[45] Although the Court adopted Special Master Hoffman's recommendation on assimilation, it did not refer to the specific social and economic connections that Special Master Hoffman mentioned in his report. The Court came closest to citing social and economic considerations in noting that the "western end of Long Island helps form an integral part of the familiar outline of New York Harbor." *Id.* at 518. A "harbor" is not just a sheltered body of water, but a body of water serving the function of providing a haven for safe anchorage of vessels. *See United States v. California*, 447 U.S. 1, 7-8 (1980); *Louisiana Boundary Case*, 394 U.S. at 37, n.42; California Report, *supra*, at 46-47; 1 Shalowitz, *supra*, at 60-62. Because providing safe anchorage for vessels is an economic and social

Recognizing the failure of its argument in the *Rhode Island and New York Boundary Case*, the United States now opposes assimilation of islands in the Alexander Archipelago on the ground that the islands have no similar social or economic connection to each other or to the mainland. *See* U.S. Count II Memorandum at 39-40. It asserts that the islands in question are rural and are sparsely populated or even unpopulated. Alaska, however, responds that "social and economic comparisons to New York are out of place" when deciding whether to assimilate a wilderness area. Alaska Count II Opposition at 46. The United States has the better argument. To the extent that "current social and economic ties" weigh in favor of assimilation, then logically the absence of such connections must weigh against it.

g. Effect of Dredging and Improvements

Dredging has deepened and improved the navigability of several of the areas of intervening waters at issue in this case. This dredging raises the question whether the Court should assess the depth and utility of waterways according to their natural state or according to their improved condition after dredging. In its briefs, Alaska generally addresses the pre-improvement characteristics of waterways. For example, the State emphasizes that Rocky Pass prior to dredging had a

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function, the integral parts of New York Harbor, by definition, have at least some economic and social ties to each other.

controlling depth[46] of only one foot, and that numerous rocks and strong currents prevented all but small vessels from passing through. *See* Alaska Count II Reply at 11. The United States, in contrast, usually highlights the post-improvement character of intervening waters. The United States points out, for instance, that vessels having a draft of 12 feet now can traverse Rocky Pass 40 percent of the time and that the fishing vessels, cannery tenders, and tugs with log rafts now regularly use the waterway. *See* U.S. Count II Memorandum at 38.

The Court did not specifically address this issue in the *Rhode Island and New York Boundary Case*. In its opinion, however, the Court did look at both the pre-dredging and post-dredging condition of the East River. The Court, for example, stressed that prior to improvement, the East River had a depth of 15 to 18 feet, with a rapid current making navigation hazardous. *See* 469 U.S. at 518. The Court, however, also looked at modern usage of the East River after improvement. *See id.* at 519. This approach comports with the view that assimilation depends not just on natural features but also on characteristics established by human activity, such as social and economic connections. *See supra* part III.C.2.f. The Special Master accordingly concludes that a realistic assessment of intervening waters requires consideration of their features both before and after improvement.

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[46]The "controlling depth" of a channel is the "minimum depth of the channel at mean low water as found in government surveys." *Cities Service Oil Co. v. Arundel Corp.*, 337 F.2d 842, 843 (2d Cir. 1964) (per curiam).

h. Geologic Origin of the Islands

In both the *Louisiana Boundary Case* and the *Rhode Island and New York Boundary Case*, the Court said that assimilation of an island depends on the island's geologic "origin and [its] resultant connection with the shore." *Louisiana Boundary Case*, 394 U.S. at 65 n.84; *Rhode Island and New York Boundary Case*, 469 U.S. at 516. The parties agree, based on geologic studies, that the islands of the Alexander Archipelago originated in the Pacific Ocean millions of years ago, and then moved to their present location through plate tectonics. *See* Alaska Count II Reply at 12; U.S. Count II Opposition at 26-27. They disagree, however, about the significance of this evidence.

The United States argues that the geologic origin of the islands in Alexander Archipelago counts against assimilation because the material comprising the islands did not come from the adjacent Alaskan mainland. *See* U.S. Count II Opposition at 25. Alaska considers this feature of their origin immaterial. It observes that the same tectonic action that brought the islands to the Archipelago also brought the terranes (rock formations) that now make up much of mainland. As result, the island and mainland differ very little in their composition and for "tens of millions of years they have been welded together." Alaska Count II Reply at 13.

The United States has the stronger argument. The Court has made clear that an island is more readily assimilated to the mainland if the island consists of material that came from the mainland by sedimentation or other process. In the *Louisiana Boundary Case*, the Court said that "islands created by sedimentation at river entrances are peculiarly integrated with the mainland." 394 U.S. at 64-65 n.84. In the same case, Special

Master Armstrong similarly concluded that a non-fluvial origin weighs against the assimilation of an island. *See* Louisiana Report, *supra*, at 39. In the *Rhode Island and New York Boundary Case*, moreover, the Court emphasized that Long Island was "formed by deposits of sediment and rocks brought from the mainland by ice sheets" as a factor weighing in favor of assimilation. 469 U.S. at 519. This approach recognizes that, all else being equal, islands formed from earth and rocks coming directly from the mainland have a closer connection to the mainland than islands formed from material that did not come from the mainland.

i. Special Treatment of Fringing Islands

Under the Convention, the territorial sea of a nation generally begins at the coast line of the mainland. Article 4, however, contains a special rule that a nation may use for measuring the territorial sea in areas, like Southeast Alaska, where a fringe of islands intervenes between the mainland and the open sea. *See supra* part II.C.5.c (discussing the Pearcy charts illustrating how article 4 would apply). Article 4 of the Convention says:

> In localities where . . . there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

Convention, *supra*, art. 4(1). When straight lines are employed under article 4, the territorial sea begins not at the shore of the mainland, but instead at the shore of the islands and along the straight lines between the islands.

An important aspect of article 4 is that the decision whether to draw straight baselines between fringing islands is optional. Article 4 says that a nation "may" employ straight lines to establish the start of the territorial sea, but does not require a nation to use straight lines. The United States has never chosen to draw straight baselines under article 4. *See Alaska (Arctic Coast)*, 521 U.S. at 10 (citations omitted).

The United States contends that assimilation of Mitkof Island, Kupreanof Island, and Kuiu Island would render the option to use or not to use article 4 a nullity. *See* U.S. Count II Memorandum at 16-17. It explains that "the selective assimilation of the island-complex would *require* the United States, against its will, to treat the entire area enclosed within the Alexander Archipelago as inland water." *Id.* (emphasis in original) (citations omitted). This requirement, the United States feels, would negate the choice given by the text of article 4. The United States says that this "contrivance is impermissible, quite apart from application of the Court's multi-factor test." *Id.* at n.5.

Alaska responds that, while the United States may decline to draw straight lines under article 4, it cannot refuse to recognize juridical bays meeting the criteria of article 7 of the Convention. Those criteria, the State says, include the Court's recognition that islands may be assimilated to the mainland. *See* Alaska Count II Opposition at 12-13.

Alaska has the better argument. The United States' position does not find support in the Court's precedent. In the *Louisiana Boundary Case*, the Court was considering a body of water surrounded by fringing islands. In a footnote, the Court said:

> Louisiana does not contend that any of the islands in question is so closely aligned with the mainland as to be deemed a part of it, and we agree that none of the islands would fit that description.

394 U.S. at 67 n.88. This footnote suggests that the Court did not dismiss out of hand the possibility that fringing islands could be assimilated to create juridical bays; rather, it simply concluded that the islands in question were too far from the mainland to be assimilated. The Court also indicated that an area can meet the test of a historic bay even if the United States chooses not to draw straight lines. *See id.* at 77 n.104. For these reasons, the Special Master recommends against concluding that article 4 affects the question whether islands should be assimilated to each other or to the mainland.[47]

j. Geographical Obviousness

The United States proposes a new limitation on assimilation that the Court did not consider in the *Louisiana Boundary Case* and the *Rhode Island and New York Boundary Case*. Specifically, the United States asserts that courts should not assimilate islands when their assimilation would create "geographically

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[47]Long Island itself arguably forms part of a fringe of islands surrounding Long Island Sound that are amenable to connection by straight baselines under article 4. This fringe of islands would include Manhattan Island, Long Island, and Block Island. Although the Court did not consider this issue in the *Rhode Island and New York Boundary Case*, it held that Long Island could be assimilated to Manhattan Island, *see* 469 U.S. at 520, which in turn was assimilated to mainland New York across the Harlem River.

non-obvious" juridical bays. *See* U.S. Count II Memorandum at 18-22. The United States notes that, under the Convention, nations may exclude mariners from juridical bays. Accordingly, the United States reasons, mariners must be able to identify the entrance to inland waters through tools that are readily available, such as nautical charts. Mariners might have difficulty determining the presence of juridical bays, the United States says, if the bays' headlands consist of assimilated islands in areas that otherwise do not have the appearance of bays. The United States therefore considers it "imperative, to avoid international conflicts, that United States courts not set precedents that encourage coastal nations to apply assimilation principles in a contrived manner for the purpose of creating geographically non-obvious inland waters." *Id.* at 19. Alaska dismisses this concern, saying that the four alleged juridical bays are obvious, *see* Alaska Count II Opposition at 19, and that to avoid confusion, the United States could mark the bay's closing lines on its published charts, *see id.* at 20.

The Special Master concludes that the assimilation principles set forth in the *Rhode Island and New York Boundary Case* and the requirements of article 7 adequately address the concerns expressed by the United States. Under these cases, a court may find an island assimilated to the mainland only if a "realistic" assessment of the various factors indicates that the island should be considered part of the mainland. *Louisiana Boundary Case*, 394 U.S. at 63; *Rhode Island and New York Boundary Case*, 469 U.S. at 517. If courts adhere to this principle, assimilation should not occur in places where mariners could not expect it to occur. Moreover, once assimilation has occurred, a body of water will qualify as a juridical bay only if

it meets the specific criteria set forth in article 7 concerning the width of its mouth, its penetration into the coast, its total area, and so forth.

k. Sovereign Interests

The Court said in the *Rhode Island and New York Boundary Case* that "[t]he ultimate justification for treating a bay as internal waters, under the Convention and under international law, is that, due to its geographic configuration, its waters implicate the interests of the territorial sovereign to a more intimate and important extent than do the waters beyond an open coast." *Rhode Island and New York Boundary Case*, 469 U.S. at 519 (citation omitted). Citing this statement, the United States contends that considerations of sovereign interests should affect decisions whether to assimilate islands. *See* U.S. Count II Memorandum at 22-24. In the view of the United States, the fundamental sovereign interest at stake is "the United States' longstanding interest in maintaining a consistent and coherent approach to coast line delimitation to promote this Nation's longstanding policy of freedom of the seas." *Id.* at 23.

The Special Master concludes that the Court took sovereign interests into account when it established the criteria for assimilation in the *Rhode Island and New York Boundary Case.* Indeed, as Alaska points out, the United States specifically has acknowledged that the result in the *Rhode Island and New York Boundary Case* is consistent with international law and the national interest. *See* Alaska Count II Opposition at 9 (citing Final Minutes of the Baseline Committee Meeting, May 2, 1985 (May 28, 1985) (Exhibit AK-320)). Adhering to the precedent of the *Rhode Island and New York Boundary Case*, accordingly,

should provide a consistent and coherent approach to coast line delimitation.

3. Analysis of Factors

Analysis based on the *Louisiana Boundary Case* and the *Rhode Island and New York Boundary Case*, and the foregoing conclusions with respect to disagreements about the meaning of those cases, reveals that assimilation is warranted between Dry Island and Mitkof Island and between Partofshikof Island and Kruzof Island, but at no other locations.

a. Kuiu Island and Kupreanof Island

Alaska argues that Kuiu Island should be assimilated to Kupreanof Island. On the chart in Appendix E, Kupreanof Island appears in the middle of the page, with Kuiu island beneath it. The parties initially dispute the identity of the intervening waters between the two land forms. As noted above, Alaska identifies the intervening waters as the 18-nautical mile narrow central portion of Keku Strait called Rocky Pass. *See* Alaska Count II Motion at 24, 26. The United States says that the intervening waters consist of the entire 41-nautical mile length of Keku Strait. *See* U.S. Count II Opposition at 15-16.

The Special Master recommends that the Court adopt the United States' position. As the Special Master previously has concluded, the intervening waters between two land forms include all the waters lying between the facing shores. *See supra* part III.C.2.a. Using the objective 45-degree test for determining when opposing shores start to face each other, the closing lines for the intervening waters lie in the area of Point

Macartney, in the north, and Point Barrie, in the south. (These closing lines are marked in red and labeled "A" on the chart in Appendix E).

The documents submitted by the parties do not establish with precision the relevant area of Keku Strait. The United States has calculated the area to be 184.22 square miles at high tide. *See* The Island Complex, Water and Land Measurements (chartlet) at 1 (Exhibit US-II-10). Yet, as Alaska correctly objects, *see* Alaska Count II Opposition at 23, 28 n.15, and 44, the measurement of area should occur at low tide rather than high tide. *See supra* part III.C.2.e. Neither the United States nor Alaska has measured the low tide area of Keku Strait. The Special Master estimates that the area would be less than 184.22 square miles, but not substantially less because most of Keku Strait does not have extensive tidelands.

The documents submitted also do not establish with precision the relevant average width of Keku Strait. The United States says that the mouths of Keku Strait are on average nine nautical miles wide. *See* The Island Complex, Water and Land Measurements (chartlet) at 1 (Exhibit US-II-10). The relevant average width of Keku Strait, however, is the average width of the entire channel, and not just the average widths of its mouths. *See supra* part III.C.2.d. Dividing the area of a channel by its length may provide a rough estimate of the channel's width. On this basis, the Special Master estimates that the average width of Keku Strait is somewhat less than 4.5 nautical miles because Keku Strait is approximately 41 miles long and has, as noted, an average area of somewhat less than 184.22 square nautical miles.

While the ratio of length to width for Keku Strait (41 nautical miles to somewhat less than 4.5 nautical miles) easily satisfies Hodgson and Alexander's three-to-one ratio requirement, other factors weigh against assimilation. Even without a precise measurement, the average distance between the two islands clearly exceeds the distances between opposing land forms where the Court has previously recognized assimilation. The marshlands in the Lake Pelto-Terrebonne Bay-Timbalier Bay indentation, discussed in the *Louisiana Boundary Case*, 394 U.S. at 63, typically lay less than 200 yards from the shore. *See* Exhibit US-II-4 (chartlet depicting Louisiana mainland west of Lake Pelto). In addition, Long Island lies as close as half a mile from the mainland, *see Rhode Island and New York Boundary Case*, 469 U.S. at 518, and nowhere between Long Island and the shore does the East River exceed more than 1 nautical mile in width, *see* Exhibit US-II-22 (chartlet depicting the East River). Assimilation of Long Island to the mainland, in addition, required the Court to ignore only about 12 square nautical miles of water. Even without a precise measurement, 12 square miles clearly is far less than the estimated area of Keku Strait at low tide. *See id.*

The depth and utility of Keku Strait are more complicated factors. In the portions of Keku Strait on either side of Rocky Pass, the depth and utility of the waters weigh strongly against assimilation. These parts of Keku Strait have depths ranging from 60 to 100 feet. *See* US-II-32 (chartlet of Keku Strait). Water of this depth can support significant navigation. Moreover, given these depths, assimilation of these portions of Keku Strait would require the Court to ignore a tremendous volume of intervening water.

In the area of Rocky Pass, however, the depth and utility factors support assimilation. Before dredging, Rocky Pass had depths as shallow as one foot at low water, and its fast currents and rocks prevented navigation except by small craft at high water. *See Southeastern Alaska: Interim Report on Preliminary Examination and Survey of Harbors in Alaska*, H.R. Doc. No. 83-501, at 84-85 (1954) [hereinafter *Southeastern Alaska Interim Report*] (Exhibit AK-133). Dredging has improved Rocky Pass to some extent. The *Coast Pilot* (a navigation guide published by the U.S. Department of Commerce's National Oceanic and Atmospheric Administration) says:

> The pass is used by fishing vessels, cannery tenders, and tugs with log rafts. The draft which can be carried through depends on the tide. It is reported that 12 feet can be carried through 40 percent of the time, with a resultant saving of from 30 to 80 miles. Because of strong currents, narrow channel, and sharp turns, it is advisable to make passage at or near high-water slack.

8 National Oceanic & Atmospheric Admin., *United States Coast Pilot* 164, ¶ 164 (1999) [hereinafter *Coast Pilot*] (Exhibit US-II-18). *See also* U.S. Coast Guard, 17th Coast Guard District, Juneau, Alaska, *Relevant Portions of Most Recent Waterways Analysis And Management System Reports for Channels Separating Alleged Headlands of North Southeast, South Southeast and Cordova Bays and Sitka Sound from the Adjacent Mainlands* (Exhibit US-II-27 at 11-12) [hereinafter *Coast Guard Waterways Reports*] (reporting similar conclusions). This passage suggests that although many vessels now can navigate the waterway, Rocky Pass has less depth and less utility than the East River.

As stated previously, the intervening waters include all of Keku Pass and not just Rocky Pass. The assimilation inquiry, accordingly, has to take the entire area into account. On balance, the Special Master concludes that the depth and utility of the very deep and easily navigable portions of Keku Strait weigh more heavily against assimilation than the shallow and less navigable portions of Rocky Pass weigh in support of assimilation.

Two other factors also have significance. One is that Kupreanof Island and Kuiu Island undisputedly lack the social and economic connections that Special Master Hoffman considered important in the *Rhode Island and New York Boundary Case*. The other is that the geologic origin of the two islands does not support assimilation; neither island consists of material that originally came from the other island or from the mainland.

For all of these reasons, the Special Master recommends that the Court should not assimilate Kuiu Island and Kupreanof Island.

b. Kupreanof Island and Mitkof Island

Alaska also argues that Kupreanof Island can be assimilated to Mitkof Island across the body of water known as Wrangell Narrows. The chart in Appendix E depicts these islands. The parties agree on several points. Alaska and the United States both identify the entire 15-nautical mile length of Wrangell Narrows as the relevant intervening waters. *See* Alaska Count II Memorandum at 20; U.S. Count II Opposition at 18. They also agree that the shape and configuration of the two islands creates a long riverine channel, having a ratio of length-to-width

easily in excess of three-to-one. *See* Alaska Count II Memorandum at 23; U.S. Count II Opposition at 19. The parties, however, disagree about the proper calculation of the width of Wrangell Narrows. The United States measures the width at 1 nautical mile, while Alaska measures it at 0.4 nautical miles (810 yards). This difference stems from the parties' conflicting measurement techniques. Alaska has taken the average of fifteen separate measurements, while the United States has averaged the width of the two mouths. For the reasons given above, *see supra* part III.C.2.d, Alaska's measurement is preferable.

The parties also disagree about the depth of Wrangell Narrows. Alaska observes that Wrangell Narrows had an unimproved depth of only 10 feet at low tide, while the United States notes that it had a depth at high tide of 31 feet. *See* Alaska Count II Memorandum at 21; U.S. Count II Opposition at 19-20. Based on the reasoning given above, *see supra* part III.C.2.e, the low tide measurement has significance for assessing the total volume of water to be ignored, but the high tide measurement has importance for assessing the utility of the waters.

Several factors weigh in favor of assimilation. Wrangell Narrows is slightly narrower than the East River. As noted above, *see supra* part III.C.3.a, the East River has a width of between 0.5 nautical miles and 1 nautical mile. Wrangell Narrows is also slightly shallower. In its unimproved condition, the East River had a controlling depth of 15 to 18 feet. *See Rhode Island and New York Boundary Case*, 469 U.S. at 518. By the United States' own calculation, the total area of water in Wrangell Narrows is only 9.1 square nautical miles, *see* Island

Complex, Water and Land Measurements (chartlet) at 1 (Exhibit US-II-10), which is less than the 12 square nautical miles of water in the East River.

Other factors, however, weigh against assimilation. Wrangell Narrows long has had significant navigational utility. Before dredging, Wrangell Narrows was part of "the regular route taken by vessels running to all southeastern Alaska points from the ports on the Pacific coast of the United States and Canada." *Report of Preliminary Examination and Survey of Wrangell Narrows, Alaska*, H.R. Doc. No. 58-39, at 2 (1903) [hereinafter *Wrangell Narrows Report*] (Exhibit AK-146). In 1902, the "large traffic" through Wrangell Narrows included 19,090 passengers and 124,681 tons of cargo. *Id.* at 5. The Alaska Steamship Company and the Pacific Coast Steamship Company made 187 transits through the Narrows in a single year. *Id.* at 13. The U.S. Army Corps of Engineers reported at the time that "[s]teamers use this channel throughout the year and in summer there is an average of a least one vessel going through per day." *Id.* at 3. It further said that "[t]he channel through Wrangell Narrows is used by all vessels running to southeastern Alaska points from ports on the Pacific coast." *Id.* at 4.

To the extent that post-dredging conditions matter to the assimilation inquiry, *see supra* part III.C.2.g, they also count against assimilation. The *Coast Pilot* says that Wrangell Narrows traffic includes "cruise ships, State ferries, barges, and freight boats carrying lumber products, petroleum products, fish and fish products, provisions, and general cargo." 8 *Coast Pilot*, *supra*, at 168, ¶ 251. Other reports indicate that large vessels can use the waters. *See Coast Guard Waterways*

Reports, *supra,* § 2-1-7 (Exhibit US-II-27 at 3); Robert W. Smith, *Report On Alaska's Juridical Bay Claims* 50 (Exhibit US-II-1).

Another factor weighing strongly against assimilation of Kupreanof Island to Mitkof Island is the purpose for which vessels use Wrangell Narrows. In the *Rhode Island and New York Boundary* case, the Court emphasized that Long Island Sound is not used as a strait, but instead is treated as a bay. It explained that ships traveling between points to the north and south of the Sound do not travel through the Sound via the East River, but instead go around the outside of Long Island. *See* 469 U.S. at 519. Hodgson and Alexander similarly stress that the intervening waterway "should ideally be channel-like but *it should not form a principal channel of navigation*." Hodgson & Alexander, *supra*, at 20 (emphasis added).

Wrangell Narrows differs from the East River in this respect. Wrangell Narrows long has served as part of the "usually traveled route" from Seattle to Skagway. *Wrangell Narrows Report*, *supra,* at 5. Most ships entering North Bay do not pass around South Bay and enter North Bay through North Bay's mouth, but instead enter South Bay and reach North Bay by traveling through Wrangell Narrows. *See Representative Portions of Maps Indicating Commercial Transit Routes Between Islands Said By Alaska To Be Part Of The Mainland* (Exhibit US-II-31). Wrangell Narrows thus serves as the principal opening between the two bodies of waters and, as a result, South Bay is not "used as one would expect a bay to be used." *Rhode Island and New York Boundary Case*, 469 U.S. at 519. *See also* Westerman, *supra*, at 146 ("Any bay, whether formed partially by islands or not, will by virtue of its land-

locked nature not serve as a principal route of international navigation.").

Two other factors also count against assimilation. First, Kupreanof Island and Mitkof Island do not have a geologic origin weighing in favor of assimilation. Alaska does not contend that either island was formed from material coming from the other island or from the mainland. Second, the islands also lack the extensive social and economic connections cited by Special Master Hoffman in the *Rhode Island and New York Boundary Case*.

In sum, the question is close. Wrangell Narrows has some geographic features resembling the East River. But additional factors counsel a different treatment of the two waterways. On balance, the Special Master concludes that Kupreanof Island should not be assimilated to Mitkof Island.

c. Mitkof Island and Dry Island

The next point of contention involves Mitkof Island and Dry Island. These two islands appear in the upper right hand corner of the small-scale map in Appendix E. The large-scale chart in Appendix H depicts these islands in more detail.

Alaska makes two alternative arguments with respect to Mitkof Island and Dry Island. One argument is that an isthmus of land actually connects Mitkof Island to Dry Island at low water, making the two "islands" in reality a single land form. *See* Alaska Count II Opposition at 31; Alaska Count II Reply at 4. The other contention is that Mitkof Island and Dry Island are separate land forms, but satisfy all of the requirements for assimilation in the *Louisiana Boundary Case* and the *Rhode Island and New York Boundary Case*. *See* Alaska Count II

Memorandum at 7-19; Alaska Count II Opposition at 30-35. The United States disputes both of these contentions.

The clearest evidence shows that Dry Strait, as its name suggests, is dry or mostly dry at low tide. A United States Geographical Survey topographic map, included in Appendix H, labels Dry Strait as "mud flats." USGS Petersburg C-2 Quadrant Alaska Topographic Map (1997) (Exhibit AK-334). A mud flat is "a level tract lying a little depth below the surface of the water or alternately covered and left bare by the tide." *Merriam-Webster's Third New International Dictionary* 1482, 866 (Philip B. Gove ed. 1969) (definition of "flat" and "mud flat"). The Alaska District of the U.S. Army Corps of Engineers similarly describes the area of Dry Strait between Mitkof Island and Dry and Farm Islands as being "above MLLW" (i.e., above mean lower low water). *See* Alaska District, U.S. Army Corps of Engineers, 2001 Project Maps & Index Sheets (excerpt) (Exhibit AK-338 at 9). The *Coast Pilot* says that Dry Strait is "mostly bare at low water." 8 *Coast Pilot*, *supra*, at 167, ¶ 242. A congressional study found that the "Stikine river has deposited sufficient material at its mouth to nearly connect Mitkof Island to the mainland at low tide." *Southeastern Alaska Interim Report*, *supra*, at 31. A declaration from an experienced mariner in the area asserts that no channel passes through Dry Strait at low tide. *See* Exhibit AK-341 ¶¶ 5,8,9 (declaration of Mr. Jim Bailey).

Under the Convention, however, a connection at low tide does not suffice to convert two islands into a single land mass. The Convention defines an island as "a naturally-formed area of land, surrounded by water, which is above water at high-tide." Convention, *supra*, art. 10(1). Under this defini-

tion, Dry Island and Mitkof Islands are separate islands because they are both surrounded by water at high water, even if they are connected at low water. As result, if the two islands are to be connected, they have to be assimilated pursuant to the analysis used in the *Louisiana Boundary Case* and the *Rhode Island and New York Boundary Case*.

Several of the factors in the *Louisiana Boundary Case* and the *Rhode Island and New York Boundary Case* counsel against assimilation of Mitkof Island to Dry Island. Although small in size, Dry Island has a shape that would alter the configuration of Mitkof Island; if assimilated, Dry Island would stick out perpendicularly from an otherwise straight coast on the larger island. The origin of the islands also do not support assimilation because the material making up Dry Island did not come from Mitkof Island or vice versa. In addition, the two islands do not have strong social or economic connections like those between Long Island and Manhattan Island.

The utility of the intervening waters provides more mixed guidance. On one hand, according to the Army Corps of Engineers, the shallow "depth and channel width make it impossible for small or large general cargo ships, passenger vessels, or the Alaska Marine Highway (ferry) system to use the existing waterway." U.S. Dep't of the Army, *Navigation Improvements Interim Reconnaissance Report: Dry Strait/Wrangell Narrows, Alaska* 40 (1994) (Exhibit AK-139). On the other hand, some vessels do navigate the area. The water is used "by log towing companies and small recreation craft." *Id.* Dry Strait also is "extensively used by fishing boats and towboats operating between the towns of Wrangell and Petersburg." 8 *Coast Pilot*, *supra*, at 167, ¶ 242. In addition,

"[t]ugs up to 82 feet with a beam of approximately 25 feet and a draft of 10 feet transit this waterway towing logs, en route [to] logging operations to the north and south of Dry Strait in Southeast, AK." *Coast Guard Waterways Reports*, *supra,* at Exhibit US-II-27, p. 6.

The deciding factors, however, are the distance between the two islands and the depth of the intervening waters. The United States argues that the relevant intervening waters for measuring these physical characteristics include not only Dry Strait but also all of Frederick Sound and certain waters south of Dry Island between Mitkof Island and the mainland. *See* Appendix E (chart depicting closing lines in red). These points mark the limits of the channel under the 45-degree test advocated by Dr. Hodgson and Alexander.

The United States' view would be correct if the physical properties of intervening waters were measured at high water. During high tide, a continuous channel flows between the mouth of Frederick Sound and the southern waters. As both parties agree, however, the physical properties of intervening waters are measured at low water. *See supra* part III.C.2.e. At low water, the points identified by the United States cannot define the channel because the channel ceases to exist. The area, although wet in places, is mostly bare. As a result, the two islands effectively have no intervening waters between them. In this situation, Hodgson and Alexander's test for measuring the start and end of the channel cannot apply.

In the Special Master's view, these factors outweigh all of the other factors in deciding whether assimilation should occur. Any other conclusion simply would not square with the "realistic" approach required by the *Rhode Island and New York*

Boundary Case and the *Louisiana Boundary Case*. Accordingly, the Special Master recommends that the Court approve assimilation between Dry Island and Mitkof Island across Dry Strait.[48]

d. Dry Island and the Mainland

As depicted in Appendix H, the north arm of the Stikine River separates Dry Island from the Alaskan mainland. Alaska presents two arguments for why this separation should not matter. Alaska initially contends that Dry Island should be treated as part of the mainland, without reference to assimila-

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[48]In Alaska's opposition brief, Alaska briefly raises an alternative theory not averred in its complaint or presented in it original motion for summary judgment. The theory is that Mitkof Island actually is a peninsula of the mainland. Alaska notes briefly that the same United States Geological Survey map (reproduced in Appendix H) that shows Mitkof Island connected to Dry Island also shows that Mitkof Island is directly "connected to the mainland by mud flats—without interruption even by any outlet channel of the Stikine—east of the point tellingly marked, 'Trouble.'" Alaska Count II Opposition at 32 (citing AK-334). The United States objects that this alternative theory is not credible because it would suggest that "for some period of each day the Stikine River ceases to flow across the tide flats at its mouth." U.S. Count II Reply at 18-19. In the absence of any additional corroborating evidence, and given that Alaska did not raise the issue earlier, the Special Master agrees with the United States that Mitkof Island is not a peninsula extending from the mainland. Alaska, however, has shown that Dry Strait contains so little water at low tide that Mitkof Island and Dry Island should be assimilated.

tion standards, because the island lies in the mouth of a river and therefore forms part of the coast line.[49] *See* Alaska Count II Memorandum at 7-8; Alaska Count II Reply at 8-9. The United States agrees that Dry Island forms part of the coast line, but rejects the proposition that Dry Island therefore is automatically an extension of the mainland for the purpose of forming a bay. *See* U.S. Count II Opposition at 22. Instead, the United States insists that, if Dry Island is to form part of the peninsula separating North Bay and South Bay, it must be assimilated to the mainland across the North Arm of the Stikine River.

The parties have cited, and Special Master's independent research has uncovered, only one source addressing the specific issue of whether an island that forms part of the coast line automatically is treated as part of the mainland. Special Master Armstrong recommended that Dauphin Island could be assimilated because it abutted the inland waters of Mobile Bay. *See* Alabama and Mississippi Report, *supra*, at 18.[50] This recom

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[49]The term "coast line" refers not just to the shore but also to the "line marking the seaward limit of inland waters." 43 U.S.C. § 1301(c). The coast line, accordingly, may cross bodies of waters, like the mouth of a river. In so doing, the coast line may encounter an island, the seaward shore of which then also forms part of the coast line.

[50]Special Master Armstrong had previously concluded that islands could not become part of the mainland through assimilation to nearby inland waters (as opposed to land). *See* Louisiana Report, *supra*, at 42. He explained: "It seems apparent that when in its opinion the Court used the term 'mainland,' it used it to refer to an existing body of land and not to inland waters. Otherwise, a small island lying

mendation, however, has little if any precedential value. The United States filed exceptions contesting Special Master Armstrong's analysis and the Court did not adopt it. *See Alabama and Mississippi Boundary Case*, 470 U.S. at 101, 115. In fact, without any clear explanation, Alaska itself now characterizes Special Master Armstrong's treatment of Dauphin Island as "flawed." Alaska Count II Opposition at 22 n.9.

The text of the Convention leads the Special Master to conclude that an island does not automatically become part of the mainland, for the purpose of creating a bay, even though the island may form part of the coast line. Article 10, as noted, defines an island as "a naturally-formed area of land, surrounded by water, which is above water at high-tide." Convention, *supra*, art. 10(1). This definition draws no distinction between islands forming part of the coast line and other islands. Dry Island, accordingly, is an island. As an island, it must be assimilated to the mainland to form part of the peninsula alleged to separate North Bay and South Bay.[51]

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many miles from the nearest solid land might by virtue of its proximity to a bay closing line be considered an extension of the mainland." *Id.*

[51] In the *Rhode Island and New York Boundary Case*, 469 U.S. at 520, the Court approved the assimilation of Long Island to Manhattan Island without discussing Manhattan Island's relationship to the mainland. The United States has acknowledged that Manhattan Island could be assimilated to the New York mainland across the small Harlem River but not the much larger Hudson River. *See* Tr. Oral Arg. at 69-70 (Feb 4, 2003).

Alaska alternatively asserts that Dry Island can be assimilated based on an argument made by the United States in the *Rhode Island and New York Boundary Case*. *See* Alaska Count II Reply at 9. In that case, as discussed above, the United States contended that the Court should recognize assimilation only for a few classes of islands, including islands "separated from the mainland by a genuine 'river.'" *Rhode Island and New York Boundary Case*, 469 U.S. at 517. Alaska interprets this contention to mean that islands separated from the mainland by a river, like Dry Island, "are properly assimilated." Alaska Count II Reply at 9.

The Special Master disagrees. Alaska has not correctly interpreted what the United States argued in the *Rhode Island and New York Boundary Case.* When the United States identified classes of islands for which assimilation is possible, the United States was not asserting that any island automatically can be assimilated across any river without regard to other considerations. On the contrary, the United States was contending that an island not only must satisfy the criteria of the *Louisiana Boundary Case*, but also had to fall within a limited class of cases for which assimilation may occur. *See* Exception of the United States and Supporting Brief at 6-7, 12, *United States v. Maine (Rhode Island and New York)* (1984) (No. 35, Orig.) (noting that the list of factors in Louisiana was not exclusive and arguing that in actual practice assimilation had been further limited).

Possibly under the multiple factors set forth in the *Louisiana Boundary Case* and the *Rhode Island and New York Boundary Case*, Dry Island could be assimilated to the mainland across the North Arm of the Stikine River. Alaska, however, does not

make this contention and has not addressed these factors. *See* Alaska Count II Reply at 9 (stating only that they "obviously" support assimilation). The United States also has not briefed the issue.[52] The Special Master, accordingly, hesitates to speculate about the conclusion. However, even if Alaska could demonstrate that Dry Island should be assimilated to the mainland, and even if Mitkof Island therefore should be assimilated to the mainland, the assimilation would still stop at the end of Mitkof Island and would not connect Kupreanof Island. As a result, there still would not be enough assimilation to turn what Alaska calls North Bay and South Bay into juridical bays within the meaning of the Convention.

e. Partofshikof Island and Kruzof Island

Alaska argues that the features of Partofshikof Island, Baranof Island, and Kruzof Island establish Sitka Sound as a juridical bay. Appendix F depicts these islands. Intervening between Kruzof Island and Partofshikof Island is a body of water known as Sukoi Strait or Inlet. This water starts out deep but becomes very shallow. At high tide, the *Coast Pilot* says that only canoes can pass between Kruzof Island and Partofshikof Island. *See* 8 *Coast Pilot*, *supra*, at 232, ¶ 227. At low tide, the land between the two islands rises above the water line. A federal government nautical chart shows that Partofshikof Island and Kruzof Island are connected at low water. *See*

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[52]In its opposition brief, the United States specifically noted that Alaska had left the question of Dry Island's assimilation as an unanswered obstacle to the creation of a juridical bay. *See* U.S. Count II Opposition at 22.

Exhibit AK-175 (chart extract showing Sitka Sound to Salisbury Sound Inside Passage).

Alaska argues that Partofshikof Island is "properly considered part of Kruzof Island." *See* Alaska Count II Memorandum at 49. Although the United States initially characterized Partofshikof Island as an independent feature, *see* U.S. Count II Memorandum at 43, the United States now agrees with Alaska that the two islands should be treated as one, *see* U.S. Count II Reply at 21. The Special Master sees no basis for disagreeing with this conclusion.

f. Kruzof, Baranof, and Partofshikof Islands

Alaska's claim that Sitka Sound is a juridical bay requires assimilating Baranof Island to Kruzof Island and the assimilated Partofshikof Island. A few features support this view. The islands, if joined at Neva Strait, would form a land mass having a wishbone shape. This water is recognizable as Sitka Sound in much the same way that Long Island, when assimilated at the East River, encloses Long Island Sound. In addition, the waters have a riverine shape satisfying the Hodgson and Alexander three-to-one ratio requirement.

Other factors, however, all weigh against assimilation. The Coastline Committee determined that Kruzof Island and Baranof Island could not be assimilated in part because "Neva Strait . . . was too broad and deep to be ignored." Minutes of the Committee on the Delineation of the United States Coastline at 3 (Sept. 20, 1971) (Exhibit AK-174). The parties have not calculated the average width of the channel at low tide, but a visual inspection of the chart included in the exhibits tends to

support the Coastline Committee's conclusion. *See* Sitka Sound, Northern Entrance (chartlet) (US-II-58).

The waters also have sufficient depth and utility to support important navigation. The Coast Guard says that "vessel traffic in the waterway is significant including barges, fishing vessels, charter boats, pleasure craft and Alaska State Ferries with lengths up to 400 ft. and drafts up to 18 ft." *Coast Guard Waterways Reports*, *supra,* at Exhibit US-II-27, p. 20. Man-made improvements have facilitated this traffic, but vessels used the route even before improvements. The United States points out that maps from the late 1890s show passages through Neva Strait. *See* Representative Portions of Maps Indicating Commercial Transit Routes Between Islands Said By Alaska To Be Part Of The Mainland 4, 11 (Exhibit US-II-31). Perhaps more important than the volume of the traffic is how vessels use the waters. Most vessels enter and exit Sitka Sound through Neva Strait, rather then through what Alaska would describe as the mouth of the alleged bay. *See Report on Sergius Narrows and Whitestone Narrows, Alaska*, S. Doc. No. 90-95, at 8 (1968) (Exhibit AK-177). Sitka Sound thus is not "used as one would expect a bay to be used." *Rhode Island and New York Boundary Case*, 469 U.S. at 519.

The islands also lack the kind of social and economic connection found by the Special Master in the *Rhode Island and New York Boundary Case.* In addition, as explained above, the geologic history of the islands shows that neither was made from material coming from the mainland or other islands. For these reasons, the islands cannot be assimilated.

g. Prince of Wales Island and Dall Island

Alaska's claim that Cordova Bay is a juridical bay requires assimilation of Dall Island to Prince of Wales Island. Appendix G contains a chart depicting these islands. The parties principally disagree about how to identify the intervening waters. Alaska says that they are the Tlevak Narrows. *See* Alaska Count II Memorandum at 55. The Tlevak Narrows occupy an area about 300 yards long and 700 yards wide. *See* Exhibit AK-180 (chart extract depicting Northern Part of Tlevak Strait and Ulloa Channel); Exhibit US-II-59 (chart depicting Alaska's proposed assimilation zone). The United States, on the other hand, identifies the intervening waters as a 7-nautical mile stretch of Ulloa Channel and Tlevak Strait. *See* Northern Entrance to Cordova Bay, Large Scale (charlet) (Exhibit US-II-39) [hereinafter Ulloa Chartlet]; U.S. Count II Opposition at 23-24 & n.9 (revising earlier measurement in U.S. Count II Memorandum at 44). This area is 2 nautical miles wide in the west and about 1.75 nautical miles wide in the east. *See* Ulloa Chartlet, *supra*. Again, based on the conclusion that the intervening waters include all the waters between the facing sides of the islands, *see supra* part III.C.2.a, the Special Master accepts the United States' view.

With the intervening waters identified in this manner, the relevant factors weigh heavily against assimilation. Although the waters have a riverine shape, with a length-to-width ratio of more than three to one, the average distance between the islands appears to exceed the distances in the *Rhode Island and New York Boundary Case* and the *Louisiana Boundary Case*. *See* Ulloa Chartlet, *supra* (depicting area). The utility of the waters also counts against assimilation. The waters are deep and

support substantial traffic. Ships may sail from Cordova Bay through the intervening waters to reach Bucareli Bay. *See* 8 *Coast Pilot*, *supra*, at 142-143, ¶¶ 234-253. The Coast Guard says that up to 150 commercial fishing vessels use this passage each week during summer months. *See Coast Guard Waterways Reports*, *supra,* at US-II-27, p. 14. In addition, barges up to 221 feet long use the route. *See id.*

The size and shape of the islands, and their relationship to the configuration or curvature of the coast do not support assimilation. The islands do not create a natural extension of the coast. In addition, as with the other assimilation points, the origin of the islands and the lack of economic and social connections between the islands are not factors weighing in favor of assimilation. Neither island was formed from material coming from the other. The sparsely populated islands lack the close social and economic connections that Special Master Hoffman observed in the *Rhode Island and New York Boundary Case*. For these reasons, Prince of Wales Island and Dall Island cannot be assimilated to each other.

4. Conclusion with Respect to Assimilation

The Special Master concludes that assimilation is warranted between Dry Island and Mitkof Island and between Partofshikof Island and Kruzof Island, but at no other locations. These connections do not suffice to create the juridical bays alleged by Alaska. Accordingly, Sitka Sound and Cordova Bay and the waters Alaska calls North Bay and South Bay do not constitute inland waters. Alaska, therefore, did not acquire title to submerged lands in these areas beyond three miles from their coasts.

If the Court agrees with this conclusion, it should grant summary judgment to the United States on count II, and deny summary judgment to Alaska. If the Court disagrees with these recommendations, it then must consider whether the land forms created by assimilated islands have configurations satisfying the criteria for juridical bays under article 7 of the Convention.

D. Juridical Bays under Article 7

Even if assimilation could occur at each of the locations considered above, the waters that Alaska calls North Bay, South Bay, Sitka Sound, and Cordova Bay still would have to satisfy the requirements of article 7 to qualify as juridical bays. Examining article 7 yields the conclusion that North Bay and South Bay would not constitute juridical bays but Sitka Sound and Cordova Bay would.[53]

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[53]The United States has asked the Special Master not to address this second issue if Alaska's assimilation theory fails. *See* U.S. Count II Memorandum at 3. It reasons that the Special Master should not express an opinion on matters not essential to the resolution of the summary judgment motion, and this second issue does not arise if Alaska loses the first issue. The Special Master appreciates this concern, but nonetheless addresses the second issue for the convenience of the Court. The Court may disagree with some or all of the Special Master's recommendations with respect to assimilation or may find the requirements of article 7 easier to address. Other Special Masters have made alternative recommendations. *See, e.g.*, *California*, 381 U.S. at 172-73 (Special Master considered whether Monterey Bay was a historic bay or a juridical bay).

1. Definition of a Bay under Article 7(2)

The first paragraph of article 7 of the Convention says that article 7 "relates only to bays the coasts of which belong to a single State." Convention, *supra*, art. 7(1). The second paragraph then defines a "bay" as follows:

> For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

Id. art. 7(2).

This definition has many elements. To apply just the first sentence of the definition in article 7(2), a court first must decide whether an indentation is well-marked. It then must determine the proper measurement of the indentation's penetration and the proper measurement of the width of the indentation's mouth. It next must consider the proportion of the indentation's penetration to the width of its mouth. Finally, a court must decide whether the indentation contains "landlocked waters," and is a not a "mere curvature of the coast."

To apply the second sentence of the definition, a court must determine the total area of the indentation. A court next must determine the proper measurement of a line drawn across the mouth of the indentation. Finally, it must decide whether the area of the indentation exceeds the area of a semi-circle having a diameter equal to the line drawn across the mouth of the indentation. This report addresses each of these required

determinations in light of precedent and the resolution of various preliminary disagreements between the parties.

2. Precedent under Article 7(2)

The Court has addressed article 7(2) in several cases. Two of these cases contain little discussion of the elements of article 7(2) because the parties did not dispute its application. The United States and Massachusetts agreed that Nantucket Sound did not meet the requirements of a juridical bay under article 7(2). *See Maine (Nantucket Sound),* 475 U.S. at 94. The parties similarly agreed that Long Island Sound and part of Block Island Sound would constitute a juridical bay if Long Island could be assimilated to the mainland. *See Rhode Island and New York Boundary Case*, 469 U.S. at 512.

In two other cases, the Court avoided applying article 7(2). In the *Alabama and Mississippi Boundary Case*, the Special Master concluded that Mississippi Sound met the requirements of article 7(2), after assimilating Dauphin Island to the mainland. *See* 470 U.S. at 100. The Court, however, did not reach this issue. It concluded that Mississippi Sound was a historic bay, and thus found it unnecessary to decide whether it also was a juridical bay. *See id.* at 101. Similarly, in *United States v. Florida*, Special Master Albert B. Maris concluded that an area of water in the vicinity of Cape Sable and Knight Key (designated as "Florida Bay") was a juridical bay. *See* Florida Report, *supra*, at 38-39. The Court, however, sent the issue back to Special Master Maris for consideration of additional arguments. *See United States v. Florida*, 420 U.S. 531, 533 (1975) (per curiam). The parties later settled, stipulating that no juridical bay existed. *See* Supplemental Report of Albert B. Maris, Special

Master at 3, *United States v. Florida* (Dec. 30, 1975) (No. 52, Orig.).

In *California*, 381 U.S. at 169-170, the Court held that Monterey Bay was a juridical bay under article 7(2), but that several other bodies of waters were not. These other bodies of waters included San Pedro Bay, San Luis Obispo Bay, Santa Monica Bay, and water located within segments of the coast from Point Conception to Point Hueneme and from the southern extremity of San Pedro Bay to the western headland at Newport Bay. *See id.* at 214, apps. A-D (Black, J., dissenting) (depicting these areas). The Court quoted article 7's requirements, and said without further elaboration: "Applying these tests to the segments of California's coast here in dispute, it appears that Monterey Bay is inland water . . . ." *Id.* at 169-170.

3. Preliminary Disagreements

In their briefs, the parties have disagreed about the meaning of several of article 7(2)'s requirements. These disagreements require resolution before applying article 7(2) to the waters at issue in this case.

a. Measurement of the Width of the Mouth

The first sentence of article 7(2), as noted above, requires a court to determine the proper measurement of the width of the indentation's mouth. *See* Convention, *supra*, at 7(2). Although measuring the width is not difficult when the mouth of an indentation is completely open, the parties strongly disagree about how to measure the width of the mouth when islands lie between the two mainland headlands. The United States argues that the Court should make a complete mainland headland to

mainland headland measurement, ignoring any islands between the headlands. *See* U.S. Count II Opposition at 33-34. Alaska, in contrast, argues for a measurement equal to the sum of the widths of actual openings from the bay to the sea. *See* Alaska Count II Memorandum at 31-32. Under this method, Alaska would subtract from the total mainland headland to mainland headland distance any space in the mouth taken up by islands.

The two methods of measuring the width of the mouth lead to very different results. For example, the United States says that the width of North Bay is the entire distance from Cape Spencer to Cape Decision, or approximately 154 nautical miles. *See* U.S. Count II Opposition at 42. In contrast, Alaska says that the width of North Bay is only 30.67 nautical miles because Baranof Island and Chichagof Island block much of the opening to the sea.[54] *See* Alaska Count II Memorandum at 31. This difference substantially affects the juridical bay analysis. The narrower the width of the mouth, the greater the proportion of the penetration to the width, and the easier to satisfy the requirements of article 7(2)'s first sentence.

The Special Master recommends that the Court adopt the position of the United States for three reasons. First, the text of article 7 better supports the United States' view. The first sentence of article 7(2) requires measurement of the width of

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[54]This distance includes a measurement from Cape Ommaney on the southern tip of Baranof Island directly to Cape Decision on Kuiu Island. Alaska notes that an even smaller figure is possible by measuring from Cape Ommaney to Coronation Island and then from Coronation Island across the closely spaced Spanish Islands to Cape Decision. *See* Alaska Count II Memorandum at 31-32 n.17.

the indentation's mouth for the purpose of comparing the width to the penetration. Nothing in article 7 expressly says how to make this measurement when islands lie in the mouth. The second sentence of article 7(2) then requires measurement of a "line drawn across the mouth of that indentation" for the purpose of comparing the area of a semi-circle having the same diameter to the area of the indentation. In contrast to the lack of explicit guidance for the measurement in the first sentence, article 7 does contain express instructions on how to make the second measurement when islands lie in the mouth. Article 7(3) says:

> Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths.

Convention, *supra*, art. 7(3).

The reasonable implication is that article 7 contemplates that space taken up by islands will not be included when measuring a line across the mouth of an indentation under the second sentence of article 7(2), but will be included when measuring the width of the indentation for the first sentence of article 7(2). Otherwise, the drafters of article 7 would have had no reason to include a special rule in article 7(3).

Second, the limited precedent available tends to support the United States' interpretation of article 7(2). In the *Rhode Island and New York Boundary Case*, the Court briefly considered whether Long Island Sound would meet the requirements of a juridical bay if Long Island were treated as an island in the mouth of the bay as opposed to an extension of the mainland. Concluding that it would not, the Court said:

> Though the coast to the north of Long Island curves somewhat, it was the nearly unanimous conclusion of the testifying experts that, in the absence of Long Island, the curvature of the coast is no more than a "mere curvature" and is not an "indentation." And, absent Long Island, the waters of the Sounds would not be sufficiently surrounded by land so as to be landlocked; neither would they satisfy the semicircle test.

Rhode Island and New York Boundary Case, 469 U.S. at 514-515.

In this passage, the Court does not say anything expressly about how to measure the width of the mouth of a bay for the purpose of the first sentence of article 7(2). Alaska therefore reads the quotation merely as emphasizing that "Long Island is all that encloses or surrounds the waters of the Sound." Alaska Count II Reply at 17. At bottom, however, the statement shows that the Court chose to ignore an island in the mouth of an indentation when determining whether the indentation's physical characteristics met the requirements of article 7(2)'s first sentence. This choice supports the United States' view that the width of the mouths of the alleged juridical bays should be measured from headland to headland, without regard to the presence of any islands.

In the *Louisiana Boundary Case*, the Court said that "lines across the various mouths are to be the baselines for all purposes." 394 U.S. at 55 (footnote omitted). Alaska contends that this statement supports its position. *See* Alaska Count II Memorandum at 33. The quotation, however, merely describes how to draw the closing lines of a bay having islands in its mouth after determining that the bay exists. The statement does

not indicate how to measure the width of an alleged bay's mouth when applying the first sentence of article 7(2) to determine whether a bay exists.

Third, adopting Alaska's interpretation would create a practical problem. The first sentence of article 7(2) requires a comparison of the "penetration" of an indentation to the width of its mouth. As explained immediately below, the penetration of an indentation must be measured starting from a point along the indentation's mouth. The United States correctly argues that an indentation having more than one mouth necessarily would have multiple penetrations, resulting in an ambiguous application of article 7(2). *See* U.S. Count II Opposition at 38. The United States' interpretation eliminates this problem because it ignores islands and treats indentations as though they have only one mouth for the purposes of measurement.

b. Measurement of the Penetration of Bay

In their briefs, the parties have discussed several alternative methods of measuring the penetration of an asserted juridical bay for the purpose of the first sentence of article 7(2). *See* Alaska Count II Memorandum at 36 n.19; U.S. Count II Opposition at 39-40. In the end, they purport to settle on what they each call the "longest straight line" method. Alaska says that the longest straight line method calculates the penetration as the distance from "any point on the closing line to the point of deepest penetration within the bay." Alaska Count II Memorandum at 36 n.19. The United States identifies the penetration as the distance "between any point on the mouth and the head of the waterbody in question." U.S. Count II Opposition at 39. Hodgson and Alexander's influential paper

on juridical bays also recommends using the longest straight line method to measure penetration. *See* Hodgson & Alexander, *supra*, at 8-9 & fig. 3. The Special Master therefore will employ this method.[55]

Despite their agreement on which test to use for measuring penetration, the parties dispute both where the longest straight line properly may start and where it may end. On the issue of

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[55]One aspect of the longest straight line method requires attention. If the longest straight line of penetration does not run exactly perpendicular to the mouth of the indentation, the line measures not only the indentation's penetration in the sense of how deeply the indentation cuts into the mainland but also to some extent the width of the indentation. To state this point more formally, if the longest line of penetration has a length of p and enters the indentation at angle a, then the distance perpendicularly into the indentation is not p but instead the smaller $p*\sin(a)$. This point deserves attention because Alaska's proposed penetration lines start near one end of the mouth of the indentations at issue and then run not only into the indentation but also across almost the entire width of the indentation. *See infra* Appendices J & L (depicting these lines). This method of drawing the longest straight line of penetration, although perhaps counter-intuitive, appears permissible. Hodgson and Alexander's influential paper includes an illustration that has essentially the same characteristics, and they appear to approve counting the entire length of the longest straight line of penetration." *See* Hodgson & Alexander, *supra*, at 9, fig. 3. The United States seeks to limit the angle of penetration by arguing that the line of penetration cannot run across the bay but must extend from the mouth of the bay to its "head." U.S. Count II Opposition at 42. The United States, however, offers no test for identifying the head of a bay.

where the longest straight line may begin, Alaska contends that it may start at the most distant entrance point leading into the bay. *See* Alaska Count II Reply at 24-25 n.9. The United States, in contrast, argues that the line must begin on a line drawn from headland to headland across the bay's mouth. *See* U.S. Count II Opposition at 43 n.19. This disagreement leads to substantially different results. For example, Alaska identifies a 124 nautical mile line starting at the entrance between Prince of Wales Island and Duke Island as the longest straight line of penetration for South Bay. *See infra* Appendix J (line connecting point marked "Ey" to point marked "Fy"). The United States objects to this line because it begins at a point seaward of the closing line across the mouth of South Bay, which runs between Cape Decision on Kuiu Island and Cape Fox on the Alaskan mainland. *See* U.S. Count II Opposition at 43 n.19. The United States identifies a shorter 75-nautical mile line as the longest straight line of penetration. *See infra* Appendix K.

Although neither side has cited authority for its position, the Special Master believes that the United States has the better view. When measuring the penetration of an indentation using the longest straight line method, the longest straight line must begin on the headland to headland line across the mouth of the bay. Although a bay may have entrance points that lie seaward of this line when islands lie in the mouth of the bay, the Special Master previously has concluded that islands should be ignored when measuring an indentation's physical characteristics for the purposes of article 7(2)'s first sentence. *See supra* part III.D.3.a.

On the issue of where the longest straight line may end, Alaska contends that it "should be drawn to the most inland

point." Alaska Count II Memorandum at 36 n.19. The United States, in contrast, says that the line may not enter "admittedly inland" waterways within the asserted bay. U.S. Count II Opposition at 42. For example, in its argument regarding North Bay, Alaska identifies the longest straight line of penetration as a 180-nautical mile line ending within a fiord called Lynn Canal. *See infra* Appendix L (line connecting point C to point D). The United States objects, contending that Alaska is measuring North Bay "plus Lynn Canal," and therefore exaggerating the penetration of North Bay. U.S. Count II Opposition at 42. The United States identifies a shorter 100-nautical mile line as the longest straight line of penetration into North Bay that does not enter any canals, ports, or sounds within the bay.[56] *See infra* Appendix M.

The United States' view has considerable logical appeal, but the United States has not cited any authority to support its position.[57] Alaska, in contrast, relies on the *Fisheries Case*

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[56]Alaska argues that the United States gave "the measurement of the penetration of North Bay as approximately 130 nm" in an answer to an interrogatory from Alaska. Alaska Count II Memorandum at 36. This answer to the interrogatory was merely estimating the length of the "longest straight line from the mouth identified by Alaska." Defendant's Response to Plaintiff's First Set of Interrogatories at 21 (Exhibit AK-157). This answer does not preclude the United States from asserting that the longest straight line, properly drawn under its own criteria, extends only 100 nautical miles.

[57]Although not cited by the United States, the influential paper by Hodgson and Alexander addresses a similar topic. The authors say that the area of an asserted bay for the purpose of article 7(2)'s

(U.K. v. Norway), 1951 I.C.J. 116. *See* Alaska Count II Memorandum at 36 n.19. In the *Fisheries Case*, the International Court of Justice considered whether the Sværholthavet Basin of Norway constituted a juridical bay. *See* 1951 I.C.J. at 141. A complication in the case was that the Sværholt Peninsula lay in the middle of the basin, separating two lengthy fiords called Laksefjord and Porsangerfjord. *See* Exhibit US-II-9 (depicting this coast line). The United Kingdom argued that the "basin's penetration inland must stop at the tip of the Sværholt peninsula," making the penetration of the basin only 11.5 nautical miles. *Id.* The International Court of Justice, however, disagreed. It ruled:

> The fact that a peninsula juts out and forms two wide fjords, the Laksefjord and the Porsangerfjord, cannot deprive the basin of the character of a bay. It is the distances between the disputed baseline and the most inland point of these fjords, 50 and 75 sea miles respectively, which must be taken into account in appreciating the proportion between the penetration inland and the width at the mouth. The Court concludes that Sværholthavet has the character of a bay.

Id.

The Special Master recommends that the Court follow the *Fisheries Case* on this issue. Although the *Fisheries Case*

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second sentence should not include "[r]ivers, lagoons, subsidiary bays, channels and the like." Hodgson & Alexander, *supra*, at 6. *See also id.* at 7, fig. 2 (illustrating this principle). The authors, however, do not say whether the same rule should apply when determining the penetration of the asserted bay.

predates the Convention, the International Court of Justice used nearly the same standards as those later embodied in the Convention. The Court has relied on the *Fisheries Case* with respect to coast line issues. *See Maine (Nantucket Sound)*, 475 U.S. at 99; *Alabama and Mississippi Boundary Case*, 470 U.S. at 102. In addition, the United States has made no attempt to distinguish the *Fisheries Case*. Accordingly, if a penetration line used for assessing whether the Sværholthavet Basin is a juridical bay may enter the Laksefjord or the Porsangerfjord, a similar penetration line used for assessing North Bay may enter the fiord called Lynn Canal.

c. Assessment of "Proportion"

Article 7(2) requires a court to consider the "proportion" of a bay's penetration to its width. The United States argues that the penetration must be at least as long as the width to form a juridical bay. *See* U.S. Count II Opposition at 40-41. The United States relies on two secondary sources to support its view. Hodgson and Alexander in their influential paper say that "true land-locked conditions should require that the opening (of the bay) be narrower than a principal lateral axis of the bay." Hodgson & Alexander, *supra*, at 8. In addition, a diagram from Mitchell P. Strohl, *The International Law of Bays* 57 (1963) (Exhibit AK-480), shows a model bay having a penetration equal to its width. Alaska disagrees, asserting that neither the Convention nor Court precedent requires a specific numeric proportion of depth to width. *See* Alaska Count II Reply at 24.

The Special Master agrees with Alaska based on the text of article 7(2) and on precedent. Article 7(2) easily could have specified that the penetration of a bay must exceed the width of

its mouth, but it does not. Accordingly, the Special Master concludes that the proportion of penetration to width is a factor to consider in deciding whether a body of water meets the requirements of article 7(2). The greater the proportion, the more the waterway resembles a bay, and vice versa. This determination admittedly lacks the certainty of a numerical test, but no more so than the question under article 7(2) of whether an indentation is "well-marked." *See Rhode Island and New York Boundary Case*, 469 U.S. at 520 (noting that some of the requirements of article 7(2) are "less mathematical" than others).

In *California*, the Court upheld Special Master Davis's conclusion that Monterey Bay is a juridical bay. *See California*, 381 U.S. 169-170. An appendix to Justice Black's dissent contains an illustration depicting Monterey Bay. *See id.* at 214, app. B (Black, J., dissenting). This illustration includes measurements showing that Monterey Bay has a penetration of only 9.2 nautical miles and a width of 19.24 nautical miles. *See id.* These figures suggest a ratio of penetration to width of 0.48. *See* Alaska Count II Reply at 24 (citing Monterey Bay as a counter-example to the United States' view on penetration). This suggested ratio, however, cannot serve as a benchmark for assessing the proportion of penetration to width of other bays. The maker of the illustration did not use the longest straight line method to measure the penetration of Monterey Bay but instead used the less generous "maximum perpendicular line" method. Using the longest straight line method, the penetration of Monterey Bay would appear to exceed the width of its mouth.

d. Meaning of "Landlocked"

The first sentence of article 7(2) requires the waters of a juridical bay to be "landlocked." The Court addressed this requirement at length in the *Rhode Island and New York Boundary Case*, 469 U.S. at 525. The Court said:

> The Convention does not define "landlocked," and this Court has not yet felt it appropriate to offer a comprehensive definition of the term. Scholars interpreting the Convention have given the term a subjective and common-sense meaning. We agree with the general proposition that the term "landlocked" "implies both that there shall be land in all but one direction and also that it should be close enough at all points to provide [a seaman] with shelter from all but that one direction." P. Beasley, Maritime Limits and Baselines: A Guide to Their Delineation, The Hydrographic Society, Special Publication No. 2, p. 13 (1978).

Id. (footnotes omitted, bracketed text in original). In a footnote following this passage, the Court quoted the following statement by Hodgson and Alexander:

> The concept of land-locked is imprecise and, as a result, may call for subjective judgments. . . . Basically, the character of the bay must lead to its being perceived as part of the land rather than of the sea. Or, conversely, the bay, in a practical sense, must be usefully sheltered and isolated from the sea. Isolation or detachment from the sea must be considered the key factor.

Id. at 525 n.19 (quotation marks omitted, ellipses in original) (quoting Hodgson & Alexander, *supra*, at 6, 8). In the *Louisiana Boundary Case*, the Court also said that an otherwise

landlocked indentation "surely would not lose that characteristic on account of an additional narrow opening to the sea." 394 U.S. at 61.

The parties disagree about one important issue with respect this definition. Alaska takes the position that non-assimilated islands may make waters landlocked by blocking them from the sea. *See* Alaska Count II Memorandum at 38. The United States, in contrast, argues that non-assimilated islands cannot make waters landlocked. *See* U.S. Count II Reply at 7-10. This dispute makes a difference in the case of North Bay. Alaska identifies the southern entrance point of North Bay as Cape Decision on Kuiu Island. *See infra* Appendix L. The United States, however, argues that much of the coast of Kuiu Island would face the open sea but for the presence of Baranof Island. *See* U.S. Count II Opposition at 41-42.

The United States has the correct view under the Court's precedent. In the *New York and Rhode Island Boundary Case*, the Court initially considered whether Long Island Sound would constitute a juridical bay if Long Island were not assimilated to the mainland. *See* 469 U.S. at 514-515. The Court concluded that it would not meet the requirements of article 7 for several reasons. *See id.* One of these reasons was that "absent Long Island, the waters of the Sounds would not be sufficiently surrounded by land so as to be landlocked." *Id.* at 515. In this passage, the Court implicitly rejected the view, now expressed

by Alaska, that the presence of unassimilated islands between the open sea and the coast line can make waters landlocked.[58]

4. Application of Article 7(2)

Based on the Court's precedents, and the resolutions of the disagreements discussed above, North Bay and South Bay would not meet the requirements of a juridical bay, but Sitka Sound and Cordova Bay would meet them if assimilation of the necessary islands occurred. The following discussion explains these conclusions.

a. North Bay

Alaska and the United States agree that North Bay satisfies the semi-circle area test in the second sentence of article 7(2). According to Alaska, a line drawn across the mouth of North Bay in accordance with the rule in article 7(3) is 30.37 nautical miles long. The area of a semi-circle having a diameter of

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[58]The Court stated: "A mere glance at a map of the region under consideration reveals that unless Long Island is considered to be part of the mainland and provides one of the headlands, neither Long Island Sound nor Block Island Sound satisfies the article 7 requirements for a bay. Though the [mainland] coast to the north of Long Island curves somewhat, it was the nearly unanimous conclusion of the testifying experts that, in the absence of Long Island, the curvature of the [mainland] coast is no more than a 'mere curvature' and is not an 'indentation.' And, absent Long Island, the waters of the Sounds would not be sufficiently surrounded by land so as to be landlocked; neither would they satisfy the semicircle test." 469 U.S. at 514-515.

30.37 nautical miles is only 362.2 square nautical miles.[59] This area is far less than the area of North Bay, which Alaska measures as 5,592.86 square nautical miles. *See* Alaska Count II Memorandum at 41. The United States accepts this conclusion. *See* U.S. Count II Opposition at 33 n.14.

The parties, however, disagree about whether North Bay is a "well-marked indentation" as required by article 7(2). Although the Convention does not define this term, Alaska and the United States each have relied on the explanations of the term given by Westerman in her treatise on juridical bays. *See* Alaska Count II Memorandum at 29; U.S. Count II Memorandum at 19. Westerman initially points out that Article 7 does not require nations to indicate bay closing lines on their official charts. *See* Westerman*, supra*, at 83. She then explains that a bay must be well-marked by physical features so that a mariner looking at charts that do not show bay closing lines may perceive the limits of the bay and avoid making illegal entry into inland waters. *See id.* Westerman concludes that "*geo-*

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[59]In its brief, Alaska calculates the area of a semicircle having a diameter of 30.37 nautical miles as 369.39 square nautical miles rather than 362.2 square nautical miles. *See* Alaska Count I Memorandum at 41. The area of a semicircle having a diameter D is $\pi(D/2)^2/2$, where π is a constant equal to approximately 3.14159. Using this formula, the area is 362.2 square nautical miles. The Special Master cannot explain the discrepancy in Alaska's calculation, but the difference is not significant. The Special Master agrees with Alaska's calculation of the area of a semicircle having a diameter equal to the width of the mouth of South Bay. *See infra* part III.D.4.b.

graphical obviousness" therefore must determine what is well-marked. *Id.* at 85 (emphasis in original). She says:

> It is this quality of geographical obviousness, i.e., the existence of a coastal indentation lying behind identifiable entrance points and having the general configuration of a bay, which is sufficient to put the mariner on notice and which, at last, lends content to the well-marked requirement of paragraph two, sentence one [of article 7].

Id.

Alaska argues that North Bay is a well-marked indentation under this definition. The State observes that North Bay generally has calm, protected waters. "Passing through the well-marked entrances to any of the asserted bays," Alaska says, "a mariner would reasonably expect that he is heading inland, to sheltered waters away from the sea." Alaska Count II Memorandum at 29. In addition, Alaska contends that North Bay has a clear bay-like shape when depicted with all non-assimilated islands removed. *See id.* at 30; Exhibit AK-149 (North Bay with Islands Removed).

The United States disagrees, asserting that North Bay is not visually recognizable as a bay. *See* U.S. Count II Reply at 6. "The juridical bays that Alaska seeks to create in this case," the United States says, "are not only impossible for mariners to identify, but they went undiscovered by numerous geographic experts and Alaska's own legal counsel until after the commencement of this quiet title suit." U.S. Count II Memorandum at 20. The United States notes that the early explorers in the region identified the waters of the Alexander Archipelago as "straits" and "passages" rather than as "bays." *See* U.S. Count II Reply at 6. It further observes that State Department Geogra-

pher S. Whittemore Boggs did not identify them in his extensive studies of the Alexander Archipelago. *See* U.S. Count II Memorandum at 20. In addition, the United States points out that the Coastline Committee did not recognize any of the asserted bays as juridical bays when it published charts of the area in 1971. *See id.* The United States further says that when Alaska objected to the Committee's conclusions in the 1970s, it argued that the Alexander Archipelago contained historic inland waters, but did not contend that the waters constituted juridical bays. *See id.* at 20-21.

The Special Master agrees to some extent with both parties. North Bay, as Alaska asserts, does have a bay-like shape when depicted without the numerous non-assimilated islands that lie within its waters. *Compare* AK-149 (graphic depicting North Bay with islands removed) *with* 381 U.S. at 214, app. B (Black, J., dissenting) (illustration of Monterey Bay). Yet, as the United States says, this bay-like shape is not obvious from a visual inspection of the area or by looking at actual charts of area. *See* Alexander Archipelago and Inside Passage (chartlet) (Exhibit US-II-6).

Resolution of the issue, accordingly, requires weighing the competing assertions of the parties. On balance, the Special Master believes that the United States has the stronger argument. In determining whether an area is a well-marked indentation for the purpose of article 7(2), if the standard is geographical obviousness, then actual charts of the area and the actual record of observation by experienced navigators and geographers must carry more weight than depictions having islands or other features removed. In addition, although North Bay undoubtedly contains sheltered water, sheltered water does not

necessarily prove the existence of a bay because straits also contain sheltered waters. Because of North Bay's great size, much of the shelter comes from the non-assimilated islands creating straits within its mouth and interior, rather than from its headlands. In many areas, the mainland itself is not "'close enough at all points to provide [a seaman] with shelter from all but . . . one direction.'" *Rhode Island and New York Boundary Case*, 469 U.S. at 525 (quoting P. Beasley, *Maritime Limits and Baselines: A Guide to their Delineation, the Hydrographic Society, Special Publication No. 2*, p. 13 (1978)) (bracketed text in original). The Special Master therefore concludes that North Bay is not a "well-marked indentation" as required by article 7(2). This conclusion, by itself, prevents recognition of North Bay as a juridical bay.

The United States also argues that, under the standards set forth in article 7, North Bay could not qualify as a juridical bay when Alaska became a state because the waters of North Bay touched the Canadian shore in 1959. *See* U.S. Count II Reply at 10. This argument rests on two legal propositions and one factual proposition. The first legal proposition is that a juridical bay cannot touch the coast line of more than one nation. This proposition, the United States says, follows from the first paragraph of article 7, which says: "This article relates only to bays the coasts of which belong to a single State." Convention, *supra*, at art. 7(1). Professor Westerman also explains: "This statement is unequivocal and is necessary in . . . order to prevent large bodies of water such as the Mediterranean or Baltic Seas from technically becoming juridical bays under Article 7." Westerman, *supra*, at 79 (footnotes omitted).

The second legal proposition is that Alaska's rights vested in 1959 when Alaska became a state. This proposition follows from the nature of Alaska's claim. As explained in part III.A., Alaska claims that title to the submerged lands lying behind the closing lines of North Bay, and the submerged lands extending three miles seaward of these closing lines, passed to Alaska at statehood under the equal footing doctrine and Submerged Lands Act. *See* Amended Complaint, *supra*, ¶ 38; Alaska Introduction and Background Brief at 6-7, 10. Alaska makes no claim of title based on developments subsequent to the time of statehood.

The factual proposition is that North Bay touched the Canadian coast in 1959. As noted in the analysis of count I above, *see supra* part II.D.5, the Grand Pacific Glacier retreated from 1911 to 1961 into Canada, causing the waters of Glacier Bay's Tarr Inlet to touch the Canadian coast. (Tarr Inlet no longer cuts so deeply into the mainland because the Grand Pacific Glacier has since advanced up to and beyond the Canada-United States border). *See* Molnia Corrections Report, *supra*, at 4. Accordingly, the United States asserts, North Bay was not a juridical bay in 1959 when Alaska became a state. *See* U.S. Count II Reply at 10.

Although this argument may have merit, the Special Master hesitates to rely on it for making a recommendation to the Court for two reasons. First, as with the similar argument that the United States made in count I, Alaska has not had a full opportunity to respond to the argument because the United

States first explicated the Tarr Inlet problem in its reply brief.[60] Second, resolution of the issue also does not matter, given the Special Master's conclusion that North Bay cannot be a juridical bay because it is not a "well-marked indentation" as required by Article 7(2). The Special Master has not required additional briefing because additional briefing would prolong the case with likely no effect on the outcome.[61]

The United States also raises two additional arguments against characterizing North Bay as a juridical bay, but these arguments are not persuasive. First, the United States argues that the proportion of penetration to width for North Bay would

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[60]The United States mentioned in its opening memorandum that Tarr Inlet touched the Canadian border "earlier this century" (apparently meaning earlier in the 20th century). *See* U.S. Count II Memorandum at 4 n.2. In making this statement, the United States was addressing the possibility that the Grand Pacific Glacier might again retreat at some time in the future. *See id.* The United States did not argue until its reply brief that the location of the Grand Pacific Glacier in 1959 prevented Alaska for acquiring title the submerged lands in North Bay. The United States and Alaska each briefly addressed the Tarr Inlet problem at oral argument. *See* Tr. Oral Arg. at 85-86 (Feb. 4, 2003) (argument of the United States); *id.* 93 (argument of Alaska).

[61]If the Court disagrees with the Special Master's recommendations and decides (1) that Kuiu Island, Kupreanof Island, Mitkof Island, and Dry Island can be assimilated to form a peninsula and (2) that North Bay is well-marked indentation, the Court should require briefing on the Tarr Inlet problem before deciding whether to grant summary judgment.

prevent recognition of North Bay as a juridical bay. *See* U.S. Count II Opposition at 42. The United States bases this contention on its calculation that North Bay would have a width of 154 nautical miles but a penetration of only 100 nautical miles. *See infra* Appendix M. The Special Master disagrees. Assuming Cape Decision is a proper headland, the longest straight line of penetration would extend 180 nautical miles. *See infra* Appendix L; *supra* parts III.D.3.b (explaining how the longest straight line of penetration in North Bay may enter Lynn Canal). A proportion of 180 nautical miles to 154 nautical miles would support the finding of a juridical bay under article 7(2). Second, the United States argues that North Bay, as Alaska initially described it, is not landlocked as required by Article 7(2). *See* U.S. Count II Opposition at 41-42. As previously explained, Alaska identifies the southern entrance point of North Bay as Cape Decision on Kuiu Island. This entrance point and much of Kuiu Island are not landlocked because they face the open sea. Although Baranof Islands lies between these two proposed entrances, the Special Master already has concluded that the presence of non-assimilated islands cannot make an area landlocked. *See supra* part II.D.3.d. The United States therefore is correct that Cape Decision cannot serve as an entrance point. Alaska, however, has identified an alternative point on Kuiu Island that satisfies the 45-degree test. *See* Alaska's Count II Reply at 19 n.6; Exhibit AK-477 (chart depicting closing line satisfying the 45-degree test). While this alternative point would make North Bay somewhat smaller in area, it would not appear to alter

substantially the width of its mouth, its penetration, or its satisfaction of the semi-circle test.[62]

In sum, the Special Master concludes that North Bay is not a juridical bay because North Bay is not a "well-marked indentation" as required by Article 7(2). The Special Master does not make a recommendation on this issue whether the Tarr Inlet problem independently would prevent North Bay from having the status of a juridical bay.

b. South Bay

South Bay satisfies the semi-circle area test under the second sentence of article 7(2). According to Alaska, a line drawn across the mouth of South Bay, under the principles in article 7(3), would be 47.49 nautical miles long. *See* Alaska Count II Memorandum at 41. The area of a semi-circle having this diameter is 885.65 square nautical miles. This area is far less than the total area of South Bay, which Alaska measures as 4,949.02 square nautical miles. *See id.* at 41-42. The United States agrees with this conclusion. *See* U.S. Count II Opposition at 33 n.14. The United States also appears to accept that the waters of South Bay are landlocked. *See id.* at 43-44 (not addressing this issue in assessing South Bay).

The parties, however, disagree about the application of the other parts of the definition of a bay in article 7(2). Alaska and the United States vigorously dispute whether South Bay is a "well-marked indentation." *See* Alaska Count II Memorandum

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[62]The parties do not provide the exact measurements in their briefs.

at 29-31; U.S. Count II Reply at 6. On the issue, the parties advance the same arguments that they make with respect to North Bay. Alaska contends that mariners would recognize that South Bay contains sheltered waters and that South Bay has a bay-like shape when depicted with all non-assimilated islands removed. *See* Alaska Count II Memorandum at 29-30; Exhibit AK-150 (South Bay with Islands Removed). The United States contends that South Bay is not visually recognizable as a bay and that explorers and experienced geographers have not characterized it as a bay. *See* U.S. Count II Reply at 6.

The Special Master again sees some merit in the views of each party. As Alaska says, when depicted with its non-assimilated islands removed, South Bay does have the general shape of a bay. Yet, when viewed on an accurate chart of the area or from the perspective of a mariner, South Bay is not visually recognizable as a bay.

On balance, the Special Master concludes that the United States has the stronger argument. South Bay is not a well-marked indentation. In assessing geographic obviousness, accurate representations of the area, descriptions by mariners, and the long-standing views of geographers must count for more than depictions of the area with the islands removed. In addition, although South Bay contains sheltered waters, much of this shelter comes from non-assimilated islands rather than the mainland. These islands create straits in places far removed from the mainland. The Special Master therefore concludes that South Bay, like North Bay, is not a well-marked indentation.

Alaska and the United States also disagree about the width of South Bay's mouth, its penetration, and the resulting

proportion of the penetration to the width. Alaska says that the width of South Bay's mouth is 47.49 nautical miles. *See* Alaska Count II Memorandum at 36. The United States says that the width of the mouth is approximately 120 nautical miles. *See* U.S. Count II Opposition at 43. The Special Master agrees with the United States because the United States has measured the distance from mainland headland to mainland headland. *See supra* part III.D.3.a.

With respect to penetration, Alaska says that the longest straight line that can be drawn from the mouth of South Bay to the head is approximately 124 nautical miles. *See infra* Appendix J (line connecting point marked "Ey" to point marked "Fy"); Alaska Count II Memorandum at 36-37. The United States, in contrast, says that the longest straight line that can be constructed to the head of South Bay is approximately 75 nautical miles long. *See infra* Appendix K; U.S. Count II Opposition at 43. The Special Master concludes that Alaska's proposed line is improper because it does not start on the headland to headline line across the mouth. *See* part III.D.3.b. Accordingly, the Special Master will accept the United States' estimation as the more accurate. This estimation yields a ratio of penetration to width of 75-to-120, or 0.63-to-1, a rather low

ratio.[63] Based on these considerations, the Special Master concludes that South Bay also is not a juridical bay.

c. Cordova Bay

The parties agree that, if Dall Island is assimilated to Prince of Wales Island, Cordova Bay satisfies the requirements for a juridical bay under article 7(2). *See* Alaska Count II Memorandum at 47-48; U.S. Count II Opposition at 45. The Special Master concurs with this assessment. *See* Exhibit AK-172 (chart depicting Cordova Bay with semi-circle plotted).

d. Sitka Sound

The parties also agree that, if Kruzof Island, Partofshikof Island, and Baranof Island are assimilated, Sitka Sound satisfies the requirements for a juridical bay under article 7(2). *See* Alaska Count II Memorandum at 47-48; U.S. Count II Opposition at 44 (stating that Sitka Sound would satisfy the criteria for a juridical bay, but disagreeing about the exact location of its closing lines). The Special Master also concurs with this assessment. *See* Exhibit AK-171 (chart depicting Sitka Sound with semi-circle plotted).

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[63] Alaska has not alleged how long its line of penetration would be if the portion lying seaward of the headland to headland line were removed. The Special Master estimates that removing this portion of the 124 nautical mile line would make the remaining portion of the line approximately 95.5 nautical miles long. This estimation would yield a ratio of 95.5-to-120, or 0.8-to-1, still a low ratio.

5. Conclusion

If the Court accepts the Special Master's recommendation with respect to assimilation, it need not consider whether North Bay, South Bay, Sitka Sound, and Cordova Bay are juridical bays. Even if assimilation of all the islands is possible, only Cordova Bay and Sitka Sound would meet the requirements of article 7(2) for juridical bays. North Bay and South Bay would not. If the Court determines that any bays exist, further proceedings would be necessary for surveying and determining the exact closing lines of the bays. *See* Convention, *supra*, arts. 7(4), (5).

E. Conclusion

The Special Master recommends that the Court grant summary judgment to the United States on count II of Alaska's amended complaint, deny Alaska's motion for summary judgment on count II, and order that Alaska take nothing on this count.

IV. THE GLACIER BAY NATIONAL MONUMENT (Count IV)

In count IV of its Amended Complaint,[64] Alaska claims title to "all the lands underlying marine waters within the boundaries of Glacier Bay National Monument." Amended Complaint to Quiet Title, *supra*, ¶ 61. The United States has moved for summary judgment on this claim, arguing that the federal government retained title to these submerged lands at statehood. The Special Master recommends that the Court grant summary judgment to the United States.

A. Overview

In 1925, under authority granted by the Antiquities Act of 1906, 34 Stat. 225 (1906) (codified at 16 U.S.C. § 431 (2000)), President Calvin Coolidge issued a proclamation creating the Glacier Bay National Monument in the northern part of the Alexander Archipelago. *See* Proclamation No. 1733, 43 Stat. 1988 (1925) [hereinafter 1925 Proclamation]. The boundaries set forth in the 1925 Proclamation surrounded much of Glacier Bay and some nearby areas. *See* Appendix N (depicting these boundaries in thick red lines). In 1939, President Franklin D. Roosevelt expanded the Glacier Bay National Monument. *See* Proclamation No. 2330, 4 Fed. Reg. 1661 (Apr. 18, 1939)

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[64]This report addresses count III after count IV. *See infra* part V. The Special Master has considered these counts in reverse order because count III involves a disclaimer of title. The basis for this disclaimer becomes clearer after explication of the standards governing federal reservation and retention of submerged lands in connection with part IV.

[hereinafter 1939 Proclamation]. The enlarged boundaries encompassed more of the Glacier Bay, added some surrounding areas, and extended three nautical miles out to sea in the west. *See* Appendix N (depicting these boundaries with thin red lines). In 1955, President Dwight D. Eisenhower slightly altered the boundaries, excluding some land in the area of the town of Gustavus. *See* Proclamation No. 3089, 20 Fed. Reg. 2103 (Apr. 5, 1955) [hereinafter 1955 Proclamation]. In 1980, Congress expanded the boundaries and designated the area as the "Glacier Bay National Park" and "Glacier Bay National Preserve." *See* 16 U.S.C. § 410hh-1(1) (2000).

Alaska contends that it acquired title to the submerged lands within the boundaries of the Glacier Bay National Monument as they existed at the time of statehood in 1959. In making this claim, Alaska relies on the Equal Footing Doctrine and the Submerged Lands Act. The United States disagrees. It asserts that Congress expressly retained federal ownership of the submerged lands within the boundaries of the Glacier Bay National Monument in the Alaska Statehood Act, 72 Stat. 339. Title to these lands, in its view, therefore did not pass to the State under either the Equal Footing Doctrine or the Submerged Lands Act.

Only the United States has filed a written motion for summary judgment on count IV. The United States asserts that count IV raises no genuine issues regarding material facts. Alaska, in contrast, asserts the existence of material factual disputes about the degree to which excluding submerged lands from the Monument would undermine or defeat the Monument's purposes. *See* Alaska Count IV Opposition at 18, 20-22. Alaska said in its opposition brief that it would like the opportu-

nity at trial to rebut evidence that the United States has offered. *See id.* at 21-22. At oral argument, however, Alaska moved for summary judgment on count IV in case the Court finds that the United States' proffered evidence is inadequate as a matter of law. *See* Tr. Oral Arg. at 156 (Feb. 3, 2003).

B. Analysis

The Court has recognized that Congress may prevent title to submerged lands from passing to a new state at statehood under either the Equal Footing Doctrine or the Submerged Lands Act. *See Alaska (Arctic Coast)*, 521 U.S. at 33-35. The Court, however, has described state ownership of submerged lands as an "essential attribute" of a state's sovereignty. *See id.* at 5. Accordingly, under the Equal Footing Doctrine, the Court begins with a "strong presumption" against interpreting federal legislation to defeat a state's acquisition of title. *Montana v. United States*, 450 U.S. 544, 552 (1981). The Court applies the same standard in deciding whether Congress averted passage of title to submerged lands to a state under the Submerged Lands Act. *See Alaska (Arctic Coast)*, 521 U.S. at 35-36.

The Court recently has decided four cases addressing title to submerged lands within the boundaries of federal reservations. *See Idaho v. United States*, 533 U.S. 262 (2001); *Alaska (Arctic Coast)*, 521 U.S. 1; *Montana*, 450 U.S. 544; *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987). In these cases, the Court has developed a "two-step test of congressional intent" to determine whether Congress prevented submerged lands from transferring to a state under the Equal Footing Doctrine or Submerged Lands Act. *Idaho*, 533 U.S. at 273. This two-step test is satisfied when (1) "an Executive reservation clearly

includes submerged lands," and (2) "Congress recognizes the reservation in a way that demonstrates an intent to defeat state title." *Id*. *See also Alaska (Arctic Coast)*, 521 U.S. at 45 (applying same two-step test). The parties agree that this two-step test governs the present case. *See* U.S. Count IV Memorandum at 35-36; Alaska Count IV Opposition at 2.

1. Inclusion of Submerged Lands

In determining whether "an Executive reservation clearly includes submerged lands," the Court considers two questions. The first question is "whether Congress was on notice that the Executive reservation included submerged lands." *Idaho*, 533 U.S. at 273-74 (citation omitted). The second question is whether "the purpose of the reservation would have been compromised if the submerged lands had passed to the State." *Id.* at 274 (citation omitted).

In *Montana*, 450 U.S. 544, the Court held that a reservation created for the Crow Tribe of Indians did not include the bed of the Big Horn, a river flowing through the reservation. The Court observed that the treaty creating the reservation did not refer to the riverbed expressly. *See id.* at 554. It further concluded that the federal government did not need to include the riverbed to accomplish its purposes in creating the reservation because fishing was not important to the Crow Tribe's diet or way of life. *See id.* at 556.

In *Utah Div. of State Lands*, 482 U.S. 193, the Court held that Utah acquired title to the bed of Utah Lake when Utah became a state. The United States Geological Survey had selected the lake as a reservoir site in 1889 pursuant to an 1888 Act that reserved selected lands as the property of the United

States and made them not subject to entry, settlement, or occupation. *See id.* at 199. The Court held that the 1888 Act's structure and history strongly suggested that Congress had no intention to defeat Utah's claim to the lake bed under the Equal Footing Doctrine upon entry into statehood. *See id.* at 208. The Court also held that the transfer of title of the lake bed to Utah would not prevent the Federal Government from subsequently developing a reservoir at the lake in any event. *See id.*

In *Alaska (Arctic Coast)*, the Court held that the National Petroleum Reserve Number 4 "necessarily embraced" submerged lands in the Arctic Ocean because the executive order creating the Reserve indicated that its boundary followed the ocean side of offshore islands. 521 U.S. at 38-39. It also reasoned that reserving the submerged lands was necessary to the purpose of the Reserve because the United States needed oil and gas deposits contained within the submerged lands. *Id.* at 39. The Court similarly concluded that the Arctic National Wildlife Range (now called the Arctic National Wildlife Refuge) embraced submerged lands in the Arctic Ocean because the document setting the boundaries of the Range expressly referred to underwater bars and reefs. *See id.* at 51. The Court also determined that reserving the submerged lands was necessary for purposes of the reservation, which included protecting the habitats of polar bears, seals, and whales. *See id.*

In *Idaho*, the State conceded that a reservation for the Coeur d'Alene Tribe of Indians included submerged lands lying beneath Lake Coeur d'Alene and the St. Joe River. *See* 533 U.S. at 274. The Court characterized this concession as "sound." *Id*. It observed that the executive order creating the reservation described its acreage in a way that necessarily

included the submerged lands. *Id.* at 267, 274. In addition, the Court explained that excluding the submerged lands would undermine the purposes of the reservation because the Coeur d'Alene Tribe, unlike the Crow Tribe, depended on fishing. *See id.* at 266, 274. Finally, the Court noted twice that the northern boundary of the reservation crossed Lake Coeur d'Alene. *See id.* at 266, 274. The court explained that the district court in the case had found this feature of the reservation to show an intent to reserve submerged lands because it contradicted "the usual practice of meandering a survey line along the mean high water mark."[65] *Id.* at 266 (quoting *United States v. Idaho*, 95 F. Supp. 2d 1094, 1108 (D. Idaho 1998)).

a. Notice to Congress of Inclusion

Under *Idaho*, the first question to consider is "whether Congress was on notice that the Executive reservation included submerged lands." *Id.* at 274-75. Unless Congress has reason to know that a reservation included submerged lands, it could not intend the reservation to prevent title of the submerged lands from passing to a state at statehood. The Special Master concludes that the text of the documents creating and expanding the Monument and their interpretation by the executive branch supplied notice to Congress that the Glacier Bay National Monument included the submerged lands within its boundaries.

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[65] Although the State disputed the district court's reasoning on this point, the Court concluded that the dispute had little consequence given the reservation's acreage description and the State's concession. *See id.* at 266 n.2.

(1) *The 1925 Proclamation Creating the Monument*. The 1925 Proclamation specified the boundaries of the Monument as follows:

> Beginning at the most southerly point of North Marble Island in approximate latitude 58° 40' north and approximate longitude 136° 4' west as shown on Coast and Geodetic Survey chart No. 8306; Thence southeasterly to the most westerly point of the largest island at the entrance of Bear Track Cove in approximate latitude 58° 34' north and approximate longitude 135 degrees 56' west; thence following the mean high water of the southerly shore to the most easterly point of said island; thence east on a parallel of latitude to the crest of the divide between the waters of Bear Track Cove and Bartlett Cove; thence [through described uplands] . . . ; thence northeasterly to the most southerly point on the north shore of Geikie Inlet; thence northeasterly following the mean high water of this shore to the most easterly point of land at the entrance of Geikie Inlet, then southeasterly to the place of beginning, containing approximately 1,820 square miles.

1925 Proclamation, 43 Stat. at 1989. *See* Appendix N (depicting this boundary with a thick red line).

Three aspects of the 1925 Proclamation's text put Congress on notice that the Monument included submerged lands. First, the last clause of the boundary description says that the reservation contains "approximately 1,820 square miles." That figure represents the total area within the boundaries described, including both uplands and submerged lands. *See* John D. Coffman & Joseph S. Dixon, *Report on Glacier Bay National Park (Proposed), Alaska* 3 (1938) (Exhibit US-IV-9, at 10)

(calculating that the 1925 boundaries contained approximately 1,549 square miles of uplands and 271 square miles of water-covered areas).[66] Second, the boundary of the Monument crosses the waters of Glacier Bay instead of following Glacier Bay's shoreline. These two features make the Monument similar to the reservation at issue in *Idaho*. In *Idaho*, as described above, the Court accepted the State's concession that the Coeur d'Alene Tribe's reservation contained submerged lands. *See* 533 U.S. at 274. The Court said that the concession was sound because the stated acreage of the reservation necessarily included submerged lands and because the boundaries of the reservation crossed a lake. *See id.* at 266-67, 274. The Court noted the district court's finding that drawing the boundary across a body of water deviated from the customary practice of meandering the boundary along the mean high water mark. *See* 533 U.S. at 266, 274.

Third, as the boundary of the Monument crosses Glacier Bay, it bends in a few places. As a result, the Monument includes some islands, like North Marble Island, while excluding others, like Drake Island and Willoughby Island. In *Alaska*, the Court held that a boundary line drawn in a similar manner around islands off the Arctic Coast revealed an intent to include submerged lands within the boundary. *See Alaska (Arctic Coast)*, 521 U.S. at 38-39. Alaska suggests that the President merely wanted to include certain islands in the Monument, and not others, and did not intend to include submerged lands. *See*

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[66] Alaska does not challenge the correctness of this determination. *See* Alaska Count IV Opposition at 11 (objecting only that Coffman and Dixon calculated it at a later date).

Alaska Count IV Opposition at 8-9. If that were true, however, the President could have identified the islands by name or by description without drawing the boundary line through the water. Presidential proclamations have used that more direct approach to include islands in other areas. *See, e.g.*, Proclamation No. 2564 (Aug. 4, 1942) (Exhibit US-IV-53) (enlarging the Katmai National Monument in Alaska by adding "all islands in Cook Inlet and Shelikof Strait in front of and within five miles of the Katmai National Monument").

Although the text of the 1925 Proclamation shows that the National Monument included submerged lands, Alaska contends that other documents reveal that the President had a contrary intent. *See* Alaska Count IV Opposition at 4. Alaska notes that a 1924 executive order temporarily withdrew certain territory in the area of Glacier Bay while the President studied the advisability of creating a National Monument. *See* Executive Order No. 3983 (Apr. 1, 1924) (Exhibit AK-346). The order described the withdrawn territory as "public lands." *Id*. Alaska contends that this order shows that the Monument does not include submerged lands because at the time submerged lands were not considered "public lands." *See* Alaska Count IV Opposition at 5.

This argument is not convincing. As the United States correctly observes, *see* U.S. Count IV Reply at 8, the 1925 Proclamation, unlike the 1924 executive order, does not describe the reserved area as "public lands." If anything, omitting this description from the 1925 Proclamation suggests that the President did not want to limit the reservation to public lands.

Alaska also cites letters written by organizations in support of the proposal to create the Glacier Bay National Monument. In some of these letters, these organizations used phrases like the "region surrounding Glacier Bay" to describe the area under consideration. *See, e.g.*, Ecological Society of America, *Recommendations submitted by the Ecological Society of America with Regard to the Establishment of a National Monument at Glacier Bay, Alaska* 2 (1924) (Exhibit AK-349). Alaska says that these phrases show that proponents of the monument did not intend the Monument to include submerged lands. *See* Alaska Count IV Opposition at 6. The Special Master disagrees. Even if the Court were to consider extrinsic evidence of this kind, the letters that Alaska cites are too general to aid in understanding the specific terms used in the 1925 Proclamation.

For the foregoing reasons, the Special Master concludes that Congress had notice that the 1925 Proclamation included submerged lands within the Glacier Bay National Monument.

(2) *The 1939 Proclamation Expanding the Monument*. In 1939, President Franklin D. Roosevelt expanded the Monument by proclamation. This proclamation described the expanded boundaries as follows:

> Beginning at the summit of Mount Fairweather, on the International Boundary line between Alaska and British Columbia; thence southeasterly along present southern boundary of Glacier Bay National Monument to the point of the divide between the waters of Glacier Bay and Lynn Canal where said divide is forked by the headwaters of Excursion Inlet; thence easterly and southeasterly along the divide between the waters of Excursion Inlet and

> Lynn Canal to a point in approximate latitude 58° 27' N., longitude 135° 18' W., where said divide meets a subsidiary divide between streams flowing into Excursion Inlet; thence westerly and northwesterly along said subsidiary divide to the east shore of Excursion Inlet; thence due west to the center of the principal channel of Excursion Inlet; thence southerly along the center of the principal channel of Excursion Inlet to its junction with the Icy Passage; thence westerly and southwesterly along the center of Icy Passage, North Passage, North Indian Pass and Cross Sound to the Pacific Ocean; thence northwesterly following the general contour of the coast at a distance of 3 nautical miles therefrom to a point due west of the mouth of Seaotter Creek; thence due east to the north bank of Seaotter Creek and easterly along the north bank of Seaotter Creek to its headwaters; thence in a straight line to the summit of Mount Fairweather, the place of beginning. Containing approximately 904,960 acres.

1939 Proclamation, 4 Fed. Reg. at 1661.

Two aspects of the 1939 Proclamation's text suggest the inclusion of submerged lands. First, the 1939 boundary line, like the 1925 boundary line, cuts across bodies of waters. The 1939 boundary line runs along "the principal channel of Excursion Inlet" and along "the center of Icy Passage, North Passage, North Indian Pass and Cross Sound to the Pacific Ocean." Second, the 1939 boundary also extends into the Pacific Ocean three nautical miles from the mainland coast. These features make the boundary line similar to the boundary line of the reservation at issue in *Idaho*. In that case, as

described above, the boundary line crossed a lake instead of meandering along its shores. *See* 533 U.S. at 266 & n.2, 274. To repeat, the Court cited this feature when it said that Idaho had made a sound concession that the reservation contained submerged lands. *See id.* at 274.

Alaska argues that the boundary line goes through the water merely to partition jurisdiction over islands between the Glacier Bay National Monument and the neighboring Tongass National Forest. *See* Alaska Count IV Opposition at 24. This argument is not convincing. As the United States points out, *see* U.S. Count IV Reply at 13, the boundary line runs through Excursion Inlet even though Excursion Inlet contains no island on its western shore. The line, moreover, would not need to run three miles off the Pacific coast for the purpose of allocating islands because no islands lie more than two miles from the coast. *See Alaska Atlas and Gazetteer*, *supra*, at 30 & 31 (showing Gulf of Alaska area of the Glacier Bay National Monument) (Exhibit US-IV-55).

Another aspect of the 1939 Proclamation's text, however, suggests that the President did not intend to include the submerged lands. The final clause of the 1939 Proclamation (which neither party has addressed in its written briefs) says that the addition to the Monument contains 904,960 acres. This figure, unlike the 1820 square mile figure stated in the 1925 Proclamation, includes only uplands and not submerged lands. *See* Theodore R. Catton, *Historical Report Relating to Claims to Submerged Lands in Glacier Bay National Park, Alaska* 36 (2001) (Exhibit US-IV-3). The total acreage within the boundaries of the addition, including submerged lands, would be 1,134,720 acres. *See id*. If acreage descriptions that include

submerged lands suggest that a reservation embraces submerged lands, *see Idaho*, 533 U.S. at 267, 274, then acreage descriptions that do not include submerged lands must have the opposite implication.[67]

The text of the 1939 Proclamation, accordingly, does not fully resolve the question whether the President intended to include submerged lands within the Monument. Looking to extrinsic evidence, the United States cites an internal executive report, made in preparation for the 1939 Proclamation. This report specifically said that the expanded Monument would contain submerged lands within its boundaries. *See* Coffman & Dixon*, supra*, at ii, 2 (Exhibit US-IV-9, pp. 4, 6). Using a source of this kind to show the meaning of a presidential proclamation is similar to using legislative history to prove the

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[67]One other point about the text of the 1939 Proclamation deserves mention. As described above in part IV.B.1.a.(1), Alaska argued that the 1925 Proclamation could not include submerged lands because, when the proposal to create the Monument was being studied in 1924, the term "public lands" did not include submerged lands. *See* Alaska Count IV Opposition at 5. The Special Master rejected that contention because the 1925 Proclamation does not describe the reserved area as "public lands." *See supra* part IV.B.1.a.(1). The 1939 Proclamation, in contrast, does use the term "public lands" to describe the area reserved in several places. *See infra* part IV.B.1.b.(5) (discussing the "whereas" clauses in the 1939 Proclamation). Alaska, however, does not cite the 1939 Proclamation's use of the term "public lands" as a reason for concluding that the 1939 expansion excluded submerged lands. *See* Alaska Count IV Opposition at 22-25.

meaning of a statute. It may show what the authors of the source wanted the proclamation to mean, but not much about its objective meaning. The report also may not have given Congress notice that the Monument contains submerged lands because Congress may not have seen the report when it enacted the Alaska Statehood Act.

More persuasive are sources showing that the executive branch interpreted the expanded National Monument to include submerged waters. In 1955, President Eisenhower removed a portion of the National Monument that the 1939 Proclamation had added. President Eisenhower's proclamation indicated that the eliminated area included "approximately 14,741 acres of land and 4,193 acres of water." 1955 Proclamation, 20 Fed. Reg. at 2103. This description reveals that the President interpreted the 1939 expansion to include submerged lands.[68]

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[68]The United States has endeavored to show that the National Park Service, which administered the National Monument, also interpreted the 1939 expansion of the Monument to include submerged lands. For example, an expert report reveals that the National Park Service studied the wildlife and fish of the marine submerged lands of the Monument. *See* Catton, *supra*, at 50-59. In addition, the National Park Service referred to the "waters" of the National Monument in various documents. For instance, in 1946, the National Park Service told the Commissioners of Indian Affairs that Alaska natives could hunt hair seals "in the waters of the national monument." Memorandum from Newton B. Drury, Acting Director National Park Service to Commissioner of Indian Affairs (May 14, 1946) (Exhibit US-IV-35). These sources add little to what the 1955 Proclamation by itself shows.

President Eisenhower's proclamation tips the balance in favor of the United States' position because the Court previously has given weight to executive interpretations of executive reservations. In *Idaho*, the Court noted that in the time between the creation of the reservation at issue and the admission of Idaho to the Union, the executive branch had construed the reservation to include submerged lands. *See Idaho*, 533 U.S. at 267 n.2. In *Udall v. Tallman*, 380 U.S. 1 (1965), the Court considered a challenge to the validity of oil and gas leases within the Kenai National Moose Range in Alaska. The proponents of the challenge argued that the Bureau of Land Management lacked authority to enter the leases. *See id.* at 3. The Court rejected the challenge. It observed that the executive order and a separate public land order did not expressly prohibit oil and gas leases and that the Secretary of the Interior, by issuing leases, consistently had construed the orders not to bar them. *See id.* at 4-5, 16-18. The Court said: "The Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; courts must therefore respect it." *Id.* at 4 (citing *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-414 (1945), and other authority).

One other exhibit lends support to the United States' contention that the Glacier Bay National Monument includes submerged lands. In 1958, the Department of Interior published an atlas of Alaska. *See* Bureau of Land Management, U.S. Department of Interior, *Alaska: Federal Withdrawals and Reservations* (1958) (Exhibit US-IV-46 at 3). The atlas shows the boundary of the National Monument enclosing areas of water, just as the description of the boundary does in the 1925,

1939, and 1955 Proclamations. The atlas does not say explicitly that the Monument includes the submerged lands within the boundary. Indeed, the relevant page does not even label the boundary lines in a clear manner. However, as the United States points out, *see* U.S. Count IV Memorandum at 44, the Court previously relied on a similar graphic depiction from a different page of the same atlas when it determined that the Arctic National Wildlife Range contained submerged lands. *See Alaska (Arctic Coast)*, 521 U.S. at 56. The Court said: "By virtue of that submission [i.e., the atlas], Congress was on notice when it passed the Alaska Statehood Act that the Secretary of the Interior had construed his authority to withdraw or reserve lands, delegated by the President, . . . to reach submerged lands." *Id*. The same reasoning supports the conclusion that the atlas graphically depicted for Congress the full extent of the Glacier Bay National Monument, including its submerged lands.

b. Purposes of the Reservation

The second consideration in deciding whether the reservation of the Glacier Bay National Monument included submerged lands is the effect of excluding submerged lands on the purpose of the Monument. *See Idaho*, 533 U.S. at 274. The Special Master concludes that the purposes of creating the Monument included studying tidewater glaciers, protecting remnants of ancient inter-glacial forests, and protecting wildlife, and that excluding submerged lands would compromise or undermine these purposes.

(1) *Applicable Standard*. The parties initially disagree about the applicable standard for judging how the exclusion of

submerged lands would affect the purposes of the Monument. According to the United States, the Court must determine whether excluding the submerged lands from the Monument would "compromise" or "undermine" the purposes of the Monument. U.S. Count IV Memorandum at 30. Alaska articulates a higher standard, arguing that the Court must decide whether denying the United States title to the submerged lands "would *entirely defeat* a primary purpose of the reservation." Alaska Count IV Opposition at 12 (emphasis in original).

Precedent supports the view of the United States. As indicated previously, the Court said in its recent *Idaho* decision that it considers "whether the purpose of the reservation *would have been compromised* if the submerged lands had passed to the State." *Id.* at 274 (emphasis added, citation omitted). Elaborating, the Court said: "Where the purpose *would have been undermined*, . . . '[i]t is simply not plausible that the United States sought to reserve only the upland portions of the area.'" *Id.* (emphasis added) (quoting *Alaska (Arctic Coast)*, 521 U.S. at 39-40). The Court in *Idaho* thus used the words "compromise" and "undermine," and not "entirely defeat," to describe the applicable test. These words indicate that the Court looks for an impairment of the purposes of the Monument, not a complete thwarting of them.

For example, in *Alaska (Arctic Coast)*, exclusion of submerged lands from the National Petroleum Reserve would have undermined, but would not have entirely defeated, the purpose of the Reserve. The Court said that the purpose was to secure a supply of oil for the Navy. *See* 521 U.S. at 39. The Court recognized that eliminating federal ownership of submerged lands within the Reserve's boundaries would deprive the United

States of oil and gas underlying those lands. *See id.* But eliminating federal ownership of the submerged lands would not have deprived the United States of all of the oil and gas within the entire Reserve because some of the oil was located underneath uplands within the Reserve. *See* Alaska Report, *supra*, at 422. Allowing Alaska to take title to the submerged lands therefore would have compromised the goal of securing a supply of oil for the Navy because it would have reduced the total supply, but it would not have entirely thwarted that goal because some oil and gas would have remained within the Reserve.

For its contrary view, Alaska relies on *United States v. New Mexico*, 438 U.S. 696 (1978). *See* Alaska Count IV Opposition at 13. The question in that case was what quantity of water, if any, the United States had reserved out of the Rio Mimbres when it set aside the Gila National Forest. *See* 438 U.S. at 698. The Court held that the United States had reserved the right to divert enough water to preserve the timber in the forest, but that the United States did not have a right to divert water for aesthetic, recreational, and certain other purposes. *See id.* at 698, 718. The Court's opinion summarized precedents in which the United States had claimed water rights in connection with a federal land reservation. In the summary, the Court observed that it previously had upheld the United States' claims only when it had "concluded that without the water the purposes of the [land] reservation would be *entirely defeated*." *Id.* at 700 (emphasis added) (footnote omitted). Alaska relies on this statement in arguing that the United States could retain submerged lands within the Glacier Bay National Monument only

if the purpose of the Monument would be "entirely defeated" without the submerged lands.

The Court's decision in *New Mexico* does not govern the present case. In *New Mexico*, the Court was considering the extent to which the United States had reserved the right to divert water from a river. This case concerns the issue whether the United States retained title to submerged lands. These inquiries involve separate considerations, and the Court has devised a distinct test for each of them. This case is governed by the *Idaho* and *Alaska* submerged land cases. These cases require the Court to consider whether excluding federal ownership of submerged lands would "undermine" or "compromise" the purposes of a federal reservation, not whether it would "entirely defeat" those purposes.

(2) *Purpose of Studying Glaciers (1925 Proclamation)*. The 1925 Proclamation uses several "whereas" clauses to identify the factors leading to its creation. These clauses say:

> Whereas, There are around Glacier Bay on the southeast coast of Alaska a number of tidewater glaciers of the first rank in a magnificent setting of lofty peaks, and more accessible to ordinary travel than other similar regions of Alaska,
>
> And Whereas, The region is said by the Ecological Society of America to contain a great variety of forest covering consisting of mature areas, bodies of youthful trees which have become established since the retreat of the ice which should be preserved in absolutely natural condition, and great stretches now bare that will become forested in the course of the next century,

> And Whereas, This area presents a unique opportunity for the scientific study of glacial behavior and of resulting movements and development of flora and fauna and of certain valuable relics of ancient interglacial forests,
>
> And Whereas, The area is also of historic interest having been visited by explorers and scientists since the early voyages of Vancouver in 1794, who have left valuable records of such visits and explorations.

1925 Proclamation, 43 Stat. at 1988-89.

The third "whereas" clause of the 1925 Proclamation reveals that one purpose of creating the Glacier Bay National Monument was to provide "opportunity for the scientific study of glacial behavior." *Id*. A glacier is a "mixture of ice and rock that moves downhill over a bed of solid rock or sediment under the influence of gravity." Bruce F. Molnia, *The State of Glacier Science and its Relationship to the Submerged Lands Adjacent to and Beneath the Tidewater Glaciers of Glacier Bay at the Time of the Founding and Expansion of the Glacier Bay National Monument, Alaska* 6 (2001) (Exhibit US-IV-4) [hereinafter Molnia Glacier Report]. As the Proclamation indicates, Glacier Bay contains magnificent "tidewater" glaciers. A tidewater glacier is a glacier that terminates in the sea. *See id.* at 7.

A tidewater glacier has various scientifically interesting behaviors. One is that the terminal cliff of a tidewater glacier from time to time drops (or "calves") large blocks of ice into the sea. *See* Dennis Trabant, *Expert Witness Report for Glaciology Relating to Claims to Submerged Lands in Glacier Bay, Alaska* 5 (2001) (Exhibit US-IV-5). Another is that tidewater glaciers change in length over time. The advance or

retreat (i.e., lengthening or shortening) of the glacier may occur rapidly. In the Glacier Bay area, the Grand Pacific Glacier advanced 1.2 kilometers seaward through a fiord in 1912 and 1913, *see* Trabant, *supra*, at 4, and the Bering Glacier retreated landward 2.6 kilometers between 1977 and 1978, *see* Molnia Glacier Report, *supra*, at 9.

The United States argues that excluding submerged lands from the reservation would compromise scientific study of the behavior of Glacier Bay's tidewater glaciers. *See* U.S. Count IV Memorandum at 30-31. Its expert witness, Dennis C. Trabant, has declared: "The complete glacier system includes the mountain peaks as well as the ocean depths. Scientific study requires continuing access to the Glacier Bay laboratory as a whole." Trabant, *supra*, at 6. He further has declared: "Glacier Bay would not be an effective area for the study of tidewater glaciers if the submerged lands were excluded." *Id.* at 7.

These conclusions clearly have a foundation. Researchers commonly used vessels to study tidewater glaciers before creation of the Monument. *See* Molnia Glacier Report, *supra*, at 19-27. Without title to submerged lands in front of the tidewater glaciers, the United States argues that it could not authorize studies involving long-term mooring of vessels. *See* U.S. Count IV Reply at 10. The advance and retreat of tidewater glaciers depends on the physical characteristic of the glacial bed and the submerged fiord bottoms. *See* Trabant, *supra*, at 6; Molnia Glacier Report, *supra*, at 9, 37. The United States also contends that without title to the submerged lands it could not authorize the taking of core samples from the submerged lands

to determine their characteristics. *See* U.S. Count IV Reply at 10. The Special Master agrees with these contentions.

Alaska objects that the United States has not shown that the "framers of the [1925] proclamation had ever thought of studying the bottom of the bay, or that this study would be impossible unless the bay bottom were reserved." Alaska Count IV Opposition at 16. This objection lacks merit for two reasons. First, the subjective thoughts of the proponents of a reservation should not define the reservation's purpose when the documents creating the reservation state the purpose expressly.[69] The term "scientific study of glacial behavior" is broad enough to cover the kind of scientific research that the United States describes, regardless of whether anyone actually envisioned it in 1925. Second, contrary to what Alaska says, researchers do in fact appear to have studied the effects of glaciers on submerged areas prior to 1925.[70]

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[69]In addition, Alaska's contentions regarding the reservation's proponents are based on questionable evidence. Alaska submits, for example, that the boundaries of the Monument proposed by the Ecological Society "did not include the bay." Alaska Count IV Opposition at 17 n.2 (citing Ecological Society of America, *supra*, at 14). The cited boundary description, however, although not giving a southern boundary, includes the bay as much as it includes anything else. *See* Ecological Society of America, *supra*, at 14.

[70]For example, the 1914 study of Alaskan glaciers by R.S. Tarr and Lawrence Martin contains a section entitled "Glacier Sculpture Below Sea Level," in which the authors review soundings taken by earlier researchers and conclude: "The great depth below sea level, the form of the submerged topography, and the departures from

Alaska also contends that the Court cannot grant summary judgment because the parties dispute the degree to which excluding submerged lands from the Monument would impair the purpose of studying glaciers. *See* Alaska Count IV Opposition at 18. In Alaska's view, excluding submerged lands would have only "attenuated effects," which it considers "plainly insufficient." *Id*. Alaska says that, at trial, it would rebut the United States' evidence through cross-examination of witnesses and presentation of its own evidence. *See id.*

This contention lacks merit. The party opposing a motion for summary judgment "may not rest upon . . . mere allegations or denials." Fed. R. Civ. P. 56(e). On the contrary, the opposing party's "response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Id*. Despite substantial discovery and

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normal slopes, etc., are all explained satisfactorily by glacial erosion, which seems to have completely erased the structural or stream-carved-and-submerged pre-glacial topography." *See* Molnia Glacier Report, *supra*, at 14 (quoting Tarr and Martin study). Tarr and Martin also investigated the question of whether the glaciers are floating or grounded. Their study notes: "The soundings made in 1910 also establish the fact that, deep as the water is, it is practically impossible that any of the glacier fronts of Disenchantment Bay and Russell Fiord are floating now and they do not seem to have been afloat at any stage of their expansion, judging by the depths of the water. This means that there was always active glacial grinding on the fiord bottom and the problem arises as to where this eroded material is now. . . . Some . . . doubtless remains in the fiord bottoms . . . ." *Id.*

ample time for preparation, Alaska has not presented any affidavit, expert report, or other evidence contradicting the statements by Trabant that excluding submerged lands from the Monument would compromise effective scientific study. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-326 (1986) ("Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case . . . .").

Indeed, at oral argument, when specifically asked what further evidence the State might present at trial, counsel for Alaska said, "it is not that there are facts that the State needs to come forward with, but that there's been a failure of proof on the United States' part." Tr. of Oral Arg. 155 (Feb. 3, 2003). Summary judgment thus would not deprive the State of the opportunity to present additional evidence. The State's contention is that the evidence presented by the United States fails to establish that the purposes of the Monument would be undermined if it did not include submerged lands. *See id.* at 155-56. Although "no defense is required by Rule 56(e) if the movant fails to meet the burden of showing the absence of any genuine issue of material fact," 10B Charles Allen Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2739 (3d ed. 1998) (footnote omitted), the evidence in this case sufficiently demonstrates that the purpose of studying glaciers would be

undermined if the Monument did not include submerged lands.[71]

(3) *Purpose of Studying Remnants of Inter-glacial Forests (1925 Proclamation)*. The third "whereas" clause of the 1925 Proclamation also identifies the study of "valuable relics of ancient interglacial forests" as another purpose of creating the Monument. 1925 Proclamation, 43 Stat. at 1988. The retreat of some glaciers in the Glacier Bay area during the 19th and early 20th century revealed remnants of ancient trees that had been buried underneath ice for millennia. *See* Molnia Glacier Report, *supra*, at 3-4. Scientists hypothesize that these remnants came from forests that grew 2000 to 8000 years ago and were destroyed and covered by the advance of glaciers. *See id.* Some of the remnants sit upon the shores of fiords, but others rest on submerged lands. *See id.* The United States therefore argues that excluding submerged lands from the Monument would compromise the protection and study of these ancient forest remnants. *See* U.S. Count IV Memorandum at 31-32.

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[71] Alaska's contention that the United States' evidence is insufficient is tied to its incorrect assertion with regard to the substantive standard. *See* Alaska Count IV Opposition at 17-18 (asserting that "the United States has plainly failed to carry its burden of demonstrating that the purpose of studying [glacial] behavior would be 'entirely defeated' without including the bay bottom"). As noted earlier, the correct standard is whether exclusion of the submerged lands would compromise or undermine the purposes of the reservation, not whether it would entirely defeat those purposes. The evidence submitted by the United States suffices under the correct substantive standard.

Alaska raises two objections. First, Alaska says that interglacial forest relics occupy just a few sites comprising a tiny fraction of the submerged lands within the Glacier Bay. *See* Alaska Count IV Opposition at 19. The State contends that the United States does not need to reserve all of the submerged lands in Glacier Bay just to protect these areas. Even if what Alaska says is true, the Court should give little weight to this consideration. The Court previously has not second-guessed the extent of the submerged lands reserved by the United States once it has determined that exclusion of title would undermine a purpose of a reservation. For example, in *Alaska (Arctic Coast)*, the Court held that the United States had retained title to all of the submerged lands in the National Petroleum Reserve, not just submerged lands containing oil and gas. *See* 521 U.S. at 40-41. Indeed, if the Court had to determine, acre by acre, which submerged lands were important to the purposes of a reservation, and which were not, deciding submerged lands cases would become almost impossible.

Second, Alaska argues that the United States could study and protect the ancient forest remnants even if it did not have title to the submerged lands on which they lie. *See* Alaska Count IV Opposition at 19. This argument is not persuasive. Alaska unsuccessfully made an almost identical argument in connection with the Arctic National Wildlife Range. Alaska asserted that the United States could protect wildlife using waters within the Range even it did not have title to the submerged lands. *See* Alaska Report, *supra*, at 497-98. Special Master Mann rejected this line of argument on grounds that there might be a need to prevent adverse effects on the submerged lands. *See id.* at 498. He further asserted that the Submerged Lands Act did not

contemplate separating title to submerged lands from resources connected with the land. *See id.* The Special Master agrees with Special Master Mann's reasoning.

(4) *Purpose of Studying and Protecting Wildlife (1925 Proclamation)*. Two portions of the 1925 Proclamation indicate that a third purpose of creating the Monument was to study and protect wildlife. The third "whereas" clause refers to the study of how glaciers affect the "movements and development of flora and fauna." 1925 Proclamation, 43 Stat. at 1988. In addition, the final portion of the Proclamation says:

> The Director of the National Park Service, under the direction of the Secretary of the Interior shall have the supervision, management, and control of the Glacier Bay National Monument, as provided in the act of Congress entitled "An Act to establish a National Park Service, and for other purposes", approved August 25, 1916 (39 Stat., 535), as amended June 2, 1920 (41 Stat., 732)."

Id. The Act of August 25, 1916, cited in the Proclamation, established the National Park Service and addressed national monuments and other reservations. *See* 16 U.S.C. § 1 (2000) (present codification). The Act requires the National Park Service to administer national monuments "by such means and measures as conform to the fundamental purpose of the said . . . monuments . . . *which purpose is to conserve . . . the wild life therein*." *Id.* (emphasis added). The Act thus identifies protecting wildlife as a fundamental purpose of all National Monuments that contain wildlife.

The United States argues that excluding submerged lands from the Monument would undermine the protection of wildlife. *See* U.S. Count IV Memorandum at 32. Although

many different animals live within the boundaries of the Glacier Bay National Monument, the United States focuses on the brown bear. The report of expert Victor G. Barnes Jr. says that brown bears eat barnacles and rye and sedge grasses on tidelands and swim to islands to gather seabird eggs. *See* Victor G. Barnes, Jr., *Brown Bear Use of Marine Habitats in Alaska with Emphasis on Glacier Bay* 6-12 (2002) (Exhibit US-IV-6) [hereinafter Barnes Report]. It also says that brown bears have customarily been hunted from vessels. *See id.* at 13. The report concludes that, if protecting brown bears was a purpose of the Monument, "it would have been necessary to protect both the intertidal habitat and an adjacent zone of nearshore marine water." *Id.* at 19.

Alaska objects on three grounds. First, Alaska argues "protecting, rather than studying, the wildlife was never enunciated as a purpose of the reservation." Alaska Count IV Opposition at 21. This objection ignores the reference in the 1925 Proclamation to the 1916 Act, which identifies "conserving" wildlife as a primary purpose of National Monuments. *See* 16 U.S.C. § 1. In addition, as the United States points out, *see* U.S. Count IV Reply at 14, the study of fauna logically requires its preservation at least to some degree.

Second, Alaska also says that the United States could offer protection to animals even if it did not retain title to the submerged lands. *See* Alaska Count IV Opposition at 21. Alaska, as noted, unsuccessfully made a similar contention in connection with wildlife in the Arctic National Wildlife Range. *See* Alaska Report, *supra*, at 497-98. Special Master Mann persuasively concluded that even if a surface right for wildlife management would suffice to protect the United States' interest,

the Submerged Lands Act does not contemplate separating the rights needed for wildlife management from ownership of lands, including submerged lands. *See id.* at 498.

Third, Alaska says that it disputes the degree to which excluding submerged lands would defeat the purpose of studying or protecting wildlife. It asserts the need for a trial so that it may refute the United States' evidence by cross-examination or otherwise. *See* Alaska Count IV Opposition at 22. This argument lacks merit. As explained previously, a party opposing summary judgment must proffer contrary evidence. *See* Fed. R. Civ. P. 56(e). Alaska has not presented any affidavit, expert report, or other evidence contesting the conclusion of the United States' expert that protection of the brown bear requires protection of submerged lands.

(5) *Purposes of the 1939 Proclamation*. A procedural issue complicates determination of the purposes of the 1939 enlargement of the Glacier Bay National Monument. Alaska averred in its complaint: "The primary purposes of the 1939 expansion of Glacier Bay National Monument were to set aside a refuge for brown bears and to preserve a coastal forest." Amended Complaint, *supra*, ¶ 57. In its Opposition Brief, however, Alaska retreats from this assertion. It says that creating a refuge for brown bears "was in fact not a true purpose of the 1939 expansion. Rather, it was a political strategy that the Park Service abandoned when it no longer served its interests." *See* Alaska Count IV Opposition at 23. The United States objects to this argument on grounds that Alaska has not sought leave to amend the contrary allegations in its complaint. *See* U.S. Count IV Reply at 14-15.

In federal district courts, factual assertions in pleadings, unless amended, are judicial admissions that conclusively bind the party who made them. *See American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988); *White v. ARCO/Polymers Inc.*, 720 F.2d 1391, 1396 (5th Cir.1983); 30B Wright & Miller, *supra,* § 7026 & n.2 (interim ed. 2000). The Special Master, however, recommends that the Court not hold Alaska to what it said in its complaint regarding the purpose of the 1939 Proclamation for three reasons. First, determination of the purpose of a presidential proclamation largely turns on a legal analysis of the proclamation's text and context rather than on facts capable of admission by a party. Second, the Court may relax procedural rules in original jurisdiction cases. *See* Sup. Ct. R. 17.2 (providing that the Federal Rules of Civil Procedure serve only "as guides" in original jurisdiction cases). Third, the United States will not suffer prejudice because it has addressed the purpose of the 1939 Proclamation in its briefs notwithstanding the averment in Alaska's complaint. *See* U.S. Count IV Memorandum at 15-19, 33-34; U.S. Count IV Reply at 14-16.

The 1939 Proclamation, like the 1925 Proclamation, contains a number of "whereas" clauses identifying the factors leading to the enlargement of the National Monument. These clauses say:

> WHEREAS it appears that certain public lands, part of which are within the Tongass National Forest, adjacent to the Glacier Bay National Monument, Alaska, have situated thereon glaciers and geologic features of scientific interest; and

> WHEREAS a portion of the aforesaid public lands contiguous to the said monument are necessary for the proper care, management, and protection of the objects of scientific interest situated on the lands included within the said monument; and
>
> WHEREAS it appears that it would be in the public interest to reserve all of the aforesaid public lands as part of the said monument:

1939 Proclamation, 4 Fed. Reg. at 1661. The 1939 Proclamation, like the 1925 Proclamation, also instructed the National Park Service to administer the enlarged monument under the "Act of August 25, 1916, 39 Stat. 535 (U.S.C., title 16, secs. 1 and 2)." *Id.*

The second "whereas" clause of the 1939 Proclamation declares that the expansion of the Monument was to serve the purpose of furthering the "proper care, management, and protection of the objects of scientific interest" in the Monument. The 1925 Proclamation, as explained above, identified these "objects of scientific interest" as the tidewater glaciers, remnants of ancient forests, and flora and fauna. The enlarged Monument, like all National Monuments, by statute also serves the purpose of conserving wildlife. *See* 16 U.S.C. § 1. Just as excluding submerged lands would undermine the purpose of the 1925 Proclamation, so also would they undermine the purposes of the 1939 Proclamation.

In the Special Master's view, the subject of the purpose of the Monument requires no further analysis to satisfy the *Idaho* inquiry. The United States, however, seeks to bolster the foregoing conclusions with extrinsic evidence of what it calls the "administrative history" of the 1939 Proclamation. The

United States asserts that this administrative history demonstrates that the 1939 Proclamation's primary purpose was to create a habitat for brown bears. The Special Master will address this contention because the United States and Alaska each have devoted considerable attention to it in their briefs. *See* U.S. Count IV Memorandum at 15-19, 33-34; Alaska Count IV Opposition at 23, 27-42.

The documents presented by the United States show the following chronology of events. In 1927, E. W. Wilson, Chief of the Biological Survey, suggested expanding the Monument to provide a reserve for brown bears. *See* Letter from A.E. Demaray, Acting Director, National Park Service to Harold Ickes, Secretary, U.S. Dep't of Interior, at 1 (Sept 2, 1938) (describing Wilson's proposal) (Exhibit US-IV-17). Various reports and hearings followed.[72] In 1934, President

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[72]In 1931, the Senate Special Committee on Conservation of Wild Life Resources submitted a report to Congress recommending "adding to the national monument some of the forest area along the gulf coast and to the south and to the southeast perhaps as far as the Lynn Canal westward to Mount St. Elias, *which would protect a certain number of large brown bears* . . . ." 1 National Resources Committee, *Regional Planning–Part VII Alaska: Its Resources and Development* 253 (1937) (Exhibit US-IV-19) (quoting the Senate Committee's report) (emphasis added).

In 1932, H.W. Terhune of the Department of Agriculture's Biological Survey testified to the Special Committee that he endorsed the possibility of enlarging Glacier Bay as a "bear sanctuary." Special Committee on Conservation of Wild Life Resources, United States Senate, *Hearing on the Protection and Preservation of*

Franklin D. Roosevelt wrote a memorandum to Secretary of Interior Harold Ickes expressing concern about a report that hunters were shooting bears from yachts in Alaska. *See* Barnes Report, *supra*, at 16 (describing this correspondence). Ickes responded that a proclamation for enlarging the Glacier Bay National Monument for the purpose of protecting brown bears

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the Brown and Grizzly Bears of Alaska 32 (Jan. 18, 1932) (Exhibit US-IV-15). In addition, Field Naturalist Joseph Dixon of the National Park Service prepared a report on the proposed expansion of the Monument. This report expressed concern about brown bears being killed outside the original Monument boundaries. *See* John M. Kauffmann, *Glacier Bay National Monument, Alaska: A History of its Boundaries* 19 (1954) (quoting Dixon's report) (Exhibit US-IV-7).

Also in 1932, the Governor of the Territory of Alaska and the District Forester advocated that the "Glacier Bay National Monument be increased in size in order to make a suitable reserve for brown bear . . . ." Notes on Proposed Glacier Bay National Park (Exhibit US-IV-20, p. 19236). Senator Walcott, Chairman of the Senate Special Committee for Conservation of Wild Life Resources, also wrote to the Director of the National Park Service advocating an expansion of the Monument for the purpose of protecting the brown bear. *See* Letter from Senator Frederic C. Walcott to Horace M. Albright, Director, National Park Service (Mar. 18, 1932) (Exhibit US-IV-21). In addition, the Director of the National Park Service informed Representative Milton W. Shreve that the Park Service was considering expansion of the Glacier Bay National Monument for the purpose of protecting brown bears. *See* Letter from Director, National Park Service, to Rep. Milton W. Shreve (Mar. 24, 1932) (Exhibit US-IV-22).

was under consideration. *Id*. After further study,[73] the President issued the 1939 Proclamation.

The National Park Service issued a press release announcing the President's Proclamation. The press release declared: "Inclusion of the coastal area in the monument provides a natural feeding ground for wildlife that will find sanctuary there. The Alaska brown bear is the most common species in the monument and is in most need of protection, being the bear most sought by hunters." U.S. Dep't of the Interior, *Memorandum for the Press* 2 (Apr. 25, 1939) (Exhibit US-IV-11). The press release also mentioned other species of animals that would receive protection. *See id.* In 1940, in a report to Congress, the National Park Service said that the expansion of the Monument "gave much-needed protection to the giant brown bear." *The Status of Wildlife in the United States*, S. Rep. No. 76-1203, at 353 (Feb. 7, 1940) (Exhibit US-IV-25).

Alaska raises four objections. First, Alaska asserts that the Court cannot infer an intent to preserve brown bears when nothing in the 1939 Proclamation says anything about bears. *See* Alaska Count IV Opposition at 27. The United States responds that a prohibition on considering extrinsic evidence of

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[73]In 1937, the National Resources Committee addressed the proposed extension of the Monument in a report. The report said: "The chief reasons that the present monument [should] be increased in size are: (1) it will make a suitable reserve for the brown bear; (2) it will include some of the finest scenery in all Alaska[;] and (3) it will preserve intact a suitable section of the coast forest of Alaska, including the finest extensive stand of Sitka spruce in the Territory." National Resources Committee, *supra*, at 252-253.

the purposes of a federal reservation would block application of the *Idaho* test because federal reservations often do not state in detail the reasons for their creation. *See* U.S. Count IV Reply at 17. The Special Master agrees with the United States. The Court has not relied exclusively on the text of the federal reservations for determining their purposes. For instance, in both *Idaho* and *Montana*, the Court considered extrinsic evidence about how Indian tribes lived in deciding the importance of submerged lands to federal reservations set aside for them. *See Idaho*, 533 U.S. at 265-66, 274 (emphasizing that the Coeur d'Alene Tribe depended on fishing); *Montana*, 450 U.S. at 556 (noting that fishing was not important to the Crow Tribe). The point, however, ultimately does not matter because the 1939 Proclamation's text suffices to establish the purpose of protecting and studying wildlife for the reasons explained above.

Second, Alaska says that President Roosevelt and his advisers believed in 1939 that a National Monument could not serve the purpose of protecting wildlife. Alaska supports this position by observing that, in 1936 and 1937, an attorney in the Solicitor General's office twice wrote memoranda telling the Department of Interior that National Monuments may not serve to protect plants or animals.[74] *See* Memorandum of Golden W. Bell, Assistant Solicitor General, U.S. Dep't of Justice, at 1

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[74]The Court has since clarified that a National Monument may serve the purpose of preserving wildlife. *See Cappaert v. United States*, 426 U.S. 128, 141-142 (1976) (upholding power to create the Devil's Hole Monument in Death Valley for the purpose of preserving rare desert fish).

(Jul. 31, 1936) (Exhibit AK-385) (discussing proposed Joshua Tree National Monument); Memorandum of Golden W. Bell, Assistant Solicitor General, U.S. Dep't of Justice, at 1-2 (Apr. 12, 1937) (Exhibit AK-386) (discussing proposed Organ Pipe Cactus National Monument). This evidence is not persuasive. The memoranda recognized that the Interior Department disagreed with the attorney's interpretation of the law, and there is no indication that this view ever became official government policy.

Third, Alaska argues that the administrative history of the 1939 Proclamation in fact shows that the President did not enlarge the Monument for the purpose of preserving brown bear. *See* Alaska Count IV Opposition at 35-42. Alaska asserts that the Department of Interior initially wanted to enlarge the Monument and transform it into a National Park where brown bears would live. Alaska contends, however, that the Department of Interior realized at the end of 1938 that creating a National Park was not possible because Alaskans wanted to continue mining in the area, but conservationists would oppose mining in a National Park. A memorandum from the Acting Director of the National Park Service to the Secretary of Interior supports this view. *See* Memorandum from A.E. Demaray, Acting Director, National Park Service, U.S. Dep't of Interior, to Harold Ickes, Secretary, U.S. Dep't of Interior (Dec. 27, 1938) (Exhibit AK-446).

On March 6, 1939, the Department of Interior transmitted its proposed proclamation to the President. The cover letter said that the expansion would "round out the area geologically and biologically." Letter from E.K. Burlew, Acting Secretary of the Interior and H. Wallace, Secretary of Agriculture to President

Franklin D. Roosevelt (Mar. 6, 1939) (Exhibit AK-384). The cover letter mentioned glaciers, geological features, remnants of ancient forests, and timber, but not bears. The President issued the Proclamation several weeks later. Alaska asserts that this omission in the cover letter confirms that the proponents of the expansion no longer viewed protection of bears as one of its purposes.

It is difficult to reconcile the cover letter sent to the President with the 1939 press release issued by the National Park Service. On the one hand, if preserving the brown bear was an important goal of the expansion, the cover letter ought to have mentioned it. On the other hand, if preserving the brown bear had ceased to be a major purpose of the expansion, then the press release should not have emphasized this purpose. Accordingly, the extrinsic evidence is not entirely consistent. Having examined all of the materials cited by the parties, the Special Master concludes that the great weight supports the position of the United States. (As explained above, however, the Special Master also believes that the plain meaning of the text of the 1939 Proclamation makes examination of this extrinsic evidence unnecessary.)

Finally, Alaska again argues that the United States could protect the brown bear even if it did not have title to submerged lands. *See* Alaska Count IV Opposition at 32-35. This argument lacks merit. As discussed above, Special Master Mann persuasively rejected a similar contention in *Alaska (Arctic Coast)* when he considered the question of title to submerged lands in the Arctic National Wildlife Range.

(6) *Conclusion*. In sum, the United States has shown that the Glacier Bay National Monument, as it existed at the time of

statehood, clearly included the submerged lands within its boundaries. The descriptions of the Monument in the 1925, 1939, and 1955 Proclamations show that the Monument necessarily embraced submerged lands. In addition, excluding submerged lands would undermine the purposes of studying tidewater glaciers and studying and preserving wildlife and the remnants of ancient forests.

2. Retention of Title at Statehood

If the Glacier Bay National Monument is a federal reservation that clearly included submerged lands at the time of statehood, the second question under *Idaho* is whether "Congress recognize[d] the reservation in a way that demonstrates an intent to defeat state title." 533 U.S. at 273. The United States contends that Congress expressed this intent in a proviso to § 6(e) of the Alaska Statehood Act, 72 Stat. at 340-341. Alaska disagrees.

a. The Alaska Statehood Act (ASA)

The Court previously considered the Alaska Statehood Act's retention of federal lands in *Alaska (Arctic Coast)*, 521 U.S. at 55-61. "The Alaska Statehood Act," the Court said, "set forth a general rule that the United States would retain title to all property it held prior to Alaska's admission to the Union, while the State of Alaska would acquire title to all property held by the Territory of Alaska or its subdivisions." *Id.* at 55 (citation omitted). Section 5 of the Alaska Statehood Act says in part: "Except as provided in section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title, including public lands." ASA § 5, 72 Stat. at 340.

Section 6 then states various special rules. For the purposes of this case, the most important of these special rules appear in § 6(m) and § 6(e). Section 6(m) provides that "[t]he Submerged Lands Act of 1953 . . . shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder." ASA § 6(m), 72 Stat. at 343. Section 6(e) contains an exception to § 5 and a proviso to that exception. The main clause of § 6(e) says:

> All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301; 48 U.S.C., secs. 192-211), as amended, and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478; 48 U.S.C., secs. 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U.S.C., secs. 221-228), as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency . . . .

ASA § 6(e), 72 Stat. at 340.

Following this main clause, a proviso within § 6(e), prevents Alaska from acquiring title to certain refuges and reservations. This proviso says:

> *Provided*, That such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife nor facilities utilized in connection therewith, or in connection with general research activities relating to fisheries or wildlife.

Id., 72 Stat. at 341.

In *Alaska (Arctic Coast)*, the Court held that § 6(e)'s proviso "reflects a very clear intent to defeat state title" to both uplands and submerged lands. 521 U.S. at 57. Explaining the impact of the proviso, the Court said:

> In § 6(e) of the Statehood Act, Congress clearly contemplated continued federal ownership of certain submerged lands—both inland submerged lands and submerged lands beneath the territorial sea—so long as those submerged lands were among those "withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife."

Id. (quoting ASA § 6(e)). Applying this interpretation, the Court held that the United States had retained title to the submerged lands within the Arctic National Wildlife Range.[75] *See id.* at 60-61.

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[75] A complication in *Alaska (Arctic Coast)* was that an application for creating the Arctic National Wildlife Range had been made prior to statehood, but the application was not final at the time of statehood. The appropriate analysis of this complication divided the Court. *See* 521 U.S. at 71 (Thomas, J., dissenting). This case does not present a comparable issue because the 1925, 1939, and 1955 Proclamations had established the Glacier Bay National Monument prior to statehood. The *Alaska (Arctic Coast)* decision also held that Congress had retained submerged lands within the National Petroleum Reserve No. 4. *See id.* at 45-46. This retention occurred under ASA § 11(b), which addressed lands "held for military, naval, Air Force, or Coast Guard purposes, including naval petroleum reserve numbered 4." ASA § 11(b), 72 Stat. at 347. In count IV of this case, the United States relies only on § 6(e) and not on § 11(b).

b. Function of ASA § 6(e)'s Proviso

The United States and Alaska agree that the Glacier Bay National Monument does not fall within the ambit of § 6(e)'s main clause. The Monument was not "property of the United States . . . specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law . . . and under the provisions of the Alaska commercial fisheries laws . . . ." ASA § 6, 72 Stat. at 341. The parties, however, disagree about the consequence of this observation.

Alaska argues that § 6(e)'s proviso acts only as an exception to the main, conveyance clause of § 6(e), not as an independent retention of all lands that the proviso describes. Thus, Alaska argues, the lands affected by the proviso are a "*subset*" of the property described in the main clause. *See* Alaska Count IV Opposition at 44 (emphasis in original). Accordingly, because the Monument does not fit within the main clause of § 6(e), Alaska contends that § 6(e)'s proviso could not have retained the submerged lands within the Monument. It maintains that the submerged lands passed to the State under § 6(m). *See* Tr. Oral Arg. at 149, 167 (Feb. 3, 2003).

The United States objects to this analysis. It asserts that the proviso does not address a subset of the lands covered by the main clause. On the contrary, the United States argues, the main clause and the proviso express two "parallel" principles. U.S. Count IV Reply at 22. These principles, in the United States' view, are that Alaska will receive property covered by the general game and fisheries laws, but that the United States will retain title to all lands set apart as refuges or reservations

for wildlife protection. *See id.* The United States therefore contends that § 6(e)'s proviso may retain submerged lands, even if the submerged lands do not fit within § 6(e)'s main clause. The United States then argues that the Glacier Bay National Monument, like the Arctic National Wildlife Range, was "withdrawn or otherwise set apart" as a refuge or reservation for the protection of wildlife and therefore retained under § 6(e)'s proviso.

Generalizations about the role of a proviso in a statute cannot resolve the dispute between Alaska and the United States about the function of § 6(e)'s proviso. Provisos undoubtedly often serve merely to create exceptions to general rules. The Court, however, has recognized that provisos sometimes state independent rules as opposed to mere exceptions. In *United States v. G. Falk & Bro.*, 204 U.S. 143 (1907), the Court had to determine whether a proviso specifying the time for weighing goods subject to an import duty applied in situations beyond those covered by the main statutory section in which the proviso appeared. The Court noted that often "a proviso refers only to the provision of a statute to which it is appended." *Id.* at 149. The Court, however, said "a presumption of such purpose cannot prevail to determine the intention of the legislature against other tests of meaning more demonstrative." *Id. See also McDonald v. United States*, 279 U.S. 12, 21 (1929) ("[A] proviso is not always limited in its effect to the part of the enactment with which it is immediately associated; it may apply generally to all cases within the meaning of the language used.") (citations omitted); *United States v. Whitridge*, 197 U. S. 135, 143 (1905) ("While no doubt the grammatical and logical scope of a proviso is confined to the subject matter of

the principal clause, we cannot forget that in practice no such limit is observed . . . .").[76] The mere identification of a clause in § 6(e) as a proviso, accordingly, does not necessarily mean that the clause refers only to a subset of the lands covered by § 6(e)'s main clause.

The United States argues that precedent supports its view that § 6(e)'s proviso may retain lands even if the lands do not fit within § 6(e)'s main clause. The Arctic National Wildlife Range, the United States asserts, does not fit within the scope of § 6(e)'s main clause because it is not specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the 1943, 1906, and 1924 laws listed in § 6(e)'s main clause. *See* Tr. Oral Arg. at 125 (Feb. 3, 2003). Yet, the United States observes, the Court held that § 6(e)'s proviso retained the Arctic National Wildlife Range as one of the areas "withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." *See Alaska (Arctic Coast)*, 521 U.S. at 61. The United States accordingly concludes that § 6(e)'s proviso must serve as an independent retention clause, and not merely as an exception to § 6(e)'s main transfer clause.[77]

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[76]A treatise on statutory construction says that using a proviso to state an independent, general rule is "improper drafting," but acknowledges nonetheless that provisos are "frequently used to introduce new and unrelated material." 2A Norman J. Singer, *Statutes and Statutory Construction* § 47:08 at 238 (2000).

[77]The United States said: "The subset theory has an initial appeal, but it has a number of problems. The first one is that if 6(e) really

The United States' argument has a significant difficulty. The Court in *Alaska (Arctic Coast)* assumed in the absence of contrary argument that the Range would fit within the scope of the main clause of § 6(e) but for the proviso. The Court said:

> Under [§ 6(e)'s] clause, the United States transferred to Alaska "[a]ll real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska. . . ." The State does not explain why all of the lands within the Range—uplands as well as submerged lands—would not have been transferred to Alaska at statehood as real property used for the protection of wildlife unless covered by the proviso. *Unless all lands—submerged lands and uplands—covered by the application were "set apart" within the meaning of the proviso to § 6(e), they would have passed to Alaska under the main clause of § 6(e).*

Id. at 60-61 (emphasis added). The Court thus did not need to address the specific argument whether § 6(e)'s proviso could reserve lands that did not otherwise fit within the scope of the § 6(e)'s main clause.

This difficulty, however, does not make the *Alaska (Arctic Coast)* decision inapposite. Although *Alaska* (*Arctic Coast*) did not consider the precise question now posed, the case addressed a very similar question. As in this case, Alaska asserted in

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did have a subset requirement then ANWR would not have been retained by the Federal Government, because ANWR was not held, had not been set apart, solely for the protection of wildlife pursuant to those three statutes." Tr. Oral Arg. at 125 (Feb. 3, 2003).

Alaska (*Arctic Coast*) that the proviso says nothing more than that the lands it describes are not included in the transfer effected by § 6(e)'s main clause. Accordingly, Alaska reasoned, even if the proviso excluded the Arctic National Wildlife Range from the transfer effected by § 6(e), the proviso could have no impact on the transfer effected by § 6(m), which makes the Submerged Lands Act applicable to the State of Alaska. In other words, Alaska argued that, even if the § 6(e) proviso applied, its only impact was to take the Arctic National Wildlife Range out of § 6(e) altogether, leaving the submerged lands within the Range subject to transfer pursuant to § 6(m). *See* Reply Brief for the State of Alaska at 44-45, *United States v. Alaska* (Oct. 10, 1996) (No. 84, Orig.). The Court rejected Alaska's argument, saying:

> If [the Arctic National Wildlife Range is covered by § 6(e)'s proviso], then the United States retained title to submerged lands as well as uplands within the Range. This is so despite § 6(m) of the Statehood Act, which applied the Submerged Lands Act of 1953 to Alaska. The Submerged Lands Act operated to confirm Alaska's title to equal footing lands and to transfer title to submerged lands beneath the territorial sea to Alaska at statehood, *unless* the United States clearly withheld submerged lands within either category prior to statehood. In § 6(e) of the Statehood Act, Congress clearly contemplated continued federal ownership of certain submerged lands—both inland submerged lands and submerged lands beneath the territorial sea—so long as those submerged lands were among those "withdrawn or

> otherwise set apart as refuges or reservations for the protection of wildlife."

521 U.S. at 56-57 (emphasis in original).

The Court thus disagreed with Alaska's proposed interpretation of § 6(e)'s proviso. If, as Alaska had argued, § 6(e) simply had no application to lands covered by its proviso, then some other provision within the Alaska Statehood Act, such as § 6(m), would have to determine the disposition of such lands. The Court's decision, however, treated the proviso as an independent retention clause, not merely as a limitation on a transfer clause. Put another way, if Alaska's construction were correct, § 6(e) as a whole could only transfer property, it would never retain any property.[78] By holding that § 6(e)'s proviso operates independently from § 6(m), the Court decided that § 6(e)'s proviso itself may retain the property it describes.

Based on *Alaska (Arctic Coast)*, the Special Master concludes that § 6(e)'s proviso operates as an independent retention clause and does not merely except certain property from the transfer effected by § 6(e)'s main clause. If the Glacier Bay National Monument is covered by the proviso—an issue addressed immediately below—then the United States retained all the lands, including the submerged lands, within the Monument.

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[78] *See* Reply Brief for the State of Alaska, *United States v. Alaska*, No. 84, Orig., at 44 (1996) ("Congress included section 6(e) in the Statehood Act to transfer property used for fish and wildlife management to Alaska, not to retain property.").

c. Coverage of ASA § 6(e)'s Proviso

If § 6(e)'s proviso operates as an independent retention clause, the question arises whether the Glacier Bay National Monument at the time of statehood was "withdrawn or otherwise set apart as [a] refuge[] or reservation[] for the protection of wildlife" within the meaning of the proviso. The Special Master concludes that it was, for two reasons.

First, all national monuments containing wildlife within their boundaries are set apart for the purpose of conserving this wildlife. As explained above, 16 U.S.C. § 1 directs the National Park Service to administer all national "parks, *monuments*, and reservations" in accordance with

> the fundamental purpose of the said parks, *monuments*, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. § 1 (emphasis added). The Glacier Bay National Monument is a national monument and it contains wildlife within its boundaries. Accordingly, under 16 U.S.C. § 1, it was set aside for conservation of this wildlife for future generations to enjoy.

Alaska presents no substantial argument against this conclusion. Although the United States relies on 16 U.S.C. § 1 throughout its memorandum in support of summary judgment, Alaska does not cite the statute in its opposition brief. At oral argument, counsel for Alaska dismissed 16 U.S.C. § 1 as a "mishmash of overgeneralization." Tr. Oral Arg. at 163 (Feb. 3, 2003). Counsel explained that the language of the provision

is too broad because some national parks do not have historic objects and some national parks and national monuments do not have any wildlife. *See id.*

This argument overlooks the use of the word "therein" in 16 U.S.C. § 1. Under the statute, monuments are set aside to conserve the wildlife "therein." If some national monuments do not contain wildlife "therein," then this part of the statute does not apply to them. The Glacier Bay National Monument, however, undisputedly contains abundant wildlife within its boundaries, and therefore was set aside for the preservation of this wildlife.

Second, as described previously, the texts of the 1925 Proclamation and the 1939 Proclamation indicate that the Monument was created in part for the purpose of preserving wildlife. *See supra* part IV.B.1.b.(4)-(5). The 1925 Proclamation expressly identifies the study of flora and fauna as one of its purposes. The study of fauna, as explained above, necessarily embraces its preservation. The 1939 Proclamation indicates that the purposes of the expansion include the "proper care, management, and protection of the objects of scientific interest" within the Monument. These objects of scientific interest, according to the 1925 Proclamation, include flora and fauna.

Alaska raises one objection to these arguments on the basis of legislative history. The State has located some documents suggesting that the proviso applies only to refuges and reservations administered by the Fish and Wildlife Service. *See, e.g., Hearings before the Committee on Interior and Insular Affairs on S. 50, A Bill to Provide for the Admission of Alaska into the Union*, 83 Cong. (2d Sess.) 55-71 (1954) (Exhibit AK-452) (testimony of the Clarence Rhode, Regional Director of the Fish

and Wildlife Service, which makes no mention of any National Park or National Monument). The United States says that other legislative history points in a different direction. *See* U.S. Count IV Reply at 22. In light of the text of the proviso (which does not mention this limitation), the text of 16 U.S.C. § 1, and the text of the 1925 and 1939 Proclamations, this legislative history does not contribute to the understanding of whether the proviso applies to the Glacier Bay National Park.[79]

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[79] A few administrative materials over the years have identified the Glacier Bay National Monument as an area set aside for wildlife. For example, a 1929 Department of Agriculture publication listed the Glacier Bay National Monument as a "wild-life reservation" administered by the National Park Service. Department of Agriculture, *National Wild-life Reservations,* Miscellaneous Publication No. 51 at 5 & n.1 (1929) (listing the Glacier Bay National Monument but noting that National Monuments are "not strictly game preserves or bird refuges.") (Exhibit US-IV-12). Similarly, as noted above, in a 1940 report to Congress, the National Park Service said that the expansion of the Monument "gave much-needed protection to the giant brown bear." *Status of Wildlife in the United States*, *supra*, at 353. Alaska objects that these obscure documents in all likelihood never came to the attention of the members of Congress who voted for Alaska's statehood. *See* Alaska Count IV Opposition at 49. This objection ultimately has no consequence because § 6(e), 16 U.S.C. § 1, and the texts of the 1925 and 1939 Proclamations make reliance on these administrative materials unnecessary.

The United States also suggests that Congress would not have diminished a national monument except in a much more explicit manner. *See* U.S. Count IV Memorandum at 40-41. It notes that, when Congress eliminated eight other national monuments between

For all of these reasons, the Special Master concludes that the United States retained title to the submerged lands in the Glacier Bay National Monument through § 6(e) of the Alaska Statehood Act.

C. Conclusion

The Special Master recommends that the Court grant summary judgment to the United States on count IV of Alaska's amended complaint and order that Alaska take nothing on its claim to submerged lands within the boundaries of the Glacier Bay National Monument.

V. THE TONGASS NATIONAL FOREST (Count III)

In count III of Alaska's amended complaint, Alaska claims title to "all lands between mean high and mean low tide and three miles seaward from the coast line inside the boundaries of the Tongass National Forest." Amended Complaint to Quiet Title*, supra*, ¶ 43. Alaska specifically asserts that the United States' withdrawal and reservation of lands for the Tongass National Forest did not defeat Alaska's acquisition of title to submerged lands within the Forest's boundaries at the time of statehood. *See id.* ¶ 44. In response, the United States has drafted an intricate disclaimer of title that the parties now agree

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1949 and 1956, it used express statutory provisions. *See, e.g.*, Pub. L. No. 84-891, 70 Stat. 898 (Aug. 1, 1956) (abolishing Fossil Cycad National Monument in South Dakota). A presumption that Congress does not lightly decrease national monuments, however, can have little force when the Court also presumes that Congress does not intend to defeat state title to submerged lands.

satisfies all of their interests and concerns. The Special Master recommends that the Court confirm this disclaimer and dismiss count III for lack of jurisdiction.

A. Overview

Two late-19th century statutes gave the President power to reserve federal forest lands. Section 24 of the Act of March 3, 1891, authorized the President to set apart as public reservations "public lands wholly or in part covered with timber or undergrowth." 26 Stat. 1095, 1103 (1891) [hereinafter 1891 Act]. The Act of June 4, 1897, continued this authorization, but limited the purposes of reservations under the 1891 Act. *See* 30 Stat. 11, 34-35 (1897) [hereinafter 1897 Act]. The 1897 Act decreed: "No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . . ." *Id.* at 35.

In 1902, 1907, 1909, and 1925, Presidents Theodore Roosevelt and Calvin Coolidge issued proclamations pursuant to these statutes setting aside lands now included in the Tongass National Forest. *See* Proclamation No. 37, 32 Stat. 2025, 2025-26 (1902) (setting aside the Alexander Archipelago Forest Reserve, which was later added to the Tongass National Forest); Proclamation of Sept. 10, 1907, 35 Stat. 2152 (1907) (creating the Tongass National Forest); Proclamation of Feb. 16, 1909, 35 Stat. 2226 (1909) (expanding the boundaries of the Tongass National Forest); Proclamation No. 1742, 44 Stat. 2578 (1925) (same). Various other proclamations, including ones related to

the Glacier Bay National Monument, have removed some of these lands.

These proclamations have made the Tongass National Forest by the far the largest national forest in the United States. As the chart in Appendix O shows, the Forest's boundaries surround almost the entire Alexander Archipelago and the Southeast Alaskan mainland. The Forest extends nearly 500 miles from north to south, and 100 miles from east to west, and covers a total area of almost 17 million acres.

In count III of its amended complaint, as noted, Alaska claims title to submerged lands within the Tongass National Forest that lie within three nautical miles of Alaska's coast line. *See* Amended Complaint to Quiet Title, *supra*, ¶ 43. The location of Alaska's coast line, as discussed in parts II and III above, depends on whether the waters of the Alexander Archipelago are inland waters or territorial sea. If they are historic inland waters or the inland waters of juridical bays, then the State's coast line would run along the limit of these inland waters. *See* Submerged Lands Act, 43 U.S.C. § 1301(c) (defining the "coast line" to follow the "line marking the seaward limit of inland waters"). Otherwise, Alaska's coast line generally would follow the shores of the islands and the mainland. *See id.* (defining the coast line to follow "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea" where there are no inland waters). In either case, the State's boundaries would encompass all submerged lands lying within three miles of the coast line. *See id.* at § 1301(b). The State would possess title to all submerged lands within its boundaries, *see id.* § 1311(a)(1),

unless the United States retained title to them at statehood, *see id.* at § 1313(a).

As described in part IV above, the Court has decided several recent cases concerning federal reservations of submerged lands. The Court begins with a "strong presumption" against interpreting federal legislation to defeat a state's acquisition of title. *Montana*, 450 U.S. at 552. It then applies a "two-step test of congressional intent" to determine whether Congress prevented submerged lands from transferring to a state under the Submerged Lands Act. *Idaho*, 533 U.S. at 273. The Court asks (1) whether "an Executive reservation clearly includes submerged lands," and (2) whether "Congress recognize[d] the reservation in a way that demonstrates an intent to defeat state title." *Id.* (citations omitted).

Alaska moved for summary judgment on count III, contending that the United States could not satisfy either test with respect to the submerged lands within the Tongass National Forest. With respect to the first test, Alaska argued that Presidents Roosevelt and Coolidge lacked authority to include submerged lands in the Tongass National Forest and did not intend to include them. *See* Alaska Count III Memorandum at 6-36. The State asserted that submerged lands did not constitute "public lands" and thus could not be reserved under the 1891 Act. *See id.* at 11-16. In addition, Alaska contended that reserving submerged lands would not improve the forest or secure conditions of favorable water flows as required for reservations under the 1897 Act. *See id.* at 7-11. Alaska also said that the language of the relevant proclamations revealed an intent only to reserve uplands. *See id.* at 16-36. With respect to the second test, Alaska asserted that nothing in the Alaska

Statehood Act retained the submerged lands within the Tongass National Forest. *See id.* at 37-49.

The United States filed a memorandum in response to Alaska's motion. In the memorandum, the United States expressed doubt about Alaska's position that the 1902, 1907, and 1909 proclamations did not embrace submerged lands. *See* U.S. Count III Response at 5 & n.3. The United States, however, agreed with Alaska that Congress did not clearly intend to retain title to submerged lands at statehood merely because those lands were located within the Forest's boundaries. *See id.* at 5. In contrast to its argument with respect to submerged lands within the Glacier Bay National Monument, the United States did not contend that the proviso in § 6(e) of the Alaska Statehood Act, 72 Stat. at 340-41, retained the submerged lands within the Tongass National Forest.

The United States, however, did not concede that Alaska should receive summary judgment on count III. The United States argued that even though Congress did not intend to reserve submerged lands merely because they were within the Tongass National Forest, Alaska still did not own all of the submerged lands within the Forest's boundaries. On the contrary, the United States identified four classes of property to which the State might not have title or was not claiming title. *See* U.S. Count III Response at 6-9.

One class of submerged lands identified by the United States consists of lands subject to § 5 of Submerged Lands Act, § 43 U.S.C. § 1313. This provision establishes certain exceptions to the ordinary transfer of title to the states. One exception in § 5 is for "all lands filled in, built up, or otherwise reclaimed by the United States for its own use." *Id.* § 1313(a). The United

States asserted that the Forest Service has built log transfer facilities, docks, and other structures on submerged lands that may come within this exception. *See* U.S. Count III Response at 8. Another exception in § 5 covers "all structures and improvements constructed by the United States in the exercise of its navigational servitude." 43 U.S.C. § 1313(c). The United States apparently also has made improvements of this kind. *See* U.S. Count III Response at 8-9. Still another exception is for lands "expressly retained" by the United States. 43 U.S.C. § 1313(a). As explained in the analysis of count IV, the proviso in § 6(e) of the Alaska Statehood Act retains lands set aside for the protection of wildlife. *See* ASA § 6(e), 72 Stat. 340-41. Although the United States did not argue that the presidential proclamations retained the entire Tongass National Forest for the purpose of preserving wildlife, the United States asserted that the Forest Service administratively had set aside some submerged lands for this purpose. *See* U.S. Count III Response at 9.

A second class of submerged lands identified by the United States consists of lands within the boundaries of the Tongass National Forest that lie more than three miles from Alaska's coast line. *See id.* at 6. Alaska would not acquire title to these lands under the Submerged Lands Act because a state's boundaries extend only three miles from its coast line. *See* 43 U.S.C. § 1301(b). Alaska's complaint, moreover, seeks title only to lands within its boundaries. *See* Amended Complaint to Quiet Title, *surpa*, ¶ 43.

A third class of submerged lands identified by the United States consists of lands reserved under the jurisdiction of agencies other than the Department of Agriculture, which

administers the Tongass National Forest through the Forest Service. The Quiet Title Act requires a state to give 180 days' notice of intent to sue to the federal agency with jurisdiction over the land in dispute before commencing a legal action. *See* 28 U.S.C. § 2409a(m) (2000). Alaska apparently gave this notice to the Department of Agriculture, but to no other agency. *See* U.S. Count III Response at 6-7.

The fourth class of submerged lands consists of lands held for military, naval, Air Force, and Coast Guard purposes. *See* U.S. Count III at 7 n.4. Section 11(b) of the Alaska Statehood reserved these lands to the United States. *See* ASA § 11(b), 72 Stat. at 347; *Alaska (Arctic Coast)*, 521 U.S. at 41-42.

In light of this submission, and a subsequent motion filed jointly by the parties, the Special Master stayed proceedings on count III so that the parties could engage in discussions regarding the proper wording of a disclaimer that would satisfy the interests of both parties. Following those discussions, with the advice and approval of Alaska, the United States prepared the proposed disclaimer of title included in Appendix A.

B. The Proposed Disclaimer

In the first paragraph of the proposed disclaimer the United States generally disclaims title to submerged lands within the boundaries of the Tongass National Forest. This paragraph says:

> (1) Pursuant to the Quiet Title Act, 28 U.S.C. 2409a(e), and subject to the exceptions set out in paragraph (2), the United States disclaims any real property interest in the marine submerged lands within the exterior

> boundaries of the Tongass National Forest, as those boundaries existed on the date of Alaska Statehood.

The second paragraph then lists four exceptions corresponding to the special classes of property described above that the United States may have retained at statehood. This paragraph says:

> (2) The disclaimer set out in paragraph (1) does not disclaim:
>
> (a) any submerged lands that are subject to the exceptions set out in Section 5 of the Submerged Lands Act, ch. 65, Tit. II, § 5, 67 Stat. 32, 43 U.S.C. 1313;
>
> (b) any submerged lands that are more than three miles seaward of the coast line;
>
> (c) any submerged lands that were under the jurisdiction of an agency other than the United States Department of Agriculture on the date of the filing of the complaint in this action;
>
> (d) any submerged lands that were held for military, naval, Air Force or Coast Guard purposes on the date Alaska entered the Union.

Paragraph (2), importantly, merely creates exceptions to the disclaimer. It does not establish that the United States has title to any specific lands. If the Court confirms the disclaimer, Alaska and the United States would remain free to contest title to areas covered by these exceptions outside this litigation. *See* Memorandum in Support of Unopposed Motion of the United States for Confirmation of the Disclaimer of Title to Marine Submerged Land Within the Tongass National Forest at 6-7 [hereinafter U.S. Disclaimer Memorandum].

Paragraph (3) contains necessary definitions. A very significant clause is paragraph (3)(e), which clarifies what paragraph (2)(a) means when it creates an exception for "expressly retained" submerged lands covered by the exception in § 5 of the Submerged Lands Act, 43 U.S.C. § 1313(a). Paragraph (3)(e) says that "expressly retained" lands under § 5 include lands under the Department of Agriculture's jurisdiction only if those lands were withdrawn by federal actions *other than* the 1902, 1907, 1909, and 1925 Proclamations or were subject to certain listed applications for withdrawal. It thus makes clear that the United States is not claiming title to any submerged lands merely because of their inclusion in the proclamations creating the Tongass National Forest.

C. Confirmation and Dismissal

The Quiet Title Act recognizes that the United States sometimes may wish to disclaim ownership of property when sued in a quiet title action. A sufficient and proper disclaimer by the United States makes adjudication of a quiet title action unnecessary. The Quiet Title Act, accordingly, provides that a disclaimer will terminate federal court jurisdiction. The Act, in 28 U.S.C. § 2409a(e), says:

> If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

28 U.S.C. § 2409a(e). Although this section refers to the jurisdiction of "the district court," the parties assume (without argument) that it applies equally to the jurisdiction of the Supreme Court. *See* U.S. Disclaimer Memorandum at 6; Alaska's Disclaimer Reply to at 3.[80]

Under the language of the quoted provision, a disclaimer requires the dismissal of a quiet title claim only if the disclaimer is "confirmed by order of the court." In this case, both the United States and Alaska support confirmation of the United States' proposed disclaimer. *See* Alaska Disclaimer Reply at 3. An amicus brief filed on behalf of the Wilderness Society, the Sierra Club, and the National Wildlife Federation (the Environmental Group Amici), however, argues against confirmation.[81] *See* Brief of *Amici Curiae* the Wilderness Society, Sierra Club, and National Wildlife Federation in Opposition to the United States's Motion for Confirmation of the Proposed Disclaimer [hereinafter Amici Disclaimer Opposition]. A question thus has

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[80]As explained previously, *see supra* part I.A., 28 U.S.C. § 2409a and § 1346(f) appear to contemplate that federal district courts will hear quiet title actions. The Court, however, has held that it may exercise original jurisdiction over quiet title actions brought by a state against the United States under § 2409a. *See California v. Arizona*, 440 U.S. at 67-68 (suit by California against Arizona and the United States).

[81]The Special Master also invited amicus participation by a group of Alaska Natives (Franklin H. James, the Shakan Kwaan Thling-Git Nation, Joseph K. Samuel, and the Taanta Kwaan Thling-Git Nation) who had earlier sought leave to intervene in this litigation. This group did not file a brief.

arisen about the proper scope of judicial inquiry when deciding whether to confirm a disclaimer of title and what conclusion that inquiry should produce in this case.

1. Positions of the Parties and Amici

The United States and Alaska characterize the task of confirming a disclaimer as automatic or ministerial. *See* U.S. Disclaimer Memorandum at 6; Alaska Disclaimer Reply at 14. In their view, the Court must determine only whether the disclaimer fully covers the lands at issue, leaving nothing to adjudicate, and whether the United States acted in good faith in making the disclaimer. *See* U.S. Disclaimer Memorandum at 6; Alaska Disclaimer Reply at 14. They accordingly assert that the Court should not consider the merits of any claim that the United States might have to the property.

The United States and Alaska specifically reject any comparison of the disclaimer to a settlement and also reject any equating of the confirmation of the disclaimer to the issuance of a consent decree. *See* U.S. Disclaimer Reply at 8-11; Alaska Disclaimer Reply at 11-14. On the contrary, they view the disclaimer as a unilateral disavowal of title by the United States not requiring any compromise or agreement by Alaska. The disclaimer, they assert, by itself removes any cloud on Alaska's title and thereby eliminates any controversy.

The Environmental Group Amici have a very different view. They liken the confirmation of a disclaimer to the issuance of a consent decree. *See* Amici Disclaimer Opposition at 2. They accordingly argue that the Court may confirm the disclaimer only if it is "fair, adequate, and reasonable" and "not illegal or contrary to the public interest." *Id.* (quoting *United States v.*

North Carolina, 180 F.3d 574, 581 (4th Cir. 1999) (internal quotation marks omitted)).

The Environmental Group Amici then make a three-step argument for why the Court should conclude that the United States retained title to the submerged lands at issue in count III. First, they argue that Presidents Roosevelt and Coolidge had authority to include submerged lands within the Tongass National Forest. The Amici explain that the 1891 Act allowed the President to reserve "public lands wholly or in part covered with timber" and thus permitted reservations to extend into submerged lands. *See id.* at 14 (quoting 26 Stat. 1103).

Second, the Environmental Group Amici assert that the reservations made in the 1902, 1907, 1909, and 1925 proclamations necessarily embraced submerged lands. *See id.* at 15. They assert that the proclamations set boundary lines in the territorial sea to ensure the inclusion of submerged lands. *See id.* They further contend that reservation of tidelands and submerged lands was critical to the purpose of the Tongass National Forest; they explain that the Forest Service needed title to establish docks and wharves because the sea furnished the only access to the Forest. *See id.* at 16.

Third, the Environmental Group Amici contend that the United States retained the submerged lands in § 5 and § 6(a) of the Alaska Statehood Act. Section 5 of the Alaska Statehood Act, as explained above, generally retained federal property. *See* ASA § 5, 72 Stat. at 340. Section 6(a) then created an exception allowing Alaska to choose 400,000 acres of national forest lands. *See id.* § 6(a), 72 Stat. at 340. The Amici argue that § 6(a) thereby implies that the United States retained all

other National Forest lands, including the submerged lands at issue in this case. *See* Amici Disclaimer Opposition at 20-21.

2. Analysis

Although the Environmental Group Amici are not parties to this litigation, their position deserves special attention because of the context in which they have filed their brief. When the United States responded to Alaska's motion for summary judgment, the United States asked for, and later received, a stay to allow the United States and Alaska to develop a "stipulation" that would provide the "basis for formulating a consent decree respecting Count III." U.S. Count III Response at 11. The United States further said that the "appropriate point for the amici curiae to articulate their objections . . . would be at the conclusion of the collaborative process that the United States envisions for reaching a stipulation respecting the federally retained parcels." *Id.* Yet now that the United States has prepared a disclaimer, and the Amici have attempted to respond, the United States denies that confirming a disclaimer is like entering a consent decree. The United States also now admits no role for the Environmental Group Amici to play in voicing their concerns about the merits.

Under these circumstances, the Amici understandably may feel that their views on the merits were called for but then excluded from consideration. The Special Master, however, sees no way to interpret § 2409a(e) to make confirmation depend on whether litigation might have demonstrated that the submerged lands at issue in count III belong to the United States. Several factors lead to this conclusion.

First, interpreting § 2409a(e) to require resolution of the merits would render disclaimers purposeless. If disclaimers do not make litigation of the merits unnecessary, then they accomplish nothing. Moreover, if a court has decided the merits, dismissing the case without entering a judgment based on its decision would waste the effort expended by the court. Congress surely did not intend these results when it enacted § 2409a(e). *See United States v. Wilson*, 503 U.S. 329, 334 (1992) (holding that arbitrary or absurd results are to be avoided in the process of statutory interpretation).

Second, interpreting § 2409a(e) to require consideration of the merits would raise a constitutional difficulty. If the United States has disclaimed title, then no dispute continues to exist between the parties. An examination of the merits, accordingly, might violate Article III's case or controversy requirement. *See* U.S. Const. art. III, § 2; *Muskrat v. United States*, 219 U.S. 346, 362 (1911). The doctrine of avoidance counsels against this interpretation. *See United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) ("where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter") (citation omitted).

Third, a disclaimer of title under § 2409a(e) differs from a settlement confirmed by a consent decree. A settlement typically involves an agreement and compromise by both parties. When a court confirms a settlement by a consent decree, the court customarily retains jurisdiction and puts its authority behind the decree. In such circumstances, courts do not act without first examining the legality of the settlement.

See Local Number 93, Intern. Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525-26 (1986) (while the "parties' consent animates the legal force of a consent decree," a court must insure that the parties do not "agree to take action that conflicts with or violates the statute upon which the complaint was based") (citations omitted).

A disclaimer under § 2409a(e), by contrast, consists of a unilateral disavowal of interest by the United States. Section § 2409a(e) does not require the concurrence of the plaintiff. In this case, for example, although the United States and Alaska discussed the wording of the disclaimer, the parties did not "settle" because Alaska did not compromise its claim in any way. Moreover, because § 2409a(e) requires dismissal for lack of jurisdiction after confirmation, a court does not put its continuing authority behind a decree. A court thus does not have the same reason to examine the legality of the disclaimer as it does the legality of a consent decree.

Finally, the limited precedent available generally supports the view that courts should not examine the grounds on which the United States has decided to disclaim title. Although no cases say very much about the confirmation inquiry under § 2409a(e), federal circuit and district courts have confirmed disclaimers under § 2409a(e) without questioning the legal basis for the United States' determination that it does not have title. *See, e.g., Leisnoi Inc. v. United States*, 313 F.3d 1181, 1184 (9th Cir. 2002); *Lee v. United States*, 809 F.2d 1406, 1409 (9th Cir. 1987), *cert. denied sub nom. Lee v. Eklutna, Inc.*, 484 U.S. 1041 (1988); *Alaska v. United States*, 662 F. Supp. 455, 457-58 (D. Alaska 1987), *aff'd sub nom. Alaska v. Ahtna Inc.*, 891 F.2d 1401 (9th Cir. 1989), *cert. denied*, 495 U.S. 919

(1990); *Madan v. United States*, 850 F. Supp. 148, 151 (N.D.N.Y. 1994); *W.H. Pugh Coal Co. v. United States*, 418 F. Supp. 538, 539 (E.D. Wis. 1976).

One might argue that, if a court's confirmation of a disclaimer is purely ministerial and involves no review of the disclaimer's legality, then the requirement of confirmation seems purposeless. The United States, however, suggests a plausible purpose for the confirmation requirement besides serving as a vehicle for judicial review of a disclaimer's legality. The United States suggests that Congress might have been concerned that an executive branch disclaimer of title, if not accompanied by a court order, could be insufficient to provide a landowner with clear title. Accordingly, the United States suggests, the purpose of the confirmation requirement is to ensure that a landowner who brings suit under the Quiet Title Act has a clear, marketable title following a dismissal of the action on the basis of a disclaimer.[82] U.S. Disclaimer Reply at 6.

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[82]The United States also suggests that "[t]he purpose of the QTA's confirmation process is to ascertain that the United States' disclaimer has in fact eliminated the dispute between the parties and thereby justifies dismissal of the action in whole or in part." U.S. Disclaimer Reply at 4; *see also* Alaska Disclaimer Reply at 7 (making a similar suggestion). The Special Master finds this other suggested purpose less plausible, because, in applying the disclaimer provision, a court would have to determine whether the United States had disclaimed "all interest in the real property or interest therein adverse to the plaintiff," even if § 2409(e) did not require the court to "confirm" the disclaimer.

One district court case held that § 2409a(e) did not permit the United States to convey property to a third party following the commencement of a quiet title action and then disclaim interest in the property. *See LaFargue v. United States*, 4 F. Supp. 2d 580, 589 (E.D. La. 1998). The court reasoned that "such a disclaimer—*i.e.*, one based on the sale of the government's interest after the filing of a quiet title action—is not the type of disclaimer contemplated by § 2409a(e)." *Id.* Nothing comparable happened here; the United States simply conceded that it did not have title without first attempting to convey the property to someone other than Alaska.

The Environmental Group Amici object that allowing the Solicitor General to decide whether the United States has title to property would strip power from Congress and the courts. They assert that if Congress did not intend for Alaska to take title to the submerged lands at issue in count III, then the executive branch may not overrule that decision. Accordingly, in their view, the courts must review the merits of the United States' position before confirming the disclaimer. *See* Amici Disclaimer Opposition at 7-8.

This objection fails because Congress has authorized the executive branch to make disclaimers in § 2409a(e). The executive branch thus does not act contrary to the desires of Congress by making disclaimers pursuant to this provision. Section 2409a(e), moreover, does not represent an improper delegation of power to the executive branch. Even before § 2409a(e)'s enactment, the Court recognized that the Solicitor General could remove issues from a case under his broad authority to litigate on behalf of the federal government. *See Utah v. United States*, 394 U.S. 89, 94-95 (1969) (holding that

the Solicitor General could enter a stipulation that the United States would not demand payment for certain valuable lands because the Solicitor General believed he could "advance no colorable argument which could conceivably vindicate the Federal Government's" interest in the lands).

Having concluded that § 2409a(e) does not permit a court to make an independent assessment of the United States' claim to title, a question remains as to what a court should consider in deciding whether to confirm a disclaimer. The Special Master agrees with the answer supplied by the United States and Alaska. In the absence of any allegation of bad faith or other extenuating circumstance, the court should determine only whether the disclaimer fully addresses the lands at issue and thus should ensure that dismissal will not prejudice the plaintiff. *See* U.S. Disclaimer Reply at 2; Alaska Disclaimer Reply at 3. This position appears to coincide with the position taken in the federal circuit and district court cases cited above. Here, Alaska and the United States agree that the confirmation serves this purpose.[83] The Special Master has reviewed the matter with care and concurs in their agreement. Accordingly, no grounds exist for rejecting the United States' proposed disclaimer.

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[83]Because of the exceptions in the disclaimer, the United States may not have disclaimed all interest in the real property described in count III of Alaska's amended complaint. Alaska nevertheless agrees that the United States has disclaimed its "interest therein adverse to the plaintiff." *See* Alaska Disclaimer Reply at 3.

D. Conclusion

For the foregoing reasons, the Court should confirm the United States' proposed disclaimer as set out in Appendix A. The parties agree that this confirmation will deprive the Court of jurisdiction over Alaska's claim in count III. *See* 28 U.S.C. 2409a(e). The Court therefore should include the disclaimer in its decree, dismiss Alaska's motion for summary judgment on count III as moot, and dismiss count III of Alaska's amended complaint for lack of jurisdiction.

VI. CONCLUSION

For the reasons set forth in this report, the Special Master recommends that the Court grant summary judgment to the United States on counts I, II, and IV of Alaska's amended complaint, deny summary judgment to Alaska on counts I and II, and confirm the United States' proposed disclaimer of title to the submerged lands at issue in count III. The Court's decree should (1) state that Alaska takes nothing on counts I, II, and IV of its amended complaint; (2) incorporate the disclaimer for count III as it appears in Appendix A below; (3) dismiss Alaska's motion for summary judgment on count III as moot; and (4) dismiss count III for lack of jurisdiction. These actions will end this litigation.

Respectfully submitted,

Gregory E. Maggs
Special Master

Washington, D.C.
March 2004

APPENDIX A

Proposed Order Confirming the United States' Disclaimer of Certain Marine Submerged Lands Within the Tongass National Forest(a)

(1) Pursuant to the Quiet Title Act, 28 U.S.C. 2409a(e), and subject to the exceptions set out in paragraph (2), the United States disclaims any real property interest in the marine submerged lands within the exterior boundaries of the Tongass National Forest, as those boundaries existed on the date of Alaska Statehood.

(2) The disclaimer set out in paragraph (1) does not disclaim:

(a) any submerged lands that are subject to the exceptions set out in Section 5 of the Submerged Lands Act, ch. 65, Tit. II, § 5, 67 Stat. 32, 43 U.S.C. 1313;

(b) any submerged lands that are more than three miles seaward of the coast line;

(c) any submerged lands that were under the jurisdiction of an agency other than the United States Department of Agriculture on the date of the filing of the complaint in this action;

(d) any submerged lands that were held for military, naval, Air Force or Coast Guard purposes on the date Alaska entered the Union.

(3) For purposes of this disclaimer:

(a) The term "coast line" means "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters," as defined in Section 2(c) of the Submerged Lands Act, ch. 65, Tit. II, § 5, 67 Stat. 32, 43 U.S.C. 1301(c).

(b) The term "submerged lands" means "lands beneath navigable waters" as defined in Section 2(a) of the Submerged Lands Act, ch. 65, Tit. II, §5, 67 Stat. 32, 43 U.S.C. 1301(a).

(c) The term "marine submerged lands" means "all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide."

(d) The term "jurisdiction" has the meaning of that word in the Quiet Title Act, 28 U.S.C. 2409a(m).

(e) The exception set out in Section 5 of the Submerged Lands Act for lands "expressly retained by or ceded to the United States when the State entered the Union" does not include lands under the jurisdiction of the Department of Agriculture unless, on the date Alaska entered the Union, that land was: (i) withdrawn pursuant to act of Congress, presidential proclamation, executive order, or public land order of the Secretary of Interior, other than the presidential proclamation of

August 20, 1902 (32 Stat. 2025), which established the Alexander Archipelago Forest Reserve; the presidential proclamation of September 10, 1907 (35 Stat. 2152), which created the Tongass National Forest; or the presidential proclamations of February 16, 1909 (35 Stat. 2226) and June 10, 1925 (44 Stat. 2578), which expanded the Tongass National Forest; or (ii) subject to one or more of the following pending applications for withdrawal pursuant to 43 C.F.R. Part 295 (Supp. 1958), designated by Bureau of Land Management serial numbers: AKA 022828; AKA 026916; AKA 029820; AKA 031178; AKA 032449; AKA 033871; AKA 034383; AKJ 010461; AKJ 010598; AKJ 010761; AKJ 011157; AKJ 011168; AKJ 011203; AKJ 011210; AKJ 011212; AKJ 011213; AKJ 011291.

APPENDIX B

Article 7 of the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, [1964] 15 U.S.T. (pt. 2) 1607, T.I.A.S. No. 5639.

Article 7

1. This article relates only to bays the coasts of which belong to a single State.

2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

APPENDIX C

Graphic Depiction of Claimed Historic Waters

APPENDIX D

Graphic Depiction of Claimed Juridical Bays

APPENDIX E

Chart Showing Dry Island, Mitkof Island, Kupreanof Island, and Kuiu Island

APPENDIX F

Chart Showing Kruzof Island, Baranof Island, and Partofshikof Island

APPENDIX G

Chart Showing Prince of Wales Island and Dall Island

APPENDIX H

Large-Scale Map Showing Dry Island and Mitkof Island

APPENDIX I

Illustration of the 45-Degree Test from Robert D. Hodgson & Lewis M. Alexander, *Towards an Objective Analysis of Special Circumstances: Bays, Rivers, Coastal and Oceanic Archipelagos and Atolls, Law of the Sea Institute Occasional Paper No. 13* at 11, fig. 4 (Apr. 1972)

APPENDIX J

Alaska's Proposed Longest Straight Line of Penetration for South Bay

APPENDIX K

United States' Proposed Longest Straight Line of Penetration for South Bay

APPENDIX L

Alaska's Proposed Longest Straight Line of Penetration for North Bay

APPENDIX M

United States' Proposed Longest Straight Line of Penetration for North Bay

APPENDIX N

Chart of the Glacier Bay National Monument

APPENDIX O

Chart of Tongass National Forest