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 IV—GLACIER BAY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

I. THE UNITED STATES HAS NOT CARRIED ITS BURDEN OF DEMONSTRATING THAT THE 1925 PROCLAMATION DEFEATED ALASKA'S TITLE TO SUBMERGED LANDS 3

A. The Proclamation Was Not Meant To Reserve Submerged Lands 4

B. Water Areas Were Not Necessary To The Primary Objective Of The Reservation 11

1. An Implied Reservation Cannot Be Found Unless A Primary Purpose Of The Reservation Would Be Entirely Defeated By Excluding The Submerged Lands 12

2. The United States Has Not Carried Its Burden Of Proving That The Purpose of Studying Glacial Behavior Would Be Entirely Defeated Without Title To The Submerged Lands 16

3. The United States Has Not Carried Its Burden Of Proving That The Purpose Of Studying Interglacial Forests Would Be Entirely Defeated Without Title To The Submerged Lands 19

4. The United States Has Not Carried Its Burden Of Proving That The Purpose Of Protecting Wildlife Would Be Entirely Defeated Without Title To The Submerged Lands 20

II. THE UNITED STATES HAS NOT CARRIED ITS BURDEN OF DEMONSTRATING THAT THE 1939 PROCLAMATION DEFEATED ALASKA'S TITLE TO SUBMERGED LANDS 22

A. The Boundaries Drawn By The 1939 Proclamation Do Not Establish As A Matter Of Law That Interior Meant To Reserve Submerged Lands 24

B. The United States Has Not Carried Its Burden Of Proving That The Stated Purposes Of The Expansion Would Be Entirely Defeated Without Title To The Submerged Lands 25

C. The United States Cannot Defeat Alaska's Title Based On A Purported Purpose To Protect Bears That Was Not Set Forth In The Proclamation Establishing The Reservation 27

1. The United States Is Bound To Its Stated Purpose In Actions To Establish Authority Over Lands Intended To Be Held In Trust For A Future State 27

2. The Submerged Lands Analysis Would Not Change Even If The United States Could Now Assert A Purpose For The Monument Not Included In The Proclamation 32

D. Bear Preservation Was Not A Purpose Of The Reservation. 35

III. CONGRESS DID NOT CLEARLY EXPRESS AN INTENT TO RETAIN THE SUBMERGED LANDS WITHIN THE MONUMENT BOUNDARIES 43

CONCLUSION 53

TABLE OF AUTHORITIES

Page

CASES:

Andrus v. Utah, 446 U.S. 500 (1980) ... 47

Cappaert v. United States, 426 U.S. 128 (1976) ... 34

Gregory v. Ashcroft, 501 U.S. 452 (1991) ... 30

Idaho v. United States, 533 U.S. 262 (2001) ... 10, 14

Minnesota v. Block, 660 F.2d 1240 (8th Cir. 1981), cert. denied, 455 U.S. 1007 (1982) ... 32

Montana v. United States, 450 U.S. 544 (1981) ... 1

Shively v. Bowlby, 152 U.S. 1 (1894) ... 14

Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001) ... 51

United States v. Alaska, 521 U.S. 1 (1997) ... passim

United States v. California, 436 U.S. 32 (1978) ... 29, 35

United States v. Holt State Bank, 270 U.S. 49 (1926) ... 14

United States v. Morrison, 240 U.S. 192 (1916) ... 47

United States v. New Mexico, 438 U.S. 696 (1978) ... 13, 34

Utah Div. of State Lands v. United States, 482 U.S. 193 (1987) ... 11, 30

Vermont Agency of Natural Resources v. United States, 529 U.S. 765 (2000) ... 30

Whitaker v. McBride, 197 U.S. 510 (1905) ... 10

Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) ... 30

STATUTES:

16 U.S.C. § 431 .... 16, 17, 28, 42

48 U.S.C. §§ 192-211 (1959) 44

48 U.S.C. §§ 221-228 (1959) 44

48 U.S.C. §§ 230-239 (1959) 44

48 U.S.C. §§ 241-242 (1959) 44

Alaska Right-of-Way Act of May 14, 1898, ch 299, 30 Stat. 409 48

Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 343 (codified at 48 U.S.C. note prec. § 21) 43-44, 48

Submerged Lands Act, Pub. L. No. 31 § 5, 67 Stat. 32 (codified at 43 U.S.C. § 1313(a)) 48

REGULATIONS:

36 C.F.R. 2.8 (1938) 21, 32

50 C.F.R. 91.8(f) (1938) 39

50 C.F.R. 91.9(b) (1938) 39

50 C.F.R. 91.38(g) (1938) 39

LEGISLATIVE MATERIALS:

Hearings Before the Senate Comm. On Interior and Insular Affairs on S. 50, 83rd Cong. (1954) 46

OTHER AUTHORITY:

Executive Order No.10857, 25 Fed. Reg. 7250 (Dec. 29, 1959) 44

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ALASKA'S OPPOSITION TO THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT ON COUNT IV—GLACIER BAY

INTRODUCTION

The United States has moved for summary judgment on Count IV, contending that there is no material dispute as to whether the United States reserved the submerged lands underneath Glacier Bay. As we have already shown in connection with Count III, however, see Alaska's Mem. in Supp. of Mot. for Summ. Judg. on Count III ("AK Count III Mem.") at 3-6, the United States bears an extraordinary burden in order to prove its case. " 'A court deciding a question of title * * * must * * * begin with a strong presumption' against defeat of a State's title." United States v. Alaska, 521 U.S. 1, 34 (1997) (quoting Montana v. United States, 450 U.S. 544, 552 (1981)). If the United States wishes to retain submerged lands that are otherwise part of a State's constitutional birthright, it must do so

"expressly." Alaska, 521 U.S. at 35 (quoting 43 U.S.C. § 1313(a)). And where, as here, the United States asserts that a pre-statehood reservation was accomplished by executive action, it must show (1) that the Executive clearly intended to include the particular submerged lands in the reservation; and (2) that Congress either "explicitly recogniz[ed], at the point of * * * statehood, an Executive reservation that clearly included submerged lands," or "acknowledged" continuing federal ownership of the reservation in the statehood act. Id. at 44-45. Congress must speak in plain language that "reflects [its] intent to ratify the inclusion of submerged lands within the Reserve and to defeat the State's title to those lands." Id. at 46.

As shown below, the United States is not entitled to summary judgment because it has failed to carry either of these burdens. Neither the 1925 proclamation that created the Glacier Bay National Monument, nor the 1939 proclamation that expanded it, clearly referred to submerged lands. Much like in the Tongass (see AK Count III Mem. at 24-35), the boundary descriptions on which the United States relies so heavily were simply the easiest way to include or exclude certain islands. And at a bare minimum, disputed issues of fact exist regarding the United States' assertion that inclusion of submerged lands was necessary to further the stated purposes of the initial reservation and later expansion. When the proper legal standard is applied, it is apparent that the United States has not carried its heavy factual burden to demonstrate such an implicit

reservation of submerged lands. Moreover, and in any event, the evidence is clear that protecting brown bears—the United States' present rationale for the 1939 expansion—was in fact not one of the purposes of that reservation. Finally, the United States' reliance on Section 6(e) of the statehood act as evidence of Congressional ratification is patently insufficient because that provision says nothing about Glacier Bay and, at most, ratified only different wildlife sanctuaries created under other laws not applicable here.

It is the United States that bears the heavy burden of proof to demonstrate a clear intent by the Executive to defeat Alaska's title to the submerged lands underlying Glacier Bay, and by Congress to ratify the purported reservation of such lands. As shown below, the United States has failed to carry those burdens and its motion for summary judgment should therefore be denied.

I. THE UNITED STATES HAS NOT CARRIED ITS BURDEN OF DEMONSTRATING THAT THE 1925 PROCLAMATION DEFEATED ALASKA'S TITLE TO SUBMERGED LANDS

In arguing that the 1925 proclamation reserved the submerged lands, the United States makes two arguments. First, it argues that the boundary descriptions necessarily demonstrate an intent to reserve the submerged lands within those boundaries. And second, it argues that the purposes of the reservation would be compromised or undermined if submerged lands were not included. The United States has not carried its heavy burden on either of these points. As to the

boundary descriptions, the proclamation is ambiguous at best and its background in fact shows that it was never intended to include submerged lands. As to the purposes, the United States has misstated the governing legal standard. When the proper standard is applied, it becomes apparent that the United States has not carried its burden of demonstrating an entitlement to summary judgment and that, at a bare minimum, disputed factual issues abound as to whether failing to reserve the lands under the bay would entirely defeat the stated purposes of the reservation.

A. The Proclamation Was Not Meant To Reserve Submerged Lands

Contrary to the United States' assertions, the language of the 1925 proclamation and the history that preceded its issuance demonstrate that it was not intended to reserve lands below high tide as part of the monument. Those who had requested a monument in the first place described the area as "the region surrounding Glacier Bay;" the Department of Interior acknowledged both that this was what was requested and that its 1924 temporary order withdrew only the lands around the bay; and the 1925 order by its terms skirted the shore at high tide.

The 1925 proclamation did not occur in a vacuum, but rather was intended to make permanent certain portions of a temporary withdrawal that had occurred in 1924. The correspondence documenting the 1924 temporary withdrawal demonstrates clearly that the Interior Department did not include submerged lands and thus did not consider the submerged lands to be under

consideration for a monument. The 1924 proclamation temporarily withdrew the "public lands lying within the hereinafter described boundaries * * * pending determination as to the advisability of including [them] in a national monument." Ex. AK-346 at 2 (emphasis added). As Alaska has already explained in detail in connection with Count III, see AK Count III Mem. at 6-16, in 1924 "public lands" was a term of art that did not include submerged lands. Indeed, this is how Interior understood the term; six months later, the First Assistant Secretary described the 1924 order as temporarily withdrawing "a large area in southeastern Alaska about Glacier Bay * * *." Ex. AK-347 (emphasis added): see also Ex. AK-348 at 28 (1930 Interior publication describing 1924 boundary of Glacier Bay National Monument as tracking the "coast line").

This is also how the Ecological Society described the monument it sought. In delineating the proposed boundaries, it gave two choices, both of which included only the uplands around Glacier Bay by defining the northern, eastern, and western boundary lines to Icy Strait and drawing no line to close the area on the south. See Ex. AK-349 at 14 & ff. The Society was even more specific when it urged conservation organizations to write letters to the Secretary of Interior and the Director of the Park Service urging the creation of the monument. It described its goal as having "the region surrounding Glacier Bay * * * withdrawn from entry

and made a national monument," and suggested that the organizations draft their own letters to that effect. Ex. AK-330 at 2 (emphasis added).

Although most of the organizations wrote letters using altered language, many described the requested monument as including only the lands around the bay. See, e.g., Exs. AK-351 to AK-354 (supporting national monument status for "the region surrounding Glacier Bay"); Exs. AK-355, AK-356 ("a portion of the country around * * * Glacier Bay"); Ex. AK-357 (the "territory surrounding Glacier Bay should be withdrawn from entry and made a National Monument"); Ex. AK-358 ("the district surrounding Glacier Bay, Alaska") (emphases added). And in responding to some of these letters, the Park Service made the same characterization. See Ex. AK-359 (letter from the Secretary of the Interior acknowledging a letter supporting the "setting aside as a National Monument the region surrounding Glacier Bay, Alaska"); Ex. AK-360 (letter from Acting Park Director regarding "the withdrawal of the region surrounding Glacier Bay as a national monument") (emphases added).

The 1925 proclamation also demonstrates this intent. It begins by stating that "[t]here are around Glacier Bay" tidewater glaciers of the first rank, and does not mention water in the description, reserving only "the tract of land lying within the * * * described boundaries." Ex. AK-361 at 1 (emphases added). The United States suggests that the words "land" and "public lands" have no set

meaning and might include submerged lands. This Court, however, has held that "public lands" has a meaning different from "lands subject to the public land laws" only when the context mandates it. See Alaska, 521 U.S. at 40. And as Alaska has already shown, the term "public lands" in 1924 did not include submerged lands. See AK Count III Mem. at 6-16.

Here, the 1924 order and the 1925 proclamation clearly use both terms in their traditional context. While the 1924 order withdrew the "public lands" within the boundaries, the 1925 proclamation refers only to the "tract of land" because the previous order had already withdrawn all lands in the area from the operation of the public land laws. At the same time, the 1925 order refers to as "public lands" the lands that had been withdrawn in 1924 but that were not ultimately included in the monument, since they were once again subject to public land laws. See Ex. AK-361 at 2.[1] Both orders' precise application of these terms refutes the suggestion that the language of the proclamation should be construed in any looser sense. Given that the 1924 proclamation had temporarily withdrawn only "public lands"—which necessarily did not include submerged lands—the 1925 proclamation, which encompassed only a subset of the previously withdrawn

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1 The proclamation states in part that "it is hereby ordered that the public lands in that portion of the area [withdrawn in 1924] not included in said Glacier Bay National Monument by this proclamation * * * shall be opened only to entry under the applicable homestead laws by qualified ex-service men of the war with Germany * * * for a period of ninety-one days * * *." Id.

uplands, cannot reasonably be interpreted as intending to include massive new areas of submerged lands. Indeed, the 1925 proclamation was intended to decrease the amount of territory reserved, not increase it.

The United States relies heavily on the fact that the boundary lines were drawn through water, but that was simply a convenient way of encompassing uplands within those boundaries. The Interior Department was following the Federal Government's practice of partitioning Southeast Alaska into large blocks of territory regulated by different agencies. Since 1905, federal agencies had been dividing Southeast Alaska into large blocks of reserved areas, broadly drawing lines through waters as a convenient way of partitioning land pieces separated by marine waters. So, for example, when the Forest Service was considering an expansion of the Tongass in 1924 to include "certain islands in Lynn Canal, Icy Straits, and Glacier Bay," the description outlined the entire area, cutting across Glacier Bay. Ex. AK-362 at 1. The Forest Service drew its boundary lines this way despite its long understanding that it had no authority over the submerged lands. See AK Count III Mem. at 37-42. And for Interior, the line drawn across Glacier Bay was a simple way to include and exclude certain islands. The boundary line cut across the bay to include North Marble Island and all islands north thereof, but to exclude Drake, Francis, Willoughby, and the Beardsley Islands because the fox farming and mining claims there made them unsuitable for

monument status. See Exs. AK-361, AK-363, AK-364 at 13-14, 19, 23; see also Exs. AK-365 at 2, AK-366 at 2. The line then angles sharply south to include the large island at the entrance of Bear Track Cove. The boundary's distinct bend in the midst of the bay has no relevance to the land under the water; it clearly relates only to the islands.

Further, Interior's intent to reserve only uplands is clear from the way the boundary line skirts the coast—it borders marine waters only at high tide. The description follows the mean high water of the "largest island at the entrance of Bear Track Cove" from the most westerly point of the island to the most easterly point, then cuts to land. After looping on land around Glacier Bay, the boundary hits the coast again on the west side of the bay, at 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 across the water to meet the line of beginning. Ex. AK-361 at 1.

The United States claims that the description demonstrates a clear intent to include the tidelands on the northern part of the island in Bear Track Cove because the boundary line did not encircle the entire island at high water, but this is an improbable conclusion. See US Count IV Mem. at 27-28. The more likely explanation is that by drawing the boundary along the southern shore of the island at high tide, Interior meant to include it and all northern islands within the

boundaries, but did not consider the adjacent tidelands to be part of the "land" within the boundaries. This interpretation is the only explanation for skirting Geikie Inlet at high tide; if Interior had considered the "tract of land" that borders Geikie Inlet to include its adjoining tidelands, it would not have expressly excluded them.

Also illogical is the United States' claim that the failure of the 1925 proclamation to "meander" the bay from the description demonstrates an intent to include submerged lands. US Count IV Mem. at 27. "Meander" is a surveying term. A meander line does not serve as a boundary, but indicates the sinuosity of a bank or shore and serves to determine the amount of land to be paid for by a purchaser. Whitaker v. McBride, 197 U.S. 510, 512 (1905). It thus has meaning in the context of a survey, when the United States is conveying title or other rights to a third party, and the comment the United States cites from Idaho v. United States, 533 U.S. 262, 274 (2001), referred to a survey conducted for the purpose of ceding reserved lands to others. The Court found that this lack of a meandering survey was one factor, among many, indicating Congress's understanding that submerged lands had been reserved. Id. The survey, however, was made 10 years after the 1873 reservation order, so the Court did not mean that the failure to meander the lake in the reservation order had any significance. In this case, the 1925 Glacier Bay proclamation was not a survey and would not have reflected

surveying practices, whatever its intent. The Court has never found that a failure to "meander" a body of water in a reservation order to be of any consequence. See, e.g., Utah Division of Lands v. United States, 482 U.S. 193, 199 (1987) (reservation of the "site of Utah Lake * * * together with all lands situate within two statute miles of the border of said lake at high water" did not include the lands underlying the lake).

Finally, the United States argues that the square mileage given for the area shows an intent to include submerged lands. The mileage figure, however, does not indicate whether it is meant to represent the entire area within the boundaries, or the "tract of land" within the boundaries. Nor can the United States demonstrate a clear intent to defeat Alaska's title from a square mileage calculation by a field naturalist and a forester years later. See US Count IV Mem. at 7. While these calculations may have correctly distinguished between the area of the water and the land within the boundaries, the individuals did not—and had no basis to—determine whether the submerged lands were reserved as part of the Monument.

B. Water Areas Were Not Necessary To The Primary Objective Of The Reservation

The United States argues that the President must have intended to include submerged lands within the reservation because its purposes would otherwise be defeated. The stated purposes of the reservation were to preserve for study glacial behavior, and "resulting movements and development of flora and

fauna" and of "relics of ancient interglacial forests." Ex. AK-361 at 1. The United States, however, applies an incorrect legal standard. The United States cannot carry its burden of establishing an implied reservation simply by suggesting some conceivable impact of excluding submerged lands. Such an implied reservation requires a much more stringent showing—the United States must prove that not including submerged lands would entirely defeat a primary purpose of the reservation. The underlying question is whether title is necessary to achieve the purpose of the regulation. When the proper legal standard is applied, it is apparent that the United States has not carried its burden and that, at a minimum, factual issues remain as to whether the reservation of enormous amounts of submerged land was truly necessary to serve the reservation's stated purposes.

1. An Implied Reservation Cannot Be Found Unless A Primary Purpose Of The Reservation Would Be Entirely Defeated By Excluding The Submerged Lands

The United States asks the Court to infer that the submerged lands within the boundaries of the monument were reserved because they are necessary to the purpose of the monument. Although the Court requires that an executive reservation reflect a "clear intent" to include submerged lands, it will infer an intent based on the purpose of the reservation if the purpose would have been defeated without including the submerged lands. Alaska, 521 U.S. at 42-43, 45. Thus, in Alaska, the Court found that an Executive Order creating a petroleum

reserve included submerged lands, because petroleum in subsurface formations extends beneath submerged lands and draining the petroleum from those lands would have defeated the purpose of preserving this resource. Id. at 39-40.

Having rarely applied this principle, the Court has not defined the degree to which excluding submerged lands must undermine the purpose to consider them included. In a similar situation, however, the Court has developed a more precise explanation of this degree, which should apply as well to the issue of whether a pre-statehood reservation includes submerged lands. In the context of federal reserved water rights—which the Court infers based on the purpose of the reservation—the Court will not find the water rights reserved unless "without the water the purposes of the reservation would be entirely defeated." United States v. New Mexico, 438 U.S. 696, 700 (1978) (footnote omitted; emphasis added).

The Court's reasons for applying this stringent standard to infer an intent to reserve water rights apply equally to an inference to reserve submerged lands. The Court explained in New Mexico that a careful examination of the purpose of the executive reservation and a close tailoring of the water right to that purpose is required because the reservation of water is implied rather than expressed, and because of "the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water," which demonstrates a tradition of deference to state allocation decisions. Id. at 701-702.

The same analysis should apply to an implicit reservation of submerged lands. The reservation of submerged lands should not be inferred unless the purpose of the broader reservation would otherwise be "entirely defeated," because—as in the reserved water rights context—the reservation is implied, and "the history of congressional intent in the field of federal-state jurisdiction" with respect to submerged lands carries a presumption in favor of the State. Congress long has had a policy of not retaining submerged lands except "in case of some international duty or public exigency." Shively v. Bowlby, 152 U.S. 1, 50 (1894). Overwhelmingly, equal footing doctrine lands have been "held for the ultimate benefit of future States," United States v. Holt State Bank, 270 U.S. 49, 55 (1926), and "the default rule" is that title to land under navigable waters passes to a new State, Idaho, 533 U.S. at 272.

The United States' brief demonstrates how easy it is to express some way in which any given purpose could be undermined by excluding submerged lands, thereby rendering the presumption meaningless. If the United States need only establish that excluding tidelands might "somewhat" or "potentially" undermine a purpose of the reservation, the presumption of state ownership is lost. The danger of so lowering the bar is illustrated by the United States' current rationalization that scientists must have wanted to study the bottom of Glacier Bay because glaciers once rested on it. Regardless of whether this position might

possibly have any currency today, the concept was never considered in 1925 when the monument was proposed. The original proponents of the monument could not have anticipated sidescan sonar or multibeam acoustic images taken from satellites to depict the gouges left by glaciers, see Ex. US-IV-8 at 92-93. Even if this technology had been foreseeable, no one would have believed that monument status was necessary to protect gouges on the ocean floor.

The arguments the United States makes about the effects of excluding submerged lands require no real showing, effectively turning the presumption to one in favor of, rather than against, the Federal Government. Similarly, unless the amount of submerged lands is limited to that necessary to the primary purposes of the reservation, the United States need only establish that not including some submerged lands would defeat the purpose of the reservation to establish title to all submerged lands within a reservation. This approach would effectively vitiate the equal footing doctrine. None of the purposes that the United States gives for the monument—to protect tidewater glaciers, intertidal forests, or wildlife—remotely justifies reserving submerged lands stretching three miles from shore.

The premise that an implied reservation of submerged lands should be limited to the lands necessary to fulfill the primary purpose of the land reservation is particularly fitting for a national monument. The Antiquities Act, which authorizes the creation of monuments, independently imposes a presumption that

the lands included "in all cases [are] confined to the smallest area compatible with the proper care and management of the objects to be protected." 16 U.S.C. § 431. Antiquities Act reservations therefore have a presumption against an implied reservation of submerged lands based both on the equal footing doctrine and on Congress's intent that the reach of monuments be strictly circumscribed. Both limitations, meant to preserve the delicate state/federal balance, would be upset by a finding that the President reserved submerged lands three miles from the outer coast to protect animals migrating to uplands left bare by retreating glaciers, stumps left by retreating glaciers, and fjord bottoms in a bay 25 or 30 miles away.

2. The United States Has Not Carried Its Burden Of Proving That The Purpose of Studying Glacial Behavior Would Be Entirely Defeated Without Title To The Submerged Lands

The United States argues that glacial science recognized that the dynamics of glacial advance and retreat were "intimately coupled" with the adjacent and underlying lands, and that it is therefore implausible that Glacier Bay National Monument would be created without the "fjord bottoms on which the glaciers sat in the past and may once again sit in the future." US Count IV Mem. at 31. But the United States has failed to carry its factual burden of demonstrating that the framers of the proclamation had ever thought of studying the bottom of the bay, or that this study would be impossible unless the bay bottom were reserved.

The United States relies on the report of one of its experts to suggest that American scientists would have considered the submerged lands vital to the monument. US Count IV Mem. at 12-13. But neither the proponent of the Monument, William Cooper, nor the Department of Interior had any concept in 1925 that the bottom of Glacier Bay ought to be included to study glacial behavior, and that fact alone is sufficient to deny the United States' motion as a matter of law. See Exs. AK-349, AK-367.[2]

If the Court determines, however, that regardless of what the framers actually intended, the effect of submerged lands on the study of glacial behavior is a material issue, then the United States has plainly failed to carry its burden of

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2 That Cooper and the Ecological Society did not consider the submerged lands of Glacier Bay critical to the study of glaciers is obvious, since the boundaries they proposed did not include the bay, Ex. AK-349 at 14, and the monument they sought was "the region surrounding Glacier Bay," Ex. AK-350. Interior itself did not consider any fine points of the study of glaciers; its officials hardly had an independent thought about the scientific basis for the monument, deferring to Cooper completely. The Secretary was astonishingly accommodating to Cooper's request; within six weeks of the proposal, the Secretary temporarily withdrew 2 1/2 million acres of land and requested the General Land Office to study it. Exs. AK-368, AK-346, AK-369. When the GLO report came back with a negative reaction, questioning the need for a monument and the need for such a large area, the Assistant Secretary asked Cooper for a response, and the interested parties negotiated the amount of land to be included. Exs. AK-370 to 376. Interior never expressed any belief that land that Cooper had not requested should be included, for a scientific or any other reason. To the contrary, the Secretary expressed to Cooper his concern that under the Antiquities Act, he was required to confine the monument to the smallest area compatible with the proper care and management of the objects to be protected. Ex. AK-377 (quoting 16 U.S.C. § 431).

demonstrating that the purpose of studying such behavior would be "entirely defeated" without including the bay bottom. The United States asserts that it is "simply not plausible" that a proclamation creating a monument because of its tidewater glaciers would exclude the fjord bottoms "on which the glaciers sat in the past and may once again sit in the future." US Count IV Mem. at 31. But in proposing a monument only for the uplands, the Ecological Society apparently found it plausible, and the United States has not shown that glaciers could not be studied without vesting the United States with title to the seabed. Just as the ocean floor can be studied in international waters without title to it, so scientists can easily study Glacier Bay without Federal title to its bottom.

Accordingly, there is a disputed issue of fact as to how the purpose of studying glaciers would be defeated, and to what degree, if title were vested with Alaska. The United States' bald assertions of attenuated effects are plainly insufficient. It should instead be required to present evidence satisfying its burden, which the State could rebut through cross-examination of the United States' witnesses or its own evidence, if necessary, to show that impacts are insufficient to find an implied reservation of submerged lands.

3. The United States Has Not Carried Its Burden Of Proving That The Purpose Of Studying Interglacial Forests Would Be Entirely Defeated Without Title To The Submerged Lands

The United States also argues that without all the submerged lands within the monument's boundaries, its purpose of providing an opportunity to study interglacial forests would be undermined. US Count IV Mem. at 31-32. The "relics of interglacial forests," to the extent they exist on tidelands, are tree stumps that reappeared in several places with the retreat of certain glaciers. Ex. AK-378 at 2. On some sites originally studied in 1921, the forest remains had been uncovered from the gravel that advancing glaciers earlier had pushed over them by the erosive action of streams and waves. A handful of these sites are located in areas uncovered by waves and found below high tide.

The acreage of submerged lands allegedly within the monument is enormous, including all of Glacier Bay, a large portion of Icy Strait, and an extensive area spanning three miles off the outer Pacific coastline. Yet the United States claims that a primary purpose of the monument would be defeated unless all these submerged lands were reserved—based on a few sites in the tidal zone of the upper bay comprising a tiny fraction of the submerged lands. This bald assertion cannot satisfy the United States' burden of proof. For just as with the study of the seabed, the United States has provided no evidence demonstrating that these areas could not be studied unless the United States reserved title to the lands.

Moreover, if the Court finds these few small areas to be vital to the purpose of the monument, another factual issue arises. The sheer size of the asserted reservation itself, and the existence of interglacial forests on uplands, belies any assertion that the scientific purpose would be "entirely defeated" without the enormous reservation of submerged lands it now espouses. Even assuming that Interior specifically intended that interglacial forests below high tide be studied, it would not follow that the existence of several such sites would mandate reservation of the entire bay, part of Icy Strait, and the three-mile strip seaward of the outer coast. According to Interior, the stumps appeared in concentration only in the area within the 1925 boundaries; few if any were added by the 1939 expansion. See Ex. AK-364 at 20. Given the presumption against taking submerged lands out of trust for the future State, the United States must establish that this purpose required reserving all the submerged lands within the boundaries, including all the land below low tide in the upper bay and all the submerged lands within the boundaries of the 1939 expansion. It has failed to do so, and its motion should be denied for that reason alone.

4. The United States Has Not Carried Its Burden Of Proving That The Purpose Of Protecting Wildlife Would Be Entirely Defeated Without Title To The Submerged Lands

The United States also argues that the monument's purpose of facilitating study of how plants and animals gradually grow and migrate to land

areas left barren by retreating glaciers would also be undermined if submerged lands were not included. US Count IV Mem. at 32. The United States argues that because the flora and fauna would be studied, the monument must also protect them. The United States then argues that, while the study would be of uplands only, people on submerged lands could harm the fauna by killing it, either from afar or from nearby when it wandered off monument lands.

This argument fails because protecting, rather than studying, the wild-life was never enunciated as a purpose of the reservation. See generally infra at 26-31. But even if this purpose had been expressed, the Court should hold as a matter of law that title to submerged lands was not necessary to fulfill the purpose. For the monument regulations that prohibited the killing of wildlife already protected all animals within the monument, regardless of the status of the land. See 36 C.F.R. § 2.8 (1938) (Ex. AK-379); see also Ex. AK-380 (February 1939 Advice of the Interior Solicitor that the Park Service has authority to regulate privately-owned and adjacent lands when necessary to protect park purposes). Because this prohibition would have applied to all lands within the monument, reserving the submerged lands would not have afforded wildlife any additional protection.

If the Court does not find this to be an issue that it can dispose of as a matter of law, then factual issues plainly exist as to whether this purpose would be

entirely defeated if the submerged lands were not reserved.[3] The United States should be required to establish how and to what extent scientists would be thwarted in "studying the invasion of plants and animals into ground vacated by the ice at known dates." Ex. AK-378. It is not sufficient for the United States to simply state that this purpose would be defeated; it must present evidence to that effect that the State has an opportunity to refute through cross-examination or otherwise.

II. THE UNITED STATES HAS NOT CARRIED ITS BURDEN OF DEMONSTRATING THAT THE 1939 PROCLAMATION DEFEATED ALASKA'S TITLE TO SUBMERGED LANDS

The 1939 proclamation greatly expanded the original monument, adding land areas to the east and west of the bay. As was the practice in Southeast Alaska, the boundary lines for the expanded monument were drawn through the waters surrounding the land mass both because they served as natural boundaries, and because the boundary lines encompassed the small islands close to shore. The stated purposes for adding these lands were the same as those given for the original reservation—to study glaciers and the emerging flora and fauna. See Ex. AK-382.

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3 In 1931, the Katmai National Monument in Alaska was expanded for the express purpose of protecting brown bears. Although the expansion added a large coastal area, the monument boundaries ended at high tide. See Ex. AK-381. These monument boundaries suggest that Interior, in fact, did not believe that a large area that was set aside for the direct, express purpose of protecting bears required reserved tidelands or submerged lands as well as uplands. It is therefore unlikely that the Federal Government thought submerged lands necessary for a monument to study the land left as glaciers retreat.

As with the 1925 proclamation, the United States fails to carry its heavy burden to demonstrate that the 1939 proclamation defeated Alaska's presumptive title to the submerged lands. As with the earlier one, the 1939 proclamation does not clearly evince an intent to reserve all the submerged lands within the boundaries described. And the United States has likewise failed to prove that the stated purposes would be entirely defeated if Alaska has title to the submerged lands.

The United States now claims another, unstated purpose, one that the State also initially thought pertinent to this case: that the monument serve as a refuge for the Alaska brown bear. After reviewing the documents the United States has produced, however, the State is now convinced that this 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. But that is immaterial because the Federal Government did not assert that a bear preserve was a primary purpose when it expanded the monument in 1939, and the United States cannot later change its explanation of what the proclamation was meant to accomplish in a way that deprives a State of a traditional attribute of sovereignty. Further, even if the United States could informally restate a monument's purposes after its establishment so that the monument is now considered a bear refuge, these animals are fully protectable without any need for Federal title to the submerged lands.

A. The Boundaries Drawn By The 1939 Proclamation Do Not Establish As A Matter Of Law That Interior Meant To Reserve Submerged Lands

The 1939 proclamation followed the practice that had become established in Southeast Alaska of drawing boundaries through the maze of marine waters to separate the mainland, large islands, and small islands into areas regulated by different federal agencies. The intent of these dividing lines was to partition uplands, not submerged lands. For example, a 1932 Forest Service memorandum on the proposed boundaries for the Glacier Bay expansion expressed the Forest Service's desire that the southern boundary exclude the Inian Islands and Pleasant Island—so they would remain in the forest—but include the small islands immediately adjacent to the mainland and all the islands in the south end of Glacier Bay. See Ex. AK-383. The boundary as ultimately drawn through Icy straits maneuvers around the islands to this specification. See Ex. AK-382.

The boundary line on the outer coast had a slightly different basis. The coastal strip of land from Cape Fairweather to Cape Spencer was Forest Service land before 1939, part of the Tongass National Forest. As Alaska has already shown in connection with Count III, the forest boundary included the submerged lands far off the outer coast of the Alexander Archipelago and the northern mainland of Southeast Alaska without reserving the submerged lands as part of the forest. See AK Count III Mem. at 24-35. The Forest Service disclaimed any

authority over these submerged lands, but it would have been inefficient to have one agency regulating huge areas of the mainland and large islands, and a different agency regulating the few small islands off the coast, so the boundary served to include them within the forest. The 1939 proclamation had the effect of converting the forest lands into monument lands, and thus it naturally used the same boundary. The monument boundary line served the same purpose it had when the area was in the forest—to include the few small islands along the coast.[4]

The United States' reliance on the boundary lines thus falls short of carrying its burden to demonstrate a clear intent to reserve submerged lands. And as next shown, its implied reservation argument also falls far short of the mark because the United States fails to demonstrate that the stated purposes of the expanded reservation would be entirely defeated if title remained with Alaska, and because the United States may not, as a matter of law, defeat Alaska's title based on a purpose not stated in the reservation proclamation itself.

B. The United States Has Not Carried Its Burden Of Proving That The Stated Purposes Of The Expansion Would Be Entirely Defeated Without Title To The Submerged Lands

The stated purposes of the 1939 expansion of the monument are nearly the same as those given by the 1925 proclamation. The United States

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4 This boundary was refined from a straight line that extended beyond the three-mile limit in places to a line consistently three miles offshore, presumably to more accurately reflect the national boundary.

asserts that the purposes of the monument clearly indicate that the submerged lands in the additional area must have been reserved as well. These arguments raise the same type of factual issues raised by the 1925 proclamation as to how and how much the purposes would be affected if the submerged lands were not reserved. The requisite evidence may be somewhat different, however, since the submerged lands within the expanded boundaries were of a different character than those within the original boundaries. The submerged lands within the original boundaries, those underlying upper Glacier Bay, were in a contained, recently glaciated area with a number of tidewater glaciers. The submerged lands within the area added in 1939, on the other hand, are in areas much less glaciated and that border on more open marine areas, including the open sea. So, for example, the United States' argument that the study of glacial behavior requires submerged lands may require different evidence concerning how that study might be affected in the three-mile wide strip underlying the outer Pacific coastline than it does for Glacier Bay proper. But just as with the 1925 proclamation, however, it is plain that the United States has failed to carry its burden of proving that the stated purposes would be entirely defeated if the Federal Government lacked title to the submerged lands allegedly added in 1939.

C. The United States Cannot Defeat Alaska's Title Based On A Purported Purpose To Protect Bears That Was Not Set Forth In The Proclamation Establishing The Reservation

In addition to the purposes shared with the 1925 proclamation, the United States asserts that the 1939 proclamation had as a primary purpose the creation of a sanctuary for bears. While Alaska disagrees that the 1939 proclamation was meant to create a bear sanctuary, the issue is not material to the question whether the United States reserved title to the submerged lands. For even if some supporters of the expanded monument had hoped to establish a bear refuge, the Federal Government's failure to state this intent in the proclamation precludes its assertion now. And in any event, there is no genuine dispute that this purpose could be adequately achieved without reserving the submerged lands within the boundaries.

1. The United States Is Bound To Its Stated Purpose In Actions To Establish Authority Over Lands Intended To Be Held In Trust For A Future State

Nothing in the 1939 proclamation says anything about bears. If the President and Secretary Ickes believed that the Glacier Bay National Monument was necessary to create a preserve for bears, they should have so indicated. Ickes' letter forwarding the proclamation to the President stated that the area to be added "present[ed] an exceptional opportunity for the study of glacial action and post-glacial ecology." Ex. AK-384. The proclamation's wording was similar, stating

that certain lands adjacent to Glacier Bay National Monument had glaciers and geologic features of scientific interest, and that the contiguous lands were necessary for the proper care, management, and protection of the objects of scientific interest in the existing monument. Ex. AK-382. Neither the letter nor the proclamation mentioned that the monument was needed to preserve bears. That is not surprising, because bears already had been protected under existing law on the same lands for six years.

In fact, in 1939 the Federal Government did not believe that the Antiquities Act permitted the creation of a national monument for the purpose of preserving wildlife at all. By statute, the President's authority was limited to creating monuments of "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest." 16 U.S.C. § 431. In 1936 when Interior was proposing the Joshua Tree National Monument, the Solicitor General's office had advised Interior's Solicitor's office that the statute contemplated the preservation of "particular, identified objects having a high degree of permanency," and was meant "to preserve individual objects rather than to preserve species which endure only by reproduction." Ex. AK-385 (emphasis added). In 1937, the Assistant Solicitor General reviewed the proposed proclamation to establish Organ Pipe Cactus National Monument, and gave similar advice. "The Department has heretofore had occasion to consider the question

whether national monuments could be established for the protection of plant and animal life, and it was concluded that a monument could not, in any event, be established for the protection of animals * * * ." Ex. AK-386 at 2 (emphasis added); see also United States v. California, 436 U.S. 32, 34 n.5 (1978) (early drafts of proclamation for Channel Islands National Monument referred to marine life preservation, but references were dropped after the Department of Justice advised that the Antiquities Act did not permit establishment or enlargement of a national monument to protect plant and animal life).

Having received this advice twice in the previous three years, Interior obviously knew that it could not create a monument as a sanctuary for bears. Indeed, nearly all of the Park Service's discussions about a preserve for brown bears on the lands adjacent to Glacier Bay National Monument had been in the context of a proposed national park rather than a monument. See, e.g., Exs. AK-383, AK-387 to AK-401. And even at its most calculating, the Park Service never represented that the monument was desired because the bears were unusual or provided a unique opportunity for study. The given reason had always been to create—in the words of the Assistant District Forester—" 'a super-zoo' in Southeast Alaska for Alaska brown bear." Ex. AK-398 at 2.

Regardless of whether the United States now believes the President had Antiquities Act authority in 1939 to create a bear refuge, it cannot claim that

the proclamation took equal footing doctrine lands out of trust because of a purpose for the reservation not stated at the time. While the Court will infer from a reservation's purposes that the United States intended to reserve submerged lands if excluding them would necessarily defeat that purpose, Alaska 521 U.S. at 39, the United States asks much more in this case. Here, the United States argues that the Court should infer an unstated purpose for the monument, and from that inference, it should infer an intent to reserve submerged lands.

This double inference would stray too far from the principles of the equal footing doctrine, and to permit it would be contrary to principles of judicial restraint deeply rooted in Supreme Court jurisprudence and vital to our federal structure. In Utah Division of State Lands, 482 U.S. at 195, 198, the Court held that a court should not construe a federal statute to restrict state title to submerged lands "unless [such an] intention was definitely declared or otherwise made very plain, or was rendered in clear and especial words." The Court has applied this principle in a number of contexts involving legislation that could alter the federal/state balance, refusing to construe laws to alter the traditional balance unless that result is "unmistakably clear in the language of the statute." Vermont Agency of Natural Resources v. United States, 529 U.S. 765, 787 (2000) (quoting Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989)); see also Gregory v. Ashcroft, 501 U.S. 452, 460-461 (1991).

This rule prevents a federal agency from assuming a traditional state authority not unambiguously granted. If indeed Interior had expanded the monument in 1939 to create a bear sanctuary, its failure to state that this was a primary purpose of the reservation might have saved it from a legal challenge or a decision by the President or by Congress that the proposed expansion would be invalid. But to use this hidden "purpose" years later as a basis for retaining title to equal footing doctrine lands would permit Interior to shift authority from the State without ever facing the scrutiny that a clear statement of such an intent would have imposed and that the Court's case law requires.

Title to submerged lands is a fundamental attribute of state sovereignty, and before statehood the United States holds these lands in trust for the future State. It would be contrary to the ideals of a federal system to permit the United States to argue that it had intended to upset the traditional balance of state/federal power but had remained silent, not only about its intent to reserve submerged lands, but also about the underlying reason that submerged lands might be considered important for the reservation. Whether or not the President actually considered bear preservation to be a primary purpose of his 1939 proclamation, his complete silence on the matter negates the openness and clarity of intent required to reserve sovereign lands otherwise held for the future State.

2. The Submerged Lands Analysis Would Not Change Even If The United States Could Now Assert A Purpose For The Monument Not Included In The Proclamation

Even if preserving bears had been an unstated reason for reserving the area added by the 1939 proclamation, and equal footing doctrine lands could be reserved for clandestine reasons, the United States would still have failed to carry its burden to demonstrate a clear intent to reserve the submerged lands as part of the monument. That is so for two reasons.

First, the United States has failed to demonstrate that unreserved submerged lands would have posed a threat to bears. In fact, the evidence shows the opposite. Park Service regulations already prohibited the killing of bears within all monument boundaries regardless of land status. See 36 C.F.R. § 2.8 (1938) (Ex. AK-379); see also Ex. AK-380 (February 1939 Interior Solicitor's opinion); Minnesota v. Block, 660 F.2d 1240 (8th Cir. 1981) (property clause permits federal regulation of activities on inholdings within wilderness area that could negatively impact wilderness values), cert. denied, 455 U.S. 1007 (1982).

Second, even if this had not been true, preserving bears was not a direct purpose of the reservation. The area added in 1939 was not needed as a bear refuge, since the land was already closed to hunting, and monument regulations kept the bears protected. Simply because a reservation creates an incidental benefit does not mean that the reservation was created primarily for that reason. An

incidental benefit is not a sufficient basis to infer that the President must have meant to reserve submerged lands, particularly when the presumption is against such an inference.

As outlined below, the Park Service initially tried to use the public desire for a bear reserve as a mechanism to develop support for an expansion of Glacier Bay National Monument, but ultimately it sought the expansion for other reasons. That bears were not a direct purpose of the monument expansion is clear not only from the plain language of the 1939 proclamation and the history leading up to it, but also from general understanding of the purposes immediately after the proclamation issued. In his 1939 Report on Alaska, the Governor of Alaska characterized the monument as "valuable from a scientific standpoint to students of natural history," with "[e]xcellent opportunities * * * for the study of glacial phenomena and the observation of progressive encroachment of vegetation upon previously glaciated area." Ex. AK-402. Brown bears, the report noted, were a "supplementary source of interest, as the region is a preserve for these animals." Id. (emphasis added). "Supplementary source of interest" is a good way to express the role of wildlife in this monument; it was a preserve for wildlife in the sense that Park Service regulations prohibited all hunting within the boundaries of all monuments, Ex. AK-379, and the Governor's Reports had described it as a bear preserve for years before the 1939 expansion. See Ex. AK-403. The United

States' argument proves far too much. If accepted, it would mean that submerged lands would always be reserved whenever hunting is prohibited within a reservation's boundaries because in that event it could always be said that the reservation serves an unstated purpose of wildlife preservation. Such a rule would turn the presumption of state title on its head.

It would be a large leap to conclude that because monument lands reserved to protect and study glaciers are also closed to hunting, the purpose of the monument would have been defeated if the adjacent waters were not also reserved. The Court rejected the same type of argument in the reserved water rights context. The United States argued that since Congress clearly foresaw that stockwatering would be one use of national forests, it intended to reserve water from the Rio Mimbres for this purpose. New Mexico, 438 U.S. at 715-716. This Court responded that while Congress intended the national forests to be put to a number of uses, including stockwatering, that was not itself a direct purpose of reserving the land and could not support an implied reservation of water.

Similarly, categorically banning hunting in all monuments does not mean that they are reserved for the purpose of protecting wildlife, unless a particular species is deemed an "object of scientific interest," such as the pupfish in Devil's Hole, Death Valley National Monument. See Cappaert v. United States, 426 U.S. 128, 142 (1976). The direct purposes of the monument are those that

meet the criteria of the Antiquities Act—for example, to preserve fossils of Pleistocene elephants and ancient trees, United States v. California, 436 U.S. at 34, a petrified forest, a natural stone bridge, or tidewater glaciers of the first rank. In the case of Glacier Bay National Monument, bear preservation was at most a collateral effect, not a direct purpose of the 1939 proclamation.

D. Bear Preservation Was Not A Purpose Of The Reservation.

The United States asks the Court to infer a reservation of submerged lands within the area expanded in 1939 based on the importance of tidelands to bears. This argument presumes that a purpose of the 1939 proclamation was to provide a refuge for bears. In fact, the true purpose of the expansion was precisely that expressed in the plain language of the proclamation—to provide the opportunity to study the effects of glacial retreat. While for years the Park Service tried to promote the idea of extending and converting the monument to a park as a preserve for brown bears, ultimately that was not the purpose. The Park Service tried to use the public outcry for a bear sanctuary as a mechanism to generate support for an expansion—to pacify conservationists and as leverage with the Forest Service and Alaskans, who wanted the timber of Admiralty Island (another proposed bear refuge) for commercial harvest. By 1939, however, the Park Service no longer needed leverage with the Forest Service, and bears had been protected on the lands adjacent to the monument for six years. Further, the

numerous documents discussing a bear sanctuary for the area overwhelmingly conceived of it as a national park, but the Park Service settled for an expanded monument, which changed its view of the appropriate purposes. Interior's explanation of the expansion to the President—and the words of the proclamation itself—express what ultimately was the true purpose of reserving the new lands.

From its inception, the idea of the Glacier Bay area as a bear preserve was part of a plan to get the support necessary to expand the monument to the size originally proposed in the 1924 withdrawal, and to convert it to a national park.[5] The Forest Service, the Park Service, and the Governor of Alaska developed an agreement that suited all their interests. Outside conservation groups had launched a campaign to set aside as a bear refuge either Admiralty or Chichagof Island, but these islands were commercially valuable for pulp timber production. Under the agreement, the Forest Service would cede the land from the Tongass for an expansion to create a national park, and in exchange the Park Service would discourage the public pressure to create a park on these islands.[6] The Park Service

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5 It appears that the first recommendation for expansion was made in a 1926 memorandum. That memorandum, however, however, recommended an enlargement only to protect birds, not mentioning bears. See Ex. AK-404; see also Exs. AK-405 to AK-410.

6 This agreement is evident in the 1932 response by the Director of the Park Service to the Governor's complaint that one prominent conservationist was stubbornly sticking to the Admiralty Island proposal rather than supporting an expansion of Glacier Bay. The Director assured the Governor that the Park

then began to actively discourage suggestions for a park on the islands and tried to harness the public support instead to promote an expanded park in the Glacier Bay area. See, e.g., Exs. AK-412 to AK-417. The Park Service Director candidly characterized the Park Service plan as "building up public sentiment favoring a suitable addition so as to make the Glacier Bay National Monument a better refuge for Alaskan brown bear." Ex. AK-418.

Many of the conservation societies, however, did not agree that Admiralty Island should no longer be considered. See Exs. AK-418 to AK-425. Further, the Forest Service was willing to cooperate only as long as the goal was to have the status of Glacier Bay National Monument changed to a national park. See Ex. AK-394. It believed that an extension of the monument without park status "would tie up the entire situation in such a way that the interests in the area could not be properly protected," id., because Congress would better fund a national park, thus assuring enforcement of bear protection regulations. See, e.g., Ex. AK-426; Ex. AK-427. Adequate bear protection in the expanded Glacier Bay area

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Service was not to blame: "I have kept faith with you absolutely. I have given no encouragement whatever to any plan to make a national park out of either Admiralty or Chichagof Islands." Ex. AK-411. Similarly, the Forest Service assured the Park Service of its support for the compromise plan; after a meeting with the Assistant District Forester two weeks later, the Park Service Director reported to the Governor that "I found the spirit of the Forest Service, so far as the proposed [Glacier Bay National] park is concerned, leaves nothing to be desired in the way of promises of cooperation." Ex. AK-390.

was vital to protecting the Forest Service's interests in Admiralty and Chichagof Islands; it was unwilling to give up forest land for a larger monument without assurance that the large islands would no longer be pursued for a bear sanctuary. See also Ex. AK-428 at 2.

Because park legislation was not possible in 1933, though, the Department of Agriculture acted to relieve public pressure for a bear refuge. Agriculture's Bureau of Biological Survey established a game preserve to protect bears on the lands adjacent to Glacier Bay National Monument, see Exs. AK-394, AK-429; see also 50 C.F.R. 91.8(f) (1938) (Ex. AK-430). Thus, by 1933, expanding the monument would have offered no additional protection to bears.

The Park Service then showed that it was less concerned about protecting bears or the Forest Service's interests than it was about getting more acreage for the monument. It decided to seek an expanded monument even though it would not have field staff to enforce regulations protecting wildlife. See Ex. AK-431, see also Ex. US-IV-42 at 50 (even as of 1954, Park Service had only "a temporary ranger once in a while" in the monument).[7] The Forest Service did not want an expanded monument, however, so the Secretary of Agriculture declined to

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7 After the expansion, the lack of enforcement personnel was a cause of complaint. See Ex. AK-432 (complaining that area formerly "patrolled and administered" by the Forest Service was, after being placed in Glacier Bay National Monument, "completely unguarded, unpatrolled, and unprotected" and subject to poaching).

support it. He told the Secretary of the Interior that he thought that his department would adequately protect the Alaska brown bear, and that "in the absence of urgent immediate action," the subject should be postponed. Ex. AK-433.

By 1938, the Park Service's strategy for a Glacier Bay extension had shifted away from bears and from cooperation with the Forest Service. In September 1938, the Park Service again was contemplating park status for the Glacier Bay area. But its Chief Forester, sent to Alaska to investigate the matter, reported that a local Interior official did not believe that an expansion was needed to preserve bears, because they were already protected. The Chief Forester's response signaled a shift in the Park Service's purpose for expanding Glacier Bay. Because bear hunting was now significantly limited on Admiralty Island,[8] and had long been banned on the lands adjacent to Glacier Bay National Monument, a bear sanctuary was no longer a convincing reason for expanding the boundaries. The Chief Forester realized this; rather than claiming that bears currently needed protection, he cited the desire to "round[] out the Glacier Bay National Monument into a well-balanced park which would permit a well-rounded presentation of the wildlife and vegetative conditions to supplement the bold wastes of snow-covered mountains and the glaciers," and suggested that the extension would provide an

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8 New regulations offered stronger protection for bears as of 1936. See 50 C.F.R. §§ 91.8(f), 91.9(b), 91.38(g) (1938) (Ex. AK-430).

element of permanence that would satisfy those who wanted to protect brown bears. See Ex. AK-397.[9]

By late 1938, the Park Service no longer used Admiralty Island as leverage with the Forest Service to get the lands adjacent to Glacier Bay. From the Park Service's prospective, the Forest Service was uncooperative on an expansion of Glacier Bay National Monument. From the Forest Service perspective, it had only ever agreed to cooperate on an expansion that was to be designated a park. As the Park Service proceeded to define the boundaries of the expansion, it virtually ignored Agriculture. See Exs. AK-435 to AK-444. Further, Secretary Ickes found a different way to coerce the Forest Service to grant the lands needed for the Glacier Bay expansion. The Forest Service wanted authority over certain Interior lands on the Kenai Peninsula, but the Secretary announced that he would do nothing on that request "unless they came across with some land around Glacier Bay." Ex. AK-445.

When Agriculture gave its approval in late December, 1938 for the park Interior had proposed, Interior was already wavering and again considering an expanded monument instead. See Ex. AK-446. Secretary Ickes had little concern

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9 The Park Service continued this new theme in October 1938, in its official view of proposed legislation to expand the monument and create a park. The reason for extending the boundaries mentioned but no longer emphasized bears. See Ex. AK-434.

left for the views of the Forest Service on either Glacier Bay or Admiralty Island. In January 1939, Ickes proposed to President Roosevelt that Glacier Bay National Monument be expanded and made into a park along with Admiralty Island. See Ex. AK-447. By this point, the Park Service had completely dropped the pretext of needing an expanded monument to protect bears. It no longer had any reason to cooperate with the Forest Service and no longer had to sell the Glacier Bay expansion as an alternative to an Admiralty Island bear sanctuary.[10] Further, because one of the primary justifications for park status on Admiralty Island was to provide permanent protection for bears, it was contrary to Interior's interests to use the same rationale for a Glacier Bay expansion.

Interior ultimately decided that park status was not possible, and proceeded with an expanded monument instead. See Exs. AK-446, AK-449.[11] On March 6, the Secretary of the Interior submitted the proclamation to the President to expand Glacier Bay National Monument. Because it was seeking a monument rather than a park, Interior greatly narrowed the focus of the purposes. Six or eight months earlier when park status seemed promising, Interior was emphasizing the

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10 Agriculture appeared to have lost the battle over Admiralty Island when the President inquired how timber on the island might be preserved permanently. See Ex. AK-448.

11 The department could not overcome Alaskans' opposition to a park without mining, but it wanted to avoid criticism from conservationists for allowing mining in a park. See Ex. AK-446.

desirability of "a well-balanced park." Ex. AK-397. A monument was not the same type of entity, however, and was intended to protect only "objects of historic or scientific interest." 16 U.S.C. § 431.

Interior's letter to the President reflected this. Its justification for the expansion was thorough and detailed, but made quite clear that the purposes of the expansion had nothing to do with protecting or preserving bear. The explanation did not mention as a purpose preserving wildlife or bears. Rather, Interior's reason for the expansion was the same as that of the original monument reservation—because the area to be added "present[ed] an exceptional opportunity for the study of glacial action and post-glacial ecology." Ex. AK-384.

The President signed the proclamation on April 18, 1939. <u>See</u> Ex. AK-382. The plain terms of the order affirm that is purpose was not to preserve wildlife. It states simply that certain lands adjacent to Glacier Bay National Monument have glaciers and geologic features of scientific interest, and that some of the lands contiguous to the monument are necessary for the proper care, management, and protection of the objects of scientific interest situated on the lands included within the existing monument. These are the reasons for which the President reserved the adjacent lands.

III. CONGRESS DID NOT CLEARLY EXPRESS AN INTENT TO RETAIN THE SUBMERGED LANDS WITHIN THE MONUMENT BOUNDARIES

Because the United States has failed to demonstrate a clear intent to reserve the submerged lands within the monument boundaries, the Court need not consider whether Congress expressed in clear terms an intent to defeat state title. Even if the submerged lands were reserved, however, Congress did not clearly express the requisite intent to retain them. The United States claims that Congress expressly retained the submerged lands in a provision of the Statehood Act that is completely inapplicable. The Court should find as a matter of law that Congress did not clearly intend this provision to apply to the Glacier Bay Monument.

The United States relies on Section 6(e) of the Alaska Statehood Act, which states in part:

> 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: * * * 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.

[Alaska Statehood Act, Pub. L. No. 85-508, § 6(e), 72 Stat. 343 (codified at 48 U.S.C. note prec. § 21) (footnote omitted; initial emphases added).]

The plain language of this section and its legislative history demonstrate that it refers to the authority and property of the Fish and Wildlife Service, and was not intended to apply to lands administered by the Park Service. The provision addressed the transition of regulatory authority over fish and game from the Federal Government to the state. The transfer was of property "specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska" under the provisions of three specific laws. Id. (emphases added).[12] The three cited laws were the Alaska game law, 48 U.S.C. §§ 192-211, and the two Alaska commercial fisheries laws, 48 U.S.C. §§ 230-239, 241-242 and 48 U.S.C. §§ 221-228. These laws gave authority to and were implemented by the Fish and Wildlife Service before statehood. The lands excepted from this general transfer, those "withdrawn or otherwise set aside as refuges or reservations for the protection of wildlife," were a subset of the property

12 The "appropriate federal agenc[ies]" who were to convey the property to the new State, id., were listed in the President's executive order terminating federal fish and wildlife management authority. Executive Order No. 10857, dated December 29, 1959, delegated authority to the Secretary to transfer the property, and authorized the Secretary to redelegate authority to "(1) the Assistant Secretary for Fish and Wildlife, (2) the Commissioner of Fish and Wildlife, (3) the Directors of the Bureaus of Commercial Fisheries and Sport Fisheries and Wildlife, and (4) the Regional Directors, Alaska Region, of the Bureaus of Commercial Fisheries and Sport Fisheries and Wildlife * * *." 25 Fed. Reg. 33 (1959) (Ex. AK-450).

"specifically used for the sole purpose of conservation and protection of the fisheries and wildlife * * *" under the given laws, and thus refers to fish and wildlife refuges under the jurisdiction of the Fish and Wildlife Service.

The legislative history of this section affirms this purpose. Secretary Chapman, who requested this language, characterized the provision as "bringing about a division of the fish and wildlife activities now conducted by the United States in Alaska, along lines of demarcation conforming to the recognized distinctions between Federal and State functions * * *." Ex. US-IV-40 at 49. A Senate report on a statehood bill containing this provision four years later reaffirmed that the purpose was to turn over "to the new State all of the Federal property * * * which is used for the conservation and protection of the fisheries and wildlife of Alaska." Ex. AK-451 at 31. According to the report, this language refers to the "valuable installations" of "the Fish and Wildlife Service of the Department of the Interior," that it had used "to further[] the long-range interests" of the fisheries and wildlife of Alaska. Id. Under the provision, "the Territory gets the equipment that will be necessary for the State to carry on the work for which the Federal Government has been responsible." Id. The report stated, however, that "[s]pecifically excepted from the grant are wildlife refuges"—the reservations regulated by the Fish and Wildlife Service. Id.

That the provisions referred to Fish and Wildlife Service wildlife refuges is also clear from hearings on the same bill a month earlier, when the Senate Committee on Interior and Insular Affairs heard testimony on the provision. The three witnesses it called to discuss this section were all Fish and Wildlife Service Employees. See Hearings Before the Senate Comm. on Interior and Insular Affairs on S. 50, 83rd Cong. 55 (1954) (Ex. AK-452). The Regional Director of the Service, Clarence Rhode, first spoke at length about commercial fisheries issues, and then was asked about wildlife. On the topic of wildlife refuges, he testified that Alaska had 26 refuges totaling about eight million acres. Id. at 64. He clearly was not referring to any Park Service reservations, because upon hearing the acreage figure, one Senator remarked that these wildlife refuges exceeded the total acreage under Park Service jurisdiction in Alaska. Id. See also Ex. AK-453 at 422. Mr. Rhode discussed the Kenai National Moose Range, Ex. AK-452 at 65-66, the Kodiak National Wildlife Refuge, id. at 72-74, the reservation of all the islands of the Aleutian chain, id. at 69, and a large musk ox reservation on an island in the Bering Sea, id. at 75. Other than these, Mr. Rhode stated, the remaining refuges were "small areas." Id. Mr. Rhode informed the Senators that under the language of the bill these game refuges would not be turned over to the State for administration, id. at 71, but that the Secretary could eliminate them under his own authority, id at 75. No mention was made of any park or

monument areas as falling within the provision. In fact, Park Service Director Wirth had testified to the committee about Glacier Bay National Monument immediately before Rhode, yet neither he nor the Senators ever mentioned the transition provision. Id. at 46-55.

Thus, regardless of whether bear preservation was a purpose of Glacier Bay National Monument, it was not a reservation established to be "specifically used" for the "sole purpose" of conservation and protection of wildlife, and Congress did not draft Section 6(e) for parks and monuments.

It is particularly inappropriate for the United States to try to expand the clear scope of a property provision of the Statehood Act, because of its bilateral nature. The land provisions of the Alaska Statehood Act are drafted in a way that makes them binding and unalterable. See, e.g., Andrus v. Utah, 446 U.S. 500, 507 (1980) (land grant in Statehood Act was a " 'solemn agreement' which in some ways may be analogized to a contract between private parties"); United States v. Morrison, 240 U.S. 192, 201-202 (1916) (land grant provision of Statehood Act was a compact). While they received benefits from forming a State and entering the Union, Alaskans also accepted the obligations of self-governance, and had a right to depend on the terms of statehood to which they agreed. By its terms, the Alaska Statehood Act would not become effective unless a majority of residents voted positively on three questions, one that related to the lands the State would

receive. Statehood Act § 8(b). Alaska statehood depended, therefore, on agreement by a majority of Alaskans that they would consent to "[a]ll provisions of the [Statehood Act] reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Alaska." Id. To agree to this provision, the people of Alaska depended on the statement of what those "terms or conditions of the grants of lands" were. Federal law had mandated since 1898 that the submerged lands in Alaska were held for the future State, and the Statehood Act provided that the State would take title to all but those "expressly retained by or ceded to the United States when the State enter[s] the Union." Statehood Act § 6(m) (incorporating the Submerged Lands Act, 43 U.S.C. § 1313(a)). See also Alaska Right-of-Way Act of May 14, 1898, ch. 299, 30 Stat. 409 (codifying for Alaska that the United States holds the beds of navigable waters in trust for the future State). The Department of Interior cannot now take back lands that passed to the State under the clear terms of the statehood compact.

Because Section 6(e) applies only to Fish and Wildlife Service wildlife refuges, the United States' arguments that Congress was on notice that Glacier Bay National Monument protected wildlife are irrelevant. But even if it had any significance, the evidence the United States offers to support this claim is

so sparse that it would be amazing if a single member of Congress in 1958 had ever seen any of it. Even if they had, they presumably read the footnotes, too.

First, the United States asserts that the Department of Agriculture had placed Glacier Bay on a list of wildlife refuges. It cites a 1929 Agriculture publication that listed over 100 areas nationwide that it characterized as "wild-life reservations." Ex. US-IV-2 at 2-7. It listed Glacier Bay National Monument as a reservation, but with a footnote stating that while on national monuments birds and animals are protected under federal law, "these are not strictly game preserves or bird refuges." Id. at 5. It is unclear what purpose or distribution this publication had, and there is no indication that any members of Congress nearly 30 years later had ever seen it.

The United States claims also that Interior "repeatedly" informed Congress that the Park Service was considering an expansion of Glacier Bay to protect brown bears, and the expansion was made largely at the behest of the congressional wildlife committees. US Count IV Mem. at 39. But the United States cites nothing that informed Congress that the Park Service was going to expand the monument to protect bears. The congressional wildlife committee that was active on Alaska bears for a very short time was interested primarily in creating a national park. Alaska's Governor interested the two committee members that visited Alaska in 1931 in creating a national park from the Glacier Bay area instead

of one on Admiralty or Chichagof Island, see Exs. AK-387, AK-388, AK-454, and the report the committee issued that year recommended that the monument be expanded and made a park. Ex. AK-455 at 142. Thus, while a few Senators in 1932 were "on notice" about a proposal for a national park with the purpose of a bear refuge, no bill creating a park ever passed. By 1958, the significant notice that Congress had about Glacier Bay was that the President had expanded the monument in 1939 with an express purpose that related to the study of glaciers.

Finally, the United States cites a 1940 report of the Special Committee on the Conservation of Wildlife Resources, which referred to the expansions of Katmai National Monument and Glacier Bay National Monument, and stated that these expansions gave protection to bears and other sub-arctic species. Ex. US-IV-25 at 353. Again, one sentence on page 353 of a 1940 report on wildlife hardly puts Congress on notice in 1958 that Glacier Bay National Monument falls within the language of Section 6(e) of the Statehood Act. Even if any member of Congress had read the report to page 353, few of them still served in Congress by 1958, and those who did intended Section 6(e) to refer to the wildlife refuges of the Fish and Wildlife Service.

The United States also argues that Congress clearly expressed its intent to retain submerged lands by rejecting attempts to abolish or diminish the monument. Again, the evidence does not support any such intent; it does not even

show that attempts were made to abolish or diminish the monument, except for the Gustavus area, and the President eliminated that part of the monument himself. See Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159, 169-170 (2001) ("Failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.' ") (citation omitted).

The United States acknowledges that the language in the 1947 statehood bill suggesting that the monument would be reduced to the 1925 boundaries was a mistake. See US Count IV Mem. at 42. While some Senators were unhappy a few years later that the monument had encompassed the home-steads of Gustavus, Congress did not "reject" an attempt to diminish the monu-ment. Congress never had the chance to act; the executive branch itself eliminated the area from the monument after the 1954 hearings. See Ex. AK-456.

Further, the United States' implication that Director Wirth put the committee on notice at these hearings that the monument reserved submerged lands is untrue; that subject never was raised or discussed. The Senators questioned Wirth about the Park Service's desire to purchase all the private land and mining claims in the area, and this—not submerged lands—was the context of Wirth's statement that land within a park ought to be in Federal ownership. See US Count IV Mem. at 43; Ex. US-IV-42 at 52. Wirth describes the purpose of the

monument as relating to glaciers, id. at 47-48, and when asked what area was added by the 1939 expansion, he described uplands only: "[i]t took from the bay to the top of the mountain [and] to the top of the range on this side." Id. at 50 (emphasis added).

The atlases that Congress received showing the federal withdrawals and reservations in Alaska during the statehood debates also have no significance to its intent to retain title to the submerged lands. While these maps obviously showed the boundaries of the Glacier Bay National Monument as running through marine areas, they also showed the Tongass boundaries in the same manner, yet Congress clearly intended that the State would take title to the tidelands of the Tongass at statehood. See AK Count III Mem. at 42-50.

CONCLUSION

For the foregoing reasons, the Special Master should recommend that the United States' motion for summary judgment on Count IV be denied.

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