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 IV OF THE AMENDED COMPLAINT

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INTRODUCTION

The United States explained in its motion for summary judgment on Count IV that the U.S. intended to reserve submerged lands within Glacier Bay National Monument and that Congress intended to retain those lands when Alaska became a State. Through expert reports, affidavits, and documentary evidence, the U.S. showed that the Monument boundaries necessarily embraced submerged lands and that submerged lands were necessary to fulfilling the Monument's purposes, which included the protection of wildlife such as the brown bear. Since 1916, Congress has made clear that a "fundamental purpose" of national monuments is "to conserve . . . the wild life therein," 16 U.S.C. 1, and Congress made clear in Section 6(e) of the Alaska Statehood Act, note prec. 48 U.S.C. 21 (ASA), that it intended to retained submerged lands in Alaska that had been set apart for wildlife protection. Congress also made clear its intent to retain the submerged lands in the Monument because Congress was aware that the Monument included submerged land, knew that Monuments are permanent and can only be disestablished by Congress, considered changes to the Monument's boundaries, but ultimately left them where they were.

Alaska claims that numerous factual disputes preclude summary judgment, but it submits no expert reports, affidavits or other cognizable evidence to establish the existence of genuine issues of material fact. Even more remarkably, Alaska urges the Master to change the governing legal standard. Implicitly conceding that it cannot prevail under the Supreme Court's governing decisions, *e.g.*, *United States* v. *Alaska*, 521 U.S. 1(1997), Alaska urges the Master to borrow dicta from a 1978 decision respecting federal reserved water rights, *United States* v. *New Mexico*, 438 U.S. 696, that has nothing to do with ownership of submerged lands. Alaska overlooks that the Master has no authority to alter the legal standard that the Court has repeatedly prescribed and applied. In yet

another extraordinary turn, Alaska disavows its own express allegations in its complaint and amended complaint that the Monument was expanded to create a refuge for brown bears, ignoring 16 U.S.C. 1 and the Monument's obvious purpose of preserving "flora and fauna." Finally, faced with the Court's ruling that Section 6(e) retains submerged lands set aside for the protection of wildlife, Alaska illogically asserts that Section 6(e) applies only to lands administered by the Fish and Wildlife Service (FWS) and not to lands administered by the National Park Service (NPS), even though Section 6(e) contains no such limitation and Congress plainly did not intend to draw such a distinction.

ARGUMENT

I. Alaska Establishes No Factual Disputes

Rule 56(c), Fed. R. Civ. P., provides that summary judgment shall be rendered if there is "no genuine issue as to any material fact" and the movant is entitled to judgment as a matter of law. Rule 56(e) further provides that, when a motion for summary judgment is made and supported by affidavits and other allowable evidence, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-326 (1986); *First National Bank v. Cities Service Co.,* 391 U.S. 253, 288 (1968).

The U.S. established its entitlement to summary judgment with expert reports, each confirmed by the affidavit of the expert, and other documentary evidence demonstrating the facts necessary to satisfy the test for retention enunciated in *Alaska*, 521 U.S. 1, and *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987) . In response, Alaska alleges generally that

"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 [of the Monument]," AK Count IV Opp. 2, but submits no affidavit, expert report or other evidence cognizable under Rule 56 disputing any of the U.S.'s evidence.

II. Alaska Urges The Master To Apply An Incorrect Legal Standard

The Supreme Court has enunciated clear standards for determining whether the U.S. has retained submerged lands. *See* U.S. Count IV Memo. 4-6, 24-26. The U.S. easily meets those standards with regard to the Monument. Realizing that it can not prevail under the Court's two-part test, Alaska urges the Master to adopt and apply a different standard derived from dicta in *New Mexico v. United States*, *supra.* Alaska argues that, to demonstrate an intent to reserve submerged lands, the U.S. must show that a "primary purpose" of the reservation would be "entirely defeated" if the submerged lands passed to the State. AK Count IV Opp. at 12-16 (citing *New Mexico*).

Even if one assumed that *New Mexico*'s statements respecting "primary purpose" have general applicability in the water rights context, they plainly are not part of the test that the Supreme Court has established for determining federal retention of submerged lands. The Supreme Court has repeatedly set out its familiar two-part test for submerged lands, and it has *never* suggested that its 1978 *New Mexico* decision has any bearing on the inquiry, despite ample opportunity to do so. *See Idaho v. United States*, 533 U.S. 262 (2001); *Alaska*, 521 U.S. 1 (1997); *Utah*, 482 U.S. 193 (1987); *Montana v. United States*, 450 U.S. 544 (1981). Indeed, Alaska did not urge this test in its own recent brief on Count III challenging federal retention of submerged lands within the Tongass National Forest, which cited *New Mexico* for *other* purposes.

The Master has no authority to disregard the Supreme Court's directly pertinent decisions,

which do not require the U.S. to satisfy Alaska's "entirely defeated" test. Indeed, the Court has implicitly rejected such a standard. It has examined a variety of indicia to determine whether the intent to reserve submerged land "was definitely declared or otherwise made very clear." *Alaska*, 521 U.S. at 34. For example, the Court has relied on whether the reservation's description "necessarily embraced" submerged lands. *Id.* at 38-40; *Idaho,* 533 U.S. at 274; *see Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631-634 (1970). It has also considered the history of a reserve's creation and the managing agency's interpretation of the reserve's limits. *Alaska,* 521 U.S. at 51 ("the drafters of the application would not have thought that the habitats mentioned were only uplands"); *Idaho,* 533 U.S. at 274 (examining the description and terms of a tribe's petition for a reservation). And it has found that "[i]t is simply not plausible that the United States sought to reserve only upland portions of the area" in situations where "the purpose of the reserve would have been compromised if the submerged lands had passed to the state." *Ibid.* The Court has never suggested that the test is whether the "primary purpose" of the reservation would be "entirely defeated."[1]

The Court's specific holdings confirm that Alaska's "entirely defeated" test has no place in submerged lands cases. In *Alaska,* the Court found an intent to reserve submerged lands within the Arctic National Wildlife Range (ANWR), both because the ANWR boundary "was drawn so that

[1] There is no merit to Alaska's contention that its new test is necessary because application of the Court's two-part test, as the Court has enunciated it, would "effectively vitiate the equal footing doctrine." AK Count IV Opp. 14-15. The Court's test, which seeks to discern federal intent, has proved amply rigorous to ensure that the courts do not mistakenly dispossess States of submerged lands that Congress had no intention to retain. *See Montana*, 450 U.S. 544; *Utah,* 482 U.S. at 202-203; *See also* U.S. Count III. Resp. 4-6 (acknowledging Alaska's entitlement to the majority of the marine submerged lands in the Tongass National Forest).

the periodically submerged tidelands were necessarily included within it" and because "the purpose of the federal reservation . . . supported inclusion of submerged lands within the Range." *Alaska* 521 U.S. at 55. The Court plainly did not require a showing that exclusion would "entirely defeat" the primary purpose of ANWR. Similarly, the Court found that the purpose of the Naval Petroleum Reserve-4 (NPRA) would be "undermined" if the submerged lands underlying lagoons had been excluded, because drainage of oil and gas could occur from those lands. *Id.* at 39. The Court plainly could have not have concluded that failure to include the submerged lands of the lagoons would "entirely defeat" the reserve's purpose. The oil reserves within the entire 23-million-acre NPRA, *Id.* at 32, certainly could not be drained from the offshore lagoons at issue in that case. As yet another recent example, in *Idaho,* the Court examined whether an Indian reservation's purpose would be "compromised" if the submerged lands passed to the State. 533 U.S. at 274. The Court made no finding that exclusion of submerged lands would entirely defeat the purpose of the reservation, but focused on the fact that the fishery was "important" to the Indians. *Ibid.* Neither *Alaska* nor *Idaho* drew any distinction between primary and secondary purposes.

Alaska's test not only lacks any support in the Court's submerged lands cases, but it also lacks a sound conceptual foundation. Alaska asserts (AK Count IV Opp. 13) that *New Mexico* provides useful guidance because federal reservations of submerged lands are analogous to federal reservations of water rights. But as *New Mexico* illustrates, they are entirely different. First, as noted above, federal intent to reserve submerged lands can be discerned from boundary descriptions while intent to reserve water rights cannot. Second, and more fundamentally, even where the U.S. has not impliedly reserved water rights, it can obtain them even *after* statehood through the State's normal legal regimes for issuing those usufructuary rights. The Court noted that, while it is

reasonable to infer that Congress implicitly reserves the water needed "to fulfill the very purposes for which the reservation was created," it is also reasonable to infer that, "where water is only valuable for a secondary use of a reservation, . . . Congress intended . . . that the United States would acquire water in the same manner as any other public or private appropriator." 438 U.S. at 702. There is no basis for drawing an analogous dichotomy in the case of submerged lands, where Congress has no post-statehood mechanism (other than condemnation) for acquiring title to submerged lands under state law. Alaska's analogy is especially strained in light of its incomplete quote from *New Mexico* that "the Court will not find the water rights reserved unless 'without the water the purposes of the reservation would be entirely defeated.'" AK Count IV Opp. 13. The Court actually stated:

> Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.

438 U.S. at 700. The Court's submerged lands decisions stand in sharp contrast to that description. As discussed above, the Court has repeatedly ruled—in *Idaho*, *Alaska*, and *Choctaw*—that Congress intended to retain submerged lands without such a finding. Instead, the Court has consistently applied the two-part test that we employ.[2]

[2] Indeed, if *New Mexico* has any relevance here, it lies in the Court's recognition that conservation of wildlife is a "fundamental purpose" of NPS-managed national monuments. 438 U.S. at 709.

III. The United States Intended To Reserve Submerged Lands Through The 1925 Proclamation

A. The Boundaries Necessarily Embrace Submerged Lands

The U.S. has demonstrated (U.S. Count IV Memo. 26-29) that the boundary description of the 1925 Proclamation necessarily embraces submerged lands. Moreover, the Executive repeatedly interpreted the Proclamation as including the submerged lands and so informed Alaska's delegate to Congress. US-IV-32 and 33, *see* US-IV-16 p.577. None of Alaska's contrary arguments is persuasive.

Alaska suggests that because some of the letters supporting creation of the Monument spoke of withdrawing the area "surrounding Glacier Bay," there was no intent to reserve the Bay itself. As Alaska concedes (AK Count IV Opp. 6), most of the letters in support of the Monument used different language. *See e.g.,* AK-367 p.012227 (supporting efforts "to have Glacier Bay set apart as a National Monument"), p.012233 (supporting "movement for making Glacier Bay, Alaska a National Monument"), p.012271 (supporting "the withdrawal of Glacier Bay, Alaska"). Neither the proposal documents of the Ecological Society of America (which proposed the Monument and initiated the letter campaign) nor the government's response suggested that the Monument would be limited to the area "surrounding Glacier Bay."

The Society's "Recommendation Submitted by the Ecological Society of America with Regard to the Establishment of a National Monument at Glacier Bay, Alaska" stated "that the Glacier Bay region should be set aside as a national monument." AK-349 p.012079. In justifying the creation of the Monument, the Society refers to "Glacier Bay" or "the Glacier Bay region." *Ibid.* The Recommendation uses the term "the region surrounding Glacier Bay" only when it states that

"[t]he Region surrounding Glacier Bay is today totally uninhabited and undeveloped . . . ." *Id.* p.012080. The Recommendation illustrates the Society's acute understanding of the role of the Bay itself in the glacial process. The document notes that, in Vancouver's time, the entire Bay was covered by a glacier. *Id.* p.012083. The report speaks of the repeated alteration between glacial retreat and expansion and confirms that:

> In establishing a national monument we are building for the future . . . and in a century or two the glaciers may . . . be moving out along their separate fjords and even merging once more in a great Glacier Bay Glacier.

Id. p.12090-91. The document reported that the ice cliff of Muir Glacier extends several hundred feet below the water surface, *Id.* p.012098; and that four glaciers "rest on or closely approached the tidal flats," *Id.* p.012085-86. It included photos of icebergs in the Bay. *Id.* p.012114. Based on all of this, the Society urged the withdrawal of the "Glacier Bay region." *Id.* p.012082.

Alaska asserts that the 1925 Proclamation was intended to reserve only "public lands" and that public lands is a term of art that does not include submerged lands. Actually, the Proclamation set apart "the tract of land within the above described boundaries," with no limitation to "public lands." Furthermore, the Court has rejected the theory that "public land" is a term of art with a consistent meaning. *Amoco Production Co. v. Village of Gambell*, 480 U.S.531, 548 n.1 (1987). In the context of federal reservations, the courts have repeatedly held that "public lands" can include submerged lands. *Alaska,* 521 U.S. at 39-40 (1923 executive order setting aside as a petroleum reserve "all of the public lands within the following described area" (*Alaska Report* 343 n.1) reserved submerged lands); *Hynes v. Grimes Packing Co.,* 337 U.S. 86, 114-116 (1949); *Alaska v. United States,* 213 F.3d 1092, 1094 (9th Cir. 2000) ("United States clearly intended to include submerged lands when it withdrew 'public lands' within PLO 82").

Alaska argues that, because the Society's sketch of the proposed Monument had no southern boundary, the Society intended to exclude the submerged lands. That sketch reveals, at most, the Society's relative ignorance of the rules of writing legal descriptions, not an intention to exclude the Bay from the Monument. *Cf. Choctaw*, 397 U.S. at 630. The recommendation document envisions inclusion of the Bay itself, stating: "If *Glacier Bay alone is to be included*, the eastern boundary should begin on Icy Strait midway between the mouth of Glacier Bay and Excursion Inlet . . . ." AK-349 p.012096 (emphasis added). The General Land Office considered the proposal to include "that part of Alaska north of Icy Straits, west of Lynn Canal and east of Cape Fairweather," AK-364 p.1, and it is federal intent that controls.

B. Exclusion of Submerged Lands Would Undermine The Purposes Of The Monument

1. Tidewater Glaciers

Alaska does not dispute our showing that glacial science recognized that the dynamics of glacial advance and retreat were "intimately coupled" with the adjacent and underlying lands, and that the glaciers sat on the fjord bottoms of Glacier Bay in the past and may do so in the future. AK Count IV Opp. 16. Rather, Alaska argues that the U.S. has failed to demonstrate 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 were reserved. *Ibid.* Alaska is wrong in both respects.

First, as explained above, the Ecological Society confirmed to Interior that the Monument should be established with due regard "for the future," when glaciers might once again fill Glacier Bay. Excluding submerged lands would mean that, in the future, the tidewater glaciers could be outside the Monument. Alaska does not dispute Dr. Molnia's expert report concluding that

American scientists would have considered the submerged lands vital to the monument, AK Count IV Opp. 17, but argues that "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," *ibid.* Cooper was a glaciologist with no fewer than five publications on Glacier Bay. US-IV-5 p.6. He related the rapid retreat of Muir Glacier to a deepening of the water level and a widening of the fjord at the mouth, stating that "[w]e must know more of Glacier Bay itself." *Id.* p.3 Other glaciologists who supported creating the Monument included Harry Reid and Lawrence Martin. AK-375 p.6; US-IV-49; US-IV-50. Reid conducted expeditions to Glacier Bay in the 1890s and described the Bay's morphology, including the depths of submerged lands. US-IV-4 p.25. Martin conducted numerous expeditions to study tidewater glaciers in Alaska with topographers and hydrographers who measured and compiled data on the depth of submerged lands adjacent to glaciers. *Id.* p.27. The evidence shows that the Monument's proponents were aware of the necessity of studying the submerged lands to understand glaciers.

Second, Alaska's insistence that the U.S. must show that it would be "impossible" to study glaciers without reserving the submerged lands rests on Alaska's misapplication of the *New Mexico* dicta. The U.S. need not show impossibility; it is sufficient that the Monument's proponents clearly wished to avoid any possibility of impairment of scientific study. As Cooper explained in a letter to Interior, economic development can ruin areas for scientific study. AK-375 p.3. Moreover, without ownership of the submerged lands, the U.S. could not authorize studies involving core samples, long term mooring, and an array of other activities.

2. Inter-glacial Forests

Alaska does not dispute that inter-glacial forest remnants exist both above and below the high tide line. AK Count IV Opp. 19. The 1925 Proclamation specifically lists the existence of those remnants as a reason for the establishment of the Monument. If the Monument excludes submerged lands, those remnants below the high water line could be subject to destruction or impairment by the State or any entity to whom the State gives authorization to engage in inconsistent uses.

Alaska mistakenly asserts, on the basis of its "entirely defeated" test, that the U.S. must prove that it would be impossible to study inter-glacial remnants unless the Monument included *all* the submerged lands of Glacier Bay. Alaska overlooks that, once the United States has established that the exclusion of all submerged lands would compromise a reservation, the Court has never second-guessed the United States' judgment respecting how much submerged land should be retained. For example, President Wilson placed the Annette Island Fishery Reserve boundary 3000 feet from the coast of the islands, US-IV-51. Neither in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), nor in *Organized Village of Metlakatla v. Egan*, 369 US. 45 (1962) did the Supreme Court require the U.S. to prove that the reservation's purposes would be "entirely defeated" if a narrower band around the islands had been reserved. In *Alaska,* the Supreme Court did not require the U.S. to prove that each lake in ANWR contained such crucial wildlife habitat that the passage of that lakebed to the State would entirely defeat the purposes of ANWR. Nor did the U.S. need to prove that every parcel of submerged land in the NPRA presented an oil and gas drainage issue. The Ninth Circuit held that the Kenai Moose Range reserved the bed of Tustumena Lake because moose feed in the lake. *United States v. Alaska*, 423 F.2d 764 (9th Cir. 1970). It did not require a showing that the moose feed all the way to the center of this six-mile-wide lake.

3. Wildlife

The 1925 Proclamation specifically set aside the Monument to protect the opportunity to study the movements and development of "flora and fauna" in the Monument. U.S. Count IV Memo. 32. We discuss that objective below as part of the discussion of the 1939 Expansion, which set aside additional marine areas within the Monument, including bear habitat, to further that goal.

IV. The United States Intended To Reserve Submerged Lands Through The 1939 Proclamation

A. The Boundaries Necessarily Embrace Submerged Lands

The U.S. has demonstrated (U.S. Count IV Memo. 29-30) that the 1939 Expansion necessarily embraced submerged lands because its boundaries were drawn through the mid-channel of waterways and three miles off the coast. Alaska insists (AK Count IV Opp. 24-25) that the boundary was so drawn merely to divide island uplands, not to reserve submerged lands. Alaska is wrong.

Coffman and Dixon, who developed the recommended expansion boundaries, calculated in their December 1938 report how many acres of submerged lands would be set apart. They specifically stated that the Monument would contain all the submerged lands within the boundaries. US-IV-9 p.2, 3. They discussed commercial fishing for halibut "within the boundaries proposed." *Id.* p.10. In January 1939, NPS requested a Mr. Moskey to "prepare a proclamation to extend the boundaries of Glacier Bay National Monument as recommended in the attached report of Messrs. Coffman and Dixon" and referred Mr. Moskey to the description at page 2 of that report. AK-449. A week after President Roosevelt issued his 1939 Proclamation, the NPS press release confirmed that the Monument extended three miles off the sea coast and spoke of the sea mammals and fish in

Glacier Bay and other inlets of the Monument. US-IV-11. Hence, this is not a case in which an intent to include the submerged lands needs to be implied or inferred. The drafters of the expansion unequivocally stated their intent both before and after the President signed the Proclamation. From its inception to the present, the U.S. has consistently interpreted the Monument to include submerged lands. U.S. Count IV Memo. 20-24, 34-35.

Alaska's explanation that the boundary was drawn so as to include "small islands immediately adjacent to the mainland" is not supported by the facts. The Proclamation boundary goes through the center of Excursion Inlet, but there are no islands along its western shore. US-IV-52**.** Moreover, when the U.S. desires to reserve only islands within a certain line of waters, it knows how to write a legal description doing so. When President Roosevelt wished to expand the Katmai National Monument (Katmai) in 1942 to include certain offshore islands, but not the submerged lands, he reserved and added to Katmai "all islands in Cook Inlet and Shelikof Strait in front of and within five miles of the Katmai National Monument . . . ." US-IV-53; *see* US-IV-54. In this case, the government considered and rejected a boundary description that would have included islands but not intervening submerged lands. In a November 30, 1938, memorandum, the General Land Office prepared for the NPS a proposed legal description for the Glacier Bay Expansion whose boundaries would have run "thence northwesterly along the Pacific coast, including all the islands along the coast." AK-444. Instead of using that description, the NPS requested Mr. Moskey to pattern the Proclamation on the description given in Coffman and Dixon's report, which included submerged lands. AK-449; US-IV-9 p.2-3. There was no need to draw a boundary on the Pacific coast to divide two sets of islands, as all the islands off the Pacific coast of the Expansion are within two miles of the mainland. US-IV-55.

B. Exclusion Of Submerged Lands Would Undermine The Purposes Of The 1939 Expansion

1. Tidewater Glaciers and Inter-glacial Forests

As demonstrated above, excluding submerged lands would compromise the purposes relating to tidewater glaciers and inter-glacial forest remnants. We add only that even more was known by 1939 regarding the relationship between tidewaters glaciers and their fjords than was known in 1925, *see* US-IV-4 and 5, and that inter-glacial forest remnants are found in the Expansion, US-IV-8 App.3.

2. Wildlife

Since 1916, a "fundamental purpose" of national monuments has been to "conserve the wild life therein" unimpaired for future generations. 16 U.S.C. 1. The 1925 Proclamation states that the Glacier Bay area afforded the opportunity for studying the development and movement of flora and fauna. Consistent with that statement, the President issued the 1939 Proclamation to create a refuge for brown bear as well as other wildlife. Alaska ignores the 1916 Act, asserts that it is not necessary to protect wildlife habitat to preserve species for study (AK Count IV Opp. 21), and denies that the Monument was expanded to protect brown bear (*id*. at 27-42). Alaska's contention that protection of flora and fauna for study does not require preservation of wildlife or its habitat is so insubstantial that it warrants no response. Because Alaska specifically disputes that the 1939 Expansion sought to protect bears, we focus on that species.[3]

a. *The 1939 Expansion was specifically intended to protect brown bears.* Alaska correctly

[3] While we, like the proponents of the Expansion, focus on brown bears, the Proclamations likewise protect other animals, including marine mammals. US-IV-9; US-IV-11; s*ee* U.S. Count IV Memo. 22-23; *see also Alaska*, 521 U.S. at 51-53.

averred in paragraph 57 of its Amended Complaint that a primary purpose of the 1939 Expansion was to create a "refuge for brown bear." Without seeking leave for further amendment, Fed. R. Civ. P. 15, Alaska now purports to disavow its own averment. Alaska instead alleges, at this late stage, that creating such a refuge "was a political strategy that the Park Service abandoned when it no longer served its interests." Alaska's far-fetched theory is contrary to the record and without merit.

The record shows that expansion of the Monument to protect brown bear was suggested as early as 1927. U.S. Count IV Memo. 15-19. In the ensuing years, Interior consistently informed Congress and the President of plans to expand the Monument to protect bears, receiving encouragement from both. Throughout that period, the NPS considered two mechanisms for expansion—legislative designation as a national park or issuance of a proclamation expanding the Monument. As early as 1932, the Chairman of the Senate Special Committee on Wildlife Conservation endorsed plans to protect bears by expanding the Monument through executive order. US-IV-21. In response to President Roosevelt's query regarding protection of brown bears, Secretary Ickes informed the President that the Katmai National Monument had recently been enlarged and that Interior planned a similar proclamation for Glacier Bay to protect brown bears. US-IV-6 p.16; *see* US-IV-24; AK-415, 416, 418.

On December 27, 1938, the NPS Director decided to use the proclamation mechanism, not because of an intent to change the purposes of the Expansion, but because, by statute, the Monument was open to mining, and conservation groups were opposed to the designation of any new national *parks* in which mining was permitted. AK-446. The Proclamation was drawn up consistently with the December 20, 1938, report of Coffman and Dixon, which focused on the protection of bear and other wildlife. US-IV-9; AK-449. Alaska's theory that the NPS "no longer needed" the cooperation

of the Forest Service cannot be squared with the joint letter to the President from the Secretaries of Agriculture and the Interior recommending issuance of the Proclamation. AK-384. Both the press release and the 1940 report to Congress highlighted that the Expansion protected bears and other species. US-IV-11; US-IV-25 p.353. Alaska can disavow its averment, but it cannot change the facts.

b. *The Executive can set aside monuments for wildlife protection*. Alaska argues that two memoranda written by a Justice Department attorney in 1936 and 1937 (AK-385 and 386) demonstrate that the Executive did not believe in 1939 that the President had authority to create or expand a national monument to protect wildlife or plants. While it is clear that Mr. Bell had doubts that national monuments could be set apart for those objects, Mr. Bell's view was not shared by the rest of the Executive. Mr. Bell's own memorandum to the file indicates that Interior disagreed with his analysis. AK-385. Despite Mr. Bell's request that Interior change the name of the then-proposed Joshua Tree National Monument to the Mohave Desert National Monument, neither Interior nor the President did so. US-IV-56. Moreover, after receiving Mr. Bell's advice in 1936, Interior nonetheless informed the President in 1937 that it was planning an expansion of Glacier Bay National Monument to provide protection for brown bears. US-IV-24.

Interior's disagreement with Mr. Bell was well-taken. Animals and plants can most assuredly constitute objects of scientific interest. The Solicitor General advocated and the Supreme Court unequivocally confirmed the correctness of Interior's position in *Cappaert v. United States,* 426 U.S. 128, 141-142 (1976). Indeed, Presidents have repeatedly created or expanded monuments in order to protect animals. *See, e.g.,* US-IV-41 (Mount Olympus National Monument established to protect elk summer range); US-IV-57 (Katmai expanded in 1931 to protect bear and other

species). When Interior broached the idea of expanding the Monument by proclamation to protect the bears, it received the endorsement of the Chairman of the Senate Special Committee on Wildlife Conservation. US-IV-21. Their prescience has yielded the perceived scientific benefits. Brown bear are now nearly extinct in the "lower 48," and the Glacier Bay population provides the unique opportunity to study their development, movements, and other responses to changes in a maritime ecosystem caused by the retreat and advance of glaciers.

c. *The President was not required to mention bears in the Proclamation*. Alaska's argument that the protection of bears and other wildlife cannot be a purpose of the Expansion because the 1939 Proclamation does not specifically mention them is plainly wrong. That Proclamation carried forward and enlarged the "flora and fauna" objectives of the 1925 Proclamation. Moreover, if a national monument has only those purposes specifically enumerated in the proclamation, many monuments would have no purposes whatsoever. Presidents have frequently created or enlarged reservations without identifying the specific objects of the reservation. In 1938, President Roosevelt enlarged Dinosaur National Monument, stating merely that the lands to be added "have situated thereon various objects of historic and scientific interest" and that "it would be in the public interest to reserve" them. US-IV-58. President Hoover created Death Valley National Monument "for the preservation of the unusual features of scenic, scientific, and educational interest therein contained." US-IV-59. Franklin Roosevelt was no more specific when he enlarged Death Valley in 1933. US-IV-60. The Antiquities Act, 16 U.S.C. 431 *et seq.* simply does not require a detailed statement of purposes. *Tulare County v. Bush*, 306 F.3d 1138, 1141 (D.C. Cir. 2002). Furthermore, the purpose of conserving wildlife is explicit and fundamental to all national monuments designated for management pursuant to 16 U.S.C. 1. *Cappaert,* 426 U.S. at 140-141. Contrary to Alaska's

assertion, there was never any doubt that the President expanded the Monument to protect bears and other species. The President was a major proponent of protecting bears, and Interior repeatedly proclaimed that purpose both before and after he signed the Proclamation. U.S. Count IV Memo. 14-23, 39; AK-413, 396, 414. Until its extraordinary about-face, Alaska itself expressly averred what was obvious to all.

d. *There is no genuine issue of fact that excluding submerged lands would compromise the Monument's wildlife protection purpose.* As demonstrated at U.S. Count IV Memo. 19-20 and the U.S. expert report and affidavit, US-IV-6, bear make extensive use of the marine environment. Alaska has submitted no cognizable evidence to contest that showing.

Coffman and Dixon sought to protect bears by "rounding out" the Monument into a "biotic unit." US-IV-9 p.8. That biotic unit clearly included submerged lands, as they calculated the number of submerged acres to be set apart. *Id.* p.3; *see* US-IV-28 p.30. Dixon's statement that brown bears straying outside the Monument's original boundaries were in danger of being killed underscored the importance of including the bear's true habitat. US-IV-7 p.19. Excluding the important marine portion of the bears' habitat would compromise the Monument's purpose of conserving the wildlife unimpaired for the enjoyment of future generations.

Alaska nonetheless insists that the U.S. has failed to show that exclusion of the submerged lands would "entirely defeat" the reservation's purpose. Alaska once again uses the wrong standard. The U.S. need not show that excluding the submerged lands would cause the bears' extinction. The issue is whether submerged lands are necessary to the goal of conserving wildlife unimpaired for the benefit of future generations. Alaska also objects that no reservation of submerged land was necessary to protect bears because the U.S. could prohibit hunting in the submerged lands areas even

if it did not own them. That may be obvious today, but was less clear in 1939. Alaska cites 1938 regulations generally prohibiting hunting within national parks and monuments. AK-379. Nothing in those regulations, however, specifically addresses activities on inholdings. Alaska's own exhibit AK-380 demonstrates that considerable uncertainty existed regarding inholdings in 1939. NPS asked the Solicitor whether the Secretary could regulate activities on park inholdings. *Ibid.* The Solicitor responded that, for parks where there had been no state cession of jurisdiction, there was a "restricted power to regulate," but that the extent of that regulatory authority was "not susceptible of definite delimitation." *Ibid.* The proponents of the Expansion plainly did not believe that hunting regulations constituted an adequate *permanent* protection for the bears. AK428 p.2; *see* AK-448 (expressing President Roosevelt's desire for *permanent* protection of bears on Admiralty Island).

Finally, Alaska argues that only a portion of the submerged lands was actually used and needed by the bears and that, under the Antiquities Act, only those submerged lands could be reserved. The Antiquities Act delegates to the President the determination of what lands are necessary for the accomplishment of the purposes of a monument. If Congress believes that a smaller area should have been set apart, it may reduce the area by statute. The courts, however, have resisted second-guessing the President when presented with an argument that a monument is unnecessarily large. *Tulare County*, 306 F.3d at 1142; *Wyoming v. Franke*, 58 F.Supp. 890, 896 (D. Wyo. 1945); *cf. Cameron v. United States*, 252 U.S. 450, 455-456 (1920).

V. Glacier Bay National Monument Was Set Apart For The Protection Of Wildlife And Therefore Retained In Federal Ownership By Section 6(e) Of The Alaska Statehood Act

The U.S. has plainly satisfied the second prong of the Supreme Court's test for federal retention. U.S. Count IV Memo. 37-45. The Court has already held that Congress expressed its clear intent, through Section 6(e) of the ASA, to retain all lands, including submerged lands, that had been set apart for the protection of wildlife. *Alaska,* 521 U.S. at 57. The Monument was set apart for the protection of wildlife because: (1) by statute, a "fundamental purpose" of national monuments is the conservation of the wildlife therein unimpaired for future generations; (2) the 1925 Proclamation designated the study of the development and movement of flora and fauna as a purpose for the creation of the Monument; and (3) a primary purpose of the 1939 Expansion was specifically to protect brown bear.

Alaska seeks to avoid the clear import of *Alaska* by inserting into the ASA requirements not found therein. AK Count IV Opp. 43-52. Alaska contends that Section 6(e)'s reservation of federal ownership applies only to wildlife refuges administered by FWS. Alaska's reading is contrary to both the words and legislative history of the provision. Congress used clear language in describing the lands to be retained in federal ownership. The State would not receive any 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." ASA Sec. 6(e). If Congress had wished to restrict the retention to those refuges and reservations administered by the FWS, it would have said so. Instead, Congress used the broader language proposed by Secretary of the Interior Chapman, who indicated that all lands set apart for wildlife protection would be retained regardless of the mechanism or statutory authority by which

they were set apart:

> [T]he United States would retain administrative jurisdiction over the Pribilof Islands and over *all other Federal lands and waters* in Alaska which have been set aside as wildlife refuges or reservations pursuant to the fur seal and sea otter laws, the migratory bird laws or *other Federal statutes of general application*.

US-IV-40 p.49 (emphasis added). The Antiquities Act is a "Federal statute of general application" used to set apart lands for the protection of wildlife. Even before the 1939 Expansion, agency regulations referred to the national monuments as "sanctuaries for wildlife." AK-379 p.13.

Alaska erroneously argues (AK Count IV Opp. 44-45) that lands retained in federal ownership are a "subset" of the lands to be conveyed to the State in the first portion of Section 6(e) and that the retention clause therefore does not apply unless the lands were "'specifically used for the sole purpose of conservation and protection of fisheries and wildlife of Alaska' under the provisions of three specific laws.'" The retention clause cannot be a subset of the conveyance clause because such a reading would result in *no* retention of even the FWS-administered wildlife refuges that Alaska claims were the subject of the retention clause. Even FWS-administered refuges are not used solely for purposes of wildlife protection. *See* AK-452 p.67. Moreover, FWS-administered refuges are not used for protection of wildlife under the provisions of the three specific laws referenced in the conveyance clause of Section 6(e). Those three specific laws are the Alaska game law of July 1, 1943 (57 Stat. 301; 48 U.S.C., secs 192-211), as amended, and provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478; 48 U.S.C. 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U.S.C. 221-228). Those three statutes have nothing to do with the administration of wildlife refuges by FWS or any other agency. Instead, they relate to the promulgation and enforcement of general fish and game regulations throughout Alaska.

Section 6(e)'s conveyance and retention clauses express two different, but parallel, principles. The State is to receive property used solely for the promulgation and enforcement of the general hunting and fishing laws, but the U.S. is to retain title to all lands set apart for wildlife protection. As Secretary Chapman explained, this division between property used for the enforcement of general hunting and fishing regulations and property reserved for the protection of wildlife was "along the lines of demarcation conforming to the recognized distinctions between Federal and State functions . . . ." US-IV-40 p.49. The *Hearings Before the Senate Committee on Interior and Insular Affairs on S. 50*, 83rd Cong. (1954)(AK-452), upon which Alaska mistakenly relies, support the construction that we urge. Alaska states that the only witnesses called to address what became Section 6(e) were three FWS employees. Actually, the Committee called representatives of each land-managing agency to review the lands administered by that agency in Alaska to determine whether some reservations could be eliminated or reduced in size. AK-452 p.23-24. Accordingly, it is was natural that the FWS witnesses primarily discussed only those lands administered by their agency. But from the Committee's perspective, it was irrelevant which specific Interior agency administered particular lands for the protection of wildlife:

> Senator CORDON. Are you going to protect [moose] wherever they are in Alaska, with refuges.
> Mr. RHODE. That is the only one on which the Fish and Wildlife Service has any big game.
> Senator CORDON. We are not too much interested in which division of the Department of the Interior does the work. I know you folks might be, but we are not.

Id. p.66. Significantly, the Committee learned that national parks and monuments were *more* protective of wildlife than were FWS-administered refuges. *Compare id.* p.32, 48 (monuments closed to trapping and hunting) with *id.* p.65 (Kenai Moose Range open to hunting). The Committee

also learned that FWS itself performed work in national monuments. *Id.* p.32.

Alaska notes that the 1954 Senate Report (AK-451 p.31) speaks of the retention of "wildlife refuges," which Alaska suggests can only refer to FWS-administered refuges. As shown at U.S. Count IV Memo. 14-19 and AK-418, monuments are frequently included in the term wildlife refuges or reservations. Subsequent reports in the ASA legislative history referred more generally to the retention of "withdrawn land used in general wildlife and fisheries research activities," US-IV-61 p.48; US-IV-62 p.19, or "wildlife refuges or reservations," US-IV-63 p.17. Alaska also notes that Alaska voters had to vote on statehood, but that adds nothing to Alaska's claim. The voters accepted certain provisions of the ASA as enacted, and those provisions retained in federal ownership all lands set apart for the protection of wildlife.

As a matter of law, Section 6(e) retains all submerged lands set aside for wildlife protection regardless of whether Congress focused on the particular withdrawal at issue during the legislative process leading up to the ASA. Nevertheless, the amount of notice specific to the Monument is comparable to or exceeds the notice found sufficient in *Alaska* and *Idaho*. Congress knew by the terms of the 1916 Organic Act, the regulations of the NPS, and numerous reports to Congress that the Monument had been set aside for the protection of wildlife. U.S. Count IV Memo. 15-19, 38-39. Furthermore, Congress was specifically aware that Glacier Bay was a national monument that included submerged lands. The 1958 BLM Atlas graphically put Congress on notice of that feature. US-IV-46; *Alaska*, 521 U.S. at 56 & n.2.[4] In addition, NPS Director Wirth illustrated his testimony

[4] Alaska claims that the Atlas has no significance with regard to the intent to retain submerged lands because the Tongass boundaries are likewise shown running through marine waters. The Tongass boundaries, however, are depicted quite differently from the Glacier Bay boundaries—they show no western limit. Congress would have considered the Atlas in conjunction

on the Monument using an earlier BLM Atlas (*see* AK-452 p.10, 46, 48) showing boundaries necessarily embracing submerged lands. He referred to the Monument as a "water park," *id.* p.51, with "a series of glaciers on a mountain range, with Glacier Bay going up through the center," *id.* p.46, and he used an acreage figure that included submerged lands, *ibid*. Thus, as in the case of the reserves at issue in *Idaho* and *Alaska*, there can be no doubt that Congress "recognize[d] the reservation in a way that demonstrates an intent to defeat state title" and "[i]t is simply not plausible that the United States sought to reserve only the upland portions of the area." *Idaho*, 533 U.S. at 273-274, citing *Alaska*, 521 U.S. at 39-40.

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with Section 6(e), which retained Glacier Bay in federal ownership based on its status as a national monument that provided a refuge for wildlife. Moreover, unlike national forests, elimination of a national monument requires congressional action. *Compare.* U.S. Count IV Memo. 39-45 *with* 16 U.S.C. 473. Indeed, the Court found that Atlas to be probative in *Alaska* for similar reasons. 521 U.S. at 56.

CONCLUSION

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

Respectfully submitted.

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December 20, 2002

TABLE OF EXHIBITS

EXHIBITS SUBMITTED BY THE UNITED STATES
RESPECTING MOTION FOR SUMMARY JUDGMENT
ON COUNT IV OF THE 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. Whenever we indicate a page number in an exhibit citation in this memorandum, the page number refers to the pagination of the original document.

One exhibit calls for comment. Appendix 6 to US-IV-8 is a pre-release version of a DVD entitled "Glacier Bay-Beneath the Reflections - A Celebration of Glacier Bay's Underwater Environment" The original is in DVD format. The copies are in VHS format. In order to avoid breakage of the VHS version, Appendix 6 is in a video jacket separate from the three-ring binder holding the remaining exhibits.

Exhibits US-IV-1 through US-IV-48 accompanied the Motion of the United States for Partial Summary Judgment on Count IV of the Amended Complaint. Exhibits US-IV-49 through US-IV-63 accompany the Reply of the United States in Support of the Motion of the United States for Partial Summary Judgment on Count IV.

US-IV-1 Proclamation No. 1733 of February 26, 1925, 43 Stat. 1988

US-IV-2 Proclamation No. 2330 of April 18, 1939

US-IV-3 Catton, "Historical Report Relating to Claims to Submerged Lands in Glacier Bay National Park, Alaska" December 2001

US-IV-4 Molnia, "The State of Glacier Science and its Relationship to the Submerged Lands Adjacent to and Beneath the Tidewater Glaciers of Glacier Bay at the Time of the Founding and Expansion of Glacier Bay National Monument, Alaska" December 18, 2001

US-IV-5 Trabant, "Expert Witness Report for Glaciology Relating to Claims to Submerged Lands in Glacier Bay, Alaska" December 18, 2001

US-IV-6 Barnes, "Brown Bear Use of Marine Habitats in Alaska with Emphasis on Glacier Bay" February 1, 2002

US-IV-7 Kaufmann, "Glacier Bay National Monument, Alaska, A History of its Boundaries." June 1954

US-IV-8 Declaration of Tomie Lee

US-IV-9 Coffman and Dixon "Report on Glacier Bay National Park (Proposed), Alaska" December 20, 1938

US-IV-10 Executive Order No. 3983, April 1, 1924

US-IV-11 U.S. Department of the Interior Memorandum for the Press, April 25, 1939

US-IV-12 "National Wild-life Reservations" United States Department of Agriculture Miscellaneous Publication No. 51 (1929)

US-IV-13 3 CFR (1938-1943 Compilation) Chap. IV Reorganization Plan 2 § 4(f)

US-IV-14 Letter from Senator Peter Norbeck to NPS Director Horace Albright dated January 10, 1931

US-IV-15 "Protection and Preservation of the Brown Bear and Grizzly Bears of Alaska" Hearing before the Special Committee on Conservation of Wild Life Resources, U.S. Senate, January 18, 1932

US-IV-16 Regulations Respecting Game Animals, Land Fur-bearing Animals, Game Birds, Nongame Birds, and Nests and Eggs of Birds in Alaska, 1 Fed. Reg. 573, June 11, 1936

US-IV-17 Letter from Acting Dir. NPS De Maray to Secretary of Interior Ickes dated September 2, 1938

US-IV-18 Senate Resolution No. 246, 71st Cong., 2d Sess.

US-IV-19 Regional Planning - Part VII Alaska: Its Resources and Development, 1937 (Excepts)

US-IV-20 Notes on Proposed Glacier Bay National Park and cover letter, 1932

US-IV-21 Letter of Senator Walcott to NPS Director Albright, dated March 18, 1932

US-IV-22 Letter of NPS Director Albright to Cong. Shreve, dated March 24, 1932

US-IV-23 Memorandum from President Franklin D. Roosevelt to Secretary of Interior Ickes dated April 21, 1937

US-IV-24 Memorandum from Acting Secretary of the Interior West to President Franklin D. Roosevelt, dated June 25, 1937, compiled in Nixon, *Franklin D. Roosevelt and Conservation, 1911-1945*

US-IV-25 "The Status of Wild Life in the United States," S. Rept. 1203, 76th Cong., 3d Sess. (Feb. 7, 1940)

US-IV-26 Calahane, "A Boundary Study of Glacier Bay National Monument" Dec. 20, 1954

US-IV-27 Proclamation No. 3089, 20 Fed. Reg. 2103 (April 5, 1955)

US-IV-28 Mission 66 Prospectus, Sitka and Glacier Bay National Monuments, April 20, 1956

US-IV-29 United States Geological Survey 1:63,600 Maps Mt. Fairweather (B-1), (B-2), (C-5) and Juneau (B-5)

US-IV-30 Butts, "Master Plan of Glacier Bay National Park" 1964

US-IV-31 Draft Master Plan Glacier Bay National Monument, 1971 (Excerpts)

US-IV-32 Letter from Anthony Dimond to Secretary of the Interior Ickes dated August 24, 1937

US-IV-33 Letter from Asst. Secretary of Interior Oscar Chapman to Anthony Dimond dated September 2, 1937

US-IV-34 Been "Preliminary Report Inspection of Glacier Bay National Monument, Alaska, August 1 to August 27, 1939"

US-IV-35 Memorandum from Acting Director NPS to Commissioner of Indian Affairs dated May 14, 1946

US-IV-36 Letter from Asst. Secretary, U.S. Dept. of the Interior to Mayor Richard Dalton of Hoonah, Alaska

US-IV-37 Letter of Charles Janda to Mayor Frank See, dated April 2, 1974

US-IV-38 NPS General Rules and Regulations, Landing of Aircraft, 24 Fed. Reg. 4519 (June 3, 1959)

US-IV-39 "Conservation of Wildlife," Hearing before the House Select Committee on Conservation of Wildlife Resources, Pursuant to H. Res. 11, 75th Cong. 3rd Sess. (1938) (Excerpts)

US-IV-40 "Alaska Statehood" Hearings on H.R. 331 and S. 2036, 81st Cong., 2d sess., April 24-29, 1950 (Excerpts)

US-IV-41 Proclamation of March 2, 1909, 35 Stat. 2247

US-IV-42 U.S. Senate, Committee on Interior and Insular Affairs, Hearings on Alaska Statehood, 83rd Cong., 2d Sess. (1954) (Excerpts)

US-IV-43 H.R. Subcommittee on Territorial and Insular Possessions, Hearings on H.R. 206 and H.R. 1808 (1947) (Excerpts)

US-IV-44 Letter from Delegate Bartlett to Fred Packard dated February 3, 1947

US-IV-45 "Statehood for Alaska," Hearings before the House Subcommittee on Territorial and Insular Affairs, 85th Cong., 1st Sess. 1957 (Excerpts)

US-IV-46 1958 Atlas of Alaska showing Federal Withdrawals and Reservations, Bureau of Land Management, U.S. Department of Interior

US-IV-47 Trager, "Glacier Bay Expedition 1939"

US-IV-48 Dixon, "1932 Glacier Bay National Monument Field Notes" with cover letter

US-IV-49 Letter of Harry Fielding Reid to W.S. Cooper dated December 29, 1924

US-IV-50 Letter of Lawrence Martin to W.S. Cooper dated January 5, 1925

US-IV-51 Proclamation of April 28, 1916, 39 Stat. 1777, creating Annette Island Fishery Reserve

US-IV-52 US Geological Survey Juneau (B-5) and (C-5) quadrangles 1:63,360 scale (excerpts showing Excursion Inlet)

US-IV-53 Proclamation No. 2564 dated August 4, 1942, enlarging Katmai National Monument – Alaska

US-IV-54 Proclamation No. 1658, dated December 7, 1912, establishing Chamisso Island Reservation and Proclamation No. 1044, dated February 27, 1909, establishing Pribilof Reservation

US-IV-55 Alaska Atlas and Gazetteer, plates 30 and 31 showing Gulf of Alaska area of Glacier Bay National Monument

US-IV-56 Proclamation No. 2193, dated August 10, 1936, creating Joshua Tree National Monument

US-IV-57 Proclamation No. 1949, dated April 24, 1931 enlarging Katmai National Monument, 47 Stat.2453

US-IV-58 Proclamation No. 2290, dated July 14, 1938 expanding Dinosaur National Monument, 53 Stat. 2454

US-IV-59 Proclamation No. 2027, dated February 11, 1933 creating Death Valley National Monument, 47 Stat.2554

US-IV-60 Proclamation No. 2228, February 8, 1937, expanding Death Valley National Monument, 53 Stat. 2454

US-IV-61 H.R .Rept No. 88, 84th Cong., 1st Sess., (1955) (excerpts)

US-IV-62 H.R. Rept. No. 624, 85th Cong., 1st Sess. (1957) (excerpts)

US-IV-63 S. Rept. No. 1163, 85th Cong., 1st Sess. (1957) (excerpts)

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 IV 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.