

Supreme Court of the United States

No. 128, Original

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

**REPLY IN SUPPORT OF ALASKA'S MOTION FOR
SUMMARY JUDGMENT ON COUNT II—JURIDICAL BAYS**

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INTRODUCTION

To prevail on Count II, Alaska need only establish that the coast of its bays may be formed in part by islands, and that the resulting indentations satisfy the standards for juridical bays under Article 7. Alaska has done so, and the United States' opposition raises no material issues of fact preventing a determination of juridical bay status.

As to assimilation, the facts necessary to appreciate the relation between the coastal features are not in dispute. The parties' disagreement centers instead on the legal standards. Alaska submits that recognition that the coasts of North and South Bays, as well as the smaller bays, are formed in part by islands requires no more than applying United States v. Maine, 469 U.S. 504 (1985), to

analogous areas. By contrast, the United States’ analysis of the assimilation inquiry is inconsistent with the “realistic approach” called for by the Court. United States v. Louisiana (“Louisiana Boundary Case”), 394 U.S. 11, 63 (1969). The United States’ approach—which focuses on places where assimilable land masses diverge, not where they converge—obscures the facts that demonstrate the effective connection between the features. It should be rejected.

Once the coasts of the bays are established, it is evident that the definitional standards of Article 7 are met.¹ The parties agree that North and South Bays meet the semi-circle test. Alaska has also demonstrated that each bay satisfies the components of the descriptive test. Each is a well-marked indentation into the mainland rather than a mere curvature of the coast. Each bay contains landlocked waters, which is confirmed both by a qualitative assessment, and by consideration of the ratio of penetration to the width of the entrances. Moreover, each of Alaska’s bays compares favorably with other recognized bays.

The United States’ opposition to bay status rests upon an unduly restrictive reading of Article 7. The United States makes the penetration-to-width ratio the paramount test while refusing to acknowledge that islands narrow the entrances to the bays. This position is inconsistent with the Court’s direction and

¹ It is agreed that Sitka Sound and Cordova Bay satisfy the standards of Article 7(2).

the intent of the Convention drafters. Determining bay status based on a fictitious mouth denies a meaningful assessment of the landlocked quality of the waters.

Alaska's approach, testing the actual bay, should prevail.

I. THE ISLANDS SEPARATING NORTH AND SOUTH BAYS ARE REALISTICALLY CONNECTED

A. The Assimilation Inquiry Should Focus On Where There May Be An Effective Connection Between Two Features

The Court has identified several factors that inform the consideration of whether an island may be considered an extension of the natural coastline and thus serve to form the shores of a juridical bay. See Maine, 469 U.S. at 516-517; Louisiana Boundary Case, 394 U.S. at 60-67. Part of this analysis involves an assessment of the "intervening waters" between the features. As the United States notes, the Court has never defined the term "intervening waters." Its proper interpretation is at the heart of the parties' dispute.

The United States argues that the term necessarily includes any waters that can be deemed generally to fall between the two features under consideration. The United States' approach is based upon an idealized figure, which depicts the channel between a narrow island and the mainland. See Ex. US-II-16 at 21. Through rote application of Hodgson's 45° channel test, id. at 17-20, the United States maximizes the waters that must be ignored before finding a connection

between the features. The United States' approach steps beyond what is required to establish a realistic connection between two coastal features.

The assimilation inquiry should focus on where the two land masses in fact come together, not on where they may diverge. See, e.g., Alaska's Mem. in Opp. to Motion of the United States for Summ. Judg. on Count II ("AK Count II Opp.") at 26-29, 30-35, 39-40; Alaska's Mem. in Support of Mot. for Summ. Judg. on Count II ("AK Count II Mem.") at 12-13, 19-20, 22-23, 26-27, 54-55, 56-57. To illustrate, if two land masses are actually connected by an isthmus of land (as Alaska believes is the case with Mitkof Island and the mainland), they do not somehow become disconnected if there are bays on one or both sides of the isthmus, no matter how narrow that isthmus may be. Likewise, if two land masses separated by water are effectively or realistically connected at the place where they come together—no matter how narrow—it should be immaterial whether the intervening waters may also open into bays at one or both ends. Rather than pretend that the waters between two features bear the same characteristics throughout, as in the Hodgson idealized figure, Alaska properly focuses the inquiry on those places where the features come together.

The United States complains that Alaska's focused approach "pre-ordains the outcome." United States' Mem. in Opp. to Mot. of Alaska for Summ. Judg. on Count II ("US Count II Opp.") at 8. Apparently, the United States is

concerned that focusing attention on a stretch of intervening waters that is particularly well-suited to treatment as land will cause the Court to find the island and adjacent feature to be realistically connected in that area. Alaska finds no fault with such a logical outcome. Neither the Court nor any commentator has defined the minimum length of an assimilable coast below which no assimilation can be considered, and there is none—just as there is no minimum permissible width for an isthmus. If a focused review reveals a realistic connection between two features, what does it matter if the coasts diverge outside that area? Such divergence elsewhere does not undermine the effective connection that has been established. This fact, so clearly embraced by nature, see Exs. AK-330 to AK-332, is stubbornly resisted by the United States. Nature’s approach should prevail.

The United States’ rigid approach does not achieve the aim of the assimilation inquiry—a common sense review of the relation between two features. While the use of a formula or objective standard can be helpful, its application should not prevent consideration of the dominant characteristic of an area. For instance, it is patently implausible to suggest that Frederick Sound captures the realistic relation between Mitkof Island and the mainland, when Mitkof Island is so clearly rooted in the mudflats of the Stikine River Delta. Indeed, the best representations by federal agencies depict Mitkof Island connected to the mainland at Dry Strait. See AK Count II Opp. at 31-34; Exs. AK-334 (USGS), AK-335 to

AK-337 (U.S. Forest Service), and AK-338 (Alaska District Army Corps of Engineers). See also AK- 339 (aerial photographs).

Common sense should prevail, as it did in Maine, where neither the Court nor the United States looked to the Hodgson 45° channel test to isolate the East River as the relevant intervening waters. Indeed, the test—as described by the United States—would not have isolated the East River as the intervening channel. Much broader waters are readily included between the facing shores. See Ex. AK-464. A different approach was warranted and was taken in that case, and the same approach is warranted here.² If an effective connection between Long Island and the mainland existed, it would obviously be across the East River. Thus, the parties and the Court focused the inquiry on that area, rather than on all the other areas ostensibly between the coastal features, including the bays and harbors into which the East River opened. See AK Count II Opp. at 26-28. A similar examination of the coastal configurations involved in the formation of North and South Bays necessarily leads to a focus on Dry Strait and Rocky Pass.

² The fact that neither the Court nor the parties relied on Hodgson’s 45° test to identify the intervening waters did not prevent consideration of the overriding question of whether the East River had the characteristics of a channel that would justify assimilation. See Michael W. Reed, 3 Shore and Sea Boundaries 278 (2000) (Ex. AK-134). The same approach should prevail here.

The United States attempts to discount the significance of the approach taken in Maine because the parties agreed on the focus. US Count II Opp. at 9. But any such agreement highlights the fact that a case-by-case assessment, rather than blind allegiance to a generalized rule, is appropriate to ensure the identification of the relevant intervening waters. The fact that the parties here do not agree does not mean the United States' formulaic rule must be applied. As in Maine, simple common sense dictates a focus on the areas where the land masses come together rather than where they diverge.

The shape of the island and its relation to the adjacent coast—both considered at mean lower low water—dictate the focus. The only place where there can be assimilation is where the coasts come together. If the coasts do not come together anywhere—as is the case with most island-mainland interfaces—the inquiry is over. But if, as in this case, they do come together, then the Court must apply the factors identified in Maine to determine whether the connections are sufficient to warrant assimilation. For the bays claimed by Alaska, any reasonable differences of opinion over the extent of the intervening waters between the blocks of the island peninsula are immaterial. Where the coastal features come together, the channel created is decidedly narrow and riverine. See, e.g., AK Count II Opp. at 42; Ex. AK-135, Ex. AK-334. Those characteristics exist regardless of whether there are other broad or bay-like waters beyond some of the channels.

B. The United States Ignores The Coast And Invents Its Own

The United States distorts the most basic of all aspects of the assimilation inquiry, the location of the coast. It is well established that the coastline under Article 7 and the Submerged Lands Act is measured at mean lower low water. See AK Count II Opp. at 22-25. Yet not only does the United States rely upon mean high water for the location of the coast, see Ex. US-II-10 at 3, ¶¶ 4, 6, it also removes significant features.

In its opening brief, the United States erased Partoshikof Island. See Ex. US-II-33. In its opposition, it deletes both Dry and Farm Islands in order to support its claim that Mitkof Island is separated from the mainland by a broad channel. See Ex. US-II-40. This is pure fantasy reminiscent of Soviet-era revisions to May Day podium photographs. Not only is the United States improperly ignoring areas above mean lower low water, it is erasing land above mean high water as well. The United States magically redefines both as water. See Ex. US-II-10 at 3, ¶¶ 4, 6.

This tactic abandons the realistic assessment that is supposed to guide an assimilation inquiry. Perhaps most egregious is the erasing of Dry and Farm Islands. As the United States admits, these river islands form part of the coastline as it continues across the mouths of the Stikine River. See US Count II Opp. at 22. Yet the United States also asserts that the islands are not part of the mainland. Id.

This is puzzling. Where the coast has uncontrovertedly been extended by islands, the inland mainland shore has no relevance.

Even if Dry and Farm islands were not considered a part of the “mainland,” the answer is not to erase them. The islands obviously satisfy the standards for assimilation. As islands “separated from the mainland by a genuine ‘river,’ ” they fall into one of the United States’ identified narrow classes of islands that even it admits are properly assimilated. Maine, 469 U.S. at 517.

The United States has no right to substitute a more favorable coast for the actual coast found at mean lower low water. At that decisive stage, the best representations by federal agencies show Mitkof Island as actually connected to the mainland. See supra at 5-6. Whatever characteristics Frederick Sound has to the north, it comes to a stop at Dry Strait. When the proper coast is considered, the realistic connection between the blocks of the island peninsula is obvious.

C. As In Maine, The Depth And Utility Of The Intervening Waters Support Assimilation

The Court’s treatment of the East River is the best indication of how to assess whether a water’s depth and utility will prevent the assimilation of two features.³ The Court relied upon the fact that the East River in its original state was “as shallow as 15-to-18 feet, with a rapid current that made navigation from

³ The Louisiana Boundary Case fails to provide a meaningful guide to the Court’s approach to this factor. See AK Count II Opp. at 21-22 n.9.

Long Island Sound extremely hazardous.” Maine, 469 U.S. at 518. In its improved state, the East River supported significant traffic across a 34-foot-deep channel. Id. n.11. The Special Master’s Report also noted evidence presented by the United States that commercial traffic had used the channel, even in its unimproved state, since the 1600s. Report of the Special Master at 40, United States v. Maine, No. 35, Orig. (U.S. 1983) (Ex. AK-130). Significantly, such commercial use, past or present, did not prevent assimilation.

In this case, each of the channels between the blocks of the island peninsula compares favorably to the East River. See AK Count II Mem. at 9-12, 20-22, 25-26, 50-53, 55-56; AK Count II Opp. at 31, 36-39, 40-44, 49. A few basic facts put the matter in perspective. Dry Strait is mostly bare at low water and affords passage to shallow draft vessels at high water only. See Ex. AK-132 at 167; Ex. AK-139 at 15; Ex. US-II-27 at 6. Wrangell Narrows had a controlling depth of ten or eleven feet in its natural state, which set it apart as deficient to support the vessels in the coastwise service between Skagway and Puget Sound without delay. A portion of the traffic still used Wrangell Narrows, but its tortuous channel and strong currents led it to be described as a “menace to life and property.” Ex. AK-146 at 5, 13; see also Ex. AK-137 at 3. These hazardous conditions led to substantial improvements that more than doubled the controlling depth and significantly widened the channel. The improvements to the channel

were described as the equivalent of the creation of an artificial channel. The route in its original state was of negligible value for shipping. See Ex. AK-148 at 11. But even in its improved state, its serpentine course and still shallow depth prevent its use by larger vessels. See Ex. AK-139 at 8, 43. Rocky Pass, the central part of Keku Strait, had a controlling depth of one foot in its natural state. Because of numerous rocks and strong currents, small vessels could make a hazardous passage only during high-water slack. See Ex. AK-133 at 9, 85. Dredging improved the channel to a controlling depth of five feet. But even with the improvements, passage is still recommended only at high-water slack. See Ex. AK-132 at 164.

None of these waters has a level of utility exceeding the East River's, and the complaints the United States makes against Alaska's interpretation of utility would apply just as well to the East River. See US Count II Opp. at 13. In fact, the United States argued in Maine that the commercial use of the East River ought to prevent assimilation—but without success. Reed, supra, at 276 (Ex. AK-134).

Alaska has presented information on the utility of the waters at both high and low water.⁴ That evidence demonstrates depth and utility at least as

⁴ To the United States, Southeast's broad tidal range means that all waters in Southeast are too useful to permit assimilation. Under its theory, all tideland beaches would also have to be considered "water," not "land," because they are below the high tide line. That cannot be the rule. Moreover, while the tidal range in Alaska is indeed significant, the western end of Long Island Sound is also affected by a substantial tidal range of 11 to 12 feet. See Ex. AK-465 (excerpt of

constrained as the East River's. Alaska need not show that the waters were useless. As in Maine, the significant limitations and hazards presented by each of the waters support assimilation.

D. The Islands' Origin And Resultant Connection To The Mainland Support Assimilation

An island's "origin * * * and resultant connection with the shore" is another factor to be considered in the assimilation inquiry. Maine, 469 U.S. at 516 (internal quotation omitted). Alaska has presented a report by its expert, Professor Begét, supported by a declaration, Ex. AK-142, as well as several articles from a noted treatise on the geology of Alaska, Ex. AK-143; Ex. AK-144, that demonstrate that the islands proposed for assimilation and the intervening waters are found in belts of rock that due to tectonic plate collisions have been a part of the continent for millions of years. See AK Count II Mem. at 14-19; see also United States Geological Survey, This Dynamic Earth: The Story of Plate Tectonics 58 (1996) (including color map depicting western North America's mosaic of terranes) (Ex. AK-466).

Chart 12363). Furthermore, although the United States implies that the tidal range is universally positive for navigational utility, strong tidal currents can in fact create navigational hazards and thus detract from a channel's utility. See, e.g., Report on Resurvey of Wrangell Narrows, Alaska, H.R. Doc. No. 71-647 at 2 (1930) (Ex. AK-147).

The United States agrees that these “rock assemblages and terranes are now attached to the North American craton” as a result of accretion. US Count II Opp. at 26. But the United States argues that the remote and likely marine origin of the terranes containing the islands weigh against assimilation. US Count II Opp. at 25-26. The United States is incorrect.

It is immaterial that the terranes which contribute much of the mainland and all of the islands of Southeast—like much of Western America—were not originally a part of the North American continent or craton. See, e.g., Ex. AK-143 at 991 fig. 2; Ex. AK-466 at 58. For tens of millions of years they have been welded together. Importantly, the channels between the islands proposed for assimilation are geologically insignificant. They mark no change in character in the rocks, and track neither terrane nor fault boundaries. See, e.g., Ex. AK-142 at HW14183, fig. 3; Ex. AK- 144 at 454-456, figs. 2, 3. The tectonic evolution of the area thus supports assimilation. Its more recent history does as well, as the process of glaciation transformed the landscape of Southeast Alaska. See Ex. AK-142 at 11. Notably, this glaciation did not carve deep channels between the islands at issue in the proposed assimilations.

* * *

To avoid recognition of the close relation that exists between the blocks of the island peninsula, the United States exaggerates the area of water that

must be ignored, replaces the coast identified in the Convention and the Submerged Lands Act with one of its own making, and relies on a standard for utility rejected in Maine. In contrast, Alaska has focused on the facts that demonstrate an effective connection between the blocks of the island peninsula that divide Southeast into bays to the north and south. Recognition of Alaska's island peninsula as an extension of the mainland coast is entirely consistent with the Court's decision recognizing Long Island as part of the mainland. While the circumstance presented by Long Island is properly called exceptional, the facts of this case show that it is not—as the United States would have it—unique. Alaska's claims fit the same mold.⁵

II. ALASKA'S NORTH AND SOUTH BAYS MEET THE DEFINITIONAL STANDARDS OF ARTICLE 7

With the coastline established, it is readily confirmed that North and South Bays meet the standards for recognition as juridical bays. The parties agree that both bays satisfy the semi-circle test contained in Article 7(2). See US Count II Opp. at 33 n.14. The descriptive test of Article 7(2) is also met as each bay

⁵ Assimilation of all the other islands listed by the United States, see US Count II Opp. at 31 n.13, potentially requires extending the standards for assimilation because the intervening waters are generally deeper than those at issue in Alaska's island peninsula. See also AK Count II Mem. at 30 n.15. But in any event, those other islands are not at issue here and do not alter the State's boundaries.

is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. [Convention, art. 7(2).]

Both North and South Bays compare favorably with other recognized juridical bays. The presence of large islands blocking what would otherwise be wide entrances assures recognition of bay status under Article 7.

The United States incorrectly asserts that the numerous non-assimilated islands within the mouths of the two juridical bays must be ignored in all parts of the Article 7 descriptive test. That is not the law. While it is true that such islands are ignored in determining whether the bay is a well-marked indentation, the presence of islands within the mouth plainly serves to enhance the bays' landlocked quality under other parts of the descriptive test.

A. North And South Bays Are Well-Marked Indentations Into The Mainland

In arguing that islands within the mouth of a bay cannot be considered in any part of the descriptive test, see US Count II Opp. at 33-39, the United States misinterprets this Court's precedents. The Court has confirmed the general understanding that "bays are indentations in the mainland, and that islands off the shore are not headlands but at the most create multiple mouths to the bay."

Louisiana Boundary Case, 394 U.S. at 62 (emphasis deleted). As the Special Master in Maine reported:

When considering whether an indentation into the mainland exists, the practice of the United States is to first visually eliminate any islands in an area and then ascertain whether there are any indentations into the coast of the mainland. [Report of the Special Master at 24 n.17, United States v. Maine, No. 35, Orig. (U.S. 1983) (Ex. AK-467) (emphasis added)].

But to say islands are ignored when applying “the indentation test,” *id.* at 25, does not mean—as the United States asserts—that islands play no role in the final determination of whether an “indentation” is a bay under the rest of the descriptive test of Article 7(2). That issue was not faced in Maine, because the inquiry never went beyond the basic indentation question. The evidence supported the Special Master’s conclusion that there was no indentation into the coast when Long Island was treated strictly as a non-assimilated island. Instead, the coast exhibited only a mere curvature, not a well-marked indentation that could satisfy Article 7(2). *Id.* at 28. Reference to a figure with Long Island removed from the coasts confirms that this conclusion was sound. See Ex. AK-468. At best, the coast presents a gentle curve, virtually indistinguishable from an open coast.

The Supreme Court reached the same conclusion when it examined the coast without Long Island. From “[a] mere glance at a map of the region,” the Court could tell there was no indentation into the mainland that could satisfy the requirements of Article 7. Maine, 469 U.S. at 514-515. Consistent with that conclusion, the Court noted the near-consensus opinion that, in the absence of

Long Island, “the curvature of the coast is no more than a ‘mere curvature’ and is not an ‘indentation.’ ” Id. at 515.

In the next sentence, the Court observed that “absent Long Island, the waters of the Sounds would not be sufficiently surrounded by land so as to be landlocked.” Id. The United States relies upon this statement as justification for its assertion that islands can play no role in determining whether an indentation may be a bay that satisfies the descriptive test of Article 7(2). See US Count II Opp. at 35. The United States also points to a similar statement by the Louisiana Special Master addressing the lack of any indentation at Caillou Bay in the absence of islands. Id. at 36. See also Ex. AK-326 at 49. As with Long Island Sound, when the islands are removed from the area around Caillou Bay, there is no indentation. The coast is nearly straight. See Ex. AK-469 (figures showing Caillou Bay with and without islands removed).

It is not a revelation that the non-existent indentations near Long Island and Caillou Bay could not hold landlocked waters. A straight or nearly straight coast surrounds nothing and holds nothing. The Court’s statements in Maine thus simply emphasized that Long Island is all that encloses or surrounds the waters of the Sound. That is the only sensible way to interpret the Court’s statement, which goes on to note that the semi-circle test would not be met without Long Island. 469 U.S. at 515. That fact, however, says nothing new about how to

apply the descriptive test of Article 7(2) to an actual indentation, such as those presented by North and South Bays. It is immediately apparent that North and South Bays with the islands removed bear no resemblance to Long Island Sound or Caillou Bay with the islands removed. Compare Exs. AK- 149 and AK-150 to Exs. AK-468 and AK-469. Instead, it is obvious that indentations plainly exist at both North and South Bays. The shores are not mere curvatures of the coast that are open to the sea. Instead, the shores exhibit a pronounced concavity that serves to surround the waters within, without considering the islands. See AK Count II Opp. at 16-17. Indeed, the indentations of North and South Bays strongly resemble and compare favorably to other indentations recognized by the Court as bays. See Ex. AK-470 (Monterey Bay); Ex. AK-471 (Ascension Bay); Ex. AK-472 (Atchafalaya Bay); Ex. AK-473 (Terrebonne/Timbalier Bay complex). North and South Bays also compare well to indentations recognized as bays by the baseline committee. See Ex. AK-474 (Biscayne Bay); Ex. AK-475 (Scammon Bay).

The baseline committee's treatment of Scammon Bay is of particular interest, because it distinguishes between an island screen to an existing indentation (such as in North and South Bay), and an island screen that creates the indentation (such as in Long Island Sound, if Long Island were not assimilated):

Scammon Bay was determined to be merely an indentation ignoring Neragon Island. This island screens the indentation and makes it a bay that meets the semicircle

test. It was felt that this was distinguishable from Caillou Bay in Louisiana since in that case without the island there would only be a mere curvature of the coast and the islands are necessary to create the indentation by forming one of the sides. [Ex. AK-476 at 2].

Under the position now advanced by the United States, Scammon Bay would not pass the descriptive test because its island screen could not be considered.

North and South Bays are unquestionably indentations when the screening islands are ignored. They appear at least as “bay-like” as other recognized bays. But any final determination of qualification under Article 7(2) must consider the bay as it actually exists, including the presence of islands blocking the entrance.⁶

⁶ The United States complains that the tip of Kuiu Island does not mark a natural entrance point for the indentation because it does not pass the 45° test with a line drawn to Cape Spencer. See US Count II Opp. at 42. The failure of Cape Decision to meet the 45° test between it and Cape Spencer is immaterial because a landward point on Kuiu Island readily satisfies the test. See Ex. AK-477. The area between these headlands is clearly an indentation.

The mainland-to-mainland line on Ex. AK-477, however, does not mark the limits of North Bay. The presence of screening islands blocking what might otherwise be the mouth brings those limits seaward to the bay’s natural entrances. See Ex. AK-151 at 17. Alaska has applied the 45° test to identify appropriate entrance points enclosing landlocked waters, using the screening islands. See Exs. AK-141 at 2-3, ¶5, AK-152 and AK-154. See also AK Count II Mem. at 31-32 n.17.

B. The Descriptive Test Of Article 7(2) Must Consider The Actual Entrances To The Bay

Whether an indentation is a “bay” under the descriptive test of Article 7(2) depends upon whether its “penetration is in such a proportion to the width of the mouth so as to contain landlocked waters.” The parties are divided over whether this inquiry considers the mouths of the bays actually passable by sailing vessels or instead a fictitious mouth consisting mostly of land. See Exs. AK-152, 153. Alaska takes the former position: bay status should be determined with reference to the mouth’s actual exposure to the sea, and the width should not regard as entrances expanses that are in fact blocked by land. As this Court has held, the proper width is specifically described in Article 7(3), which considers only the water areas and not screening islands. The United States, by contrast, contends that the “mouth” of the bay for purposes of the descriptive test includes land areas that block the entrances. Alaska’s view should prevail: the presence of islands in the mouth of a bay confirms its landlocked character.

In the Louisiana Boundary Case, this Court identified the entrances described in Article 7(3) as the baselines “for all purposes,” explicitly rejecting the notion that islands forming multiple mouths are relevant only to the semi-circle test. 394 U.S. at 55 (emphasis supplied). The United States suggests that the Court’s statement only applies to drawing closing lines. See US Count II Opp. at

36. But the Court’s very language—“for all purposes”—defies such a limited reading.⁷

So does the Court’s reference to the unambiguous Commentary by the drafters of the Convention. Louisiana Boundary Case, 394 U.S. at 55 n.74, 56. See also AK Count II Mem. at 33-34. That Commentary plainly states that “the total length of the lines drawn across all the different mouths will be regarded as the width of the bay.” (1956) 2 Y.B. Int’l L. Comm’n 269 (quoted in Louisiana Boundary Case, 394 U.S. at 55 n.74). Accord, 1955 Commentary (Ex. AK-156). The width of the mouth is the same for all purposes, just as the Court stated. It is not one thing for all parts of Article 7 except the descriptive test of Article 7(2).

That islands have narrowed the entrance to a bay is obviously relevant to whether there is a bay under the descriptive test. One of the hallmarks of the test is a showing that the waters enclosed within the bay are landlocked. The Court has taken a common sense approach to the term, which captures the quality of isolation and shelter from the sea. Maine, 469 U.S. at 525 n.19. See also AK Count II Mem. at 37-38. As this Court has held:

⁷ The United States cites Professor Prescott as supporting the proposition that the mouth of a bay is not the sum of multiple entrances, see US Count II Opp. at 34, but the United States takes his statement out of context. The statement related only to the semi-circle test, not the descriptive test, as confirmed by the next sentence clarifying Prescott’s concern that only one semi-circle should be drawn in

the presence of islands at the mouth of an indentation tends to link it more closely to the mainland, and this consideration may justify some alteration in the ratio between the width and the penetration of the indentation. [Louisiana Boundary Case, 394 U.S. at 56 (citation omitted).]

That holding would be frustrated if the islands were ignored in favor of the fictitious mouth relied upon by the United States. The descriptive test measures the realistic extent to which the waters of a prospective bay relate to the land or are sheltered or isolated from the open sea. See also id. at 58 (“[I]slands tend to separate the waters within from those without the entrances to the bay.”)

C. North And South Bays Meet The Descriptive Test Of Article 7

Both qualitatively and as confirmed by reference to the proportion of penetration to width, North and South Bays contain landlocked waters that meet the descriptive test of Article 7. The waters of North and South Bays are surrounded by land from nearly every direction, due to both the configuration of the coast and the presence of extensive islands blocking most of the distance between the mainland shores. See Ex. AK-152, 153. The waters are landlocked as the term is commonly understood.

The ratio of penetration to width also indicates the presence of landlocked waters. By any measure, the penetration exceeds by several fold the

a multi-mouth bay. J.R.V. Prescott, The Maritime Political Boundaries of the World 53 (1985) (Ex. AK-478).

width of the actual mouths of the bays. See AK Count II Mem. at 36-37. This is well beyond what is required.

Neither the Convention nor this Court requires a specific numeric standard for the proportion of depth to width, or any particular method of measuring penetration. And contrary to the United States' assertion, see US Count II Opp. at 40-41, geographers have not agreed that the width between the mainland headlands must be exceeded by the depth of the bay—even where islands are between the headlands. To the contrary, with regard to the headlands Shalowitz observed that the width of the bay would account for the presence of islands by “altering the ratio of width to penetration so as to result in an indentation becoming a bay that might not meet the test if the full width from headland to headland were to be used.” Aaron L. Shalowitz, 1 Shore and Sea Boundaries 221 (1962) (Ex. AK-479). Hodgson's statement, also cited by the United States, reinforces that it is the actual entrances that matter: “true land-locked conditions should require that the opening (of the bay) be narrower than a principal lateral axis of the bay.” Ex. US-II-16 at 8 (emphasis added). See also supra at 15-22.

Hodgson did not say that the depth of penetration to the “head” of the bay must equal the width of the bay’s entrance.⁸ That is a different measure. To illustrate, Monterey Bay is wider than its mouth (at least at some point), but the distance to the “head” of the bay from its entrance is clearly less than the bay’s opening. See Ex. AK-470; see also Ex. AK-471 (Ascension Bay). North and South Bays would meet even a 1:1 test, but the fact that recognized bays would not casts doubts on the viability of the requirement. Even Strohl admitted that his 1:1 standard for penetration is likely to be ignored. Mitchell P. Strohl, The International Law of Bays 57 (1963) (Ex. AK-480). In any event, debate about a minimum ratio need not be resolved in order to confirm the bay status of North and South Bays.⁹

⁸ Indeed, Hodgson envisioned landlocked bays with ratios of penetration to width near 1:2. His preferred method of measuring penetration was the straight line method the United States now asserts calls for a 1:1 ratio. Id.

⁹ The penetration for each bay is so great that disagreements over the location of the lines of penetration are also immaterial. Nevertheless, Alaska’s approach has been appropriate. The United States’ suggestion that Lynn Canal is not a proper terminus for the penetration line, see US Count II Opp. at 42, is absurd. Lynn Canal is part of the area of the bay for the purposes of the semi-circle test, and it is obviously a direct continuation of Chatham Strait. See Reed, supra, at 232 n.142 (penetration can be measured to a point included in the area of the bay under the semi-circle test, even if that area could be separately closed off) (Ex. AK-481); The Fisheries Case (U.K. v. Norway), 1951 I.C.J. 116, 141 (Dec. 18) (depth of penetration properly measured to most inland point).

Also, Alaska’s selection of seaward anchors for its lines of penetration is a reasonable approach for multiple-mouth bays. Cf. US Count II Opp. at 38-39.

III. RECOGNITION OF NORTH AND SOUTH BAYS AS JURIDICAL BAYS IS CONSISTENT WITH THEIR CHARACTER AND USE

The United States attempts to distinguish the use of North and South Bays from the use the Court found buttressed a finding of bay status for Long Island Sound. The distinction fails. North and South Bays are adjacent bays, like Long Island Sound and New York Harbor. The fact that some vessels enter South Bay before entering North Bay is unremarkable. In Maine, it was accepted that vessels entered Long Island Sound bound either for points within or in the adjacent

Where islands occupy a large proportion of the area between the mainland shores of the bay, it may not be possible to reach a point near the most inland point of the indentation from the natural entrances. In such circumstances, a line joining the mainland headlands can approximate the limits of the bay and provide a reasonable base for assessing the depth of the penetration.

The United States' complaint that one of the straight lines for South Bay is anchored seaward of the fallback lines under Article 7(5), id. at 43 n.19, is unfounded. Areas beyond the fallback lines are still a part of the bay; Article 7(5) simply provides that they are not ultimately enclosed as part of the State's inland waters. The measure of penetration for a bay should capture the depth of penetration inland from the limits of the bay. Using the bay's entrances clearly accomplishes that goal.

In North Bay, Alaska did not anchor its straight penetration line from the line across the entrance at Chatham Strait, in order to avoid controversy over the entrance location. See AK Count II Mem. at 31 n.17. Mindful that the penetration could readily be understated and still pass any reasonable standard, Alaska used the less favorable line already drawn from Cape Spencer to Cape Decision as a simple expedient.

New York Harbor. Vessel traffic not bound for points within either of those waters did not use them as a through-way. Maine, 469 U.S. at 519.¹⁰

The use of North and South Bays is comparable. Major shipping routes bypass the waters of the Inside Passage, as do vessels in the Alaska trade. See AK Count II Mem. at 44-45; Exs. AK-166 to AK-168. The United States responds by treating “distant destinations” within North Bay as if they were the equivalent of destinations outside the bays. See US Count II Opp. at 28. This is untenable. The ports reached within North Bay, however distant from each other, share landlocked waters. Moreover, the normal traffic pattern for vessels serving Southeast has long been to visit several ports in succession. See, e.g., Ex. AK-133 at 36. The routing of the Alaska Ferry is a prime example. See Ex. US-II-31 at 12.

The United States also asserts that oceangoing traffic heads for distant destinations “beyond” North Bay, but the United States fails to support or explain the significance of its assertion. Some cruise ship traffic certainly heads to other ports in Alaska, outside Southeast, but not before making ports of call in both North and South Bays. See Ex. AK-7 at 1. Such use by vessels—visiting ports in Southeast—does not establish a route of international “passage.” The Canadian

¹⁰ The waters of bays do not lose their integrity as “enclosures” because of the presence of an additional opening between the islands. See Louisiana, 394 U.S. at 61. And as in Maine, the additional openings here are not even outlets to the sea. Maine, 469 U.S. at 519.

vessels which have visited Skagway or Wrangell, for example, come to the American port, unload, and either proceed to another port in Southeast or return home. Such visitors are welcome, as they would be in most bay ports. Their presence does not make the area visited anything other than a bay.

To the extent that the traffic “beyond” Southeast refers to overland routes, it is irrelevant. Passengers disembarking at bays frequently travel further. That a port may serve as a hub for trade, commerce, or transportation services is entirely bay-like. Thus, any transport of Canadian goods or passengers beyond the port, across United States territory, does not convert a vessel’s route to port into an international passage. For example, New York Harbor is plainly a bay even though some goods or people unloaded there may find their way to Canada.

The sole evidence identified by the United States that the waters of North and South Bays were used as a route of actual international passage is a flyer from the Gold Rush era that advertises a route from Vancouver traversing some part of the Inside Passage. See Ex. US-II-31 at 9. That isolated record from 100 years ago is insufficient to support the characterization of the waters of North and South Bays as a route of international passage. Most vessel routes supporting the Gold Rush did not cut through the Inside Passage; they terminated in it. See id. at 7-11. And the un rebutted evidence of current use is, as in Maine, free of international passage through North and South Bays.

IV. THE SMALLER BAYS SATISFY ARTICLE 7

A. The Islands Forming Sitka Sound Are Properly Considered Part Of The Mainland Coast

The United States' challenge to the assimilation of Partoshikof Island to Baranof Island rests solely on the observation that commercial vessels use Neva Strait when traveling between Sitka and other ports in Southeast Alaska. See US Count II Opp. at 22. That traffic is no bar to assimilation. Maine teaches that mere use of a waterway does not preclude assimilation, as the East River experienced heavy use. See 469 U.S. at 518. The proper inquiry takes into account the nature of the channel and the quality of use. Like the East River, Neva Strait was more than challenging; it was dangerous. Even after improvements by dredging, the channel was considered to "seriously hinder traffic and pose definite threats to life and property." Ex. AK-177 at 101. See also AK Count II Mem. at 50-53; AK Count II Opp. at 49. The limited utility of Neva Strait compares well with the characteristics of the East River. It presents no bar to assimilation.

B. There Is No Significant Dispute Over The Location Of The Closing Lines For Sitka Sound

There is merit to the United States' observation that Sitka Point should be used as the western entrance point for Sitka Sound. But the United States' selection of the eastern mainland entrance point is too far landward. The more seaward eastern point originally identified by Alaska satisfies the 45° test.

See Ex. AK-482; see also Ex. AK-173. Islands intersected by this mainland-to-mainland line form separate mouths to the bay. Hodgson describes the process of identifying closing lines between the sequence of intersected islands as a simple exercise. See Ex. AK-151 at 12. Exhibit AK-482 records the application of this method to the sequence of intersected islands, and identifies fair estimated closing lines for Sitka Sound. The location of the closing lines presents no genuine dispute. See Joint List of Subsidiary Issues at 7 (filed Apr. 16, 2001).

C. Cordova Bay Is A Juridical Bay

Whether Dall and Prince of Wales Islands form a juridical bay should be determined based upon the characteristics of the waters where the features in fact come together, not all the waters ostensibly between the features. The waters at Tlevak Narrows are narrow and certainly less bay-like than nearby waters. And as explained above, the simple fact of commercial use of the waters does not bar assimilation.

CONCLUSION

For the foregoing reasons, and those set forth in Alaska's motion and in its opposition to the United States' motion, summary judgment should be granted in favor of Alaska on Count II.

Respectfully submitted,

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