IN THE SUPREME COURT OF THE UNITED STATES

No. 128, Original

STATE OF ALASKA,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

Before the Special Master
Gregory E. Maggs

REPLY OF THE UNITED STATES IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT
ON COUNT I OF THE AMENDED COMPLAINT

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INTRODUCTION

The United States has moved for summary judgment on Count I because Alaska has failed to identify an adequate legal and factual basis for treating the waters of the Alexander Archipelago as historic inland waters. The U.S. specifically addressed the legal theory and facts that Alaska put forward in its amended complaint. *See* U.S. Count I Memo. 16-17; Amended Compl. paras. 7, 14, 22; AK Compl. Br. 12-15. Alaska now claims that its previous assertions are not "Alaska's case" and shifts its reliance to what it calls an "overwhelming body" of other historical evidence. AK Count I Opp. 1-2. The U.S. has already explained in opposing Alaska's competing motion that those new arguments, which rest on mistaken articulations of legal principles and incomplete renditions of the historic record, are also inadequate to establish an historic inland waters claim. *See* U.S. Count I Opp. 3-44. Before addressing Alaska's opposition to the U.S.'s motion, we note several considerations bearing on the determination of the parties' competing motions.

First, the U.S. and Alaska oppose each other's competing motions on the merits, disagreeing over the legal requirements for establishing historic inland waters and the significance and proper characterization of documents that constitute the essentially undisputed historic record. The U.S. and Alaska appear to agree that there are no genuine issues as to any material fact that would warrant a trial and that judgment may be entered as a matter of law. Fed. R. Civ. P. 56(c).

Second, although the arguments respecting Count I and Count II focus on the international status of the waters of the Alexander Archipelago, this case remains an action to quiet title. The U.S. has acknowledged, in response to Alaska's motion for summary judgment on Count III of the amended complaint, that Alaska owns the vast majority of the submerged lands within the Alexander Archipelago that are within three miles of Alaska's coast line. The submerged lands in dispute in

Counts I and II consist of only those so-called enclaves and cul-de-sacs, illustrated in Exhibit 1 to Alaska's amended complaint, that are more than 3 miles from the coast line of either the mainland or the offshore islands. *See* U.S. Count I Memo. 1-2 & n.3. The submerged lands at issue have limited importance in themselves. *See* U.S. Count II Memo. 22-23. The legal issues here have practical importance primarily because their resolution will establish an international precedent that could have important consequences for the U.S.'s foreign relations and national defense.

Third, the historic inland waters claim ultimately turns on application of international law principles, set out in this Court's past historic inland waters decisions, to the historic record here. S*ee* U.S. Count I Memo. 5-16. Although Alaska has submitted extensive arguments and copious exhibits, it has failed to come forward with "any *specific* assertion by the U.S. that the waters of [the Alexander Archipelago] are inland waters." *United States* v. *Alaska*, 521 U.S. 1, 11 (1997). It has also failed to show that the U.S. has ever claimed a right to exclude innocent passage, much less that it has done so "continuously" and with "the acquiescence of foreign nations." *Ibid.* To the contrary, the U.S. has disclaimed such a right. Alaska repeatedly asserts that the U.S. "mischaracterizes," "ignores," or "selectively" quotes the historic record, *e.g.*, AK Count I Opp. 14, but the U.S. submits that the converse is true. The U.S. encourages the Master to review the relevant documents in their entirety and apply the Court's "strict evidentiary requirements," *Alaska*, 521 U.S. at 11, to the full historic record in this case. The chronology of events, *see* U.S. Count I Opp. 37-38, demonstrates no "about-face" by the U.S., AK Count I Opp. 1. Rather, Alaska asserts a claim that the U.S. has never made, much less one that the U.S. has consistently asserted and foreign nations have accepted.

ARGUMENT

I. Alaska Misstates The Governing Legal Standards

Alaska claims that the U.S. "attempts to unsettle" the "legal standards governing historic waters claims." AK Count I Opp. 3-7. The opposite is true. The U.S. and Alaska agree that "the State must demonstrate that the United States: (1) exercises authority over the area; (2) has done so continuously; and (3) has done so with the acquiescence of foreign nations." *Alaska*, 521 U.S. at 11. *See* U.S. Count I Memo. 5-6; AK Count I Opp. 3. The U.S. submits, however, that these are "strict evidentiary requirements," *Alaska*, 521 U.S. at 11, while Alaska urges the Master to employ a "relatively relaxed interpretation of the evidence" in evaluating Alaska's historic inland waters claims. AK Count I Opp. 6.[1]

Alaska's "relaxed interpretation" is manifested in a variety of ways. Alaska contends that it need not show that the supposed historic waters claim is "exceptional" in the sense that the U.S. claims an area as historic inland waters that would not qualify as such under generally applicable rules of international law. *Compare* U.S. Count I Memo. 5-6, 20-21 *and* U.S. Count I Opp. 6 *with* AK Count I Opp. 4. This point is significant because Alaska cannot rely on mere *uncertainty* respecting the appropriate juridical standards for delimiting inland waters, which the international community ultimately resolved through the Convention, as evidence of a historic waters claim. The

[1] Alaska contends that the Supreme Court "embraced the view of commentators" that a "relatively relaxed interpretation" of the historic evidence is appropriate. AK Count I Opp. 6 (citing *United States v. Louisiana*, 470 U.S. 93, 113 (1985)) (*Mississippi Sound*). Alaska cites a passage from *Mississippi Sound* that addressed only the specific question whether a State must prove actual exclusion of vessels in innocent passage. 470 U.S. at 113-114. The Court did not "embrace[]" the statements of the cited commentators, but instead noted that the absence of evidence of actual exclusion was not fatal to a historic waters claim if the opportunity for exclusion never arose. *Ibid.*

fact that some nations (including the U.S.) argued, temporarily and unsuccessfully, for principles that did not become a part of the Convention does not mean that those nations are now entitled to whatever they would have received if their controverted view of the appropriate international rules had prevailed. If it were otherwise, the Convention would have accomplished very little. *See* U.S. Count I Memo. 20-21; U.S. Count I Opp. 6.[2]

Alaska next asserts that it is entitled to establish its historic waters claim by a bare preponderance of the evidence and that "no special burden of proof applies here." AK Count I Opp. 7. The Supreme Court, however, has relied on the dominant approach set forth in the Juridical Regime, which expresses the international consensus that, because historic waters claims are "exceptional," in the sense that they depart from international rules that the international community has adopted to provide clarity and certainty, the burden of proof is "rigorous." U.S. Count I Memo. 10-11; U.S. Count I. Opp. 6. The U.S. adheres to that view in its foreign relations, refusing to recognize historic waters claims unless they are "exceptionally strong," Juridical Regime ¶ 40, US-I-4 p.7. *See* Roach & Smith, *Excessive Maritime Claims* 37 n.14 (1996) (protesting Australian historic waters claims that were "only 'probable'" under international law). Alaska's own expert likewise asserts that "[t]he coastal nation asserting an historic claim must provide 'extraordinary proof of historic usage.'" Westerman, *The Juridical Bay* 180 (1987).

Alaska also gives no weight to the U.S.'s express disclaimer, more than 30 years ago, that the waters of the Alexander Archipelago are not historic inland waters. The Supreme Court has

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[2] Significantly, from the time of Alaska's statehood until Alaska' conversion to a different view literally months ago, Alaska recognized that the Archipelago waters "do not geographically possess the status of bays," U.S. Count II Memo. 20-21, and could be claimed as inland waters only on the basis of a historic inland waters claim.

consistently made clear that the U.S.'s international disclaimer carries great weight in assessing a historic waters claim and is normally decisive unless historic title is "clear beyond doubt." U.S. Count I Memo. 11; U.S. Count I Opp. 6; *see United States v. Louisiana*, 394 U.S. 11, 27-29, 76-77 (1969); *United States v. California*, 381 U.S. 139, 175 (1965). Contrary to Alaska's assertion, a disclaimer is not effective only when "evidence is questionable." AK Count I Opp. 5. If the evidence is "questionable," then there is no basis for finding historic title—regardless of whether the U.S. has expressly disclaimed title. *See* pp. 18-19, *infra.*

II. The United States Has Not Continuously Exercised Authority Over The Waters Of The Alexander Archipelago As Inland Waters

Alaska contends that Russia and the U.S. have continuously asserted authority over the waters of the Archipelago, and it chides the U.S. for "address[ing] only a mere handful of facts." AK Count I Opp. 7. The "mere handful of facts" are the specific allegations contained in Count I of Alaska's amended complaint. *See* Amended Compl. paras. 4-22. Alaska previously contended that *those* allegations provided the basis for its legal claim. *See* AK Compl. Br. 12-16. Alaska now recognizes that the allegations contained in its amended complaint are inadequate to prove its claim. Alaska cannot avoid that difficulty by shifting reliance to a jumble of documents that either do not say what Alaska purports or say very little at all about the status of the waters in question.

A. Alaska's Pre-Cession Evidence Does Not Establish A Historic Waters Claim

During the nineteenth century, there was only one specific sovereign assertion of dominion over the waters off the coast of Alaska that could potentially give rise to a claim of historic inland waters—the Russian Imperial Ukase of September 4, 1821. The Supreme Court has already ruled that the ukase "is clearly inadequate" as a basis for historic waters because it "was unequivocally

withdrawn in the face of vigorous protests from the United States and England." *United States v. Alaska*, 422 U.S. 184, 191-192 (1975) (*Cook Inlet*). The U.S. noted in its opening memorandum, in response to Alaska's ambiguous reference to "Russia's exercise of authority," AK Compl. Br. 13 n.7, that the ukase would provide Alaska with no basis for a historic waters claim. U.S. Count I Memo. 32-33. Far from "mischaracteriz[ing] Alaska's argument," AK Count I Opp. 8, the U.S. correctly pointed out what Alaska now explicitly concedes—the ukase does not support a historic waters claim. *See* U.S. Count I Memo. 32-33.

In opposing Alaska' motion for summary judgment, the U.S. has already responded to Alaska's arguments respecting Russia's 1824 Treaty with the U.S. and its 1825 Treaty with Great Britain. U.S. Count I Opp. 7-10. In each case, Russia asserted no more than the right to control access to "interior seas, gulphs, harbours, and creeks" indenting the *mainland* coast of Alaska. *Ibid.* Alaska posits that, notwithstanding the U.S.'s and Britain's "vigorous protests" to the 1821 ukase and Russia's agreement to limit its claim to the generally accepted 3-mile-cannon-shot rule for territorial waters, US-I-15 pp.925-926, the U.S. and Britain inexplicably acceded to an extraordinary Russian claim. Under that theory, the 1824 Treaty would have recognized a Russian inland waters claim to Cook Inlet—an area that the Supreme Court has already concluded is not historic inland waters. *Cook Inlet*, 422 U.S. at 191-192. See U.S. Count I Opp. 9. Furthermore, under Alaska's theory, the 1825 Treaty pointlessly gave Britain a right to navigate mainland rivers through the Russian lisière, but no right to proceed through the Archipelago waters to British Columbia ports. *Id*. at 9-10.

Alaska persists in its misstatement of Russian enforcement actions, which were limited to areas within the 3-mile-cannon-shot rule for territorial waters. U.S. Count I Opp. 9; US-I-15; *Cook*

Inlet, 422 U.S. at 191-192. Alaska neglects again to acknowledge that the *Loriot* incident involved an entry into specific Russian harbors. *Compare* AK Count I Opp. 9 *with* U.S. Count I Opp. 10-11. Alaska notes that Russia stationed a brig at Tongas, a harbor near Pearce Canal, in 1835, AK Count I Opp. 9, but Alaska fails to reveal that the brig's purpose for intercepting foreign vessels was not to repel them, but rather "to deliver written notice of the expiration of the [1824 and 1825] treaty provisions," AK-13 p.70. Alaska repeats its incorrect paraphrase of the U.S.'s 1845 notice to mariners as recognizing Russia's "complete sovereignty" over the Archipelago waters when it actually referred to Russian sovereignty over Alaska uplands. *Compare* AK Count I Opp. 9 *with* U.S. Count I Opp. 10-11. Alaska adds one unlikely document to support its historic waters claims—a 1899 issue of National Geographic Magazine. AK Count I Opp. 10-11. That article, written by a former Secretary of State in his personal capacity, cannot be credited as expressing the views of the U.S. But in any event, that article undermines Alaska's historic waters claim.

Former Secretary of State Foster described the events leading to the 1825 Treaty between Russia and Britain. He noted, as the U.S. has explained, that Russia agreed "to disavow the maritime jurisdiction" and "to grant free access to the British posts in the interior by the rivers which may cross the Russian strip of the mainland." AK-299 p.431. Alaska cites passages from the article stating that, under the 1825 Treaty, "all the interior waters of the above [the lisière's] southern limit became Russian, and would be inaccessible to British ships and traders except by express license," and that the Treaty recognized "complete sovereignty of Russia over * * * the waters of all bays or inlets extending from the ocean into the mainland." AK Count I Opp. 10 (citing AK-299 p.435, Alaska's emphasis omitted). Those passages, however, by their terms, refer to Russian sovereignty over rivers and bays extending into the *mainland* – not to the Archipelago straits. As Foster clearly

understood, Britain was entitled to navigate the straits of the Archipelago to the mouths of mainland rivers and bays and therefore did not seek an "express license" to pass through those waters.[3]

B. Alaska's Post-Cession Evidence Does Not Establish A Historic Waters Claim

Alaska argues that, upon Russia's cession of Alaska, the U.S. inherited Russia's rights over the waters of the Archipelago. AK Count I Opp. 12. Since Alaska has produced no evidence that Russia claimed those waters as inland, Russia's cession does not provide any basis for inferring that the U.S. succeeded to such a claim. U.S. Count I Opp. 11. Indeed, the U.S. has not only never claimed those waters as inland, it has expressly disclaimed them. *Id*. at 11-14, 35-37. Alaska attempts to conjure up a historic waters claim by merely citing virtually every instance in which the word "inland" appears in a nineteenth century document pertaining to Alaska, without regard to who made the statement, whether the word was used in a legal sense, and what waters were at issue. AK Count I Opp. 12 n.6. The U.S. has already explained why those arguments, as well as Alaska's additional citations (*id*. at 13) to the presence of American revenue vessels, the U.S.'s enforcement of fisheries regulations, the Canadian negotiations, and the Pearcy charts, is each insufficient to establish a historic waters claim. U.S. Count I Opp. 11-14, 18-26, 32. The U.S. does not "pretend[]" that this "body of evidence does not exist." AK Count I Opp. 14. Rather, the U.S. points out, as the

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[3] If further confirmation is needed that Foster was referring to mainland rivers and bays, context provides it. Foster stated, immediately before the passages that Alaska quotes, "Russia was to have a continuous strip of territory *on the mainland* around all the inlets and arms of the sea" and that the "purpose for which the strip was established would be defeated if it was to be broken in any part of its course by inlets or arms of the sea *extending into British territory*." AK-299 p.435 (emphasis added). He similarly stated, "This ten-years' privilege is inconsistent with any other interpretation of the treaty than the complete sovereignty of Russia over, not only *a strip of territory on the mainland* which follows around the sinuosities of the sea, but also of the waters of all *bays or inlets extending from the ocean into the mainland*." *Id*. at 439 (emphasis added).

Supreme Court has itself made clear, that evidence of this character does not provide a basis for inferring that the U.S. has put the world on notice of a historic inland waters claim. *Cook Inlet*, 422 U.S. at 192-200. Indeed, Alaska's reliance on its multitudinous collection of immaterial or ambiguous statements and events underscores Alaska's inability to produce "any *specific* assertion by the United States that the waters of [the Alexander Archipelago] are inland waters." *Alaska*, 521 U.S. at 11.

C. The United States Did Not Unequivocally Claim The Waters Of The Archipelago As Inland At The 1903 Arbitration

Alaska's inability to demonstrate that the U.S. claimed the Archipelago waters as inland waters during the nineteenth century is fatal to its historic waters claim, because a claim that first arose in the twentieth century lacks sufficient duration to qualify for recognition. U.S. Count I Memo. 38-39. But in any event, Alaska's primary piece of twentieth century evidence—statements of counsel in the 1903 Arbitration—falls far short of the requisite assertion of inland water status to prove a historic claim. U.S. Count I Memo. 22-27; U.S. Count I Opp. 14-17. Alaska's latest arguments do not overcome that problem.

First, Alaska does not squarely respond to the U.S.'s submission that government arguments in arbitral or judicial proceedings are insufficient as a matter of law to prove historic inland waters. U.S. Count I Memo. 22-24. Because the U.S. does not accept the proposition, in its foreign relations, that statements by foreign government counsel in arbitral or judicial proceedings would place the U.S. on notice of a foreign government's inland waters claims, the U.S. reciprocally does

not expect foreign nations to accept that extraordinary proposition. *Ibid.* *See* US-I-1 pp.201-203.[4]

Even if statements of counsel could place the world on notice of an extraordinary inland waters claim, the statements of Hannis Taylor did not have that effect. The record does not support Alaska's accusation (AK Count I Opp. 14) that the U.S. "mischaracterizes" or "selectively quot[es]" Taylor's argument. As the U.S. has explained, Taylor assumed 10-mile closing lines across islands merely for the purpose of showing the absurdity of Britain's construction of the word "coast" in the pertinent treaties. U.S. Count I Memo. 24-27; U.S. Count I Opp. 14-16. The text and context fully support that understanding. *Ibid.* Alaska's understanding of Taylor's argument, by contrast, makes no sense. Alaska contends that Taylor

> unequivocally stated that those principles established the relevant coastline for determining the political boundaries of the Archipelago.

AK Count I Opp. 15 (Alaska's emphasis). But the U.S.'s written argument, under the apt heading, "The Political Coast Line Not Involved In This Case," expressly states otherwise:

> The artificial coast line created by international law for the purposes of jurisdiction only, which following the general trend of the coast, cuts across the heads of bays and inlets is not involved in this case in any form, for the simple reason that *the outer coast*, to which it is exclusively an accessory, is not involved.

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[4] Contrary to Alaska's suggestion (AK Count I Opp. 17), the Supreme Court did not give controlling weight to a prior government brief in *Mississippi Sound*. The Court in that case relied on its *own prior decision* in *Louisiana v. Mississippi*, 202 U.S. 1 (1906), in holding the U.S. had recognized those waters as inland. *See* 470 U.S. at 107-108; U.S. Count I Memo. 23-24. Alaska also cannot draw any support from the U.S.'s assertion that Chesapeake Bay, Delaware Bay, and Long Island Sound are historic inland waters. AK Count I Opp. 17-18. As the United Nation's 1957 historic waters study documents show, the U.S. specifically asserted, and the international community recognized, the status of those waters based on the U.S.'s longstanding exercise of sovereign authority. *See* US-I-13 pp. 4-6, 8. The United Nation's 1957 coastal archipelago study expressed the opposite understanding of the Alexander Archipelago, correctly stating that the U.S. treats each island therein as having "its own marginal sea of three nautical miles." US-I-3 p.24. *See* US-I-1 p.46.

U.S. Count I Memo. 27, quoting 5 *Proceedings* pt. 1, 17-18 (US-I-30); *see* U.S. Count I Opp. 16. For all of Alaska's rhetoric, its characterization of Taylor's argument is plainly wrong.[5]

D. The United States' 1964 California Brief Does Not "Confirm" Alaska's Historic Waters Claim

Alaska takes issue with the U.S.'s explanation why the 1964 *California* brief does not support Alaska's claim. *See* U.S. Count I Memo. 28-31; U.S. Count I Opp. 31-32. That brief addressed the status of California waters, not the status of the Alexander Archipelago. In the course of responding to California's arguments, the brief alluded to the U.S.'s policy, between 1930 and 1953, respecting a "strait leading only to inland waters," mistakenly describing the Archipelago as having that geographic configuration. *Ibid.*; U.S. Count I Opp. 31-32. (We discuss that principle further at 13-14, *infra*.) Contrary to Alaska's contentions (AK Count I Opp. 18-21), that misstatement, which played no part in the *California* decision, 381 U.S. 139, does not amount to an unequivocal declaration that the Archipelago waters are *historic* inland waters, nor does it "confirm" any past understanding that those waters had *that* status. The government's error is indeed a "<u>fact</u>" (*id.* at 20), but not one of significance to the historic waters inquiry. It is an inconsequential misstatement about a dubious delimitation principle that the U.S. suggested in 1930, never actually

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[5] Alaska once again mistakenly describes the 1845 notice to mariners and other statements respecting jurisdiction as if they applied to the straits of the Alexander Archipelago, when in fact they refer to the Alaska mainland, mainland indentations, and the 3-mile "cannon-shot" belt of territorial waters. *Compare* AK Count I Opp. 15-16 *with* U.S. Count I Opp. 10-14 and the discussion *supra*. Neither Britain nor Norway recognized what Alaska says was the U.S.'s claim. *Compare* AK Count I Opp. 16 *with* U.S. Opp. 27-29. Alaska's statement that the Justice Department endorsed Alaska's view in 1952 (AK Count I Opp. 16) is incorrect. Alaska cites a draft of a Department attorney's "working memo" that the attorney indicated should "not be cited as coming from the Justice Department." AK-I-29. That draft internal memo merely contains an individual attorney's preliminary description of Taylor's argument; it does not endorse Alaska's construction. *See ibid.*

applied to the Archipelago, and abandoned upon signing the Convention. *See Alaska Report* 74-75 (describing that principle). The U.S. maintains in its international relations that a nation cannot establish historic water status based on its temporary advocacy of delimitation principles that the international community ultimately rejects. *A fortiori*, Alaska cannot create historic inland waters based on the U.S.'s mistaken reference to a rejected delimitation principle long after the U.S. had abandoned it.

E. Alaska Has Failed To Overcome Additional Obstacles To Its Claim

Alaska claims that it has shown that the U.S. consistently and continuously claimed that the Archipelago waters have inland status, dismissing the contrary history as "a handful of anecdotal evidence" that gives rise to only minor "uncertainties or contradictions." AK Count I Opp. 21-22. Alaska unsuccessfully made a similar argument in *Alaska*, 521 U.S. at 15-16. To place Alaska's bold assertion in context, we refer the Master to a summary of the chronological events, U.S. Count I Opp. 35-36, and then turn to what Alaska portrays as additional "minor" obstacles to its claim.

1. *The Bayard Letter and the 1910 Arbitration*. Alaska suggests that Secretary of State Bayard's 1888 letter, explicitly stating that the U.S. claims only a three-mile territorial sea along the coast of Alaska, "had a limited focus" and "in no way contradicts" Alaska's historic waters claim. AK Count I Opp. 24. That is simply not what the letter says. *See* U.S. Count I Memo. 34. We invite the Master to read the letter in its entirety, US-I-6, pp.13a-18a, which will confirm that the Secretary of State was not merely addressing the meaning of "a specific clause in an 1818 treaty." AK Count I Opp. 24. Rather, Secretary Bayard made clear that the U.S. had long followed the practice of claiming a three-mile territorial sea and "plac[ing] round [offshore] islands the same belt." US-I-6 pp.16a. He pointed out that the U.S., as a matter of foreign policy, must maintain a

consistent international position in Alaska as well as elsewhere. *Id*. at16a-18a. The U.S. maintained that position throughout the 1910 Arbitration. As Special Master Davis explained:

> The position maintained by the United States throughout the controversy was that the line of demarcation is the low-water mark following the sinuosities of the coast, excluding any straight-line measurement from headland to headland of bays.

California Report 15. *See* U.S. Count I Opp. 28-29. Master Davis nowhere suggested that the Bayard letter had "limited focus." AK Count I Opp. 25.[6]

2. *The 1930 Hague Conference*. Alaska's discussion of the 1930 Hague Conference (AK Count I Opp. 25-26) omits any reference to the U.S.'s primary proposal of relevance here—a rule that coastal islands would each have a 3-mile belt of territorial sea and any resulting enclaves of high seas would be assimilated to the coastal nation's *territorial sea*. *See Alaska*, 521 U.S. at 16; *Alaska Report* 71-74. Under that delimitation theory, the waters of the Alexander Archipelago plainly are not inland. U.S. Count I Memo. 35. Instead, Alaska focuses on the U.S.'s willingness to maintain recognition of previously recognized historic waters. AK Count I Opp. 26. That position does not assist Alaska because the U.S. had not previously claimed the Archipelago waters as historic inland waters and Alaska's pre-1930 evidence is insufficient to prove a historic waters claim. Alaska also cites (*id*. at 25-26) the U.S.'s subsidiary proposal that, "where a strait is merely a channel of communication with an inland sea, the rules regarding bays apply to such strait." *Alaska Report* 74.

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[6] Alaska asserts that Secretary Bayard statements respecting the 3-mile territorial sea should not be viewed as "statements of general policy" because the 10-mile rule for bays had "formed the basis of a treaty between Great Britain and the United States, <u>negotiated in 1888 by Secretary Bayard</u>.'" AK Count I Opp. 24-25 (quoting *California Report* 17). Alaska neglects to mention that the Senate *rejected* that treaty, *California Report* 17 n.12. Secretary Bayard thought an exception might be permissible in that instance, which involved certain bays that were 10 or less miles in width, but the Senate Committee on Foreign Relations reported unfavorably on the treaty because it employed 10-mile closing lines. *See* US-I-6 pp.82-85.

That subsidiary proposal is clearly inapplicable to the straits of the Alexander Archipelago, which provide a channel of communication from the lower 48 States and British Columbia, through the Archipelago, to points in western Alaska. *See* U.S. Count I Memo. 35-36; 43-44; U.S. Count I Opp. 38.[7]

3. *The Views of S.W. Boggs*. As we have explained, Alaska's contentions are inconsistent with the views of State Department Geographer Boggs, who developed the 1930 proposal. U.S. Count I Memo. 36-37. We discuss Alaska's misunderstanding of Boggs' statements (AK Count I Opp. 27-29) in our opposition to Alaska's motion (U.S. Count I Opp. 23-26). One matter deserves special attention. Alaska suggests that Boggs, the architect of the 1930 Hague proposals, understood that those proposals would result in assimilation of enclaves to "inland waters." AK Count I Opp. 29. Alaska is plainly mistaken. As the Supreme Court and Special Master Mann expressly stated, the U.S. clearly proposed—and Boggs manifestly understood—that enclaves, such as those present in the Alexander Archipelago, would be assimilated to the *territorial sea*. *Alaska*, 521 U.S. at 16; *Alaska Report* 72-74; U.S. Count I Opp. 23-26.

4. *The 1957 United Nations Study*. Alaska does not deny that the United Nation's 1957 coastal archipelago study expressly states that the U.S. does not view the Archipelago waters as inland. U.S. Count I Memo. 37-38; US-I-3 p.24. Instead, Alaska dismisses that report, prepared for

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[7] Alaska claims that foreign nations nevertheless would have viewed the Archipelago waters as subject to the rule for "straits leading to an inland sea" because the United States did so itself, in its 1964 <u>California</u> brief." AK Count I Opp. 26. In making that assertion, Alaska does not discern any difference between a nation's binding enunciation or recognition of an inland waters claim and a government's counsel's minor and inconsequential misstatement about the physical geography of the Alexander Archipelago in a 183-page brief that focused on other issues. *See* U.S. Count I Memo. 22-24.

the United Nations Conference on the Law of the Sea and disseminated to nations throughout the world, as a mere "anecdote." AK Count I Opp. 29. It is unclear whether the author reached his conclusion through inquiry to the U.S. or through independent research. But it is quite clear that the U.S. did not dispute and has never questioned the accuracy of that study, which was a preparatory document for formulating the 1958 Convention. If the U.S. had believed a study of such importance was manifestly wrong, it presumably would have said so. That study provides highly pertinent evidence that neither the U.S., nor the international community, considered the Archipelago waters as inland at the time of Alaska's statehood.[8]

F. Alaska Has Failed To Demonstrate That The United States Has Asserted Power To Exclude Foreign Vessels

The U.S. has stated, in accordance with the Supreme Court's decisions in *Mississippi Sound* and *Cook Inlet*, that:

> To establish a claim of historic *inland* waters, the coastal nation's "exercise of sovereignty must have been, historically, an assertion of power to exclude all foreign vessels and navigation."

U.S. Count I Memo. 7 (quoting *Cook Inlet*, 422 U.S. at 197); accord *id.* at 43. Alaska nevertheless characterizes the U.S. as urging that "a nation must actually have excluded all foreign navigation from the waters," AK Count I Opp. 33, and then devotes four pages to pointlessly attacking the strawman it has constructed, *id*. at 33-36.

Alaska's real difficulty is that it cannot satisfy the Court's standard, which requires that Alaska demonstrate that the U.S. has *asserted that it has the power* to exclude vessels that pass

[8] Alaska's contends that the study is "classic hearsay," AK Count I Opp. 30, but it is clearly admissible. See Fed. R. Evid. 803(16). Indeed, Alaska's case is largely constructed of "classic hearsay," such as passages from National Geographic Magazine and other documents.

through the Archipelago waters in innocent passage. *Cook Inlet*, 422 U.S. at 197. To be sure, if no foreign vessel transits the waters in question, then "the need *to exercise* that privilege may never arise." *Mississippi Sound*, 470 U.S. at 114 (emphasis added). That was the case in *Mississippi Sound*, where there never "was any occasion to exclude from Mississippi Sound foreign vessels in innocent passage." *Ibid.* But that is *not* the case here. Foreign vessels have passed through the Archipelago waters for nearly 200 years, and the U.S. has never asserted that it has the power to exclude vessels in innocent passage. To the contrary, Secretary Bayard stated more than 100 years ago that the U.S. asserted the right of innocent passage against Russia and, upon Russia's cession of Alaska, the United could not deny it to others. US-I-17a-18a.[9]

Alaska notes that the U.S. allows foreign vessels to enter inland waters, in order to reach ports such as New York Harbor, and suggests that such similar traffic occurs in the Archipelago. AK Count I Memo. 33, 36. But the foreign vessel traffic here is not limited to entries and departures from ports of call, which require prior notice by all vessels. 33 C.F.R. 160.201. Rather, foreign vessels have historically entered the Archipelago waters for an unlimited range of purposes, including traversing the waters for sightseeing or for protected passage to distant destinations. U.S. Count I Memo. 43-44; U.S. Count I Opp. 38-40. The U.S. has never asserted that it has the power to exclude such traffic on the basis that the Archipelago waters are inland. Alaska's only basis for asserting otherwise is a statement in an internal memorandum from 30 years ago that recites informal

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[9] Alaska once again suggests that, in the mid-1830s, Russia had blockaded entry into the Archipelago. AK Count I Opp. 37. The historic record shows, however, that the Russians were not blocking entry into the Archipelago waters, but were claiming the right to prevent traders from entering their harbors and mainland rivers and inlets, and even that claim generated objections from the U.S. and Britain. *See* US-I- 2 pp.20-23. The *Dryad* incident involved a British entry into the Stikine River, while the *Loriot* incident involved an American entry into Russian harbors. *Ibid.*

anonymous advice that is clearly wrong. U.S. Count I Opp. 39-40.

To the contrary, mariners have understood that they have a right of innocent passage through the Archipelago waters. For example, during the Klondike Gold Rush, Canadian vessels transported prospectors from Vancouver *through* the Archipelago, then into the Gulf of Alaska to the mouth of Yukon River, where the prospectors then traveled back into Canada. Chesapeake Bay, Delaware Bay, Long Island Sound, and Mississippi Sound are not used in that manner, and Alaska points to no other body of bona fide historic inland waters that is similarly used as an intermediate segment of international travel. U.S. Count I Opp. 38. Alaska's observation (AK Count I Opp. 38-39) that the foreign vessel traffic was mostly British and Canadian and (according to Alaska) frequently beneficial is irrelevant. That traffic nevertheless was *foreign* and the U.S. asserted no authority to exclude it on the basis that the Archipelago waters were inland.[10]

Alaska ultimately asserts that "the United States' evidence of foreign vessels in the Archipelago does not prove that the United States lacked authority to exclude them." AK Count I Opp. 40. The State forgets that Alaska has the burden of proving that the U.S. has historically asserted the "power to exclude all foreign vessels and navigation." *Cook Inlet*, 422 U.S. at 197. The U.S. must not only claim inland water status, but it must assert it if the opportunity arises. The U.S. frequently has the opportunity to exclude foreign vessels, or to assert its right to do so, but it has

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[10] In yet another irrelevant excursion, Alaska notes that, during the 1950s, Congress made an exception, on behalf of Canadian carriers, to the general statutory requirement, set out at Chapter 26, 30 Stat. 248, that merchandise transported from one U.S. port to another U.S. port must be carried on American flag vessels. AK Count I Opp. 39. Congress's exception from general legislation designed to protect the American merchant fleet from foreign competition has nothing to do with the Archipelago's status and does not depend on whether the waters are territorial sea or inland waters.

never done so.

G. Alaska Has Failed To Overcome The United States' International Disclaimer

More than 30 years ago, the U.S. published charts formally informing the international community that the Archipelago waters are not inland. Alaska contends that the U.S.'s sovereign action "does not alter Alaska's burden of proof in this case." AK Count I Opp. 40. To the contrary, the U.S.'s issuance of charts was an express sovereign action taken to inform the world of the U.S.'s inland water claims. The Supreme Court has not held the U.S.'s international disclaimer is "decisive in all circumstances, for a case may arise in which the historic evidence was clear beyond doubt." *California*, 381 U.S. at 175. But as *California* clearly indicates, that sovereign action is highly pertinent, particularly in light of Alaska's failure to identify any comparable "*specific* assertion by the United States" (*Alaska*, 521 U.S. at 11) that the Archipelago waters *are* inland. Alaska must produce clear evidence that, notwithstanding the U.S.'s express international position, the U.S. has actually treated those waters as historic inland waters.

Alaska relies heavily on *Mississippi Sound*, where Mississippi and Alabama overcame a disclaimer issued in the course of that litigation by demonstrating that historic title ripened before the U.S. issued the disclaimer. 470 U.S. at 111-112. The Supreme Court relied specifically on its own decision in *Louisiana, supra*, which "clearly treated Mississippi Sound as inland waters" and put foreign nations on notice that "the United States considered Mississippi Sound to be inland waters." 470 U.S. at 108. Alaska has not produced any comparable evidence in this case—whether in the form of Supreme Court decision or some other specific assertion by the U.S. sufficient to put the international community on notice—that the Archipelago waters are inland. Rather, the historic

evidence shows that the U.S. has never considered those waters inland. The 1971 disclaimer was not notice that the U.S. "no longer claimed the waters of the Archipelago as inland," AK Count I Opp. 41, but rather confirmation of the U.S.'s understanding and practice dating back to the 1821 Russian ukase.

Alaska's contention that historic title had already ripened before the disclaimer is accordingly without merit. Alaska cannot assert a sufficient time period for its claim without evidence that the United State clearly claimed the Archipelago waters as inland during the nineteenth century. *See* U.S. Count I Memo. 38-39. That evidence does not exist. Despite Alaska's promise of "overwhelming evidence" that the Archipelago is historic inland waters, it delivers a mass of questionable assertions that show, at most, some occasional uncertainty over the status of those waters.[11]

III. Foreign Nations Neither Were Aware Of Nor Acquiesced To The Supposed Inland Waters Claim

Alaska has produced no convincing evidence that foreign nations "have acquiesced willingly" in any "express assertions of sovereignty." *Mississippi Sound*, 470 U.S. at 114. *See* AK Count I Opp. 42-46. To the contrary, foreign flag vessels routinely transit the Archipelago straits in innocent passage without fear of hindrance and have done so for more than a century. *See* U.S. Count I Memo. 43-44; U.S. Count I Opp. 38-40. The U.S. has already addressed Alaska's inaccurate

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[11] Indeed, while Alaska claims that historic title had "ripened" at statehood, AK Count I Opp. 2, the waters at issue here would not have qualified as inland at that time, even under Alaska's theory, because a portion of the claimed waters that Alaska designates as inland waters extended into Canada at the time of Alaska's statehood and for the preceding 40 year period. *See* US Count II Reply 10; US-II-42-4. Alaska has previously acknowledged that historic inland waters "must be entirely bounded by the same state or nation." US-I-5 p.3. *See* U.S. Count I Memo. 21 n.11.

descriptions of the 1893 Fur Seal Arbitration (U.S. Count I Opp. 27-28), the 1910 Fisheries Arbitration (*id*. at 28-29), the *Marguerite* incident (*id*. at 18-21), the Canadian negotiations (*id*. at 21-26), and the positions of Britain and Norway in the Fisheries case (*id*. at 27-29; U.S. Count I Memo. 41-42). Alaska's evidence of acquiescence rests largely on argument of counsel about arguments of other counsel, none of it bearing the imprimatur of unambiguous foreign sovereign action addressed to the world at large. *See* AK Count I Opp. 43-44. Alaska attaches no importance to the fact that none of the various compilations of historic waters claims includes the Archipelago waters, AK Count I Opp. 45, notwithstanding the fact that the foreign nations and the U.S. rely on such lists to identify historic claims, U.S. Count I Memo. 42 & n.22; U.S. Count I Opp. 42. The Alexander Archipelago is huge in geographic extent and importance, and it is regularly traversed by foreign vessels. A historic waters claim would not have gone unnoticed.[12]

IV. The Policy Considerations That Alaska Identifies Do Not Support Its Historic Waters Claim

Alaska contends, on the basis of internal federal government memoranda from 30 years ago, that "pecuniary interests and not foreign policy or national defense underlie the United States' opposition to Alaska's claim." AK Count I Opp. 47. Alaska is wrong. The internal memoranda indicate that Alaska brought political pressure to bear on the State Department, before the Supreme Court's decision in *Cook Inlet*, to withdraw its 1971 charts disclaiming the inland water status of the

[12] Contrary to Alaska's argument, the U.S. does not contend that absence from publicized lists absolutely precludes a finding of historic waters. In *Mississippi Sound*, the Supreme Court concluded that its prior decision in *Mississippi v. Louisiana*, *supra*, provided sufficient foreign notice that Mississippi Sound was historic waters and did not address whether that waterbody appeared on publicized lists. 470 U.S. at 108. In this case, the Archipelago waters have not been publicized through a past Supreme Court decision or a historic waters list. That absence of publication through either means is strong evidence of the absence of such a claim.

Archipelago waters. AK-118 p.12. The Legal Adviser proposed that the U.S. might depart from its longstanding policy and apply straight baselines to the area, *id.* at 12-13, noting that "[w]hile assertion of an historic claim may also be possible, we believe such a course would raise some uncertainties, and possible difficulties with other governments," *id.* at 13. Further study and discussion created even greater doubts. A new Legal Adviser later counseled that "there is a substantial question as to whether there is sufficient evidence in this case to establish [a historic inland waters] claim," "an historic territorial sea claim would also be based on questionable evidence," and "an historic claim of either type would seem inadvisable in this instance." AK-124 pp.1-2. Thus, the documents that Alaska relies on indicate that the U.S. declined to make a historic waters claim in 1972 for the same reason it opposes Alaska's claim here—the claim lacks merit under the "standards of proof employed in international law." *Ibid.*[13]

Alaska asserts that it has "legitimate policy reasons for pursuing its claim," but those interests are insubstantial. AK Count I Opp. 49. Alaska cites its entitlement to "equality" with other States, *id.* at 49, 51-52, but evenhanded application of the same principles that the U.S. applies internationally ensures that all States are treated equally. Alaska also claims an interest in eliminating jurisdictional disputes under state civil and criminal law if offenses are committed within the enclaves, but Alaska points to no instances of a crime or civil offense committed in those areas. *Id.* at 49. Such enclaves occur elsewhere along the U.S. coast, and the problem of determining state jurisdiction near an enclave is no different than the problem that would occur anywhere near a

[13] Alaska's suggestion that the U.S. bases its position on "pecuniary interests" is particularly unpersuasive in light of Alaska's acknowledgment that the enclaves and cul-de-sacs at issue here "have little if any monetary value" and "other Submerged Lands Act cases" that could have been affected by the precedent set here "are over." AK Count I Opp. 48.

federal-state maritime boundary.

As the U.S.'s position on Count III makes clear, the U.S. will readily recognize a State's *valid* claims to submerged lands. The U.S. cannot accede, however, to state claims that rest on a mistaken view of the controlling legal principles, particularly when misapplication of those principles would undermine the U.S.'s foreign policy and national defense interests. The U.S. has determined and consistently maintained that excessive maritime claims, like those Alaska asserts here, undermine free navigation and threaten this Nation's defense capabilities. U.S. Count I Memo. 2-5; U.S. Count I Opp. 41-44. Alaska' contention that the U.S. has misjudged its military interests (AK Count I. Opp. 49-51) should be rejected out of hand. The U.S. is entitled to conclude that the need to protect American interests in strategic overseas waters outweighs the potential threat that a foreign nation may invade the U.S. by sending an armada "to steam more than 70 miles up Chatham Strait and Frederick Sound into the heart of the Archipelago." AK Count I Opp. 50. Neither Alaska nor the courts are charged with assessing "the vital self-defense interests of the United States." AK Count I Opp. 50-51. The U.S.'s political branches bear that responsibility and their judgment on those sensitive issues should be respected.

CONCLUSION

The motion of the United States for summary judgment on Count I should be granted.

Respectfully submitted.

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December 20, 2002

TABLE OF EXHIBITS

EXHIBITS SUBMITTED BY THE UNITED STATES
RESPECTING MOTIONS FOR SUMMARY JUDGMENT
ON COUNT I OF AMENDED COMPLAINT

To avoid confusion between the exhibits relating to the various motions for partial summary judgment in this action, each exhibit of the United States is designated as "US" followed by a Roman numeral that corresponds to the count in Alaska's Amended Complaint to which the individual motion for partial summary judgment applies, followed by the number of the exhibit and page number (where appropriate). The bottom of each page of the exhibits has been labeled with the number of the exhibit as well as the number of the page in that exhibit. Because many exhibits are excerpts of longer documents or have title pages or tables of contents, the pagination of an exhibit may not correspond to the pagination of the original documents. When we indicate a page number in an exhibit citation in this memorandum, the page number usually refers to the pagination of the original document.

Exhibits US-I-1 through US-I-14 accompanied the Motion of the United States for Partial Summary Judgment on Count I. Exhibits US-I-15 to US-I-33 accompanied the Memorandum of the United States in Opposition to Alaska's Motion for Summary Judgment on Count I of the Amended Complaint No new exhibits accompany the Reply of the United States in Support of Motion for Partial Summary Judgment on Count I of the Amended Complaint.

US-I-1 Dr. Clive R. Symmons, Preliminary Expert Witness Report of Dr. Clive R. Symmons On Behalf of the US Federal Government

US-I-2 Dr. Barry M. Gough, Report On International Navigation Through The Waters Of The Alexander Archipelago Of Southeast Alaska, of 7 January 2002

US-I-3 Jens Evensen, Certain legal aspects concerning the delimitation of the territorial waters of archipelagos, United Nations Conference On The Law Of The Sea, A/CONF.13/18, 29 November 1957

US-I-4 Juridical Regime Of Historic Water, Including Historic Bays, Study Prepared by the Secretariat, United Nations General Assembly, A/CN.4/143, 9 March 1962

US-I-5 1961 Opinions of the Attorney General [of Alaska], No. 25, November 30, 1961

US-I-6 *United States v. California*, Supreme Court No. 5, Original, October Term, 1963, Brief For the United States In Anser To California's Exceptions To The Report Of the Special Master, June 1964

US-I-7 Convention On The Territorial Sea And The Contiguous Zone, Geneva, 1958

US-I-8 S. Whittemore Boggs, Delimitation Of The Territorial Sea, 24 American Journal of International Law 541 (1930)

US-I-9 S. Whittemore Boggs, memoranda of August 5, 1930 and November 5, 1932 concerning the delimitation of United States territorial seas in the Alexander Archipelago of Alaska for the Tariff Commission Charts

US-I-10 S. Whittemore Boggs to Admiral O'Neill, letter of August 1, 1952 concerning the delimitation of United States territorial seas in the Alexander Archipelago of Alaska

US-I-11 Documents establishing the Law of the Sea Task Force Committee on the Delimitation of the Coastline of the United States (from Reed, *3 Shore and Sea Boundaries* (2000))

US-I-12 United States Coast Guard - 17th Coast Guard District, Juneau, Alaska, list of vessels, including indication of their flag states, entering the Alexander Archipelago of Alaska in late 2001 and early 2002

US-I-13 Historic Bays, Memorandum By The Secretariat Of The United Nations, A/CONF.13/1, 30 September 1957

US-I-14 United States Department of State file documents concerning US/Canadian negotiations as to the status of waters in the Dixon Entrance of the Alexander Archipelago of Alaska

US-I-15 I. J.B. Moore, *International Law Digest* (1906) (excerpts)

US-I-16 Treaty Between Great Britain and Russia, Signed at St. Petersburg, February 16/28 1825 (French original followed by English translation)

US-I-17 Sen. Ex. Doc. 106, 50th Cong., 2d Sess. (1889) Proceedings of the US-British Fur Seal Arbitration (excerpts)

US-I-18 Statement of Mr. Peirce, the delegate for the United States during the arbitration of the whaling and selaing claim of the United States against Russia held at the Hague in 1902, made on July 4, 1902 (Foreign Relations of the United States 1902, Appendix I, 440)

US-I-19 *United States v. Alaska*, Civ. No. A-45-67 (D. Alaska, Findings of Fact and Conclusions of Law, January 29, 1973)

US-I-20 *Alaska Atlas and Gazeteer,* pages 16-17 (excerpt) map scale 1"= 4.8 statute miles or 4.2 nautical miles

US-I-21 Earl A Trager, "Glacier Bay Expedition" 1939 (excerpts)

US-I-22 Memorandum for Regional Director, NPS, from Frank Been submitting information for preparation of a Master Plan for Glacier Bay National Monument.

US-I-23 Memorandum to Regional Director, NPS Region Four, from Superintendent, Sitka National Monument dated August 17, 1949, regarding "Patrol and reconnaissance trip to Glacier Bay National Monument."

US-I-24 "Field Notes for inspection Richardson Highway, Kennicott, Thompson Pass, Glacier Bay and Way points by Frank Been, July 19-August 29, 1941"

US-I-25 National Park Service, Glacier Bay National Monument (undated, but believed to be from approximately 1946 based upon dates appearing in the text)

US-I-26 Glacier Bay National Monument brochure, 1950

US-I-27 Roach and Smith, *United States Responses to Excessive Maritime Claims* (excerpts)

US-I-28 Excerpts from Part II of the Proceedings of the 1903 Alaska Boundary Arbitration

US-I-29 Excerpts from Part IV of the Proceedings of the 1903 Alaska Boundary Arbitration

US-I-30 Excerpts from Part V of the Proceedings of the 1903 Alaska Boundary Arbitration

US-I-31 Memorandum from Supt. Sitka and Glacier Bay to Director, NPS, "Monthly Narrative Report, Sitka and Glacier Bay National Monuments," August 2, 1955

US-I-32 Memorandum from Supt. Sitka and Glacier Bay to Director, NPS, "Monthly Narrative Report, Sitka and Glacier Bay NM July 1958," August 12, 1958

US-I-33 Memorandum dated August 5, 1930, from U.S. Dept. of State, Office of the Historical Advisor re: Alien Fishing in Territorial Waters and on the High Sea

IN THE SUPREME COURT OF THE UNITED STATES

No. 128, Original

STATE OF ALASKA,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

Before the Special Master
Gregory E. Maggs

CERTIFICATE OF SERVICE

A copy or copies[*] of the Reply of the United States in Support of Motion for Partial Summary Judgment on Count I of the Amended Complaint were served by hand or by standard overnight courier to:

Paul Rosenzweig
Joanne Grace
G. Thomas Koester
John G. Roberts, Jr.

Dated this 20th day of December, 2002

____
David Brown

[*]Two copies were served on counsel unless the individual counsel requested that he or she receive only one copy. Counsel for amici, Darron C. Knutson requested that only briefs relating to Count III of the amended complaint be sent to him and Ms. Fishel. Accordingly, this motion and memorandum were not served on counsel for amici.