Supreme Court of the United States

No. 128, Original

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ALASKA'S OPPOSITION TO THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT ON COUNT I—HISTORIC WATERS

Of Counsel:

JOHN G. ROBERTS, JR.
JONATHAN S. FRANKLIN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

G. THOMAS KOESTER
2550 Fritz Cove Road
Juneau, Alaska 99801
(907) 789-6818

BRUCE M. BOTELHO
Attorney General
JOANNE M. GRACE
LAURA C. BOTTGER
Assistant Attorneys General
STATE OF ALASKA
Department of Law
1031 W. Fourth Avenue
Anchorage, Alaska 99501
(907) 269-5100

Counsel for Plaintiff

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INTRODUCTION

Despite affirmatively moving for summary judgment on Count I on the ground that there is no historical evidence of its having claimed the waters of the Archipelago as inland, the United States fails to address most of the relevant evidence, and mischaracterizes Alaska's position on the evidence it does cite. As a result, the United States does not, and cannot, refute the overwhelming evidence demonstrating that the United States—before its 1971 about-face—consistently and continuously exercised dominion over the waters of the Alexander Archipelago and did so with the acquiescence of foreign nations.

Rather than making its own case, the United States devotes most of its memorandum to attacking what it claims is Alaska's case. But the case described

by the United States is not Alaska's. Alaska's case begins with the 1824 Treaty between the United States and Russia on Navigation, and it tracks the United States' recognition of Russia's claim to the waters of the Archipelago prior to the Treaty of Cession. It then outlines the United States' claim thereafter as Russia's successor, pointing out how the United States confirmed that claim at the 1903 Alaska Boundary Arbitration and asserted it continuously until belatedly disclaiming it in 1971—long after Alaska's claim had ripened through statehood. As shown below, the United States fails to address most of the relevant evidence, and mischaracterizes what it does address. And the scanty evidence on which the United States relies in no way diminishes the strength of Alaska's claim.

Rather than take issue with the overwhelming body of historical evidence demonstrating the United States' consistent claim to the submerged lands at issue, the United States mischaracterizes the law by asserting that waters cannot be inland if the United States permits foreign nations to travel them, and that Alaska's title to lands received at statehood can be divested by a disclaimer by the United States more than a dozen years later. This Court, however, has rejected both of these arguments. Because it is in the interests of the United States to encourage trade and commerce with foreign nations, this country generally does not exercise its right to deny foreign nations innocent passage in its own historic inland waters, and the Court has made clear that the United States does not

compromise its dominion over such waters by permitting such passage. The Court has likewise made clear that a belated, post-statehood disclaimer cannot divest a State's title to equal footing lands received at statehood.

Finally, the United States' litigation-driven policy arguments miss the mark. The United States' own representatives determined long ago that claiming the Archipelago as inland waters would have no adverse effect on the United States' foreign or defense policy, and the evidence strongly suggests that the 1971 disclaimer of such status was motivated by pecuniary rather than foreign policy concerns. In fact, the United States has long recognized the strategic defense value of the Archipelago's waters, and their importance to Alaska.

ARGUMENT

I. THE GOVERNING LEGAL STANDARDS ARE WELL SETTLED

Notwithstanding the United States' attempts to unsettle them, the legal standards governing historic waters claims are well settled. A body of water constitutes historic inland waters if 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." United States v. Alaska, 521 U.S. 1, 11 (1997); Mem. in Supp. of Mot. for Partial Summ. Judg. on Count I ("US Count I Mem.") at 6; Mem. in Supp. of Mot. for Summ. Judg. on Count I ("AK Count I Mem.") at 4. When those factors have been satisfied, historic title is established.

Yet the United States erroneously claims that historic inland water claims generally, and Alaska's claim to the waters of the Archipelago specifically, are contrary to generally applicable rules of international law. US Count I Mem. at 5-6. That is not true. The International Court of Justice rejected Britain's similar argument in the Fisheries Case, finding that Norway's claim was not "exceptional" and instead represented "the application of general international law to a specific case." The Fisheries Case (U.K. v. Norway), 1951 I.C.J. 116, 131 (Dec. 18). Norway's use of straight lines between islands to enclose inland waters had been consolidated by consistent and long-standing practice, and it had been accepted by other nations, which showed "that they did not consider it to be contrary to international law." Id. at 139. Like Norway's claim, Alaska's claim here is based on the United States' consideration of the waters of the Archipelago as inland before statehood, a claim that was consolidated by consistent and long-standing practice and had been accepted by other nations. Even today, Alaska's claim is neither exceptional nor in conflict with international law, for Article 7(6) of the Convention clearly recognizes claims to historic inland waters.[1]

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1 The United States cites A.M. Gross, The Maritime Boundaries of the States, 64 Mich. L. Rev. 639, 650 (1966), for the proposition that the international community did not treat the waters of coastal archipelagos as inland prior to the 1951 Fisheries Case. See US Count I Mem. at 42 n.21. The court's opinion in that case, however, shows that both Mr. Gross and the United States are wrong.

The United States also mistakenly argues that a party seeking historic title must put forward "an extraordinary quantum of proof." US Count I Mem. at 10. The Court has never so held. In United States v. Alaska, 521 U.S. at 11, the Court made clear that a historic waters claim will be sustained upon a showing that the requisite conditions are satisfied, without suggesting that any elevated quantum of proof is necessary. In United States v. California, 381 U.S. 139 (1965), the Court held that "questionable evidence" of historic title is insufficient to overcome an express disclaimer by the United States prior to the ripening of such title, id. at 175, but for the reasons set forth below and in our opening memorandum the evidence supporting Alaska's claim is not "questionable." Alaska's title, moreover, ripened long before the attempted 1971 disclaimer.

In California, the Court also noted that such a disclaimer would be ineffective where the evidence of historic title is clear beyond doubt, id., but the Court has never held that such a finding is required to overcome all disclaimers, no matter their circumstances. See United States v. Maine, 475 U.S. 89, 92 (1986) (noting that standard of proof issue remained open question). To the contrary, the Court has indicated that a disclaimer is conclusive only where—unlike here—evidence is questionable. See United States v. Louisiana ("Louisiana Boundary Case"), 394 U.S. 11, 77 (1969) ("While we do not now decide that Louisiana's evidence of historic waters is 'clear beyond doubt,' neither are we in a position to

say that it is so 'questionable' that the United States' disclaimer is conclusive."). And in United States v. Louisiana ("Alabama and Mississippi Boundary Case"), 470 U.S. 93, 111-112 (1985), the Court declined to afford any special weight to a disclaimer of inland-water status issued long after historic title had ripened, noting that "[t]his Court repeatedly has made clear that the United States' disclaimer of historic inland-water status will not invariably be given decisive weight."

In that case, the Court found that the plaintiff States—notwithstanding the United States' belated disclaimer—had established historic title by putting forward "substantial evidence," id. at 111, that the United States had continuously exercised authority over the area with the acquiescence of foreign nations. The Court so held without ever indicating that the United States' ineffective disclaimer required plaintiffs to satisfy some extraordinary evidentiary standard. See id. at 101-111. To the contrary, the Court embraced the view of commentators that

> [a] relatively relaxed interpretation of the evidence of historic assertion and of the general acquiescence of other states seems more consonant with the frequently amorphous character of the facts available to support these claims than a rigidly imposed requirement of certainty of proof, which must inevitably demand more than the realities of international life could ever yield. [Id. at 113 (quotation and citation omitted).]

So too here, Alaska has put forward substantial—indeed overwhelming—evidence that all the requirements for demonstrating historic title are satisfied, and the United States' belated attempt at a disclaimer cannot divest Alaska of

title that had ripened long before. Thus, while Alaska believes the evidence of historic title is in fact clear beyond doubt, no special burden of proof applies here.

II. THE UNITED STATES HAS CONTINUOUSLY EXERCISED AUTHORITY OVER THE WATERS OF THE ARCHIPELAGO

A. The United States Mischaracterizes Alaska's Pre-Cession Evidence

Alaska has already outlined in detail Russia's and the United States' assertions of authority over the waters of the Archipelago from the 1824 Treaty between the United States and Russia on Navigation and Fisheries through the United States' purported disclaimer in 1971. See AK Count I Mem. at 6-26, 31-45. Alaska has also described several examples of foreign nations' acquiescence in that claim, ranging from Britain's recognition of it at the 1893 Fur Seal Arbitration to cooperative salmon management negotiations with Canada shortly before Alaska's 1959 admission to the Union. Id. at 20-30.

In moving for summary judgment on the ground that there is no evidence of its historical claim to the waters or the acquiescence of foreign nations, the United States fails to address most of this evidence. Instead, it addresses only a mere handful of facts. As to the continuous assertion of authority over the waters of the Archipelago, the United States identifies only three pieces of evidence: (1) Russia's 1821 ukase (US Count I Mem. at 32); (2) a statement by counsel at the 1903 Alaska Boundary Arbitration (id. at 16, 24-27); and (3) a statement in a 1964

brief in United States v. California (id. at 17, 27-31). As to foreign nations' acquiescence, the United States identifies only two pieces of evidence: (1) Britain's arguments at the 1903 Alaska Boundary Arbitration; and (2) Britain and Norway's arguments in the Fisheries Case, 1951 I.C.J. 116. US Count I Mem. at 40-42.

As to the first piece of evidence discussed by the United States—the 1821 ukase—the United States mischaracterizes Alaska's argument entirely. Contrary to the United States' assertion, Alaska does not rely on the ukase at all. Alaska's case begins with Article IV of the 1824 Treaty between the United States and Russia on Navigation and Fisheries, 8 Stat. 304 (Ex. AK-10), which granted United States' mariners, for only ten years, the right to navigate the inland waters of the Archipelago. Subsequent events prove that, by accepting this limited right, the United States conceded that these were Russia's inland waters.[2]

Following expiration of that ten-year period in 1834, the governor of Russian America gave written notice to American sea captains that they could not continue their voyages through the "inland waters" of the Archipelago, and in 1835 sent a Russian brig to the southern boundary of the Archipelago "for the purpose of intercepting foreign vessels entering the inland waters of the [Russian] colony." 1

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2 As Britain explained at the 1893 Fur Seal Arbitration, absent the 1824 treaty "the United States would not have any right of access [to these waters] at all." 13 Proceedings of the Tribunal of Arbitration, S. Exec. Doc. 53-177, at 142 (1895) (Ex. AK-79).

Proceedings of the Alaskan Boundary Tribunal ("Proceedings"), S. Doc. No. 58-162, Pt. I at 69-70 (1904) (Ex. AK-13). In 1836, in furtherance of this policy, Russia forced the United States vessel Loriot to leave the Archipelago, claiming the right to exclude all United States nationals from its inland waters. See S. Exec. Doc. No. 50-106, at 232-233, 246-247 (Ex. AK-11).

Importantly, the United States acquiesced in that claim and in 1845 advised United States vessels not to "frequent" the inland waters of the Archipelago. 2 Proceedings at 250 (Ex. AK-12). In publishing this notice, the United States recognized Russia's "complete sovereignty" over those waters. 1 Proceedings, Part II, at 72 (Ex. AK-13). It is this complete acceptance of Russia's claim to the territory after 1834, not the much earlier disputed ukase, that demonstrates the United States' recognition of the inland status of the waters. Thus, contrary to the United States' assertion (see US Count I Mem. at 31-32), Alaska's historic waters claim is not estopped by the Court's characterization of the ukase in United States v. Alaska, 422 U.S. 184 (1975), because Alaska does not rely on that event.[3]

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[3] Similarly, Alaska is not estopped by the Court's holding in No. 84, Orig., that a historic waters claim cannot be sustained solely by reference to the United States' general policy regarding inland waters, unaccompanied by evidence that the policy was applied to the waters in question. Unlike the Court's characterization of Alaska's argument in the No. 84 case, Alaska's claim in this case is based on specific federal assertions that the waters of the Archipelago are inland. See United States v. Alaska, 521 U.S. at 20-21. In that earlier case, moreover, the Court recognized the United States' policy of claiming straits leading to inland seas as inland waters, but concluded that Alaska had not proved that this rule

Years later, former Secretary of State Foster confirmed Russia's "complete sovereignty" over the Archipelago in his analysis of the 1825 treaty between Britain and Russia that, among other things, gave Russia the lisiére along the coast of the mainland that would become the subject of the 1903 Alaska Boundary Arbitration. See J.W. Foster, "The Alaskan Boundary" in 10 National Geographic Magazine 425 (Nov. 1899) (Ex. AK-299).[4] According to Foster, the treaty established that "all the interior waters of the ocean above [the lisiére's] southern limit became Russian, and would be inaccessible to British ships and traders except by express license." Id. at 435 (emphasis added). Article VII of the treaty granted that "express license," giving British mariners the same ten-year privilege to navigate the waters of the Archipelago that Article IV of the 1824 United States-Russia treaty gave United States' mariners. Id. at 439.

Secretary Foster made clear that this limitation on the right to "frequent" the waters of the Archipelago

> is inconsistent with any other interpretation of the treaty than the complete sovereignty of Russia over * * * the waters of all bays or inlets extending from the ocean into the mainland. This is the more manifest when the subsequent history respecting the provision of article IV

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applied to its north coast. Id. at 16-18. Here, the United States expressly told the Court in 1964 that this rule applied to the Archipelago. See infra at 18-21.

4 The 1825 Britain-Russia treaty is reprinted in 3 Proceedings at 56-60 (Ex. AK-300).

> of the American and article VII of the British treaty is recalled. At the expiration of the term of ten years the Russian minister in Washington gave notice to the Government of the United States that the privilege had expired, and a notification to that effect was made in the public press of the United States. Persistent efforts were made by the United States to have the privilege extended for another period of ten years, but it was firmly refused by Russia. The British privilege was likewise terminated upon the expiration of the ten years mentioned, and this article of the treaty was never again revived. [Id. (footnotes omitted; emphasis added).[5]]

Alaska relies on this evidence of Russia's "complete sovereignty" over the waters of the Archipelago as evidenced by Russia's treaties with both Britain and the United States, not the ukase of 1821. In its opening memorandum, the United States does not even address, much less refute, this evidence.

B. The United States Does Not Address Most Of The Relevant Evidence

As noted above, with respect to the continuous assertion of authority over the inland waters of the Archipelago the United States discusses only the 1821 Russian ukase and two statements, one at the 1903 Alaska Boundary Arbitration and one in the United States' 1964 brief in the California case. But the United States cannot achieve summary judgment in its favor by simply ignoring the

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5 Britain regained the privilege of navigating the waters of the Archipelago, but only as a contract right when, with Russia's permission, the Russian American Company in 1839 leased the lisiére to the British Hudson's Bay Company "together with the free navigation and trade of the waters of that coast." Id. at 445-447 & n.*.

wealth of other evidence demonstrating the United States' continuous claim to the inland waters of the Archipelago. Alaska's case, as shown both in Alaska's opening memorandum and here, consists of an overwhelming body of evidence spanning the almost 150 years between 1824 and 1971.

Under the Treaty of Cession, Mar. 30, 1867, U.S.-Russ., 15 Stat. 539, the United States "acquired whatever dominion Russia had possessed * * *." United States v. Alaska, 422 U.S. at 192 n.13. This clearly included Russia's "complete sovereignty" over the inland waters of the Archipelago. In our opening memorandum, we presented several instances of government officials recognizing the inland-water status of the Archipelago between the Treaty of Cession and the 1903 Alaska Boundary Arbitration, which the United States had recognized before cession. See AK Count I Mem. at 9-11 And those examples are not all.[6] Indeed, in his 1899 article Secretary Foster noted that Russia and the United States had

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6 See, e.g., S. Exec. Doc. No. 47-71, at 32, 61, 69, 74, 76, 83-84 (1882) (report of Navy Commander Beardslee describing waters of Archipelago as "inland waters," "our waters," "Alaska waters," "United States waters," and "inland seas") (Ex. AK-301); H.R. Exec. Doc. No. 47-81, at 2, 40-41 (1882) (reports of Navy Commander Glass and Navy Lt. Commander Rockwell describing waters as "inland waters") (Ex. AK-15); S. Exec. Doc. No. 48-2, at 4 (1884) (report from Army Lieutenant Schwatka describing "inland passages" of the Archipelago) (Ex. AK-302); S. Rep. No. 54-1507, at 1 (1897) (statement of Treasury Secretary Carlisle that "the steamer route through the inland waters" of the Archipelago has been surveyed "as the inland waters have been well protected," but that a more substantial vessel would be required to survey the "outside" waters) (emphasis added) (Ex. AK-303).

exercised several acts of occupation in the Archipelago, including the patrolling of the waters by United States revenue vessels, "without a single protest or complaint on the part of the British or Canadian governments." Ex. AK-299 at 452-453.

Moreover, Alaska presented abundant evidence in its opening memorandum that the United States consistently claimed the waters of the Archipelago as inland between 1903 and its belated disclaimer in 1971, including the period after Alaska's admission and the vesting of its title to submerged lands. For example, Alaska showed that the United States, with the acquiescence of foreign nations, consistently enforced its fishing regulations against foreign nations in waters more than three miles from shore. See AK Count I Mem. at 15-21. Alaska and Canada agreed that the waters were inland during the Dixon Entrance negotiations of the 1930s and 1940s. Id. at 21-26. The Coast Guard, in carrying out law enforcement activities after statehood, relied on the Pearcy charts showing straight baselines enclosing the inland waters of the Archipelago. Id. at 38-39. And the United States cited the Archipelago as one example of its longstanding policy—unchanged until well after statehood—of enclosing inland waters behind baselines of ten miles or less under the rule for straits leading to inland seas. Id. at 37-38. Again, these are not the only examples.[7]

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[7] See, e.g., Ex. AK-304 at 261, 294-295 (1937 Congressional report to President noting that a survey of the "outer coast" had been completed but only 60 percent of the "inland waterways" had been surveyed); S. Rep. No. 85-763, at 1

The United States' opening memorandum pretends that this consistent body of evidence does not exist. Thus, while its attempted refutation of the evidence it does discuss fails as shown below, it is important to bear in mind the quantity of evidence the United States has simply failed to address.

C. The United States Unequivocally Claimed The Waters Of The Archipelago As Inland At The 1903 Alaska Boundary Arbitration

In trying to minimize the effect of the position it took at the 1903 Alaska Boundary Arbitration, see US Count I Mem. at 24-27, the United States both mischaracterizes the evidence it cites and ignores additional evidence from that proceeding. It then suggests that the clearly delineated position was simply the musings of counsel that ought to be disregarded. The Court should accept neither argument.

The United States mischaracterizes the evidence it cites by selectively quoting only part of one statement at the Arbitration, and relegating even that excerpt to a footnote. See US Count I Mem. at 26 n.14. The complete passage, set out in Alaska's opening memorandum (see AK Count I Mem. at 12), makes clear

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(1957); H.R. Rep. No. 85-2264, at 1 (1958); H.R. Rep. No. 85-2532, at 2 (1958) (1957 and 1958 legislation addressing vessels traveling "the inland waters of southeastern Alaska" and between such waters and other destinations) (all in Ex. AK-305); S. Rep. No. 85-1045, at 3 (1957) (proposed legislation to grant to the Territory of Alaska lands beneath "inland tidal waters" in Southeast Alaska) (Ex. AK-306).

that the United States considered the waters of both the Alexander Archipelago in Alaska and the Archipiélago de Los Canarios in Cuba as inland:

> The minute you establish [the political coast line], the minute you fix it, all waters back of it, whether they are the waters of the Archipelago there of Alexander or the Archipiélago de Los Canarios, of Cuba, they all became * * * salt-water lakes: they are just as much interior waters as the interior waters of Loch Lomond. [7 Proceedings at 611 (Ex. AK-27) (emphasis added).]

Thus, the record does not support the United States' present assertion that its unequivocal statement regarding the legal status of the waters was simply a "reductio ad absurdum" argument that did not embrace the truth of what was asserted. See US Count I Mem. at 27. Although the United States was arguing against Britain's use of international law principles to delineate the physical coastline that was in dispute under the 1835 treaty, it unequivocally stated that those principles established the relevant coastline for determining the political boundaries of the Archipelago. It was obviously in the interests of the United States to make this claim, and there is no indication that the United States' unequivocal assertions were anything other than a considered and continued recognition of the sovereignty over the Archipelago that the United States had recognized since Russian times.

Indeed, the United States also ignores other compelling evidence of its claim to the inland waters of the Archipelago at the 1903 Arbitration. The United

States explained that the State Department's 1845 notice to United States mariners not to frequent the waters of the Archipelago marked recognition of Russia's "complete sovereignty" over those waters. 1 Proceedings, Part II, at 72 (Ex. AK-13). As the United States' representative stated, "[t]he United States, in 1867, entered into possession of, and has exercised jurisdiction over, all of these interior waters and coasts to the present time." 5 Proceedings, Part I, at 4 (Ex. AK-8) (emphasis added). Thus, "[f]rom [the day the Treaty of Cession was signed] to this the United States has constantly asserted and exercised jurisdiction over that coast and the adjacent waters." Id. at 152 (emphasis added).

But the Court need not take Alaska's word that the United States unequivocally claimed the waters of the Archipelago as inland at the 1903 Alaska Boundary Arbitration. Britain noted the United States' claim at the 1910 North Atlantic Coast Fisheries Arbitration. See AK Count I Mem. at 28-29. Britain and Norway did so in the 1951 Fisheries Case. See id. at 29-30. Even the Justice Department—the same Justice Department that now denies that the United States claimed the waters of the Archipelago as inland at the 1903 Arbitration—concluded in 1952 that "the United States [at the 1903 Arbitration] explicitly stated that the waters inside the islands were inland." Ex. AK-29 at 1 (emphasis added).

For these reasons and others, the Court should also reject the United States' contention that the position it espoused with Britain at the 1903 Arbitration

can simply be ignored as musings of counsel irrelevant to the historic waters issue. See US Count I Mem. at 22-24. The Court has already held that such statements can, in fact, put foreign nations on notice of a historic waters claim. In the Alabama and Mississippi Boundary Case, 470 U.S. at 108-109, the Court held that if foreign nations had retained any doubt as to whether the United States claimed Mississippi Sound as inland waters, that doubt "must have been eliminated" by a statement in a brief filed by the United States in this Court. Thus, the Court has held that even statements in a brief in a case to which no foreign nation was a party were sufficient assertions of authority to establish a historic waters claim in the face of any doubts by other nations as to the existence of the claim. Here, the statements in question were not only made in the course of litigation, but were made directly to the neighboring nation—Britain (then-ruler of Canada)—with the greatest interest in the claim. And Britain's own use of the statements in its later dispute with Norway makes clear that Britain understood the intended message.

In fact, the United States itself has asserted historic waters claims through statements of counsel. The claim to Chesapeake Bay "was made before the Second Court of Commissioners of Alabama claims." Defendant's Response to Plaintiff's First Set of Interrogatories, First Requests for Production of Documents, and First Request for Admission ("US Response to Interrogatories") at 15 (response to interrogatory 10) (Ex. AK-307). And the United States' claim to

Delaware Bay was not even made before a court or tribunal; it was made in an Attorney General's opinion. Id. (citing 1 Op. Att'y Gen. 32 (1793)).[8]

Alaska's case, of course, does not rely exclusively on such statements. But the Court's conclusion in the Alabama and Mississippi Boundary Case and the United States' own historic waters practice demonstrate that such statements are relevant and, in appropriate circumstances, dispositive.

D. The United States' Statement In Its California Brief Confirms Its Earlier Claim To The Lands At Issue

The United States attempts to dismiss its characterization of the Archipelago's waters as inland in its 1964 California brief (see US Count I Mem. at 27-31), but in the process the United States ends up supporting Alaska's case. As shown in Alaska's opening memorandum (see AK Count I Mem. at 31-34), in 1930 the United States formalized its policy of claiming waters enclosed by islands as inland under a rule providing that straits leading to inland seas are inland waters if the entrances are less than ten miles wide. In its 1964 California brief, the United States expressly told the Court that the straits leading into the Archipelago were examples of such straits. Id. at 37-38.

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8 The United States' two other historic-waters claims were made known through a state appellate court decision (Long Island Sound) and through the Alabama and Mississippi Boundary Case (Mississippi Sound). US Response to Interrogatories at 15 (response to interrogatory 10) (Ex. AK-307).

The United States now admits that the rule for straits leading to inland seas became its policy in 1930, and concedes that this was "the State Department's policy in 1953." US Count I Mem. at 30 n.15. This admission confirms Alaska's contention that the United States claimed the waters of the Archipelago as inland prior to Alaska's admission to the Union—and the vesting of its title to submerged lands—in 1959.

To be sure, the United States now denies that its 1964 brief has that effect. It first claims that it was only describing "the evolving nature of inland waters principles." Id. at 28-29. But in the passage quoted in both Alaska's and the United States' opening memoranda (see AK Count I Mem. at 37-38; US Count I Mem. at 29), the United States did not describe evolving principles. The United States described its own policy, which was to consider straits leading to inland seas as inland waters. And, by expressly pointing to the straits leading into the Archipelago as examples of such straits, the United States made clear that (as Alaska contends) both the waters inside the Archipelago and the straits leading into them are inland waters.

The United States next says this express statement does not "claim" those waters as inland. US Count I Mem. at 30. As straits leading to inland seas, however, the United States' policy provided that they were considered—i.e., "claimed"—as inland waters. Whether the statement in the 1964 brief constituted

a "claim," moreover, is not really the issue. Instead, the 1964 statement is simply an additional <u>fact</u> confirming the pre-existing and longstanding position of the United States that the waters of the Archipelago are inland.

The United States also argues that "caveats" in a footnote in its 1964 brief (to the effect that application of the rule can be difficult in certain cases, that a "circularity" is involved, and that some applications—like Chandeleur Sound—"have been unduly liberal") also apply to the waters of the Archipelago and "disqualify" the brief as a claim to these waters. US Count I Mem. at 30. But those "caveats" have no significance here, for the United States explicitly told the Court in the same brief that the rule in fact applies to the Archipelago.[9]

Finally, the United States claims that there is "no basis, under international or domestic law," for treating the statements in its 1964 <u>California</u> brief as a "public acknowledgment" of inland water status. US Count I Mem. at 31. As noted above, however, this Court has already disagreed with that contention, holding that statements in the United States' briefs before this Court

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9 Alaska does not argue, as the United States suggests it might, that the United States is estopped from taking a different position here than it took in 1964. <u>See</u> US Count I Mem. at 31 n.16. But the principles underlying the estoppel doctrine should lead the Court to view with great skepticism the United States' present attempt to disavow cavalierly the position it so clearly took in that case. <u>Cf.</u> <u>New Hampshire</u> v. <u>Maine</u>, 532 U.S. 742, 749-750 (2001) (purpose of the doctrine is "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment") (internal quotation marks and citations omitted).

can eliminate any doubt foreign nations might have that the United States claims a given body of water as inland. Alabama and Mississippi Boundary Case, 470 U.S. at 108-109. Indeed, the United States' argument on this point is rather puzzling, for the United States acknowledges this very holding at an earlier point in its memorandum. See US Count I Mem. at 24 n.13.

The United States' 1964 characterization of the Archipelago as inland waters under the rule for straits leading to inland seas provides a fitting capstone to Alaska's evidence of the United States' continuous claim to the inland waters of the Archipelago from cession through statehood. When coupled with Alaska's evidence of the United States' continuing claims, both before and after statehood, to both the waters of the Archipelago in particular, and other waters enclosed by islands in general (see AK Count I Mem. at 31-41), the first two elements of the historic waters test are fully satisfied.

E. The Evidence Advanced By The United States Does Not Defeat Alaska's Case

Against the array of Alaska's evidence showing a continuous claim to the inland waters of the Archipelago from 1824 until 1971, the United States proffers only a handful of anecdotal evidence. None of that evidence defeats Alaska's claim.

As a threshold matter, minor uncertainties or contradictions in a nation's otherwise consistent practice do not thwart a historic waters claim under

international law. Cf. Fisheries Case, 1951 I.C.J. at 138 ("[T]oo much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice. They may be easily understood in the light of the variety of the facts and conditions prevailing in the long period which has elapsed since [the claim was first made] * * *."). But the anecdotal evidence the United States proffers does not even rise to the level of such uncertainties or contradictions. Instead, when considered in the context of Alaska's evidence of the United States' claim to the inland waters of the Archipelago, the materials identified by the United States are at the very most ambiguous. And many of them actually support Alaska's claim.

1. The Bayard Letter And The 1910 Arbitration

The United States first argues that Secretary of State Bayard's 1886 letter to Treasury Secretary Manning and the United States' position at the 1910 North Atlantic Coast Fisheries Arbitration contradict the inland waters claim it made at the 1903 Alaska Boundary Arbitration. See US Count I Mem. at 34-35. The United States apparently argues that this evidence shows the United States claiming a strict three-mile territorial sea measured from the low-water mark without regard to inland water closing lines.

Revealingly, however, the United States' memorandum does not discuss the complete text of Secretary Bayard's letter. Instead, it merely quotes

excerpts from secondary sources. Viewed in its entirety (the complete letter is reprinted in Appendix A to Ex. US-I-6 at 13a-18a), the letter does not support the United States' argument. In his first paragraph Bayard acknowledged—as Alaska contends— "our own claim to a jurisdiction over territorial waters on the northwest coast beyond the three-mile zone." Id. at 13a-14a (emphasis added). Indeed, the United States later described the State Department letters Bayard cited (id. at 14a) as showing that the three-mile territorial sea did not include "waters or bays that are so landlocked as to be unquestionably within the jurisdiction of the adjacent State." 2 1950 Yearbook of the Int'l L. Comm. 61 (1957) (Ex. AK-315). Thus, far from refuting a specific claim to the waters of the Archipelago more than three miles from shore, Bayard's letter presumes the existence of that claim.

Bayard also noted that the United States "conceded to [Spain], so far as concerned Cuba, the same limit of territorial waters as we claimed for ourselves, granting nothing more; and this limit was afterwards reasserted by Mr. Seward during the late civil war." Ex. US-I-6, App. A at 16a. Seward stated in 1863 that the islands along the coast of Cuba constituted "the exterior coast line, and that the inland waters jurisdiction ceases there, while the maritime jurisdiction of Spain begins from the exterior sea in front of those keys." Ex. AK-89 at 3. Not coincidentally, these are the same Cuban waters the United States cited as inland in making its claim to the inland waters of the Archipelago at the 1903 Alaska

Boundary Arbitration. See 7 Proceedings at 611 (Ex. AK-27). Thus, when considered in its entirety, the Bayard letter in no way contradicts the United States' longstanding claim to the waters of the Archipelago.

Nor does the United States' position at the 1910 Arbitration cast any doubt on its continued claim to those waters. Quite to the contrary, in that proceeding the United States explained that in the earlier 1903 Alaska Boundary Arbitration it had "adopted the contention of Great Britain that 10-marine miles was the proper limit for the [entrances to the inland waters of the Archipelago] and laid down the line between the islands lying off the mainland of Alaska." Ex. AK-81 at 1093-94 (emphasis added). Thus, the 1910 Arbitration also provides no support for the United States' present revisionist theory.

In his 1952 Report in the California case, Special Master Davis made clear that Bayard's 1886 letter and the 1910 Arbitration had a limited focus: a specific clause in an 1818 treaty under which the United States renounced all fishing rights on or within three miles of Canada's eastern "coasts, bays, creeks or harbors." Report of Special Master Davis, United States v. California, No. 5, Orig., at 15-16 (1952) (Ex. AK-309). He gave ample reasons for limiting the statements to that 1818 treaty and not considering them as statements of general policy, observing that the 10-mile rule for bays "had already formed the basis of a treaty between Great Britain and the United States, negotiated in 1888 by Secretary

Bayard," id. at 17 (emphasis added), and, most tellingly, that "[i]n 1903 the United States took the position in the Alaska Boundary Arbitration that a ten-mile limit for bays is proper." Id. at 19 (emphasis added). This Court should adopt Special Master Davis's understanding of the limited focus of these materials.

2. The 1930 Hague Codification Conference

The United States next claims that it "expressly repudiated" any inland waters claim it might have made at the 1903 Alaska Boundary Arbitration when it proposed its rule for assimilating enclaves of high seas to the territorial sea at the 1930 Hague Codification Conference. US Count I Mem. at 35. Contradicting this rather startling claim, however, the United States also confesses that it proposed the rule for straits leading to inland seas—the rule the United States in 1964 said applied to the Archipelago—at the same Conference. Id. The United States does not explain how the assimilation rule "expressly repudiated" its claim to the inland waters of the Archipelago when its simultaneously proposed rule for straits leading to inland seas validated its claim to those waters. There is no indication whatsoever that the assimilation proposal was even intended to affect, much less repudiate, the United States' longstanding claim to the waters of the Archipelago.

In fact, at the 1930 Conference the United States also proposed a rule preserving pre-existing inland-water claims. See Ex. AK-91 at 197 ("Waters,

whether called bays, sounds, straits or by some other name, which have been under the jurisdiction of the coastal State as part of its interior waters, are deemed to continue a part thereof."). Thus, even if the United States had not proposed the rule for straits leading to inland seas, the assimilation proposal would not have "expressly repudiated" the claim to the inland waters of the Archipelago. That claim would have been preserved by the proposed rule for pre-existing inland waters claims.

Finally, despite these explicit proposals validating its claim to the inland waters of the Archipelago, the United States asserts that no nation could view the rule for straits leading to inland seas "as endorsing the closing lines that the United States discussed in the 1903 arbitration or as a basis for otherwise treating the waters of the Alexander Archipelago as inland waters." US Count I Mem. at 36. Yet the United States did so itself, in its 1964 California brief. No amount of backing and filling can alter that irrefutable fact.

3. The Views Of S.W. Boggs

The United States also claims that State Department Geographer Boggs, in internal discussions at the State Department and with other federal agencies, did not treat the waters of the Archipelago as inland. See US Count I Mem. at 36-37. Such internal governmental discussions could not have put foreign nations on notice that the United States had changed its position from recognizing

the waters of the Archipelago as inland during the Russian period and claiming them as inland thereafter to one in which it no longer claimed the waters of the Archipelago as inland. But in any event, the evidence does not support the United States' characterization of those discussions.

The United States says that Boggs, in the AB Line Negotiations with Canada, employed the "arcs of circles" method in defining the limits of United States' jurisdiction in the Archipelago. See US Count I Mem. at 36 n.18 (citing Ex. US-I-14).[10] But the only document in that exhibit prepared by Boggs is a one-page memorandum that says nothing about delimiting inland waters or arms of high seas extending into the Archipelago. See Ex. US-I-14 at 4. In earlier documents, however, Boggs called the waters of the Archipelago "inland waters" and attached a map showing "inland navigation routes," Ex. AK-64 at 9, 19, 33 & Map 1, and also noted the seizure of the Marguerite more than three miles from shore with no suggestion that it was outside United States' waters. See Ex. AK-65 at 14 & n.1. Moreover, in a later memorandum, Boggs quoted the United States' argument at the 1903 Alaska Boundary Arbitration that includes this description of Alaska's boundary: "The boundary of Alaska—that is, the exterior boundary from which the [three-mile territorial sea] is measured—runs along the outer edge of the

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10 These negotiations are discussed in Alaska's opening memorandum. See AK Count I Mem. at 21-26.

Alaskan or Alexander Archipelago." Ex. AK-68 at 8. Boggs also believed Canadians had "no basis" to enter waters north of Wedge Island where the United States now claims there is an enclave, a conclusion that indicates his view that those waters were inland. See AK Count I Mem. at 24-25. Thus, when all of Boggs' views during these discussions are considered, they provide no support for the United States' new-found position.

The United States also claims that Boggs told the Tariff Commission to draw the United States' territorial waters by strictly applying the method of arcs of circles. See US Count I Mem. at 36 n.18 (citing Ex. US-I-9 at 3). The Tariff Commission charts, however, had nothing to do with the location of the United States' territorial sea in its international relations. To the contrary, the depiction of United States' waters on these charts was solely "for the purposes of the investigation being made by the Tariff Commission." Ex. US-I-9 at 3 (emphasis added). Proving the point, the State Department added a disclaimer to the charts, stating that they represented only the Tariff Commission's position for purposes of the study, to ensure that no one erroneously viewed them as a statement of the United States' position as to its territorial jurisdiction. See Ex. US-I-9 at 4. Even that disclaimer, however, was not sufficient for the Secretary of Commerce; he had the charts withdrawn (see Ex. AK-310) and destroyed. See Ex. US-I-9 at 5.

Whatever involvement Boggs might have had in preparation of the Tariff Commission charts provides no support for the United States' current position.

The United States also claims that Boggs supported a strict three-mile limit for "territorial waters" in the Archipelago in his 1952 letter to the Coast Guard Commandant. See US Count I Mem. at 37. At most, that letter is ambiguous. Boggs noted that enclaves or pockets of high seas would be assimilated to the "territorial waters," not the "territorial sea." Ex. US-I-10 at 2. This distinction is critical, for the term "territorial waters" can include both inland waters and territorial sea. See Ex. AK-91 at 195; Ex. AK-92 at 7; 1 Aaron L. Shalowitz, Shore and Sea Boundaries 23, 317 (1962) (Ex. AK-311). At the time Boggs responded to the Commandant, moreover, the Justice Department had just given him its study of the 1903 Alaska Boundary Arbitration showing that the United States claimed the waters of the Archipelago as inland. See Ex. AK-29. It is inconceivable Boggs meant to give contrary advice to the Coast Guard.

4. The 1957 United Nations Study

The last anecdote relied on by the United States is a 1957 United Nations study prepared by a Norwegian named Jens Evensen, which (according to the United States) put the international community on "express notice that the United States did not claim the waters of the Alexander Archipelago as inland." US Count I Mem. at 37 (emphasis added). As evidence of the United States'

position, however, this study is classic hearsay—an out of court statement introduced to prove the truth of the matter stated. By relying on this secondary source—a hearsay statement by a foreign national employed by the United Nations—instead of official U.S. government records, the United States effectively concedes that there is no direct evidence that its policy was as stated in the study. See Mammoth Oil Co. v. United States, 275 U.S. 13, 51 (1927) (" 'all evidence is to be weighed according to the proof which it was in the power of one side to have produced' ") (citation omitted); Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226 (1939) ("[t]he production of weak evidence when strong is available can only lead to the conclusion that the strong would have been adverse" and "[s]ilence then becomes evidence of the most convincing character") (citations omitted). On this ground alone, this hearsay description should be accorded no weight whatsoever as evidence of the United States' actual policy.

But most significantly, the study's description of the United States' policy is flatly contradicted by facts. According to the import of the Norwegian's description, the United States never claimed that waters enclosed by coastal archipelagos are inland. But only eight months before the study was published, the United States reminded this Court that Mississippi Sound was found to be inland waters in Louisiana v. Mississippi, 202 U.S. 1, 48, 50-53 (1906), and added that the United States also claimed Chandeleur Sound as inland waters. Br. for the

United States in Supp. of Mot. for Judg. at 128, United States v. Louisiana, No. 11 (filed Feb. 1957) (Ex. AK-99). And six months after the Norwegian's study was published (and one month after the Convention was opened for signature in April, 1958), the United States again told this Court that offshore islands in Louisiana, Alabama, and Mississippi enclose inland waters. Br. for the United States in Supp. of Mot. for Judg. on Amended Compl. at 177, 254, and 261, United States v. Louisiana, No. 11 (filed May 1958) (Ex. AK-100). Making clear that this was the official position of the United States, and therefore that the 1957 United Nations' study did not accurately describe its policy, the brief was reviewed and approved by the State Department prior to being filed. See Ex. AK-95 at 1. Given a choice, it seems more likely that United States policy was accurately expressed in briefs prepared by the Justice Department, approved by the State Department, and filed with this Court, than in a United Nations study prepared by a Norwegian.

Four months later (and two months after the Alaska Statehood Act became law in January, 1959), the United States again told this Court that waters enclosed by islands in Louisiana, Alabama, and Mississippi are inland. Reply Br. for the United States at 43-45, 81, 83, United States v. Louisiana, No. 11 (filed Sept. 1958) (Ex. AK-101). It also advised the Court that the decision in Mahler v. Norwich & N.Y. Transp. Co., 35 N.Y. 352 (1866), "depends on the inland status of the waters involved, and is in exact accord with the position of the United States,

that a boundary will extend out from the shore to embrace those islands which are so situated as to enclose inland waters." Ex. AK-101 at 85 (emphasis added). As with the May 1958 brief, this brief was reviewed and approved by the State Department prior to being filed. See Ex. AK-95 at 1.

Finally, even if there were some aspects of general United States' policy—e.g., the assimilation proposal at the 1930 Hague Codification Conference—under which the waters of the Archipelago might be considered other than inland, any such general rule must yield to the United States' specific claim and practice that these waters are inland. Cf. United States v. Alaska, 521 U.S. at 15 ("the variation or imprecision in the United States' general boundary delimitation principles" is irrelevant where "the State could point to specific federal assertions that [the waters at issue] consisted of inland waters"). The United States successfully urged this Court to adopt that very rule of law in opposition to Alaska's claim in the No. 84 case. Id. Accordingly, the United States cannot seek now to rely on purported general delimitation policies to overcome evidence as to its actual historical treatment of a specific body of water.

The addition of Alaska's evidence that the United States claimed the waters of the Archipelago as inland even after statehood (see AK Count I Mem. at 37-41) completes the picture. The undisputed facts show a continuous claim to these inland waters from 1824 through statehood until 1971.

F. Limited Foreign Vessel Traffic In The Archipelago Is Consistent With Alaska's Historic Waters Claim

1. To Prevail, Alaska Need Not Show That The United States Excluded All Foreign Vessels From The Archipelago

The United States asserts that, to prove a historic waters claim, a nation must actually have excluded all foreign navigation from the waters. See US Count I Mem. at 7, 43. This is not the law, and such an argument is preposterous on its face. To take one obvious example, New York Harbor is unquestionably part of the inland waters of the United States, yet the United States not only allows but encourages foreign vessels to enter the Harbor in order to promote trade and commerce.

In fact, the Court long ago expressly rejected the per se rule now suggested by the United States. In the Alabama and Mississippi Boundary Case, 470 U.S. at 113, the Court noted that "the United States argues that proof of historic inland-water status requires a showing that sovereignty was exerted to exclude from the area all foreign navigation in innocent passage"—precisely the argument the United States raises here. But the Court flatly rejected the argument, holding that "[t]his rigid view of the requirements for establishing historic inland-water status is unrealistic and is supported neither by the Court's precedents nor by writers on international law." Id. (footnote omitted). Instead, the Court embraced the position of commentators who advocated "a flexible approach to appraisal of

the factors necessary to a valid claim of historic inland-waters status." Id. at 113-114 (citations omitted). See also supra at 6.

The Court also endorsed the view that "the requirement of effective exercise of sovereignty over the area by the appropriate action on the part of the claiming state"

> does not, however, imply that the State necessarily must have undertaken concrete action to enforce its relevant laws and regulations within or with respect to the area claimed. It is not impossible that these laws and regulations were respected without the State having to resort to particular acts of enforcement. It is, however, essential that, to the extent action on the part of the State and its organs was necessary to maintain authority over the area, such action was undertaken. [Id. at 114 (internal quotation marks and citation omitted).]

Accordingly, the Court held under this flexible approach that "although a coastal nation has the privilege to exclude from its inland waters foreign vessels in innocent passage, the need to exercise the privilege may never arise." Id. See also id. at 113 n.13 ("a nation can assert power to exclude foreign navigation in ways other than by actual resort to the use of that power in specific instances"); id. at 113 n.14 (quoting, with apparent approval, commentator's view that it would be "too strict" to insist that only exclusion constitutes evidence of a claim and that even providing navigational aids supports such a claim).

Thus, there is no legal requirement that the United States actually exclude foreign vessels from waters it claims as inland in order for those waters to

qualify as historic inland waters; all that is required is a showing through appropriate evidence that the United States has claimed the authority to do so, regardless of whether that authority is ever exercised.[11] The United States' own practice proves the point. The United States made its first historic inland waters claim, the claim to Delaware Bay, in 1793. See 1 Op. Att'y Gen. 32 (1793); supra at 18. That opinion concluded that the seizure of one foreign vessel by another was illegal because it occurred in neutral United States' inland waters. See President Jefferson's August 16, 1793 letter to Mr. Morris, quoted in 4 Marjorie M. Whiteman, Digest of International Law 235 (1965) (Ex. AK-312). Far from relying on the exclusion of foreign vessels, the United States' first historic inland waters claim thus rests on the presence of foreign vessels in inland waters. In fact, none of the United States' claims to historic inland waters is based on the exclusion of foreign vessels. US Response to Interrogatories at 15 (answers to interrogatories 9 and 10) (Ex. AK-307).

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11 For its contrary view, the United States relies almost entirely on this Court's brief statement in United States v. Alaska, 422 U.S. at 197, that to demonstrate historic title "the exercise of sovereignty must have been, historically, an assertion of power to exclude all foreign vessels and navigation." An "assertion of power" is not, of course, the same as the actual exercise of that asserted power. As the next sentence of the opinion makes clear, the point of that statement was simply to emphasize that "[t]he enforcement of fish and wildlife regulations * * * [is] patently insufficient in scope to establish historic title * * *." Id. As the Court's later holding in the Alabama and Mississippi Boundary Case confirms, the United States need only assert that it has the power to exclude foreign vessels; it need not exercise the power.

As noted in our opening memorandum and above, the United States has historically asserted dominion over the Archipelago such that it could deny foreign vessels innocent passage. But in order to maintain its historic title, the United States need not actually deny such passage—and for good reason. The United States does not, as a general policy, exclude foreign vessels from its inland waters because it is in the United States' interest to encourage trade and commerce with foreign nations. This general policy of permitting innocent passage by foreign vessels in the inland waters of the United States is reflected by the fact that the United States does not even require such vessels to obtain permission to transit inland waters. See id. at 16 (answer to interrogatory 11).

Thus, no inference adverse to Alaska can be drawn from foreign vessel traffic in the Archipelago during the relevant period. But in any event, as next shown, the United States exaggerates the extent of that traffic before statehood.

2. The United States Exaggerates The Extent Of Foreign Vessel Traffic In The Archipelago Before Statehood

To show that there historically was extensive foreign vessel traffic in the Archipelago, the United States relies primarily on a report by B. M. Gough entitled Report on International Navigation through the Waters of the Alexander Archipelago of Southeast Alaska (Ex. US-I-2). See US Count I Mem. at 43. The only foreign vessel traffic Gough reports between 1834 and the 1867 Treaty of

Cession, however, consists of United States and British vessels, many of which he describes as only visiting Sitka and not traveling into the interior waters of the Archipelago at all. See Ex. US-I-2 at 17-32. Two exceptions are the British Dryad and the United States' Loriot, both of which Russia forced to leave. Id. at 17-21; see also AK Count I Mem. at 7-9 (discussing the Loriot incident). Thus, Russia clearly was asserting "complete sovereignty" over these inland waters.

According to Gough's report, moreover, Russia subsequently blockaded the Archipelago—i.e., excluded foreign vessels—by stationing a ship at the southern end of the Archipelago. Ex. US-I-2 at 22 (citation omitted). Gough thus confirms the United States' comment at the 1903 Alaska Boundary Arbitration that Russia in 1835 sent a brig to the southern boundary of the Archipelago "for the purpose of intercepting foreign vessels entering the inland waters of the [Russian] colony." 1 Proceedings, Pt. I at 69-70 (Ex. AK-13). It is difficult to imagine a more concrete exercise of the power to exclude foreign vessels.

The Russian blockade lasted until the Russian American Company leased the lisiére to Britain's Hudson's Bay Company in 1839. See Ex. US-I-2 at 23-24. Although this lease did not directly refer to the exclusion of foreign vessels, a joint blockade of United States' vessels was implicit in its terms. Id. And, as former Secretary of State Foster pointed out in 1899, the lease was entered into with Russia's permission and included both the lisiére and "the free navigation

and trade of the waters of that coast." Ex. AK-299 at 447 & n.*. Thus, under the lease, Britain gained a contract right to navigate the inland waters of the Archipelago. This necessarily implies that Britain would not have had such a right absent the lease.

Gough also points out that, in conjunction with the 1867 Treaty of Cession, United States vessels navigated the area prior to the Treaty and Russian vessels did so immediately thereafter. See Ex. US-I-2 at 32-33. This is perfectly understandable, however, as one would expect the two countries to grant each other reciprocal navigation rights to implement the transfer of jurisdiction provided for in the Treaty.

Between the 1867 Treaty of Cession and Alaska's 1959 admission to the Union, the foreign vessel traffic documented by Gough is almost exclusively British and Canadian. See Ex. US-I-2 at 33-41. This is confirmed by a number of other sources.[12] Nothing in that traffic, however, would cause the United States to exercise its power to exclude it. Indeed, much of the foreign vessel traffic Gough

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12 See A.W. Shiels, A Short History of Transportation to and Within the Territory of Alaska 23 (1950) (showing only one non-British foreign vessel entering Skagway between December, 1897 and May, 1901) (Ex. AK-313); Wrangell Narrows, H.R. Doc. No. 67-179, at 15 (1922) (noting two Canadian vessels in service in the Archipelago in 1919) (Ex. AK-137); Skagway Harbor, Alaska, H.R. Doc. No. 79-746, at 8 (1946) (30 percent of steamer trips to Skagway were by Canadian vessels) (Ex. AK-314); Transportation in Alaska, H.R. Rep. No. 80-1272, at 10 (1948) (noting Canadian steamships operating in the Archipelago) (Ex. AK-315).

describes appears beneficial to the United States: providing humanitarian aid and delivering mail; responding to an invitation by United States' authorities; contributing to the hydrographic surveying of the Archipelago; exercising reciprocal rights to procure supplies and land halibut in Alaska and Canadian ports; and engaging in trade and commerce. Id. As statehood approached, moreover, Congress explicitly recognized the benefits that the Canadian vessels serving the area provided,[13] and repeatedly granted authority to Canadian vessels to engage in trade and commerce in the Archipelago.[14]

Other than these British and Canadian vessels, the first foreign vessel Gough mentions is the Fairsea, a cruise-ship that made seven voyages (presumably through the Archipelago, although Gough simply says it went "to Alaska") in 1973. See Ex. US-I-2 at 41. This evidence, of course, is of little import, for it is long after Alaska was admitted to the Union—and title to its submerged lands

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13 See Transportation in Alaska, H.R. Rep. No. 80-1272, at 11 (1948) (the area was without steamship service except for Canadian vessels on three occasions in 1946) (Ex. AK-315); Southeastern Alaska, H.R. Doc. No. 83-501, at 36 (1954) (extensive tourist and freight business conducted by three Canadian steamship companies "is of major importance in Skagway's economy") (Ex. AK-133).

14 See S. Rep. No. 81-681 (1949); S. Rep. No. 81-1842 (1950); H.R. Rep. No. 81-2312 (1950); H.R. Rep. No. 81-2313 (1950); S. Rep. No. 82-419 (1951); H.R. Rep. No. 82-554 (1951); H.R. Rep. No. 82-2000 (1952); S. Rep. No. 83-119 (1953); H.R. Rep. No. 83-594 (1953); H.R. Rep. No. 83-1700 (1954); S. Rep. No. 84-59 (1955); S. Rep. No. 84-1666 (1956); S. Rep. No. 85-299 (1957); H.R. Rep. No. 85-560 (1957); S. Rep. No. 85-1389 (1958); H.R. Rep. No. 84-1928 (1958); H.R. Rep. No. 85-1981 (1958) (all in Ex. AK-316).

vested under the equal footing doctrine—in 1959. The visit also occurred after the United States made its belated disclaimer of title which (as explained above) had no effect on Alaska's ripened title to the lands.

Gough's evidence supports the conclusion that, except for British and Canadian vessels allowed into the Archipelago for beneficial reasons, foreign vessels honored the United States' claim to the inland waters of the Archipelago by not entering them. This is consistent with the State Department Legal Adviser's comment in 1972 that "no right of innocent passage has generally been accorded in the Alexander Archipelago" except "in the 'Inside Passage' along the Alaskan and Canadian coasts, where U.S. and Canadian vessels (only) transit freely." Ex. AK-118 at 8.

In sum, the United States' evidence of foreign vessels in the Archipelago does not prove that the United States lacked authority to exclude them. Indeed, the fact that only British and Canadian vessels navigated the waters of the Archipelago, and did so to benefit the area, supports Alaska's claim to the historic inland waters of the Archipelago.

G. The 1971 Disclaimer Cannot Divest Alaska Of Title That Had Already Ripened By Statehood

As noted above, see supra at 5-6, the United States' belated 1971 disclaimer does not alter Alaska's burden of proof in this case. In fact, that disclaimer has no effect on this case at all. A disclaimer in 1971 is patently

insufficient to divest Alaska of title that had ripened at statehood in 1959, more than a decade earlier.

As an initial matter, the 1971 disclaimer is the first and only evidence of the United States informing the international community that it no longer claimed the waters of the Archipelago as inland. The United States freely admits as much: "The United States determined, more than 30 years ago, through its [Baseline Committee] that [the disputed] lands are not located within inland waters." US Count I Mem. at 2. The United States cites no earlier assertion that the waters of the Archipelago are not inland for one simple reason—it did not assert that position until 1971. Instead, as the evidence shows, the United States continuously recognized the inland-water status of the Archipelago until it issued the disclaimer in 1971, more than 12 years after Alaska was admitted to the Union and its title to the submerged lands of the Archipelago had vested.

The United States asserts that its disclaimer was effective in part because the evidence of Alaska's historic title is of only relatively recent vintage, stemming (according to the United States) only from 1903 at the earliest. See US Count I Mem. at 39. Even if Alaska's evidence began in 1903, the United States' continued assertion of authority from then until 1971 would plainly be a sufficient basis to recognize historic title. But Alaska's evidence begins far earlier. As shown above and in our opening memorandum, that claim is based on historical

evidence from at least 1824 to 1971 (147 years), and the United States' own claim from the 1867 Treaty of Cession until 1971 (104 years). Even the United States does not contend that a century and a half is an insufficient period of time for a historic waters claim to have ripened, particularly since the area was only discovered by the European powers in 1775. See Ex. US-I-2 at 2-3, 5-6.

It is immaterial that the disclaimer here was not made as a result of litigation to which Alaska was a party. See US Count I Mem. at 39-40. No authority holds that a United States' disclaimer of historic title prior to the onset of litigation is per se effective. Where historic title ripened prior to the disclaimer, as it did here, such a rule would lead to the absurd result that the disclaimer was effective even though it was made after historic title passed to a State. That would contravene the principle that the United States cannot, under the guise of foreign relations, contract a State's recognized territory. See Louisiana Boundary Case, 394 U.S. at 77 n.104; United States v. California, 381 U.S. at 168; see also Idaho v. United States, 533 U.S. 262, 280 n.9 (2001).

III. THE EVIDENCE SHOWS THAT FOREIGN NATIONS WERE BOTH AWARE OF THE UNITED STATES' CLAIM TO THE INLAND WATERS OF THE ARCHIPELAGO AND ACQUIESCED IN IT

As to the acquiescence of foreign nations, the United States discusses only British statements at the 1903 Alaska Boundary Arbitration and British and

Norwegian arguments in the Fisheries Case. See US Count I Mem. at 40-42. Again, the United States fails to address much of the relevant evidence.

Alaska's historic waters case begins with Russia's assertion of authority over the Archipelago. That foreign nations acquiesced in that claim is shown by Britain's comment at the 1893 Fur Seal Arbitration that, absent the 1824 Treaty between Russia and the United States, "the United States would not have any right of access at all." 13 Proceedings of the Tribunal of Arbitration, S. Exec. Doc. No. 53-177, at 142 (1895) (Ex. AK-79). That statement, of course, would be true only if—as Britain clearly conceded—the waters of the Archipelago were inland.

At the 1910 North Atlantic Coast Fisheries Arbitration, Britain relied on both the United States' specific claim to the inland waters of the Archipelago at the 1903 Alaska Boundary Arbitration and its general policy of claiming enclosed areas as inland waters. 8 Proceedings in the North Atlantic Coast Fisheries Arbitration, S. Doc. No. 61-870, at 83-86 (1912) (Ex. AK-80). Similarly, neither Britain nor Canada protested the 1924 seizure of the Marguerite even though it occurred more than three miles from shore. See AK Count I Mem. at 17-18, 22 (and exhibits cited therein). And although never memorialized in a treaty, the AB line negotiations between the United States and Canada during the 1930s and 1940s showed Canadian agreement to the United States' claim that the waters of

the Archipelago are inland. See id. at 21-26 (and exhibits cited therein). And Canada agreed that the United States' inland waters closing line for regulating salmon fisheries was "appropriate." Id. at 20-21.

In the Fisheries Case, 1951 I.C.J. 116—notwithstanding the United States' attempts to downplay the event (see US Count I Mem. at 41-42)—both Britain and Norway explicitly recognized with apparent approval the United States' claim to the inland waters of the Archipelago. See Alabama and Mississippi Boundary Case, 470 U.S. at 107; AK Count I Mem. at 29-30 (and exhibits cited therein). The United States now says this recognition of the United States' claim is of no moment because "Norway gave an inaccurate account of the United States' position" to support closing lines more than 10 miles long while Britain argued that the United States' position was "limited to 10-mile closing lines and had since evolved." US Count I Mem. at 41. But this minor disagreement related only to the length of the closing lines claimed by the United States in 1903, not to the unassailable proposition that the United States claimed the waters of the Archipelago as inland. Both Britain and Norway were on common ground on that issue.

Thus, even if Alaska relied only on Britain and Norway's positions in the Fisheries Case—and Alaska does not—that would be sufficient. For once foreign governments "know or have reason to know of the effective and continual exercise of sovereignty over a maritime area, inaction or toleration on the part of

foreign governments is sufficient to permit a historic title to arise." Alabama and Mississippi Boundary Case, 470 U.S. at 110. The Fisheries Case alone shows that foreign governments knew of and tolerated the United States' claim to the inland waters of the Archipelago. See id. at 107; AK Count I Mem. at 29-30. It is immaterial that the statements were made in unrelated proceedings, cf. US Count I Mem. at 41-42, because all that is needed to demonstrate acquiescence is evidence that foreign nations were on notice of a claim yet took no action to oppose it.

Finally, the Court should reject outright the United States' argument that acquiescence cannot be shown because the Archipelago does not appear on any published lists of such waters. See US Count I Mem. at 42 & n.22. Alaska is aware of no authority—and the United States cites none—holding that an area's absence from such lists means foreign nations cannot be on notice of a historic waters claim.[15] Indeed, the United States' own historic waters practice refutes the argument. None of the lists of which Alaska is aware, including the 1957 United Nations study on historic bays that the United States suggests is definitive (US Count I Mem. at 42 n.22), show Mississippi Sound as historic inland waters.

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15 Such lists of necessity only give examples of historic waters, for there would be insurmountable difficulties in trying to prepare a definitive list. See Juridical Regime of Historic Waters, Including Historic Bays, U.N. Doc. A/CN.4/143, at 23-24, ¶¶ 168-176 (1962) (Ex. US-I-4). The world even now is simply too big a place for the Court to endorse such a radical proposition that only areas appearing on some "list" can be considered historic inland waters.

Nonetheless, the United States claims Mississippi Sound as such, US Response to Interrogatories at 15 (answer to interrogatory 9) (Ex. AK-307), and this Court has held that it is. Alabama and Mississippi Boundary Case, 470 U.S. at 114-115.

Accordingly, the evidence shows that foreign nations both knew of and tolerated Russia's and the United States' assertions of authority over the inland waters of the Archipelago. There is no evidence that any nation disputed these claims. In fact, foreign nations did not just tolerate those claims; the evidence shows foreign nations considered them valid.

IV. RELEVANT POLICY CONSIDERATIONS DO NOT SUPPORT THE UNITED STATES' CONTENTIONS

The United States claims to have "compelling reasons for objecting to Alaska's historic waters claim." US Count I Mem. at 2. The cited reasons, however, do not withstand scrutiny. The United States first claims that "Alaska's theory would dispossess the United States of [federal outer continental shelf ("OCS")] lands that are held by the United States * * * for the benefit of all the American people." Id. This assertion begs the question. Alaska claims that the waters of the Archipelago were inland prior to statehood, and consequently that there never was any federal OCS in the Archipelago. That the United States did not disclaim the inland-water status of the Archipelago until 1971 proves the point. Alaska's claim cannot "dispossess" the United States of something it never had.

The United States asserts that it opposes Alaska's historic inland waters theory on foreign policy and national defense grounds. See US Count I Mem. at 2-5. The evidence, however, shows that pecuniary interests and not foreign policy or national defense underlie the United States' opposition to Alaska's claim. In response to Alaska's protests of the United States' 1971 disclaimer, the State Department concluded that Alaska's claim would have absolutely no effect on the United States' foreign policy interest of minimizing inland water claims by foreign nations. See AK Count I Mem. at 43-45. The only meritorious objections came from the Justice and Interior Departments because of the possible effect drawing straight baselines in Alaska might have on Submerged Lands Act litigation with Louisiana, a purely domestic proprietary concern. Id. at 44-45. The Defense Department's concern that drawing straight baselines for the Archipelago might undermine the United States' law of the sea negotiating position was found to be "without substantial merit." Ex. AK-122 at 1. As noted below, moreover, national defense considerations actually support claiming the waters of the Archipelago as inland.

Thus, the only reason the United States refused to correct its mistake in disclaiming the inland-water status of the Archipelago was pecuniary, not policy-based. The United States' willingness to employ straight baselines in the Archipelago in international relations—but only if Alaska waived its claims under

the domestic Submerged Lands Act (see Ex. AK-123 at 5)—proves the point. Indeed, since foreign nations have the absolute legal right under Article 4 of the Convention, in their discretion, to employ straight baselines to claim waters just like those at issue here, it is difficult to understand how a rejection of Alaska's valid historic waters claim would have any effect on what foreign nations legally choose to do with their own waters.

The other Submerged Lands Act cases are over and the parties agree that the disputed lands here—while critically important to Alaska and its sovereignty—have little if any monetary value. Accordingly, Alaska's claim does not adversely impact any legitimate United States' policy interest, pecuniary or otherwise. The closing lines Alaska urges under its historic waters claim are ten miles or less in length. They lie substantially further landward and are even more conservative than the Article 4 straight baselines the State Department found would have no adverse effect on the United States' foreign relations. Alaska's claim, moreover, simply reflects the United States' position until 1971, a position that both it and foreign nations considered fully consonant with international law. Finally, the United States remains free to characterize the waters of the Archipelago as territorial sea in its international relations if it so chooses. Alaska's claim addresses only Alaska's boundaries as they existed at statehood and Alaska's

title to submerged lands. From Alaska's perspective, the only reason the United States continues to oppose Alaska's claim is because it can.

In contrast to the United States' arguments, Alaska has legitimate policy reasons for pursuing its claim. Alaska is entitled to the equality with other States, guaranteed by the equal footing doctrine, that the United States' position denies it. Alaska has a significant interest in eliminating the checkerboard jurisdictional regime for state civil and criminal law that the United States' claim would establish. Indeed, because proving whether a given event occurred within or without the pockets and enclaves claimed by the United States could be difficult if not impossible, there is a very real possibility that neither the State nor the Federal Government could successfully claim jurisdiction over a particular incident. Finally, Alaska has an abiding interest in ensuring that all parts of Alaska are within its boundaries. The State's territorial integrity directly reflects its existence as a State.

In fact, the United States itself has historically recognized the strategic and economic importance of the waters of the Archipelago. See Alabama and Mississippi Boundary Case, 470 U.S. at 102, 105-106 ("the vital interests of the coastal nation, including elements such as geographical configuration, economic interests, and the requirements of self-defense" can "fortify" a finding of historic inland waters); AK Count I Mem. at 46-49. During and after World War II, the

military highlighted the strategic benefits and defensibility of the Archipelago's inland waters. For example, the Army Board of Engineers noted that

> Skagway is accessible to shipping from Puget Sound entirely by way of the comparatively easily defended Inside Passage. Preservation of the harbor is, to a degree, a national obligation as the port has strategic value to national defense. [Skagway Harbor, Alaska, H.R. Doc. No. 79-746, at 12-13 (1946) (Ex. AK-315).]

A Senate subcommittee made the same point with respect to Haines, "which lies at the head of the inland waterway" and "offers an alternate route [to crossing the Gulf of Alaska to Whittier and Seward] in the event of war." Report of the Alaskan Task Force, S. Doc. No. 82-10, at 12-13 (1951) (Ex. AK-317); see also id. at 33-34. In comments to the subcommittee, General Rogers stated that "Haines is believed to be the most desirable terminus [for a pipeline], since it is on the inland water passage and thus the route leading to it should more easily be protected from interruption by enemy submarines." Id. at 49 (emphasis added); see also id. at 60-61 (using Haines to supply interior Alaska is "the most naturally protected supply line from a military standpoint"). But according to the United States, potentially hostile foreign warships or submarines would have had the absolute right prior to statehood to steam more than 70 miles up Chatham Strait and Frederick Sound into the heart of the Archipelago. See AK Count I Mem. at 47-49. It is obvious that such a view is incompatible with the vital self-defense

interests of the United States. And Congress has also repeatedly recognized the importance of the inland waters to the people of the Archipelago.[16]

The United States' says that it is willing to address Alaska's interests through "special legislation" and that Alaska has "no reason" to expect it will not do so. US Count II Mem. at 23. That is no answer to Alaska's concerns. The United States' abrupt about-face in 1971 created the problems it now says it is willing to cure through "special legislation." That alone gives Alaska ample reason to question the United States' willingness to "accommodate" Alaska's interests. Such legislation, moreover, would indeed be "special." No other State must rely on the Federal Government's willingness to give, as matters of federal grace, what the Constitution gave other States as inherent attributes of sovereignty.

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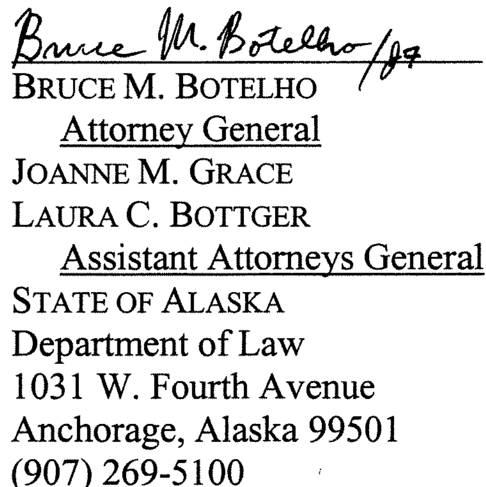
16 See, e.g., Wrangell Harbor, Alaska, H.R. Doc. No. 76-284, at 8 (1939) ("Wrangell, like all other towns in southeastern Alaska, is entirely dependent on water and air transportation for its connection with other communities and the outside world") (Ex. AK-318); Petersburg Harbor Alaska, H.R. Doc. No. 76-670, at 11 (1940) (illustrating "southeastern Alaska's dependence on water transportation") (Ex. AK-319); Transportation in Alaska, H.R. Rep. No. 80-1272, at 10 (1948) (ocean transport is the principal means of conveyance in Alaska, and "Southeastern Alaska, in particular, is and must continue almost entirely dependent on water transportation for local services") (Ex. AK-315); Report of the Alaskan Task Force at 60 ("Southeastern Alaska has always been and still is supplied entirely by water transport through the so-called inside passage") (Ex. AK-317); Southeastern Alaska, H.R. Doc. No. 83-501, at vii (1954) ("[t]he importance of the local waterways to the basic economy of the region cannot be overemphasized"), id. at 4, 36 (observing that the area is dependent upon water and air transportation), id. at 69 ("navigation is vital to the economy of southeastern Alaska"), id. at 109 (noting the "complete dependence of the area upon navigation") (Ex. AK-133).

The United States' position relegates Alaska to second-class status as a State, a clear violation of the guarantee in Section 1 of the Alaska Statehood Act that Alaska was admitted to the Union "on an equal footing with the other States in all respects whatever." Alaska Statehood Act, Pub. L. No. 85-508, § 1, 72 Stat. 343 (codified at 48 U.S.C. note prec. § 21).

CONCLUSION

For the foregoing reasons, and those set forth in Alaska's motion for summary judgment, the Special Master should recommend that the United States' motion for summary judgment on Count I be denied and that Alaska's motion for summary judgment be granted.

Respectfully submitted,



BRUCE M. BOTELHO
Attorney General
JOANNE M. GRACE
LAURA C. BOTTGER
Assistant Attorneys General
STATE OF ALASKA
Department of Law
1031 W. Fourth Avenue
Anchorage, Alaska 99501
(907) 269-5100

Counsel for Plaintiff

Of Counsel:

JOHN G. ROBERTS, JR.
JONATHAN S. FRANKLIN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

G. THOMAS KOESTER
2550 Fritz Cove Road
Juneau, Alaska 99801
(907) 789-6818

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