Supreme Court of the United States

No. 128, Original

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

STATE OF ALASKA'S MOTIONS FOR SUMMARY JUDGMENT—INTRODUCTION AND BACKGROUND

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July 24, 2002

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The State of Alaska brought this original action against the United States to quiet title to the lands underlying marine waters in the Alexander Archipelago. Alaska's motion for leave to file a complaint was granted by the Supreme Court on June 12, 2000, 530 U.S. 1228, and its motion for leave to file an amended complaint was granted on January 8, 2001. 531 U.S. 1066. The United States filed its answer to the amended complaint on February 7, 2001.

Case Management Order No. 14 provides that motions for summary judgment may be filed with the Special Master by July 24, 2002. Alaska respectfully moves for summary judgment on Count I (historic waters), Count II (juridical bays), and Count III (Tongass National Forest) of its amended complaint.

The State's submission consists of four parts: this introductory memorandum, containing material applicable to all three counts, and a separately-bound memorandum addressing each individual count.

The State's submission establishes that the waters of the Alexander Archipelago are inland waters as a matter of law, that the State accordingly acquired title to the lands underlying those waters at statehood, and that the State's title was not defeated because the lands at issue were within the boundaries of the Tongass National Forest at statehood.

INTRODUCTION

> Gazing from the deck of the steamer, one is borne smoothly over calm blue waters, through the midst of countless forest-clad islands. The ordinary discomforts of a sea voyage are not felt, for nearly all the whole long way is on inland waters that are about as waveless as rivers and lakes.
>
> * * *
>
> In general, the island-bound channels are like rivers, not only in separate reaches as seen from the deck of a vessel, but continuously so for hundreds of miles in the case of the longest of them. The tide-currents, the fresh driftwood, the inflowing streams, and the luxuriant foliage of the out-leaning trees on the shores make this resemblance all the more complete. The largest islands look like part of the mainland in any view to be had of them from the ship * * *. [John Muir, Travels in Alaska 13, 17 (1979) (Ex. AK-1).]

So wrote famed naturalist John Muir of his 1879 voyage through the Alexander Archipelago. His impressions echoed those of another early visitor, who reported in 1873 that the waters of the Archipelago were "a labyrinth of straits, sounds and inlets * * *—a network of waters resembling inland lakes, majestic streams and small rivers—through which only the native and the most experienced trader know how to find their way." Bernard Bendel, The Alexander Archipelago, Proceedings of the Agassiz Institute 26 (Feb. 4, 1873) (Ex. AK-2).

The area that Muir and Bendel traveled by boat—Southeast Alaska—comprises a narrow strip of mountainous mainland and the Alexander Archipelago—a group of over 1000 islands nearly 600 miles long and 100 miles wide. The area contains more than 10,000 miles of shoreline, sculpted by receding glaciers 10,000 years ago, at the same time receding glaciers carved other inland waters out of the North American continent, such as the Finger Lakes in New York. University of Alaska Arctic Environmental Information and Data Center, Alaska Regional Profiles: Southeast Region 3 (Ex. AK-3); 20 Alaska Geographic: Southeast Alaska, No. 2, at 4, 6 (1993) (Ex. AK-4).

Southeast Alaska was discovered by Europeans in 1741, when Aleksei Chirikof—whose ship St. Paul had sailed with but had become separated from Vitus Bering's St. Peter—sighted what would become Prince of Wales Island. After anchoring off the seaward side of Kruzof Island at the mouth of a bay,

Chirikof sent a longboat with ship's mate Abram Dementief and a crew of ten around a protrusion of land. Dementief and his men were never seen again. When, days later, canoes manned by Tlingit Indians paddled out to the St. Paul, Chirikof weighed anchor and sailed back to Russia. Hubert Howe Bancroft, History of Alaska 1730-1885, at 68-71 (1886).

The same line that Dementief and his men crossed to meet their fate forms a sheltering boundary that has shaped the character of Southeast Alaska since the glaciers receded. The closely-knit islands and peninsulas of the Archipelago form a barrier against the open sea and create a maze of protected marine water—an ideal environment for the fur-bearing marine animals that attracted the Russians, and the salmon and other fish that have long been the foundation of life and commerce in the area. For the indigenous inhabitants "[t]he numerous interconnected waterways of the region were the travel routes; a couple of trails connected the northern end of the inland waterway system with the Yukon River, but otherwise land travel was virtually unknown." Early Visitors to Southeastern Alaska vi (R.N. De Armond, ed. 1978) (Ex. AK-5). Indeed, the name of the major native group in Southeast—the Tlingits—translates to "tidal people." 14 Alaska Geographic: South/Southeast Alaska, No. 2 at 19 (1987) (Ex. AK-6).

The marine waters of Southeast Alaska continue to be vitally important to the thirty-three coastal communities and numerous tiny settlements

there. Fishing remains a mainstay of the region's economy, providing the economic base for many Southeast towns. The cruise ship industry—which provides some $200 million annually to the Southeast economy—is also obviously linked to the water and, in particular, the closely surrounding landscape. See McDowell Group, The Economic Impacts of the Cruise Industry in Southeast Alaska, at 2 (2000) (Ex. AK-7). The towns of Southeast Alaska, including the State's capital, Juneau, generally are accessible only by plane or boat. The sounds, straits, canals, channels, and narrows of Southeast Alaska—known collectively and tellingly as the Inside Passage—still form its "roads." The state ferry system that travels these waters is aptly called the Alaska Marine Highway. Ex. AK-3 at 3; Ex. AK-4 at 6, 28; Ex. AK-7 at 1.

The waters of the Inside Passage are the historical, cultural, and commercial lifeblood of the region. They define Southeast Alaska. The State brought this original action to confirm that the land underlying these waters is in fact part of Alaska.

LEGAL BACKGROUND

To evaluate motions for summary judgment in original actions, this Court applies Federal Rule of Civil Procedure 56 and the precedents construing that rule. Nebraska v. Wyoming, 507 U.S. 584 (1993). Under those standards "[s]ummary judgment is appropriate when there is no genuine issue of material

fact and the moving party is entitled to judgment as a matter of law," and such relief "is warranted if the nonmovant fails to 'make a showing sufficient to establish the existence of an element essential to [its] case.' " Id. at 590 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). On Counts I, II, and III, the disagreements that divide the parties concern legal issues and the legal significance of undisputed facts.

When Alaska became a State on January 3, 1959, it entered the Union with all the powers of sovereignty and jurisdiction enjoyed by the original thirteen States. See Coyle v. Smith, 221 U.S. 559, 573 (1911). As sovereign successors to the Crown, the thirteen original States—and, thus, when it entered the Union, Alaska—acquired title to the submerged lands underlying navigable waters. See Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842). The Constitution reserves these lands to new States to ensure that they join the Union on an "equal footing" with the original thirteen. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 229-230 (1845). The United States, as territorial sovereign before creation of new States, acquires title to the beds of navigable waters of federal territories and holds them in trust for future States. See Borax Consol., Ltd. v. Los Angeles, 296 U.S. 10, 15 (1935). Title to these lands is "an inseparable attribute of the equal sovereignty guaranteed to [a new State] upon admission." United States v. Louisiana, 363 U.S. 1, 16 (1960).

In 1947, this Court held that the Federal Government had paramount rights and powers over the offshore marine waters below low tide. See United States v. California, 332 U.S. 19 (1947). Congress, however, disagreed. Louisiana, 363 U.S. at 16-20. Accordingly, in 1953 it enacted the Submerged Lands Act, 43 U.S.C. §§ 1301-1315, to "undo" the 1947 decision and restore these lands to the States. United States v. California, 436 U.S. 32, 37 (1978). Effectively extending the equal footing doctrine, Congress "recognized, confirmed, established, and vested in and assigned to" the States title to submerged lands within their boundaries—including both inland navigable waters and offshore marine waters. 43 U.S.C. § 1311(c). See United States v. Alaska, 521 U.S. 1, 35-36 (1997).

Several years later, the Alaska Statehood Act defined Alaska as consisting of "all the territory, together with the territorial waters appurtenant thereto, now included in the Territory of Alaska." Pub. L. No. 85-508, 72 Stat. 339, § 2 (1958). Congress thus made Alaska's boundaries coextensive with the territorial sea properly belonging to the United States on the effective date of the Act, July 7, 1958. Congress further provided that Alaska would have the "same rights" to lands within these boundaries as given existing States under the Submerged Lands Act. Id. § 6(m).

Under the Submerged Lands Act, Alaska's title to submerged land extends three miles seaward from the "coast line." 43 U.S.C. § 1301(a)(2), (b). The term "coast line" is in turn defined as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." Id. § 1301(c) (emphasis added). Congress did not define "inland waters," but instead "left th[at] responsibility * * * to this Court." United States v. California, 381 U.S. 139, 164 (1965). In California, this Court expressly adopted, for purposes of the Submerged Lands Act, what it termed "the best and most workable definitions available" of inland and other waters, id.—those contained in the International Convention on the Territorial Sea and the Contiguous Zone, Sept. 10, 1964, 15 U.S.T. 1606, 516 U.N.T.S. 205, T.I.A.S. No. 5639.

The Convention recognizes three general types of sovereignty over waters and the submerged lands beneath. "Inland" or "internal" waters "are subject to the complete sovereignty of the nation, as much as if they were part of its land territory, and the coastal nation has the privilege even to exclude foreign vessels altogether." United States v. Louisiana ("Louisiana Boundary Case"), 394 U.S. 11, 22 (1969). Next is the "marginal" or "territorial" sea. In these waters, "the coastal nation may exercise extensive control but cannot deny the right of innocent passage to foreign nations." Id. Outside these waters are the "high seas,"

which are "international waters not subject to the dominion of any single nation." Id. at 23.

In the Louisiana Boundary Case, the Court specifically ruled that "the line marking the seaward limit of inland waters" under the Submerged Lands Act was "to be drawn in accordance with the definitions of the Convention." Id. at 35. The Convention provides a geographic test for determining the existence of bays and fixing the seaward limit of their inland waters in Article 7. The Convention and this Court have also recognized that such inland waters can alternatively be established on the basis of historic practice. See Convention art. 7(6); California, 381 U.S. at 172.

As detailed in Alaska's motions for summary judgment on Counts I and II, the waters of the Alexander Archipelago qualify as "inland waters," both because they have historically been recognized as such (Count I) and, alternatively, because they meet the test for juridical bays under Article 7 of the Convention (Count II). Alaska's "coast line" therefore runs along the outer, seaward edge of the Archipelago, and the State's title extends to all the submerged lands of the Alexander Archipelago, including those enclaves and pockets more than three miles from the shore of the mainland and any islands. Contrary to the position of the United States, Alaska's title to these lands is not defeated because they were

within the boundaries of the Tongass National Forest when Alaska became a State (Count III).

SUMMARY OF ARGUMENT

I. The waters of the Alexander Archipelago qualify as inland waters because they constitute "historic bays"—waters "over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations." California, 381 U.S. at 172. The United States recognized and acquiesced in Russia's assertion of sovereignty over those waters prior to acquiring Alaska in 1867, and continuously exercised dominion over them itself from the Treaty of Cession through statehood. Perhaps most prominently, the United States explicitly argued during the 1903 Alaska Boundary Arbitration that "[t]he boundary of Alaska—that is, the exterior boundary from which the marine league is measured—runs along the outside edge of the Alaskan or Alexander Archipelago, embracing a group composed of hundreds of islands." 5 Proceedings of the Alaska Boundary Tribunal, S. Doc. No. 58-162, at 15-16 (1904) (Ex. AK-8). Foreign nations acquiesced in that unambiguous claim. Although the position of the United States would shift in 1971, what is pertinent is the status of the lands at statehood. That is when title passed to the State, and "Congress cannot, after statehood, reserve or convey submerged lands that 'ha[ve] already been bestowed' upon a State." Idaho v. United States, 533 U.S. 262, 280 n.9 (2001) (quotation

omitted). Quite clearly, if post-statehood Congressional action cannot divest Alaska's title, post-statehood Executive action cannot either.

II. Quite apart from the foregoing, the waters at issue are inland waters because they meet the geographical standards set forth in Article 7 of the Convention and adopted by this Court. See United States v. Maine, 469 U.S. 504, 514-520 (1985) (adopting and applying Article 7); California, 381 U.S. at 163-165 (same); Louisiana Boundary Case, 394 U.S. at 16, 35 (same). Under this Court's precedents, three islands in the middle of Southeast that fit together with each other and the mainland like a jigsaw puzzle and are divided only by narrow, shallow, riverine channels—Mitkof, Kupreanof, and Kuiu Islands—are properly considered a peninsular extension of the mainland. They are separated by bodies of water called Dry Strait, Wrangell Narrows, and Rocky Pass, which goes far to making the point. Once that is recognized, it is clear that Southeast consists of two juridical bays under Article 7. The fact that much of the interior of these bays is taken up by islands, and that entrance to the bays is largely blocked by islands, solidifies the ties to the mainland and fortifies the case for inland water status. Louisiana Boundary Case, 394 U.S. at 56-60.

III. Alaska's title to the land underlying these inland waters was not defeated by the pre-statehood reservation of the Tongass National Forest. To establish that the United States has retained title to submerged lands, a court must

determine both that the United States intended to include submerged lands within a reserve and that it intended to defeat the State's title to the lands. Utah Div. of State Lands v. United States, 482 U.S. 193, 202 (1987). Courts begin this inquiry with a strong presumption of state title and will not infer an intent to defeat a future State's title unless that intention was definitely declared or otherwise made plain. United States v. Alaska, 521 U.S. at 32-33.

The proclamations reserving land for the Tongass National Forest did not reserve the submerged lands of the Archipelago. In the first place, the enabling legislation only authorized forest reservations to preserve forests or to protect water flows, and neither purpose justifies reserving submerged lands. Second, the legislation limits reservations to "public lands wholly or in part covered with timber or undergrowth," 26 Stat. 1103 (1891); "public lands" is a term of art that did not include submerged land, and land "covered with timber or undergrowth" plainly does not include lands submerged under saltwater.

Given the foregoing, it is not surprising that the proclamations did not even purport to reserve submerged lands. They specifically referred to the islands of the Archipelago, but not the submerged lands. The fact that a map of the Reserve shows a boundary line encompassing marine waters does not evince the requisite intent to reserve submerged lands and defeat the State's title; the line was drawn for simplicity to encompass the myriad islands in lieu of a painstaking

precise boundary in an area that was largely unsurveyed. Indeed, the line extends 60 miles out to sea, embracing waters that were not even within the Nation at the time. Again, not surprisingly, the Federal Government consistently took the position through statehood (and well beyond) that the Forest Reserve did not include submerged lands.

That was plainly the view of Congress. During consideration of Alaskan statehood, frequent proposals were made to safeguard federal rights of access over the marine waters to Forest Reserve land. Those proposals assumed what was generally understood—that the submerged lands would pass to Alaska upon statehood. When a proposal was made to hold back from the new State tidelands adjoining the Forest, Alaska's delegate noted that he would not accept statehood on such a compromised basis. The Federal Government now seeks to deprive the State of far more by claiming title not only to the tidelands but the Submerged Lands Act areas as well. This Court should insist on the clearest evidence of congressional intent before sanctioning such a dramatic change in the federal-state balance, and such a revisionist recasting of the bargain embodied in the Statehood Act. The record is clear that no such evidence can be adduced.

CONCLUSION

For the reasons set forth above and in the accompanying memoranda, the Special Master should file a report recommending that the Court grant

summary judgment in favor of Alaska on Counts I, II, and III of the State's amended complaint. The effect of such a ruling would be a recognition that the waters of the Alexander Archipelago are inland waters, that Alaska holds title to the lands underlying such waters, and that such title was not defeated by the reservation of the Tongass National Forest. Remaining for trial would be Count IV, which seeks to establish that the State's title was not defeated by the reservation of Glacier Bay National Monument.

Respectfully submitted,

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