

**Supreme Court of the United States**

No. 128, Original

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STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

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**REPLY IN SUPPORT OF ALASKA'S MOTION FOR  
SUMMARY JUDGMENT ON COUNT III—TONGASS**

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December 20, 2002

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In response to the State's motion for summary judgment on Count III of the amended complaint, the United States has acknowledged that it did not retain title to the submerged lands within the Tongass National Forest at statehood. Its brief states that with "the benefit of Alaska's full articulation of the basis for its claim" it is now "the position of the United States that the State of Alaska does have a valid claim to the majority of the disputed marine submerged lands within the Tongass National Forest." United States Mem. in Response to Alaska's Mot. for Summ. Judg. on Count III ("US Count III Response") at 3.

Despite this dispositive concession, the United States asks the Special Master to put aside the State's motion for summary judgment on Count III, and to defer making a recommendation on it until an undetermined future date. This

delay is not for a reason related to the merits of the claims at issue in this case; the United States suggests that while Count III raises only the issue of whether the Tongass National Forest reservation defeated state title, the parties might meet and settle title clouded by hundreds of other, smaller, more particularized reservations in Southeast Alaska.

The State believes that the Special Master should proceed on schedule with Count III and decide the motion for summary judgment in Alaska's favor. The parties were precise in clarifying—both with each other and in the initial pleadings filed with the Court—that this litigation would not include any other types of reservations that potentially overlapped with the Tongass reservation. In its response to Alaska's motion to file its complaint, the United States specifically stated its understanding that this action did not involve “marine submerged lands \* \* \* over which the Forest Service and the National Park Service do not claim administrative jurisdiction,” including lighthouse sites administered by the Coast Guard, Indian cannery sites, and tidelands associated with Fish and Wildlife Service piers. Brief for the United States at 18, 19 (filed Apr. 12, 2000). The United States expressed its view that the Court lacked jurisdiction to consider those reservations and also noted that, if the Court were nevertheless to accept such jurisdiction, “considerable resources could be expended by this Court and the parties in determining the location and status of

small tracts that would be more appropriately litigated—if at all—through an action in federal district court.” Id. at 19, 20.

In reply, Alaska confirmed that Count II of its complaint (now Count III of the amended complaint) sought to quiet title only to “ ‘those marine submerged lands that are currently included in and administered by the Forest Service as part of the Tongass National Forest,’ ” and that the other reservations identified by the United States in its brief “are not included within the State’s complaint.” Reply Brief for Plaintiff at 1-2 (filed Apr. 25, 2000) (quoting Brief for United States at 18).

The State’s objective for Count III remains to establish title to those submerged lands within only the Tongass reservation. This limitation is appropriate given the posture of the litigation. The Court accepted the case based only on the counts presented, and the Special Master sits to decide the issues actually raised in the complaint filed in the case. He should not delay the case for issues not before him—including the status of lands potentially subject to other reservations—which can be resolved later in a different forum. If the United States had any argument that Alaska is not entitled to specific submerged lands that are solely within the Tongass reservation, the United States could have, and should have, presented those arguments in opposition to Alaska’s motion for summary judgment. It did not, and Alaska’s motion should therefore be granted,

confirming its title to all submerged lands within the boundaries of the Tongass reservation and administered by the Forest Service.<sup>1</sup>

In any event, settlement of so many other prestatehood reservations is an unrealistic proposition. The State cannot bargain with submerged lands, because it holds them in trust for the people of Alaska. CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1117 (Alaska 1988). On the rare occasion when the State conveys submerged lands, it transfers them subject to the public's rights to use them for navigation, commerce, and fishing. Id. at 1118. The United States, on the other hand, conveys retained submerged lands to private property owners without any requirement that they remain available for public use. See, e.g., Alaska v. United States, 213 F.3d 1092, 1093 (9th Cir. 2000) (based on its

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<sup>1</sup> While the United States claims that certain tidelands adjacent to some log transfer facilities within the Tongass may have been filled before statehood and thus fall within an exception to the Submerged Lands Act, it fails to establish this for any particular site. See US Count III Response at 8. This indefinite statement is insufficient to defeat summary judgment. In addition, to the extent the lands were not even submerged at statehood, they are not before the Court in this case. The United States also claims that two National Forest areas closed by regulation to hunting each contain a salt-water lagoon that falls within Section 6(e) of the Alaska Statehood Act. This also does not defeat summary judgment. The United States has not challenged the State's assertion that the Tongass National Forest Reservation was never intended to include submerged lands, see Mem. in Supp. of Alaska's Mot. for Summ. Judg. on Count III at 6-42, and, in any event, Section 6(e) is unavailing for the reasons set forth in the State's opposition brief on Count IV. See Alaska's Opp. to the United States' Mot. for Summ. Judg. on Count IV at 43-48.

position that it retained the lands underlying the Kukpowruk River within a prestatehood reservation, the United States conveyed substantial parts of the bed to two corporations). Because of the importance of submerged lands to the public, the State could stipulate to federal title only with a high degree of certainty that the State had no colorable claim to them. Further, given the strong protection for public access to tidelands and navigable waters in the Alaska Constitution<sup>2</sup> and the Alaska Statutes,<sup>3</sup> state officials will be unlikely to approve a settlement of federal claims without convincing evidence. As the United States indicated in its brief responding to Alaska's motion to file this action, investigating title for hundreds of ad hoc reservations would require a significant amount of time and money, and there may be little reason to settle title to particular areas not currently subject to any active dispute.

Resolving title to the submerged lands within these particularized reservations is better left to a time when the parties have a reason for doing so,

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<sup>2</sup> See Alaska Const. art. VIII, § 3 (fish, wildlife, and waters are reserved to the people for common use); id. art. VIII, § 6 (submerged and tidal lands possessed by the State are part of the state public domain); id. art. VIII, § 14 (free access to the navigable or public waters of the State shall not be denied any citizen of the United States).

<sup>3</sup> See Alaska Stat. § 38.05.127 (State retains easements to navigable waters when it conveys upland interests); Alaska Stat. § 38.05.128 (obstructions to navigable waters prohibited).



outside the scope of this action. From the State's perspective, no reason currently exists. The impact of the United States' suggestion would be primarily to divert attention away from Count III until after the other counts are resolved.

Eliminating the Count III issues from summary judgment would, however, be detrimental to a full understanding of the rest of the case. Most significantly, the Tongass history establishes that the United States does not necessarily intend to reserve lands underlying marine waters when it creates a reserve with boundaries extending through ocean waters. The evidence demonstrates that for the half-century preceding statehood, the United States consistently took the position that submerged lands within those boundaries were not part of the forest and did not fall under the jurisdiction of the Forest Service. And although the United States does not concede that the submerged lands were not reserved before statehood, it argues primarily that the tidelands must have been reserved because the harvested timber was transported over them, from uplands to water. US Count III Response at 5 n.3. However, because the tidelands were federally-owned before statehood, access over them would not have required that they be reserved as National Forest lands, and this argument does little to counter the consistent position of the United States that the Forest Service had no jurisdiction over the Tongass tidelands before statehood.

Moreover, it does not even address the lands seaward of low tide—by far most of the submerged lands within the Tongass boundaries.

Further, regardless of the United States' current position on the significance to title of reservation boundaries enclosing marine waters, certain aspects of the Tongass reservation demonstrate that, by definition, not all marine waters within the boundaries could have been reserved. As the State explained in its summary judgment motion, the boundaries of the 1909 reservation extended beyond the national boundaries claimed by the United States at the time. Further, the United States claims that the areas more than three miles from land within the Alexander Archipelago—the pockets and enclaves at issue in Counts I and II—were not within the United States at the time. These lands were unquestionably within the reservation boundaries, but the United States could not have taken the position that they were reserved as part of the Tongass National Forest. Based on these elements of the Tongass reservation, the United States cannot seriously argue in the context of the Glacier Bay National Monument that submerged lands within the reservation boundaries are necessarily reserved. The effort to take Count III “off the table” is simply an effort to avoid the significance of the United States' concessions on Count III to analysis of Count IV. The Court should grant summary judgment in favor of the State on Count III in accord with Alaska's unanswered arguments and the Federal Government's concessions.

## CONCLUSION

For the foregoing reasons and those set forth in Alaska's motion for summary judgment, summary judgment should be granted in favor of Alaska on Count III.

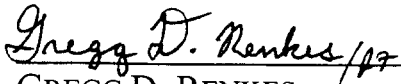
Respectfully submitted,

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