Supreme Court of the United States

No. 128, Original

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM IN SUPPORT OF ALASKA'S MOTION FOR SUMMARY JUDGMENT ON COUNT I—HISTORIC WATERS

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INTRODUCTION

It was obvious to the earliest American explorers of the Archipelago that it consisted, in John Muir's words, of "inland waters that are about as waveless as rivers and lakes." John Muir, Travels in Alaska 13 (1979) (Ex. AK-1). Muir and subsequent travelers would doubtless be surprised to learn that these waters—according to the United States' current position—included the "high seas." Indeed, that characterization would come as a great surprise to the former officials of the United States who consistently shared Muir's view for more than 120 years before statehood. Yet in a complete about-face, the United States now seeks to reject that consistent pre-statehood policy and excise from the State of Alaska many areas deep within and surrounded by the Archipelago.

As shown below, these revisionist tactics must fail. The United States contends that Alaska's territorial waters extend only three miles from the physical coastline of the mainland and myriad islands of the Alexander Archipelago, including its innumerable twists and turns. This redrawing of the map would result in various "pockets" and "enclaves" of non-Alaskan waters—those areas more than three miles from any physical coast—surrounded by Alaskan territorial waters. Yet for more than a century before statehood, the United States consistently asserted in its dealings with foreign nations that the same waters it now seeks to take away from Alaska were inland waters under the sole control of this country (and Russia before it). Foreign nations consistently acquiesced in that view.

The United States cannot now repudiate that longstanding position. Given that the United States consistently and successfully maintained that the waters of the Alexander Archipelago were inland waters before statehood, the law is clear that title to the submerged lands underlying those "historic waters" necessarily passed to Alaska in 1959, and no amount of post-statehood revisionism can divest Alaska of that title. Indeed, more than four years after statehood, the United States represented to this Court that the waters of the Alexander Archipelago are "treated as a bay." Ex. AK-9 at 130-131.

Accordingly, the Special Master should recommend that summary judgment be granted to Alaska on Count I, declaring that the submerged lands

underlying the waters of the Alexander Archipelago—defined according to the boundary drawn by the United States itself almost 100 years ago—belong to Alaska. To hold otherwise would allow the United States, by fiat, unilaterally to contract Alaska's territory.

ARGUMENT

I. LEGAL STANDARDS

Under the Submerged Lands Act Alaska's boundaries extend three miles from the "coast line," defined in part as "the line marking the seaward limit of inland waters." 43 U.S.C. § 1301(a)(2), (b), (c). The term "inland waters" is in turn defined according to the International Convention on the Territorial Sea and Contiguous Zone (the "Convention"), Sept. 10, 1964, 15 U.S.T. 1606, 516 U.N.T.S. 205, T.I.A.S. No. 5639 (Ex. AK-127). See United States v. California, 381 U.S. 139, 161-165 (1965). Under Article 7(6) of the Convention, "a body of water can qualify as inland waters if it is a 'historic bay.' " United States v. Louisiana ("Alabama and Mississippi Boundary Case"), 470 U.S. 93, 100 (1985). Historic bays are waters "over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations." California, 381 U.S. at 172. Accord, United States v. Alaska, 521 U.S. 1, 11 (1997); Alabama and Mississippi Boundary Case, 470 U.S. at 101.

The standards for determining such historic waters are well-settled. A body of water is a historic bay if the United States "(1) exercises authority over the area; (2) has done so continuously; and (3) has done so with the acquiescence of foreign nations." Alaska, 521 U.S. at 11. See Alabama and Mississippi Boundary Case, 470 U.S. at 102; California, 381 U.S. at 172. In appropriate cases, additional pertinent factors are "the vital interests of the coastal nation, including elements such as geographical configuration, economic interests, and the requirements of self-defense." Alabama and Mississippi Boundary Case, 470 U.S. at 102.[1]

Importantly, the inquiry here necessarily focuses on the status of the waters at statehood, which is when title passed to Alaska. If a body of water is a historic bay by virtue of the longstanding, continuous exercise of authority by the United States and the acquiescence of foreign nations, it cannot be rendered otherwise by actions or pronouncements of the United States after statehood. As this Court has held, although a State cannot force the United States to use Article 4 straight baselines under the Convention where they had never been used before:

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1 The legal standards relating to historic bays are different from Article 4 of the Convention—on which Alaska does not directly rely in this case—which authorizes nations, in their discretion, to employ "straight baselines" to close off bays and other bodies of water. See Convention art. 4. Regardless of whether the United States would be justified in electing to use Article 4 straight baselines for the Archipelago (and it clearly would be), the same area qualifies as historic waters because, prior to statehood, the United States continuously claimed those waters as its own with the acquiescence of foreign nations.

> [i]t would be quite another [thing] to allow the United States to prevent recognition of a historic title which may already have ripened because of past events but which is called into question for the first time in a domestic lawsuit. The latter, we believe, would approach an impermissible contraction of territory * * *. [United States v. Louisiana, 394 U.S. 11, 77 n.104 (1969) (citing California, 381 U.S. at 168) (emphasis in original).]

Here, Alaska's title to the submerged lands of the Archipelago "ripened" at statehood, and any reliance on post-statehood actions to defeat that title would amount to an impermissible contraction of Alaska's territory. As the Court confirmed only recently, "Congress cannot, after statehood, remove or convey submerged lands that 'ha[ve] already been bestowed upon a State.' " Idaho v. United States, 533 U.S. 262, 280 n.9 (2001) (citation omitted). The same is necessarily true of Executive action.

As shown below, when the relevant summary judgment standards are applied in light of the governing law and the undisputed facts of record, Alaska is entitled to summary judgment on Count I of its complaint because all relevant factors demonstrate that the waters of the Alexander Archipelago are historic inland waters whose underlying lands passed to Alaska at statehood. First, the United States—like Russia before it—has continuously exercised authority over the area. Second, both the United States and Russia did so with the acquiescence of foreign nations. Third, the vital interests of the United States support historic waters status. Accordingly, the Court should hold that the waters of the Alexander

Archipelago—including the isolated pockets and enclaves the United States now claims were high seas at the time of statehood—are historic waters whose submerged lands passed to Alaska at statehood.

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

The first two factors of the historic inland waters inquiry—whether the United States has exercised authority over the waters of the Archipelago, and whether it did so continuously before statehood—are plainly satisfied. The United States respected Russia's sovereignty when the waters were under the dominion of that country, and the United States continued to claim such dominion in its foreign relations after it succeeded to Russia's title. That assertion of authority is perhaps best shown by the United States' express and unequivocal claim, in a 1903 boundary arbitration with Britain, of dominion over the territory to which Alaska now seeks to quiet title. And the United States' claim of dominion never wavered before statehood, as evidenced by enforcement actions taken against foreign vessels in those waters, the agreement of the United States and Canada to the United States' jurisdiction over the waters, and numerous other unchallenged statements of United States sovereignty.

A. Prior To Cession, Russia Exercised Sovereignty Over The Waters With The Acquiescence Of The United States

The United States' recognition of the waters of the Alexander Archipelago as inland began even before the United States took title to them. The United States purchased Alaska from Russia on March 30, 1867. See Treaty of Cession, 15 Stat. 539 (1867). As this Court has noted "[t]he cession was effectively a quitclaim," and "the United States thereby acquired whatever dominion Russia had possessed." United States v. Alaska, 422 U.S. 184, 190, 192 n.13 (1975). Thus, if Russia possessed dominion over the waters of the Alexander Archipelago, the United States succeeded to that title. The evidence convincingly demonstrates that Russia did, in fact, possess such dominion and, even more importantly, that Russia did so with the acquiescence of the United States.

In 1821, Tsar Alexander I issued a disputed ukase barring all foreign vessels from passing within 100 miles of the Alaska coast. Id. at 190. Russia quickly abandoned its 100-mile claim but continued to claim exclusive rights to the waters of the Archipelago, a claim to which the United States ultimately acquiesced. Russia made clear that any foreign nation would require Russia's agreement to enter such waters. Thus, Article IV of the 1824 Treaty between the United States and Russia on Navigation and Fisheries provided that, for only ten years, ships of both powers could "frequent, without any hindrance whatever, the interior seas, gulphs, harbours, and creeks, upon the coast [of the Archipelago], for

the purpose of fishing and trading with the natives of the country." 8 Stat. 304 (emphasis added) (Ex. AK-10).

Upon the expiration of this ten-year period, Russia claimed the right to exclude United States nationals from these "interior" waters. The United States sought to renew Article IV, but Russia refused, and the United States ultimately conceded that Russia had the right to exclude all foreign vessels, including those of the United States. In 1836, Russia ordered the American brig Loriot to leave the waters of the Archipelago. See S. Exec. Doc. No. 50-106, at 232-233 (1889) (Ex. AK-11). Subsequently, Russia stated that it would no longer permit United States vessels to "frequent the interior seas, gulfs, harbors, and creeks" of the Archipelago. Id. at 246-247.

Far from disputing Russia's assertion of sovereignty—as it now does Alaska's—the United States acquiesced in it. In 1845, the State Department advised American vessels not to "frequent the interior seas, gulfs, harbors, and creeks upon that coast at any point north of latitude 54° 40′." 2 Proceedings of the Alaska Boundary Tribunal, S. Doc. No. 58-162, at 250 (1904) ("Proceedings") (Ex. AK-12). This acquiescence marked full recognition by the United States of Russia's "complete sovereignty" over the waters of the Archipelago. Id., Part I at 72 (Ex. AK-13). Indeed, this recognition of Russia's right to bar foreign vessels entirely is particularly important, because exercise of sovereignty over water was

historically equated with "an assertion of power to exclude all foreign vessels and navigation." Alaska, 422 U.S. at 197.[2]

B. The United States Asserted Authority Over The Waters Of The Archipelago Between Cession And The 1903 Alaska Boundary Arbitration

As noted, the Treaty of Cession gave the United States title to the lands and waters of Alaska over which Russia had previously exercised dominion. As the United States later confirmed, that included all the waters of the Alexander Archipelago, which the United States had earlier recognized as having been Russian territorial waters. Indeed, complete sovereignty—i.e., the right to bar foreign vessels—was seen as one of the benefits of the purchase. As noted in an 1868 House of Representatives report on the Treaty of Cession, "command of all the bays and straits of the northwest coast" would greatly benefit American whalers. H.R. Rep. No. 40-37, at 33 (1868) (Ex. AK-14). Russia's power to exclude had now been transferred to the United States.

Between cession and the early part of the 20th century, United States officials consistently recognized the Federal Government's dominion over the waters of the Archipelago. For example, in an 1880 letter to the Navy Secretary,

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2 The United States was not the only nation that recognized Russia's sovereignty over the waters. Years later, Britain agreed that the 1824 treaty had given the United States only a temporary right to navigate the waters of the Archipelago. See infra at 34.

the Commander of the U.S.S. Jamestown referred to the "inland waters" of the Archipelago, without in any way indicating that some of the waters of the Archipelago included the high seas. H.R. Exec. Doc. No. 47-81, at 2 (1882) (Ex. AK-15). And in 1888, an official of the United States Geological Survey wrote the Secretary of State regarding his discussion with a Canadian authority about the international boundary along the Archipelago. They agreed that "navigation of these coast and territorial waters might be wholly or partly withheld by either power from the citizens and vessels of the other." S. Exec. Doc. No. 50-146, at 10 (1889) (Ex. AK-16). That would have been permissible, of course, only if the waters were considered inland. Notably, there is no indication that the Secretary of State or any Canadian official in any way opposed this characterization.[3]

In a similar vein, in 1890 the Interior Secretary referred to the "inland channels" of the Archipelago in urging an appropriation for a vessel to serve the area. S. Rep. No. 51-287, at 2 (1890) (Ex. AK-17); H.R. Rep. No. 51-1203, at 3 (1890) (Ex. AK-18). Likewise, in the early years of the 20th century, congressional reports addressing appropriations for navigation aids similarly

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[3] Although this was an "informal consultation" between representatives of the two countries, the Secretary of State told the President that this and other documents were "considered of value as bearing upon a subject of great international importance, and should be put in shape for public information." Id.

referred to the "Alaskan waters" of the Archipelago.[4] Finally, in 1902 the Alaska Customs Collector wrote the Secretary of Commerce, noting that Sitka's harbor on the seacoast has "interior communication with the inland waters" of the Archipelago. H.R. Rep. No. 57-3883, at 2 (1903) (Ex. AK-75). None of these statements indicated that the waters of the Archipelago in fact contained high seas.

All these statements recognizing as a matter of course that the waters of the Archipelago are "inland waters" set the stage for the 1903 Alaska Boundary Arbitration, in which the United States expressly claimed that status in negotiations with a foreign power. The position of the United States at the 1903 Arbitration provides perhaps the most compelling evidence of the United States' historic claim to the waters.

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

Unable to agree on the location of the boundary between Alaska and British Columbia under an 1825 treaty between Britain and Russia, the United States and Britain submitted the matter to binding arbitration in 1903. The general area of concern was Southeast Alaska. In this proceeding, the United States expressly and unequivocally stated that the waters of the Archipelago are inland.

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4 S. Rep. No. 56-170, at 1-2 (1900); H.R. Rep. No. 56-1187, at 2 (1900); S. Rep. No. 56-1909, at 1 (1901); S. Rep. No. 57-70, at 2 (1902); S. Rep. No. 57-2382, at 1 (1903); H.R. Rep. No. 57-3811, at 1 (1903) (Exs. AK-19-24).

The 1825 Britain-Russia treaty provided that Russia—and thus the United States as Russia's successor—possessed a 10-league (30-nautical mile) lisiére or strip of upland along the coast of the mainland. While arguing that the lisiére should be measured from the physical coastline of the mainland—i.e., the shoreline following all the sinuosities of the coast—the United States drew a clear distinction between the "political" and "physical" coastlines, observing that the former runs along the outside of the islands, crosses the various entrances to the Archipelago, and encloses inland waters. 4 Proceedings, Part I at 31-32 (Ex. AK-26).

As one of the United States representatives stated, "for the purposes of international law, instead of following all the convolutions and sinuosities of the [physical] coast, it is permitted to go across the heads of bays and inlets." 7 Proceedings at 611 (Ex. AK-27). The United States explicitly claimed that the waters enclosed by the political coastline were inland:

> [t]he minute you establish [the political coast line], the minute you fix it, all waters back of it, whether they are waters in the Archipelago there of Alexander or the Archipiélago de Los Canarios, of Cuba, they all became * * * salt-water lakes: they are just as much interior waters as the interior waters of Loch Lomond. [Id.]

The United States made clear that this political coastline was the baseline for measuring the territorial sea, simultaneously accepting a reasonable

10-mile limit on the length of closing lines across the water entrances to the Archipelago:

> The boundary of Alaska—that is, the exterior boundary from which the marine league is measured—runs along the outside edge of the Alaskan or Alexander Archipelago, embracing a group composed of hundreds of islands. When "measured in a straight line from headland to headland" at their entrances, Chatham Strait, Cross Sound, Sumner Strait and Clarence Strait, by which the exterior coast line is pierced, measure less than ten miles. [5 Proceedings at 15-16 (Ex. AK-8).]

As the United States explained, "within the political coast line there are a great number of straits, sounds and inlets, formed by the contour of the continent and the proximity of the islands to it and to one another." 4 Proceedings at 32 (emphasis added) (Ex. AK-26). Exhibit AK-28 shows the political coastline described by the United States during the Boundary Arbitration. It is that political coastline that Alaska now seeks to enforce.

As the United States made clear at this time, its position on the maritime boundaries of the Archipelago was far from new. As noted by a United States representative, the 1845 State Department notice to mariners not to frequent the waters of the Archipelago (see supra at 8) marked recognition by the United States of "the complete sovereignty of Russia" over the waters of the Archipelago. 1 Proceedings, Part II, at 72 (Ex. AK-13). As the United States stated in the 1903 Arbitration, "[t]he United States in 1867, entered into possession of, and has

exercised jurisdiction over, all of these interior waters and coasts to the present time." 5 Proceedings, Part I, at 4 (Ex. AK-8). Thus, the United States recognized that "[f]rom [the day the Treaty of Cession was signed] to this the United States has constantly asserted and exercised jurisdiction over that coast and the adjacent waters." Id. at 152 (emphasis added). When it analyzed the 1903 Boundary Arbitration in 1952, the Justice Department concluded—as is readily apparent from the excerpts quoted above—that "the United States explicitly stated that the waters inside the islands were inland waters because none of the ocean entrances exceeded ten miles in width." Ex. AK-29 at 1 (emphasis in original).

Although the status of the waters of the Archipelago was not strictly at issue in the 1903 Arbitration, this Court has made clear that the position taken by the United States with regard to those waters in 1903—and noted by the Justice Department in 1952—was the "publicly stated policy" of the United States:

> Prior to its ratification of the Convention on March 24, 1961, the United States had adopted a policy of enclosing as inland waters those areas between the mainland and off-lying islands that were so closely grouped that no entrance exceeded 10 geographical miles. This 10-mile rule represented the publicly stated policy of the United States at least since the time of the Alaska Boundary Arbitration in 1903. [Alabama and Mississippi Boundary Case, 470 U.S. at 106-107 (footnotes omitted; emphasis added).]

In this case, Alaska seeks no more than continued recognition of the political coastline that the United States claimed for itself in 1903, and the right to

use that coastline for purposes of the Submerged Lands Act. Under both the United States' position in 1903 and Alaska's claim here, Alaska's boundaries would lie three miles seaward of the coastline. The contours of the submerged land Alaska claims here have been drawn to match precisely the historical boundaries claimed by the United States in 1903 (as well as continuously before and after that time through statehood). As this Court has held in another context, "the significance of the United States' concession * * * is not that it has binding effect in domestic law, but that it represents a public acknowledgment of the official view that [the waters of the Archipelago] constitute[ ] inland waters of the Nation." Id. at 110. Indeed, as next shown, the position of the United States did not waver between 1903 and statehood, thus confirming Alaska's claim of historic title to the submerged lands of the Archipelago.

D. The United States Continued To Consider The Waters Of The Archipelago As Inland Between 1903 And Statehood

1. The United States Enforced Fishing Regulations With The Acquiescence Of Foreign Nations

In United States v. Alaska, 422 U.S. at 197-199, this Court held that fishing regulations that are not enforced against foreign nationals do not, by themselves, establish historic title because nations can and do enforce their fish and game regulations against their own citizens even on the high seas. Likewise, a single incident in which fish and game regulations are enforced against foreigners

does not demonstrate inland status, absent acquiescence by the foreign nation. Id. at 202-203. In the Archipelago, however, United States fishing regulations were consistently enforced against foreign nationals well beyond three miles from shore, and foreign governments acquiesced in that enforcement. The reason was that the waters of the Archipelago—regardless of their distance from the physical coast—were recognized as inland waters.

In 1904, the Federal Government adopted regulations governing fishing in Alaska, which applied "to all the territorial waters of Alaska, including tide waters, lagoons, bays, coves, straits, inlets, bayous, rivers, streams, and the beach approaches to the same." Ex. AK-30 at 2 (Commerce Department Circular No. 42). The position of the United States at the 1903 Boundary Arbitration made clear that the "territorial waters" included all waters within the "outside edge of the * * * Archipelago." 5 Proceedings at 15-16 (Ex. AK-8). In 1906, the Alien Fishing Act, 34 Stat. 263, was enacted to prohibit aliens from commercial fishing "in any of the waters of Alaska under the jurisdiction of the United States." Again, the 1903 Boundary Arbitration position left no doubt that the United States considered its "jurisdiction" to extend to all the waters within the Archipelago.

This fact was evidenced by the enforcement actions of the United States. In 1906 and 1908, the United States enforced the Act against foreign nationals up to the "AB line" established in the 1903 Alaska Boundary

Arbitration.[5] Ex. AK-31 at 4. Much of the water area enclosed by the AB line is more than three miles from shore. See Ex. AK-32 (Alaska Geographic Map of Southeast, line in Dixon Entrance labeled "United States-Canada Border"). Significantly, Great Britain acquiesced in this assertion of authority. On July 22, 1924, the Coast Guard Cutter Smith seized the Canadian vessel Marguerite. See Ex. AK-33. As noted in a British Embassy letter to the Secretary of State, the seizure took place "approximately five and one-half (5 1/2) miles from the nearest United States territory." Ex. AK-34 at 1. On December 23, 1925, a representative of the Secretary of State informed the British Envoy that "the Marguerite was seized while attempting to catch halibut in that part of the waters of Dixon Entrance which are within the jurisdiction of this Government." Ex. AK-35 at 2 (emphasis added). Importantly, far from contesting the asserted jurisdiction of the United States, the Master of the Marguerite pleaded guilty, id., and Britain did not pursue the matter. According to the description of the ship's location, the seizure occurred inside one of the pockets which the United States now asserts were high seas, where foreign vessels allegedly could navigate and fish without restriction. In fact, the seizure of the Marguerite—in which Britain acquiesced—demonstrates that the

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[5] In addition to determining how the lisiére should be measured, the Tribunal drew the "AB Line" from a point "A" at Cape Muzon to a point "B" just south of the passage between Sitklan Island and Wales Island.

United States asserted greater dominion over the waters of the Archipelago than it now asserts Alaska received at statehood.

Implementing the Alien Fishing Act and other Alaska fishery laws, the Commerce Department promulgated regulations in 1926 and 1928 that applied to "all territorial coastal and tributary waters of Alaska extending from Dixon Entrance on the south to and including Yakutat Bay on the north." Ex. AK-36 at 19; Ex. AK-37 at 26. The 1926 regulations defined the various districts as including "[a]ll waters" within the areas described. Ex. AK-36 at 20-23. This necessarily included all the pockets and enclaves now claimed by the United States. The 1928 regulations addressed "territorial waters"—consistently interpreted to include all waters of the Archipelago and extending three miles seaward of lines drawn across the entrances to the Archipelago—and these regulations were enforced against foreign nationals. See Provisional U.S. Charts Delimiting Alaskan Territorial Boundaries: Hearing Before the Senate Comm. on Commerce, 92d Cong. 17, 22-23, 25-26, 35-36, 57-58, 70-73, 177, 180, 181, 183-185 (1972) (Ex. AK-38). Because the United States claimed only a three-mile territorial sea at that time, see Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 441 n.8 (1989), these "baselines" necessarily marked the seaward limit of inland waters from which the three-mile territorial sea was measured.

In 1930, the Bureau of Fisheries informed Alaska enforcement officials that "Interior coastal waters cease to be International waters at and above place where distance from headland to headland is less than ten nautical miles." Ex. AK-39. Commerce Department fishing regulations adopted the same year applied to "all territorial coastal and tributary waters" of the Archipelago. Ex. AK-40 at 25. They also prohibited commercial fishing for herring in areas the United States now asserts were outside Alaska at statehood. Id. at 43-44. These prohibitions were repeated in 1935. Ex. AK-41 at 1-2, 45-46.

Regulation of Alaska fisheries was transferred to the Department of the Interior in 1939, see Reorganization Plan No. 2, § 4(e), 3 C.F.R. 254, 256 (Supp. 1939), and that Department's regulations from 1940 through 1949 also claimed jurisdiction over "all territorial coastal and tributary waters" of the Archipelago.[6] From 1950 through 1956, the regulations claimed jurisdiction over "all territorial waters" of the Archipelago.[7] In 1955, the Chief of the Branch of Alaska Fisheries described the waters to which these regulations apply as:

> All waters for a distance 3 miles seaward (1) from the coast and lines extending from headland to headland

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6 See, e.g., Ex. AK-42 at 29, Ex. AK-43 at 44, Ex. AK-44 at 42, Ex. AK-45 at 42, Ex. AK-46 at 42, Ex. AK-47 at 42, Ex. AK-48 at 44, Ex. AK-49 at 44, Ex. AK-50 at 45, Ex. AK-51 at 43.

7 See Ex. AK-52 at 44, Ex. AK-53 at 44, Ex. AK-54 at 44, Ex. AK-55 at 44, Ex. AK-56 at 43, Ex. AK-57 at 43, Ex. AK-58 at 61.

> across all bays, inlets, straits, passes, sounds, and entrances, and (2) from the shores of any island or group of islands, including the islands of the Alexander Archipelago <u>and the waters between such groups of islands and the mainland</u>. [Ex. AK-59 at 1 (emphasis added).]

The waters between the islands of the Archipelago and the mainland—and all waters three miles seaward of those waters—were thus understood to be within the "territorial waters" of the United States.

In 1956, the Interior Department adopted that precise interpretation as a formal regulation, defining the "waters of Alaska" as "including those extending three miles seaward * * * from any island or groups of islands, including the islands of the Alexander Archipelago, and the waters between such groups of islands and the mainland." <u>See</u> 50 CFR § 101.19 (1957) (Ex. AK-60 at 26-27). Three later State Department studies described this action as the "[a]doption by United States of straight baselines method in measuring limits of territorial waters in Alaska," and concluded that there are no high seas within the Archipelago. Ex. AK-31 at 25-26 (regulation "made clear * * * that [the] obligation to control fishing in the high seas * * * did not extend to waters inside a belt of three miles measured from lines drawn between islands adjacent to the coast of Alaska"); Ex. AK-61 at 19-20 (same); Ex. AK-62 at 13-14 (same).

Shortly after adoption of this regulation, United States and Canadian representatives met to coordinate salmon regulation. Ex. AK-63 at 2. One major

agreement was that the closing line encompassed by the regulation was "appropriate." Id. at 6-7. As noted, the regulation unambiguously provided that all of the waters of the Archipelago were enclosed inland waters. Thus, on the eve of statehood Canada acquiesced in the United States' exercise of exclusive fisheries jurisdiction over the waters of the Archipelago.

Notably, each of the regulations enacted by the United States between 1903 and statehood claimed dominion over waters the United States now says are not within Alaska. And far from disputing that dominion, both Britain and later Canada agreed with it.

2. The United States And Canada Agreed That The Waters Are Inland

In fact, the United States and Canada long before had expressed agreement on the inland status of the waters of the Archipelago in boundary negotiations during the 1930s and 1940s. In those negotiations, both nations agreed that the waters of the Archipelago—which the United States now says includes pockets and enclaves of non-Alaskan waters—were United States territorial waters. Although no formal agreement was ever signed on the subject, these negotiations evidence the consistent view of both the United States and its foreign neighbor that the waters of the Archipelago are inland.

In the 1930s, the United States and Canada disagreed whether the AB Line was a boundary or merely a line allocating land. Ex. AK-64 at 1-3 (and

accompanying maps). Canada was also seeking to claim the waters of Dixon Entrance and Hecate Strait as Canadian. Id. at 23. In describing the negotiations, State Department Geographer Boggs attached a map showing "the inland navigation routes through the waters of southeastern Alaska." Id. at 19. Significantly, many of these "inland navigation routes"—denoted "Principal inland routes" on Map 1 (id.)—run through areas where the United States now claims there were pockets and enclaves of high seas (e.g., Clarence Strait, Sumner Strait, Chatham Strait, Frederick Sound, and Icy Strait). Boggs also noted that the official United States Government publication on maritime navigation described Dixon Entrance as "of importance as one of the deep-water inlets to southeastern Alaska from [the] sea, and as one of the connecting waters of the Inland Passage." Id. at 20 (quoting U.S. Dep't of Commerce, United States Coast Pilot Alaska Part I: Dixon Entrance to Yakutat Bay 80 (8th ed. 1932)). He concluded that "protection of American navigation rights of access to important inland waters of southeastern Alaska" required that both Dixon Entrance and Hecate Strait be high seas. Id. at 33 (emphasis added).

In 1938, State Department officials (including Assistant Legal Adviser Vallance) met with Canadian counterparts. Ex. AK-65. They discussed the United States' seizure of the Marguerite in 1924, and no one disputed its validity. Id. at 14 & n.1. The United States presented a proposal to assimilate

Dixon Entrance "to the status of one of the Great Lakes," with the boundary running down the middle. Id. at 20. A draft agreement provided that "the waters of Dixon Entrance have been under the exclusive jurisdiction" of Canada and the United States. Id. at 24.

A later revision, "approved in principle" by several State Department officials, recited that "the waters of Dixon Entrance constitute historic waters" under the jurisdiction of Canada and the United States. Ex. AK-66 at 1-2. Assistant Legal Adviser Vallance believed that part of Clarence Strait might remain high seas under this proposal, but that there would be "no way for third party vessels to reach the area without going through Dixon Entrance, which of course could be closed at any time." Ex. AK-67 at 4. Discussing this proposal, however, Boggs quoted the description of the "outer coast line" of the Archipelago advanced by the United States at the 1903 Alaska Boundary Arbitration and commented that all of the enclosed waters are "territorial waters." Ex. AK-68 at 8.

In 1940, the State Department circulated to Canada a draft "understanding" as to Dixon Entrance, which provided that the United States and Canada would claim as historic waters the "bays, straits, sounds, entrances, and inlets" contiguous to Alaska and British Columbia, that the AB Line allocated only land, and that the boundary ran down the middle of Dixon Entrance, which the two countries could jointly claim as historic waters. See Ex. AK-69 at 1. Canada's

1943 counter-proposal contained the <u>same</u> provisions. Ex. AK-70 at HW424-425. According to a 1943 memorandum, United States officials were "in agreement that the Canadian proposal should be accepted with a minimum of delay." Ex. AK-71. Subject to certain clarifications, the United States was prepared to enter into the agreement. Ex. AK-72 at 1, 4-5. Canada likewise responded that it was prepared to do the same. Ex. AK-73 at 1.

The draft agreement defined Dixon Entrance's "adjacent waters" in which, under the agreement, Canadian nationals would be permitted to fish as including, among other places, Clarence Strait south of Wedge Island, but not waters farther north. Ex. AK-70. In internal United States discussions in 1944, Boggs proposed redrafting the agreement to substitute "national waters" for "adjacent waters." Ex. AK-74 at 1. "National waters" are inland waters. <u>See</u> 1 Aaron L. Shalowitz, <u>Shore and Sea Boundaries</u> 303 (1962) ("Shalowitz") (Ex. AK-75). In addition, Boggs proposed deleting references to Wedge Island and other features as "superfluous." Ex. AK-76 at HW487. State Department Legal Adviser Hackworth, however, questioned that proposed deletion. Without expressing any opinion on the issue, he suggested the deletion might imply that Canadians could enter the waters of Clarence Strait north of Wedge Island that are more than three miles from shore—an implication he did not want conveyed. <u>Id</u>. at HW489. North of Wedge Island is one of the alleged enclaves the United States

now asserts was the high seas at that time. <u>See</u> Ex. AK-77. Hackworth therefore suggested retaining the references to provide "a degree of definiteness by references to these landmarks which might be useful to fishermen and others." Ex. AK-76 at HW489.

Boggs agreed to retain the references, noting that

> [t]here is no objection whatever to including them, especially as Mr. Hackworth wants to make sure that there is no basis for Canadian nationals entering waters farther north. Geographically, I do not see how there can really be any possibility of such an interpretation, but certainly there is no harm in making it foolproof. [Ex. AK-76 at HW487.]

Thus, Boggs necessarily considered all the waters of the Archipelago "farther north" of Wedge Island to be inland waters; only if they are inland waters would Canadians have "no basis" to enter. If they were territorial sea, Canadians would have a right of innocent passage and, if the enclave north of Wedge Island were high seas as now claimed by the United States here, even fishing would be permitted. As noted, Canada not only acquiesced to the United States' claim of exclusive jurisdiction, but also proposed an agreement containing the same provisions.

Thus, while no formal agreement was signed by the United States and Canada, shortly before statehood the longstanding position of the Federal Government was that the submerged lands of the Archipelago were subject to the

exclusive jurisdiction of the United States, and that position was common ground between the United States and Canada.

E. Statehood Legislation Contemplated That Alaska Would Retain The Waters Of The Archipelago

In enacting statehood legislation for Alaska, Congress contemplated that Alaska would gain full jurisdiction over the waters of the Archipelago. In 1954, Senator Cordon, the manager of the bill that became the Submerged Lands Act, proposed that the Alaska Statehood Act include this definition of its boundaries: "The State of Alaska shall consist of all the territory, together with the territorial waters appurtenant thereto, now included in the Territory of Alaska." Hearings on S. 50 Before the Senate Comm. on Interior and Insular Affairs, 83d Cong. 222 (1954) (Ex. AK-78). Cordon wanted Alaska's boundaries to be coextensive with "the three mile limit that this country has contended for always." Id. at 223. When another Senator asked whether this description would convey "everything there is up there, as far as the overall boundary lines are concerned, to the new State," Senator Cordon assured him that it would. Id. at 282. What the United States had consistently claimed as its own would become Alaska's—including the waters of the Archipelago.

On July 7, 1958, the Alaska Statehood Act became law. On January 3, 1959, Alaska was admitted to the Union and its submerged lands title vested.

III. FOREIGN NATIONS CONSISTENTLY ACQUIESCED IN THE UNITED STATES' POSITION

As shown above, the first two factors of the historic waters inquiry are satisfied because, prior to statehood, the United States maintained a consistent, continuous position that the waters of the Archipelago were inland waters. The remaining factor is likewise satisfied because foreign nations consistently acquiesced in the United States' position. "When foreign governments do know or have reason to know of the effective and continual exercise of sovereignty over a maritime area, inaction or toleration on the part of the foreign governments is sufficient to permit a claim of historic title to arise." Alabama and Mississippi Boundary Case, 470 U.S. at 110. In this case, the evidence of acquiescence is even clearer, for not only did foreign governments tolerate the United States' exercise of dominion, they affirmatively agreed with it. That acquiescence is shown by many of the events recited above. Britain acquiesced in the capture of the Marguerite. See supra at 17. Canada agreed with the United States' position during the Dixon Entrance negotiations, and in discussions regarding salmon fishing. See supra at 26-25. But there are other, equally definitive instances of such acquiescence.

A. Britain Endorsed The United States' Position At The 1893 Fur Seal Arbitration And 1910 Fisheries Arbitration

At the 1893 Fur Seal Arbitration, Britain noted that the 1824 United States-Russia treaty granted freedom to navigate the internal waters of the

Archipelago for only ten years. As Britain's representative stated, absent the treaty "the United States would not have any right of access [to these waters] at all." 13 Proceedings of the Tribunal of Arbitration, S. Exec. Doc. No. 53-177, at 142 (1895) (Ex. AK-79). Britain thus recognized that the waters of the Archipelago are inland, for the United States would have had a right to navigate them if they were either territorial sea or high seas as the United States now claims. As noted above, the United States had long held the same understanding of the effect of the 1824 treaty. See supra at 8.

Likewise, at the 1910 North Atlantic Coast Fisheries Arbitration, Britain cited several examples of the United States' practice of claiming enclosed areas as inland waters, including the United States' claim to the Archipelago in the 1903 Alaska Boundary Arbitration. 8 Proceedings in the North Atlantic Coast Fisheries Arbitration, S. Doc. No. 61-870, at 83-86 (1912) (Ex. AK-80). Indeed, Britain even exaggerated the United States' position, claiming that it included closing lines more than 25 miles long. Id. at 86. The United States representative vigorously denied this assertion, and described the ten-mile closing lines claimed by the United States. 10 Proceedings in the North Atlantic Coast Fisheries Arbitration, S. Doc. No. 61-870, at 1094 (1912) (Ex. AK-81). Thus, seven years after the 1903 arbitration, Britain and the United States continued to agree that the

United States had dominion over the inland waters behind the closing lines recognized in 1903.

B. Britain And Norway Endorsed The United States' Position During The Fisheries Case

In 1950, Britain and Norway brought a case over fishing rights to the International Court of Justice. In The Fisheries Case (U.K. v. Norway), 1951 I.C.J. 116 (Dec. 18), Norway relied specifically on the United States' assertion of jurisdiction over the waters of the Archipelago in support of its own claim to waters it asserted were similarly situated. And while Britain disputed Norway's particular claim, it likewise accepted the validity of the United States' position on the Archipelago.

Norway supported its own position that the political coastline for jurisdictional purposes must be distinguished from the physical coastline by citing the United States' position at the 1903 Alaska Boundary Arbitration. Ex. AK-82 at 162-163, ¶ 303. Norway noted that the United States had "stressed the notion of the 'outer coast line' " in the 1903 Alaska Boundary Arbitration, and quoted from the United States' 1903 presentation, including its description of the "outer coast line" of Alaska as running along the outside of the Archipelago. Id. at 218-219 (¶¶ 445-446). Norway also cited many other instances in which the United States had applied a similar policy over the years. Id. at 199-200 (¶401), 209 (¶422), 225-227 (¶¶461-462), 248 (¶500), 279-281 (¶541).

For its part, Britain did not dispute or criticize any of the examples of United States policy cited by Norway—including the United States' position at the 1903 Alaska Boundary Arbitration. Rather, Britain argued that the United States' claim to the inland waters of the Archipelago did not validate Norway's claim because

> the United States did not contemplate the possibility of an unrestricted outer coast line wherever archipelagos occur but limited the outer coast line concept to cases where the interior waters are genuinely enclosed by the configurations of the island groups. It also appears only to have claimed a line passing along the shores of each individual outer island and across the promontories of the actual inlets into the interior waters—a very different method of delimitation from that adopted by Norway * * *. [Ex. AK-83 at 154-155, ¶ 336.]

Thus, far from suggesting that the United States' claim to the Archipelago was improper, Britain continued to accept it as valid as late as 1951. The examples of United States practice cited by Norway and Britain, moreover, were matters of public record and therefore either actually or constructively known by all members of the international community. Most notably, there were absolutely no objections to Russia's and later the United States' claims to the inland waters of the Alexander Archipelago.

IV. THE UNITED STATES' PRE-STATEHOOD POSITION WAS IN ACCORD WITH ITS GENERAL PRE-STATEHOOD POLICY REGARDING INLAND WATERS, AS WELL AS ITS POST-STATEHOOD ACTIONS

For all the reasons set forth above, the United States maintained the consistent view before statehood that the waters of the Archipelago are inland waters, and maintained that position with the acquiescence of foreign nations. That alone is dispositive of Count I. But in addition, the United States' policy is confirmed by both its general pre-statehood practice regarding inland waters, as well as post-statehood actions.

A. Prior To Statehood, The United States Consistently Claimed Inland Status For Waters Enclosed By Coastal Islands

Until relatively recently, the United States' general practice was to consider as inland waters those waters enclosed by near-shore coastal islands less than ten miles apart. Alabama and Mississippi Boundary Case, 470 U.S. at 106. While this general practice does not, by itself, demonstrate that the waters of the Archipelago constitute historic waters, see Alaska, 521 U.S. at 11-21 (finding general practice of drawing baselines between islands insufficient to establish inland status absent specific evidence with respect to territory at issue), such a practice is powerful confirmation of the body of evidence demonstrating the United States has continuously claimed dominion over the waters of the Archipelago and has done so with the acquiescence of foreign nations. See

Alabama and Mississippi Boundary Case, 470 U.S. at 107 (practice can support finding of inland status where "the general principles in fact were coupled with specific assertions of the status of the [area] as inland waters").

Dating back to the founding of the Nation, the United States has claimed enclosed waters as inland.[8] As to islands, in 1805 the British Admiralty Court held that the United States' territorial sea is to be measured from alluvial islands off the mouth of the Mississippi River that are more than three miles from the mainland and form "a kind of portico to the mainland." The Anna, 165 E.R. 809, 815 (1805). Likewise, in 1863 Secretary of State Seward informed Spain that islands along the coast of Cuba constitute "the exterior coast line, and that the inland jurisdiction ceases there, while the maritime jurisdiction of Spain begins from the exterior sea front of those keys." Ex. AK-89 at 3. See also 1 James Moore, Digest of International Law 713 (1906) (reaffirmation of position in 1869). In 1866, the New York Court of Appeals recognized islands as enclosing inland

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8 See, e.g., 1 Op. Att'y Gen. 32 (1793) (1793 Attorney General opinion that Delaware Bay is United States territorial waters) (Ex. AK-84); Department of State, Office of the Solicitor, Position Taken by this Government in its Diplomatic Correspondence with Respect to the Three-Mile Limit and its Extension (1921)) (noting positions taken prior to 1800) (Ex. AK-85); Ex. AK-86 (Secretary of State Madison's May 17, 1806 letter to Monroe and Pinkney); 2 Conference for the Codification of International Law, Bases of Discussion, League of Nations Doc. C.74 M.39, at 129 (1929) (Secretary of State Buchanan's January 23, 1849 letter to Jordan) (Ex. AK-87); Naval War College, International Law Topics and Discussions 17 (1913) (explanation of President Jefferson) (Ex. AK-88).

waters. Mahler v. Norwich & New York Transp. Co., 35 N.Y. 352, 355-356 (1866). See also The Alleganean, in 4 James Moore, History and Digest of the International Arbitrations to Which the United States Has Been a Party 4332, 4335, 4341 (1898) (determination that Chesapeake Bay is "wholly within the territorial jurisdiction and authority" of the United States).

In Louisiana v. Mississippi, 202 U.S. 1, 48 (1906), this Court described Mississippi Sound as "an inclosed arm of the sea, wholly within the United States, and formed by a chain of large islands * * *." Subsequently, 1923 Treasury Department regulations defined United States waters to include "bays, such as the Chesapeake Bay and the Delaware Bay, which, except at their entrance, are so surrounded by the lands of the United States as to be reasonably regarded as geographically a part thereof, regardless of the distance between the opening headlands." Ex. AK-90 at 1. In 1925, the United States seized the French vessel Cherie for unloading liquor in violation of the Tariff Act of 1922, asserting that the seizure occurred within territorial waters measured from a straight baseline eleven and one-half miles long between two islands off the coast. William E. Masterson, Jurisdiction in Marginal Seas 322-323 (1929).

At the 1930 League of Nations' Conference for the Codification of International Law, the United States proposed a number of maritime delimitation measures, including a ten-mile limit for bay closing lines. Ex. AK-91 at 197-198.

Under this proposal, the ten-mile limit for bays would also apply to straits leading to inland seas: "where a strait is merely a channel of communication with an inland sea, the rules regarding bays apply * * *." Id. at 201. Thus, where a strait with a mouth less than ten miles wide leads only to inland seas, under the U.S. proposal it would be considered a bay whose waters are inland. In 1949, the United States informed the Special Master in United States v. California that its 1930 proposals represented the "official" position of the United States. Ex. AK-92 at 6-7, 18-19. See also Ex. AK-93 at 4 (1951 letter from Secretary of State to Department of Justice confirming policy)

The United States' treatment of Chandeleur and Breton Sounds in Louisiana demonstrates application of this pre-statehood position. In 1950, the State Department advised the Justice Department that these sounds, both of which are formed by islands, are inland waters. Ex. AK-94 at 1. That same year, a federal interagency group drew the "Chapman Line" to separate the marginal sea from Louisiana's inland waters. See Ex. AK-95 at 1. In doing so, "the principle followed in drawing the baseline was that waters enclosed between the mainland and offlying islands which were so closely grouped that no entrance exceeded 10 nautical miles in width were considered inland waters." 1 Shalowitz, supra, at 161 (Ex. AK-75). The reasoning of the task force was that

> [a]long the Louisiana coast all islands are so situated in relation to the mainland and to each other as to enclose all

> waters landward of the islands as inland waters with the result that the islands constitute large segments of the coastline. The openings between the numerous islands along the Louisiana coast constitute channels leading to inland waters and the rule as to bays becomes applicable. [Id. at 108 n.7.[9]]

See also Submerged Lands: Hearings on S.J. Res. 20 before the Senate Committee on Interior and Insular Affairs, 82d Cong. 440, 455-456, 460 (1951) (testimony by Boggs that Chandeleur and Breton Sounds, formed by "a string of islands," are inland waters) (Ex. AK-96).

Following that consistent position, in 1954 an Interior Department official who participated in drawing the Chapman Line informed the Interior Solicitor that Mississippi Sound (among other water bodies) constitute "inland waters of the State of Alabama and the offering of oil and gas leases within those areas is perfectly proper." Ex. AK-97. Like the Alexander Archipelago, Mississippi Sound is formed by a chain of barrier islands. Louisiana v. Mississippi, 202 U.S. at 48. Thus, in 1956 the Director of the Bureau of Land Management informed the Interior Department that "the coastline of the State of Alabama follows the outer limit of the barrier islands." Ex. AK-98. See also Brief

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9 This explanation was based on the personal knowledge of Mr. Shalowitz, who assisted the Department of Justice in the matter. Id. at 109 n.8; see Alabama and Mississippi Boundary Case, 470 U.S. at 106 n.9 ("the United States followed [the 10-mile rule] in drawing the Chapman line along the Louisiana coast") (citing Shalowitz).

for the United States at 128, United States v. Louisiana, No. 11, Orig. (U.S. filed February 1957) (statements by United States that Mississippi and Chandeleur Sounds are inland waters) (Ex. AK-99).

The United States' consistent policy of enclosing inland waters behind coastal islands like those in the Archipelago continued unabated right up to the time of statehood. In 1958, the United States informed this Court that

> It happens that all the islands on the coast of Louisiana are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters; consequently the lands underlying those waters necessarily passed to the State upon its entry into the Union. Pollard v. Hagan, 3 How. 212. Thus the islands, together with the line marking the outer limit of the intervening inland waters, constitute the "coast" of Louisiana in the sense of the Submerged Lands Act. [Brief for the United States in Support of Motion for Judgment on Amended Complaint at 177, United States v. Louisiana, No. 11, Orig. (U.S. filed May 1958) (Ex. AK-100).]

The United States advanced the same position for the islands off Alabama and Mississippi. Id. at 254 and 261. And the United States reiterated those positions to the Court several months later. Reply Brief for the United States at 43-45, 81, 83, United States v. Louisiana, No. 11, Orig. (U.S. filed Sept. 1958) (Ex. AK-101). It should be noted that the State Department reviewed and approved both of these briefs before filing. Ex. AK-95 at 1.

B. The United States Continued To Claim The Waters Of The Archipelago As Inland Even After Statehood

Although the actions of the United States after statehood are irrelevant to whether the territory that passed to Alaska at statehood included the historic waters of the Archipelago, the evidence shows that the United States' position that these waters are inland continued well past statehood. Indeed, there is no indication of any formally announced change in policy until 1971, more than a dozen years after Alaska had already gained title to the submerged lands.

On July 1, 1959, the District Court for Alaska (sitting as a temporary state trial court) declared the waters of the Archipelago "inland waters over which the State of Alaska has dominion." Organized Village of Kake v. Egan, 174 F. Supp. 500, 502 (D. Alaska 1959). The United States continued to agree with this view before this Court. In the briefing for United States v. California, the United States specifically cited the Archipelago as an example of its policy of treating straits leading to inland waters as inland waters themselves:

> Wherever the United States has insisted on the right of innocent passage through straits, denying them the status of inland waters, the claim has rested on the character of the strait as a passageway between two areas of high seas. No such right is claimed as to a strait leading only to inland waters. Such a strait is treated as a bay. Examples of this have already been discussed, including the straits leading into the Alaskan Archipelago, * * * straits leading to waters between Cuba and its encircling reefs and keys, and Chandeleur Sound. [Brief for the United States in Answer to California's Exceptions to the Report of the

Special Master at 130-131, United States v. California, No. 5, Orig. (U.S. filed June 1964) (emphasis added; citations omitted) (Ex. AK-9).]

Thus, five years after statehood, the United States continued to state publicly that the Archipelago's waters are inland.

Federal officials' actions also continued to reflect this recognition. Shortly after statehood, State Department Geographer Pearcy plotted the United States' territorial sea using "principles drawn from the Convention," which the United States had not yet ratified. Measurement of the U.S. Territorial Sea, 40 Dep't of State Bull. 963, 964 (1959) (Ex. AK-102). He noted that "a highly irregular coastline with numerous offshore islands may call for a baseline involving a combination of rules that are difficult to apply," usually resulting in "a succession of straight closing lines alternating with stretches of the shoreline itself." Id. at 967. While he stated that it is sometimes difficult to ascertain when such straight baselines should be employed, he noted that one "clear-cut example" of such a situation is "the archipelago along the southeast coast of Alaska." Id. at 971. Consistent with his comments, Pearcy's charts of the Alexander Archipelago show straight baselines enclosing inland waters. Exs. AK-103 and 38.

Although these charts were not "official," the Coast Guard relied on them "when carrying out law enforcement activities," Ex. AK-104, as did Interior Department fisheries officials. Ex. AK-105 at 15e; Ex. AK-106 at 20e. As noted

by Interior Department officials, that Pearcy's charts lacked official standing "seems somewhat irrelevant for it is obvious and, we believe, was made known to the State Department that the charts will be used for enforcement purposes and therefore may serve as the basis for action by United States patrol vessels against foreign nationals." Ex. AK-107 at 17e. Thus, even after statehood, the United States continued to take enforcement actions against foreign vessels based on the assertion that the waters of the Archipelago are inland.

C. The United States' General Practice of Claiming Waters Enclosed By Islands As Inland Remained Unchanged Well After Statehood

The United States' continued treatment of the waters of the Archipelago as inland after statehood was in accord with its continued practice with regard to other similar bodies of water. For example, when Pearcy's charts for Louisiana showed enclaves of high seas in Chandeleur Sound,[10] Solicitor General Rankin wrote in 1960 that those charts were "inconsistent" with the United States' position before this Court, a position taken "on the advice of the Department of State." Ex. AK-95 at 1. The Solicitor General noted "the undesirability" of the United States reneging on its concession that Chandeleur Sound constitutes inland waters, and asked that the incorrect charts not be published. Id. at 2. That year, this Court agreed with the United States' position, describing the

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10 See Exs. AK-108 (enc. 2 at 7, ¶ 77), AK-109.

waters enclosed by islands in Louisiana as "inland waters" subject to the equal footing doctrine. United States v. Louisiana, 363 U.S. 1, 67 n.108 (1960).

The United States ratified the Convention on March 24, 1961, Alabama and Mississippi Boundary Case, 470 U.S. at 106, but the United States' general practice did not change. In response to a 1961 inquiry from Solicitor General Cox asking "[u]nder what circumstances should the coast line depart from the mainland to embrace offshore islands?," Exs. AK-108 at 4, AK-109 at 4, the Director of Geodetic Survey enclosed the position of Shalowitz that:

> The coast line should not depart from the mainland to embrace offshore islands, except where such islands either form a portico to the mainland and are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters, or they form an integral part of a land form. [Ex. AK-110 at 7.]

As Shalowitz noted, this "was the basis for drawing the Chapman Line" and conformed to the concession in the Louisiana case. Id. He later explained that the portico concept is an "amplification" of the ten-mile rule and illustrated it with a figure showing a chain of barrier islands. 1 Shalowitz, supra, at 161-162 and Fig. 25(a) (Ex. AK-75).

In late 1965, the United States continued to hold to its general practice. In a brief to this Court in United States v. Louisiana, the United States—while noting that its ratification of the Convention had altered some aspects of previous U.S. positions in that case—did not change its position that Chandeleur

and Breton Sounds are inland waters. To the contrary, it proposed a decree describing a coastline formed in part "by straight lines across the channels between the islands." Ex. AK-111 at 3-4. This Court granted the motion and adopted this description. United States v. Louisiana, 382 U.S. 288 (1965).

It was not until April 1967—more than eight years after Alaska obtained title to the waters of the Archipelago—that the United States indicated any change in its longstanding practice of enclosing inland waters behind baselines drawn between coastal islands separated by less than ten miles. In a letter, the State Department—apparently referring to the discretionary use of straight baselines under Article 4 of the Convention, see supra n.1—informed Germany that "[t]he United States has not adopted the straight baseline method on any of its coasts." Ex. AK-112 at 2. Despite this disclaimer, however, the Undersecretary of State recommended two months later that the United States not change its position in the Louisiana case. Ex. AK-113. Then, in 1968, the United States informed this Court that while there was "much justification" for relief from its concession in that case that Chandeleur and Breton Sounds are inland waters, "it would not be in the public interest * * * to upset a fundamental assumption" that had guided the parties' conduct. Ex. AK-114 at 79, 80.

D. The United States Belatedly Changed Its Position On The Archipelago In 1971

The United States did not publicly disclaim the inland status of any of the waters of the Archipelago until 1971—more than a decade after statehood, and contrary to the United States' consistent position up to that point. And even then, the evidence strongly suggests that the United States' change of heart was not motivated by principle but rather by its pecuniary interests elsewhere, which the United States feared might suffer from continued adherence to its longstanding position in the Archipelago. But in any event, the United States' change in position came far too late to affect Alaska's title, which had vested years before. Indeed, even after the policy shift, United States officials continued to express doubt as to the correctness of the new approach.

In 1970, the United States formed the interdepartmental Committee on the Delimitation of the Coastline of the United States (the "Baseline Committee") to delimit baselines, the territorial sea, and the contiguous zone for the entire United States. Ex. AK-115. The Committee was instructed to use as the baseline the mean low water line and river and bay closing lines and not address the political question whether the United States should employ straight baselines under Article 4. Exs. AK-115, AK-116 at HW1968. The Baseline Committee charts were published in 1971, and for the first time showed enclaves and pockets of high seas in Mississippi, Chandeleur and Breton Sounds on the Gulf coast, and in the

Alexander Archipelago. This is the first time the United States publicly disclaimed that any of these areas were inland waters. See Alabama and Mississippi Boundary Case, 470 U.S. at 111 (discussing Mississippi Sound). There was no indication in the Committee's discussions as to whether the waters of the Archipelago should be considered an historic bay as a result of the United States' longstanding and continuous dominion over the waters.

In congressional hearings called in response to Alaskan protests over these new charts, the Special Assistant to the State Department Legal Adviser acknowledged that the earlier Pearcy charts—which showed no such pockets or enclaves—"have become standard reference" for federal officials in Alaska, including the Coast Guard. Provisional U.S. Charts Delimiting Alaskan Territorial Boundaries: Hearing Before the Senate Comm. on Commerce, 92d Cong. 6 (1972) (Ex. AK-38). That testimony was subsequently confirmed by the Acting Coast Guard Commandant. Ex. AK-117 at 2-3.

In response to the objections voiced over the new charts, the State Department Legal Adviser recommended that the United States employ straight baselines under Article 4 of the Convention—which effectively would have marked a return to the position the United States had consistently taken from before cession until 1971—because such a position would be consistent with the Convention and would not in any way compromise the foreign policy of the United

States. The Adviser acknowledged the continuous exercise of fisheries jurisdiction over all the waters of Archipelago and the Coast Guard's reliance on the Pearcy charts. Ex. AK-118 at 3-5. Importantly, he also confirmed that "no right of innocent passage has generally been accorded in the Alexander Archipelago," id. at 8—a key fact demonstrating inland water status. The Adviser also recognized that the evidence put forward by Alaska at that time in support of its historic water claim, "though not a complete historical record in any sense, is sufficiently weighty to cast doubt on the appropriateness of the [Baseline Committee] charts." Id. at 12. And without rejecting that claim, he relayed the State Department's recommendation to employ Article 4 straight baselines, stating that "[w]e do not believe the use of such a system will have a negative impact on our Law-of-the-Sea negotiating position, nor do we believe a continued refusal to use such a system is justifiable in light of the fact that it is so clearly appropriate to this situation." Id. (emphasis added).

In 1972, the Law of the Sea Task Force Executive Group decided "to withdraw the 1971 maps of the Archipelago" and to use lines similar to those on the Pearcy charts. Ex. AK-119 at 1. The Baseline Committee discussed this decision, Ex. AK-120 at 2, but could not agree on implementing it "because of difficulties in resolving the questions related to the domestic effect of the actions to be taken." Ex. AK-121. In particular, the Interior and Justice Departments were

concerned about the precedential effect of drawing straight baselines for the Archipelago on the "one-half billion dollars worth of offshore oil revenues" at issue in the submerged lands litigation with Louisiana. Ex. AK-122. Confirming the solely pecuniary nature of these objections, a Justice Department official later suggested "conditioning the application of [straight baselines] on a waiver by the state to all claims it might assert in the natural resources of the added areas of submerged lands." Ex. AK-123 at 5.

In 1973, a new State Department Legal Adviser continued to assert that returning to the United States' consistent view that the waters of the Archipelago are inland would have no adverse effects on foreign relations. At that time, the Legal Adviser stated that the United States could employ Article 4 straight baselines in the Archipelago "in a manner fully consistent with the most conservative possible reading of Article 4," noting that it would be "extremely doubtful" that such an action would have any negative effects on the United States' negotiating position with other nations. Ex. AK-124 at 2. The matter was then referred to the Office of Management and Budget because of "the possible precedent-setting effect" that drawing straight baselines would have on state and federal submerged lands and revenues. Ex. AK-125. No further action was taken.

V. THE "VITAL INTERESTS" OF THE UNITED STATES ALSO SUPPORT A FINDING OF HISTORIC WATERS STATUS

Where pertinent, "the vital interests of the coastal nation, including elements such as geographical configuration, economic interests, and the requirements of self-defense" can also "fortify" a finding of historic waters status. Alabama and Mississippi Boundary Case, 470 U.S. at 102. Although it is not necessary for these factors to support Alaska's claim in order for it to prevail, id., it is clear that the vital interests of the United States do fortify the inland status of the waters of the Archipelago. Just as this Court has held with regard to the waters of Mississippi Sound, the Archipelago "historically has been an intracoastal waterway of commercial and strategic importance to the United States." Id.

As set forth in more detail in Alaska's introductory and background memorandum, and in its memorandum in support of summary judgment on Count II, the "geographical configuration, economic interests, and the requirements of self-defense" all support a finding that the waters of the Archipelago are historic inland waters. As to geographical configuration, the waters—even if held not to comprise juridical bays under Article 7 of the Convention—are plainly linked to the coastal mainland far more than to the open sea. The waters are truly landlocked by the maze of large and small islands creating the many straits and sounds which, in Muir's words, constitute "inland waters that are about as waveless as rivers and lakes." Muir, supra, at 13 (Ex. AK-1). A glance at a map

shows that the waters of the Archipelago, formed by the interlocking islands, resemble rivers and lakes much more than ocean waters. See also Memorandum in Support of Motion for Summary Judgment on Count II.

As to economic interests, since well before European and American explorers visited the territory the people of Alaska have used the waters as a vital means of commerce and trade. Because of the geography of the area, transportation over any distance is by water, air, or often—in the case of the omnipresent seaplanes—both water and air. The waters serve as the region's roads. The name of the major indigenous native group in the area—the Tlingit—translates to "tidal people," and inhabitants of the area have, historically and today, typically derived their living, in one way or another, from the protected waters. These, and other economic factors described in Alaska's introductory memorandum, strongly support a finding of inland water status. See Introductory and Background Memorandum at 4-5. Just as with Mississippi Sound, "the evidence demonstrates that the United States historically and expressly has recognized [the waters of the Archipelago] as an important internal waterway and has exercised sovereignty over [it] on that basis * * *." Alabama and Mississippi Boundary Case, 470 U.S. at 106.

Finally, the requirements of self-defense also support continuation of the United States' historical dominion over the waters of the Archipelago. The

main fort of the Tlingits was on Castle Hill at Sitka, and Russia took over this fort and made Sitka the Russian American capital after defeating (temporarily) the Tlingits in 1804. See Hubert Howe Bancroft, History of Alaska 1730-1885 at 428-442 (1886). Notably, Sitka is on the outer boundary of the Archipelago, and the historic fortification there demonstrates the importance of controlling that outer boundary. It does not take a Clausewitz to perceive that any defense of Southeast Alaska must begin at the outer edge of the Archipelago. Indeed, during World War II Sitka "sprang to life" with a naval air base including large seaplane hangars and a radio station, and residents undertook "constant vigils for signs of the enemy." Ex. AK-126 at 71. Such vigils 100 miles landward on the mainland shore would have been as pointless as vigils in Albany, New York.

At the time of statehood, a foreign vessel traveling into one of the pockets of what the United States now says were high seas would find itself in a highly advantageous situation, having penetrated into the heart of United States territory. For example, a ship traveling into the pocket of high seas the United States asserts existed in Chatham Strait and Frederick Sound, see Ex. AK-28, would have been able to travel more than 70 miles into these waters. Allowing such passage would be like allowing a warship to travel 70 miles up the Mississippi River from the Gulf of Mexico. As noted, the waters serve as the region's roads. Just as it would be unthinkable to allow a foreign nation to enter

the United States' highways at will—even if only through the median strip—so it would have been unthinkable at statehood for the United States to permit foreign vessels unfettered access to pockets and enclaves of waters along "roads" deep within Alaskan territory. And, indeed, the United States never did so. As noted above, it consistently claimed the right to deny foreign vessels even the right of innocent passage through the Archipelago, demonstrating the importance of the waters to the safety and security of the people who depend on them.

CONCLUSION

To prevail on Count I, Alaska "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. Alaska has done so.

As to the first two factors, the evidence is overwhelming. The historical record shows that the United States recognized Russia's "complete sovereignty" over the Archipelago's waters in 1845; claimed the waters of the Archipelago as inland at the 1903 Alaska Boundary Arbitration; recognized that claim in the 1952 Justice Department study of the 1903 Alaska Boundary Arbitration; told this Court in 1964 that the waters of the Archipelago were inland; employed the Pearcy charts' straight baselines for law and fisheries enforcement; and denied foreign nations the right of innocent passage. All this evidence is

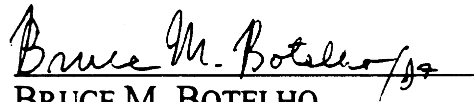
consistent with the United States' general pre-statehood practice with regard to waters enclosed by fringe islands elsewhere in the country.

As to the remaining factor, foreign nations continually acquiesced in the United States' claim. Britain did so in the 1893 Fur Seal Arbitration, the 1910 North Atlantic Fisheries Arbitration, the 1924 Marguerite incident, and the 1951 Fisheries Case. Canada likewise acceded to the United States' position in boundary discussions in the 1930s and 1940s, and in the subsequent recognition of United States fisheries jurisdiction. Norway likewise accepted the United States' position, relying on it in support of its own claim in the Fisheries case.

And consideration of the littoral state's vital interests explains both the motivation for the exercise of jurisdiction and other nations' acquiescence in it. The Archipelago waters are an inseparable part of Southeast Alaska.

For these reasons, the Special Master should recommend that summary judgment be granted to Alaska on Count I, confirming that Alaska has historical title to the submerged lands of the Archipelago as measured by the boundaries claimed by the United States in 1903, including the pockets and enclaves more than three miles from the physical coastline.

Respectfully submitted,



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