IN THE SUPREME COURT OF THE UNITED STATES

No. 128, Original

STATE OF ALASKA,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

Before the Special Master
Gregory E. Maggs

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

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In accordance with Rule 56, Fed. R. Civ. P., the United States moves for partial summary judgment on Count I of the Amended Complaint of the State of Alaska in this original action. Specifically, the United States moves for an order ruling that the waters of the Alexander Archipelago are not historic inland waters, decreeing that Alaska does not possess title to the associated submerged lands that it claims on that basis, and entering judgment on Count I in favor of the United States. There are no disputed material issues of fact and the United States is entitled to judgment as a matter of law. This motion is supported by the attached Memorandum.

Respectfully submitted.

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

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INTRODUCTION

The State of Alaska brought this original action to quiet title to marine submerged lands in the vicinity of the Alexander Archipelago. The Special Master's Report on Intervention describes the nature and scope of the four counts of Alaska's amended complaint. *See* Report of Special Master on the Motion to Intervene 1-3 (Nov. 2001) (*First Report*). In Count I of the Amended Complaint, Alaska seeks to quiet title to certain disputed lands on the theory they are historic inland waters within the meaning of the Convention on the Territorial Sea and the Contiguous Zone, Sept. 10, 1964, 15 U.S.T. 1606 *et seq.*, T.I.A.S. 5639 (the Convention), and that they therefore qualify as inland waters. *See* Amended Compl. paras. 4-22.; *First Report* 2.[1] The United States contends that those waters are territorial sea. The resolution of this dispute will have two major consequences, one domestic and one international.[2]

On the domestic front, if the waters at issue are inland, then title to the seabed beneath them, unless reserved by the United States, was transferred to Alaska at statehood under the equal footing doctrine. *United States v. Alaska*, 521 U.S. 1, 5 (1997); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845); Alaska Statehood Act, Pub. L. No. 85-508, 48 U.S.C. 21 (preceding note). If they are territorial sea, Alaska holds title to submerged lands within 3 nautical miles of the mainland and islands (subject to federal reservations), and the United States retains title to those submerged

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[1] The Convention is set out in the United States' Exhibits US-I-7 and US-II-2. Please see the Table of Exhibits for an explanation of the designation of exhibits used in this memorandum.

[2] The Convention and domestic law employ slightly different terminology. For purposes of this memorandum (as well as the United States' memoranda in support of motions for summary judgment on Counts II and IV), the Convention terms "territorial sea," "internal waters," "baseline," and "innocent passage," are synonymous (and used interchangeably) with the respective domestic terms "marginal sea," "inland waters," "coast line," and "free passage."

lands farther offshore. Submerged Lands Act of 1953 (SLA), 43 U.S.C. 1301 *et seq.*[3] On the international front, if the waters at issue are inland, then they are totally subject to the United States' sovereignty and dominion. If they are part of the territorial sea, then, pursuant to the Convention, they are subject to the international right of innocent passage. Arts. 14-23, 15 U.S.T. 1610-1612.

The United States has compelling reasons for objecting to Alaska's historic waters claims. As an initial matter, Alaska's theory would dispossess the United States of lands that are held by the United States under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.*, for the benefit of all the American people. The United States determined, more than 30 years ago, through its Law of the Sea Committee on the Delineation of the Coastline of the United States (the Coastline Committee) that those lands are not located within inland waters. *See* 3 Reed, *Shore and Sea Boundaries,* 359-361, 415-418 (2000). If Alaska's claims are accepted, the United States would irretrievably be dispossessed of approximately 777 square statute miles of submerged lands that are held for the benefit of all of its citizens. The issues here, however, transcend that acreage, which appears to have limited economic value. The international precedent of this case has important consequences for the United States' foreign relations and national defense.

As a maritime nation and naval power, the United States has consistently championed a

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[3] As illustrated in Exhibit 1 to Alaska's Amended Complaint, in the absence of federal reservation of submerged lands at the time of statehood, the majority of the submerged lands within the Alexander Archipelago would have been transferred to Alaska in either case. (Alaska separately disputes that the United States reserved the submerged lands within the Tongass National Forest and Glacier Bay National Monument through Counts III and IV of the Amended Complaint. For purposes of its motions for partial summary judgment on Counts I and II, the United States postpones discussion of those reservations.) Because there is no point within the Archipelago that is more than 12 miles from the nearest island or the mainland, all of the waters are within the 12 nautical mile territorial sea of the United States. Presidential Proclamation No. 5928 of December 27, 1988, 54 Fed. Reg. 777.

policy of freedom of the seas. *See, e.g.,* Roach & Smith, *United States Responses to Excessive Maritime Claims* 3-6 (1996); Swartztrauber, *The Three Mile Limit of Territorial Seas* 252 (1982); Bouchez, *The Regime of Bays in International Law* 84 (1964); *Hearings on Submerged Lands before the Sen. Committee on Interior and Insular Affairs*, 83rd Cong., 27-28 (1953). That policy is "essential to [the United States'] maritime commerce and national security." Roach, *supra*, at 3. As the Department of the Navy explained to Congress more than 50 years ago:

> The time-honored position of the Navy is that the greater the freedom and range of its warships and aircraft, the better protected are the security interests of the United States because greater utilization can be made of warships and military aircraft.

H. Rep. No. 82-2515, at 18 (1952). Given the United States' "dependence on the sea to preserve legitimate security and commercial ties, the freedom of the seas will remain a vital interest. . . . Recent events in the Gulf, Liberia, Somalia, and elsewhere show that American seapower, without arbitrary limits on its . . . operations, makes a strong contribution to global stability and mutual security." Roach, *supra*, at 3 n.3 (quoting National Security Strategy of the United States (Aug. 1991)).

In order to protect national security, and as a matter of demonstrating its own self-restraint in conformity with that interest, the United States has both restricted its inland water claims and resisted the extravagant claims of others. It has regularly advocated, through diplomatic channels and in international fora, that foreign nations likewise define their own inland waters narrowly to preserve the right of innocent passage through coastal waters and that they join the United States in resisting such claims by other nations. Roach, *supra*, at 3-4.[4] Indeed, the United States has been at

[4] There are numerous other examples of the United States' articulation of a restrictive theory of maritime claims and of the international community's recognition that the United States

the forefront in actively and forcefully opposing extravagant foreign claims of maritime sovereignty. For example, since 1948 the United States has filed more than 140 diplomatic notes opposing excessive foreign maritime claims. Roach, *supra*, at 7. *See, e.g., id.* at 15-28, 31-34, 77-81, 161, 172, 186-192, 203-208, 214-222, 236-251, 266-267, 296-359 (describing diplomatic actions). The United States has further reinforced its diplomatic stance through military action. Beginning in 1979, the United States initiated its Freedom of Navigation Program "to further the recognition of the vital national need to protect maritime rights throughout the world." *Id*. at 5. That program includes "[o]perations by U.S. naval and air forces designed to emphasize internationally recognized navigational rights and freedoms." *Id.* at 10. Those forces "have exercised their rights and freedoms in all oceans against objectionable claims of more than 35 countries at the rate of some 30-40 per year." *Id.* at 11. *See, e.g.*, *id*. at 49-52 and 242-251 (Russia), 141-142 (Libya), and 339-353 (Canada).[5]

As part of its international policy, to set a conservative example and avoid precedents which might be cited in support of foreign claims, the United States has limited this Nation's inland water claims. The United States must therefore voice strong objections when a State of the Union urges the Supreme Court to adopt historic inland waters principles that are inconsistent with that important and established foreign policy. The legal theory that Alaska puts forward in Count I is inconsistent

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adheres to that policy. *See* US-I-14; US-II-11.

[5] As President Reagan stated, the United States will not "acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses." Ocean Policy Statement (Mar. 10, 1983), reprinted in 1 *Public Papers of the Presidents: Ronald Reagan* 378 (1983). See also US-I-1 at 201-203 (description).

with governing legal principles and the positions that the United States puts forward in the international arena. Although historic waters claims often entail a fact-intensive inquiry, in this case, Alaska's legal theory is plainly inadequate to support judgment in its favor under the controlling principles of law. Because there appear to be no genuine issues of material fact in dispute as to the controlling legal considerations and the federal government is entitled to judgment as a matter of law, the United States moves for summary judgment on Count I. *See* Fed. R. Civ. P. 56(b) & (c).

STATEMENT

The resolution of Count I turns on the application of well established principles, originating in international law and embraced by the Supreme Court, governing claims of historic inland waters. The discussion that follows: (A) reviews the settled legal requirements that a sovereign must satisfy to claim historic inland waters; (B) describes the Supreme Court's application of those principles to specific geographic areas; and (C) explains the basis on which Alaska asserts an historic inland waters claim in this case.

A. The Legal Requirements For Establishing An Historic Waters Claim

The Convention on the Territorial Sea and the Contiguous Zone preserves the rights of coastal nations to claim inland waters based on historic practices. *See* Art. 7(6), 15 U.S.T. 1609. Nevertheless, international law recognizes that such claims are "exceptional." *E.g.*, Blum, *Historic Titles In International Law* 261 (1965); *see* US-I-1 p.26-36. Such claims are rarely recognized and narrowly construed precisely because they are "contrary to the generally applicable rules of international law." Bouchez, *The Regime of Bays in International Law* 281 (1964). *See, e.g.*, 3 Gidel, *Le Droit International Public de la Mer* 623 (1934). Those claims "share one all-important and never-to-be-forgotten attribute: That is that they are normally established at the expense, and to

the detriment, of the community of nations as a whole." Blum, *supra*, at 248. *See generally* US-I-1 p.39-58.

The Supreme Court has articulated comparable standards, drawn from principles of international law, for discerning the United States' historic inland waters in domestic disputes. *United States v. Alaska*, 521 U.S.1, 11 (1997). For a body of water to qualify as an historic bay,

> the coastal nation "must have effectively exercised sovereignty over the area continuously during a time sufficient to create a usage and have done so under the general toleration" of the community of nations.

Ibid. ((quoting Juridical Regime of Historic Waters, Including Historic Bays, [1962] 2 Y.B.Int'l L. Comm'n 1, ¶132, U.N. Doc. A/CN.4/143 (1962) (Juridical Regime), US-I-4. *Accord United States v. Maine*, 475 U.S. 89, 95 & n.10 (1986); *United States v. Louisiana*, 470 U.S. 93, 101-102 (1985); *United States v. Alaska*, 422 U.S. 184, 189 (1975); *United States v. Louisiana*, 394 U.S. 11, 23-24 n.27 (1969); *United States v. California*, 381 U.S. 139, 172 (1965). "Accordingly, where a State within the United States wishes to claim submerged lands based on an area's status as historic inland waters, the State must demonstrate that the United States: (1) exercises authority over the area; (2) has done so continuously; and (3) has done so with the acquiescence of foreign nations." *Alaska*, 521 U.S. at 11. The State bears the heavy burden of satisfying these "strict evidentiary requirements." *Ibid.*

1. The actual exercise of sovereign authority. Under international and domestic law, an historic waters claim cannot be predicated upon a mere proclamation of jurisdiction over the relevant waters. Rather the coastal nation must take actions that demonstrate its claim of sovereignty. As the Supreme Court has stated, "a legislative declaration of jurisdiction without evidence of further active and continuous assertion of dominion over the waters is not sufficient to establish the claim."

California, 381 U.S. at 174. *See, e.g.,* Juridical Regime ¶98 ("On this point there is full agreement in theory and practice. Bourquin expresses the general opinion in these words: 'Sovereignty must be effectively exercised; the intent of the [coastal nation] must be expressed by deeds and not merely by proclamations.'"); *see, e.g.*, Bouchez, *supra* at 239 ("Therefore, our starting point is that, when a [coastal nation] wants to create exclusive territorial competencies contrary to the generally applicable rules of international law, the exercise of sovereignty must be effectively demonstrated."); Pharand, *The Law of the Sea of the Arctic* 107 (1973) ("the coastal [nation] must exercise an effective control over the maritime area being claimed to the exclusion of all other [nations] from the area"). It is "essential that, to the extent that action on the part of the [coastal nation] and its organs was necessary to maintain authority over the area, such action was undertaken." *Louisiana*, 470 U.S. at 114 (quoting Juridical Regime ¶99); *see, e.g.*, US-I-1 p.144-151.

Furthermore, the coastal nation's actions must be consistent with the type of historic claim that it asserts. A coastal nation relying on historic title may claim the disputed waters as historic inland waters or as historic territorial sea. *Alaska*, 422 U.S. at 197; *Louisiana*, 394 U.S. at 24 n.28; Juridical Regime ¶13. Accordingly, the Court has recognized that a coastal nation's "exercise of authority necessary to establish historic title must be commensurate in scope with the nature of the title claimed." *Alaska,* 422 U.S. at 197; *see Louisiana*, 394 U.S. at 24 n.28 (quoting Juridical Regime ¶13). To establish a claim of historic *inland* waters, the coastal nation's "exercise of sovereignty must have been, historically, an assertion of power to exclude all foreign vessels and navigation." *Alaska*, 422 U.S. at 197. *See* Juridical Regime ¶164. ("If the claimant [nation] allowed the innocent passage of foreign ships through the waters claimed, it could not acquire an historic title to these waters as internal [i.e., inland] waters, only as territorial sea."); US-I-1 p.151-171.

A coastal nation may not only claim historic title, but it may also abandon or disclaim any historic rights. *Louisiana*, 394 U.S. at 28-29; *California*, 381 U.S. at 175.[6] Obviously, if the coastal nation publicly disclaims an area as historic inland waters, that action would normally eliminate any question that the area should be treated as such. In situations in which the United States has publicly disclaimed inland waters contrary to the interest of an individual State, the Court has nevertheless evaluated the circumstances to ensure that the disclaimer is effective. *Louisiana*, 470 U.S. at 111-112. *California*, 381 U.S. at 175. The Court has indicated that a disclaimer is normally "decisive" unless the evidentiary basis for an historic waters claim is "clear beyond doubt." *Ibid.* The Court has further indicated, however, that the United States cannot disclaim "ripened" historic title in ongoing domestic litigation simply to obtain an advantage over a State of the Union. *Louisiana*, 470 U.S. at 111-112; *see also Louisiana*, 394 U.S. at 77.

2. The continuous usage requirement. Under international and domestic law, the exercise of overt sovereign authority over the claimed waters must continue for a sufficient period of time "to create a usage." *Louisiana*, 470 U.S. at 102 (quoting Juridical Regime ¶132); *accord Louisiana,* 394 U.S. at 23-24 n.27; *see* Blum, *supra*, at 335-336; Bouchez, *supra*, at 250-254; Pharand, *supra*, at 108; 1 O'Connell, *The International Law of the Sea* 433 (1982); US-I-1 p.40-44. The Court has recognized that "no precise length of time can be indicated as necessary to build the usage on which the historic title must be based. It must remain a matter of judgment when sufficient time has elapsed for the usage to emerge." *Louisiana*, 470 U.S. at 102 n.3 (quoting Juridical Regime ¶104).

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[6] Alaska has recognized that the United States may abandon historic title. *See* US-I-5 p.3 (1961 Opinions of the Alaska Attorney General, No. 25 (Nov. 30, 1961)). *See also* US-I-1 p.171-183 (describing disclaimers).

Nevertheless, given that a continuous usage must be established among nations, the appropriate length of time must necessarily be "a long period." Jessup, *The Law of Territorial Waters And Maritime Jurisdiction* 476 (1927); *cf.* Bouchez, *supra*, at 256 (suggesting that time "immemorial," although sometimes been used, may be too onerous). If the government has disclaimed historic title before that title has "ripened," then the requirement of "continuity" would not be satisfied.[7]

3. The acquiescence of foreign nations. Under international law, a coastal nation's claim to historic waters, even if supported by sovereign acts and continuing over a long period of time, is ineffective in the absence of acceptance by the community of nations. Juridical Regime ¶126. *See, e.g.*, Blum, *supra*, at 248-249 (the coastal nation must show that the nation "whose rights have been encroached upon, or are likely to be infringed, by an historic claim has, by its conduct, acquiesced in such an exceptional claim"). "The United States has taken the position that an actual showing of acquiescence by foreign states in such a claim is required, as opposed to a mere absence of opposition." Roach, *supra*, at 31. *Accord* 2 Max Plank Institute, *Encyclopedia of Public International Law* 713 (1995) ("Since maritime historic rights are acquired at the expense of the whole international community, their establishment requires 'international acquiescence' of a representative body of States reflecting international toleration of an otherwise illegal situation.").

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[7] The Supreme Court and its special masters have found a basis for historic title only in those cases in which continuous usage has extended more than a century. *See Louisiana*, 470 U.S. at 102 (Mississippi Sound, 168 years sufficient); Report of the Special Master in *United States v. Maine*, (Oct. Term, 1984) (*Massachusetts Report*), at 62 (Vineyard Sound,182 years sufficient); Report of the Special Master in *United States v. Florida*, (Jan. 8, 1973) (*Florida Report*), at 42 (Florida Bay, 105 years would have been sufficient if other conditions had been satisfied). *See* US-I-1 p.42 (usage should usually exist for at least a century). The Court's special masters have determined that 52 years and 9 years, respectively, are insufficient to establish a usage. *Massachusetts Report* 69.3 (Nantucket Sound; 1932 Act is insufficient to demonstrate usage); *Florida Report* 46 (Florida Bay, 9-year oil leases insufficient to establish usage).

The Supreme Court has likewise adopted a requirement of "acquiescence." *Alaska*, 521 U.S. at 11. Obviously, the community of nations can acquiesce in a claim by the United States of historic title only if those nations know, or have reason to know, that the United States is claiming sovereignty over a body of water on that basis. The Supreme Court has specifically applied that principle to litigation between the United States and Alaska in the case of Cook Inlet, stating:

> The failure of other countries to protest is meaningless unless it is shown that the governments of those countries knew or reasonably should have known of the authority being asserted.

Alaska, 422 U.S. at 200. Accordingly, "[i]n the absence of any awareness on the part of foreign governments of a claimed territorial sovereignty over lower Cook Inlet, the failure of those governments to protest is inadequate proof of the acquiescence essential to historic title." *Ibid*. *Cf. Louisiana*, 470 U.S. at 110 (where "the United States publicly and unequivocally stated that it considered Mississippi Sound to be inland waters," the "failure of foreign governments to protest is sufficient proof of the acquiescence or toleration necessary to [establish] historic title").

4. The burden and quantum of proof. Under international and domestic law, "[t]he onus of proof rests on the [coastal nation] which claims that certain maritime areas close to its coast possess the character of internal waters which they would not normally possess." Juridical Regime ¶150 (quoting 3 Gidel, *supra*, at 632). The burden rests with the coastal nation because that nation's claims "constitute an encroachment on the high seas; . . . which remains the essential basis of the whole public international law of the seas." *Ibid*. *See also id*. at 62-63; Strohl, *The International Law of Bays* 252 (1963); Bouchez, *supra*, at 281; Blum, *supra*, at 232; 4 Whiteman, *Digest of International Law* 250 (1965); US-I-1 p.37-39. Furthermore, the coastal nation must put forward an extraordinary quantum of proof:

> If the right to "historic waters" is an exceptional title which cannot be based on the general rules of international law or which may even be said to abrogate these rules in a particular case, it is obvious that the requirements with respect to proof of such title will be rigorous. In these circumstances the basis of the title will have to be exceptionally strong. The reasons for accepting the title must be persuasive; for how could one otherwise justify the disregarding of the general rule in the particular case?

Juridical Regime ¶40; *see ibid.* (Because "[T]he coastal [nation] which makes the claim of 'historic waters' is asking that they should be given exceptional treatment; such exceptional treatment must be justified by exceptional conditions." (quoting 3 Gidel, *supra*, at 635)); *accord* Westerman, *The Juridical Bay* 180 (1987) (The coastal nation asserting an historic claim must provide "extraordinary proof of historic usage.").

The Supreme Court has likewise made clear that, if a State "wishes to claim submerged lands based on an area's status as historic inland waters," the State "must demonstrate" that the necessary conditions are satisfied. *Alaska*, 521 U.S. at 11. The Court has further characterized those conditions as "strict evidentiary requirements." *Ibid.* If the United States has disclaimed historic title, then "questionable evidence of continuous and exclusive assertions of dominion over the disputed waters" is insufficient to overcome that disclaimer. *California*, 381 U.S. at 175. Rather, the disclaimer is normally "decisive" unless historic title is "clear beyond doubt." *Ibid.* A disclaimer would be ineffective only if the United States has disclaimed historic title after the onset of litigation with the affected State and after historic title has ripened. *See Louisiana*, 470 U.S. at 112.

B. The Supreme Court's Application Of Historic Waters Principles To Specific Geographic Areas

The Supreme Court has applied historic waters principles in federal-state litigation to six specific geographic areas. In five of the six instances, the Court has rejected the State's historic

waters claim. Each of those six decisions has a bearing on Alaska's claim in this case. We first summarize, in chronological order, the five cases rejecting historic waters claims. We then turn to the single case in which the Court has upheld such a claim over the United States' objection.[8]

1. Decisions rejecting historic waters claims. The Court first addressed an historic waters claim arising from federal-state litigation in *United States v. California*, 381 U.S. at 172-175. California asserted that portions of its coast, including Santa Monica and San Pedro Bays, constitute historic inland waters, relying on that State's constitution, laws, and court decisions. The Court rejected that claim. It identified the controlling legal principles, set out above, and concluded that "a legislative declaration of jurisdiction without evidence of further active and continuous assertion of dominion over the waters is not sufficient to establish the claim." *Id*. at 174. The isolated court decisions that California cited were also insufficient. *Ibid*. The Court noted that the United States, through its position in the litigation, "disclaims that any of the disputed areas are historic waters" and that, in light of the "questionable evidence" California had provided, the United States' disclaimer is "decisive." *Id*. at 175.

The Court returned to the issue of historic inland waters in *United States v. Louisiana*, 394 U.S. at 23-32. Louisiana claimed that the United States' designation of an "Inland Water Line" for purposes of regulating navigation, had the effect of creating historic inland waters along the Louisiana coast. The Court rejected that claim, relying again on the principles set out above. It concluded that "it is universally agreed that the reasonable regulation of navigation is not alone a

[8] The United States has acknowledged several areas as historic inland waters, including Long Island Sound, in New York, and Vineyard Sound, in Massachusetts. *See United States v. Maine*, 475 U.S. 89, 91 (1986) (Vineyard Sound) ; 469 U.S. 504, 509 (1985) (Long Island Sound).

sufficient exercise of dominion to constitute a claim to historic inland waters" and that "enforcement of navigation rules by the coastal nation could not constitute a claim to inland waters from whose seaward border the territorial sea is measured." *Id.* at 24, 25-26. The Court reiterated its point in *California* that "the United States' disclaimer to the Court of any historic title" is "decisive in the light of 'questionable evidence of continuous and exclusive assertions of dominion over the disputed waters.'" *Id.* at 28-29.[9]

The question of historic waters arose again in *United States v. Alaska*, 422 U.S. at 189-204, which came to the Court by way of certiorari rather than through an original action. Alaska claimed that Cook Inlet constituted historic inland waters based on the Russian government's alleged assertion of such a claim, which the United States supposedly inherited. *Id.* at 190-192. Alaska additionally based its claim on the United States' and Alaska's regulation of fish and wildlife within those waters. *Id.* at 190-203. The Court rejected those claims, applying the familiar historic waters principles. It concluded that the evidence of Russian authority was insufficient to establish an historic waters claim, specifically noting that an imperial ukase "is clearly inadequate as a demonstration of Russian authority" because "the ukase was unequivocally withdrawn in the face of vigorous protests from the United States and England." *Id.* at 190, 191-192. The Court also ruled

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[9] Later in its decision, the Court declined to rule on Louisiana's claim that certain specific waters constituted historic inland waters and referred that issue to the special master. 394 U.S. at 74-77. *See id.* at 77 ("While we do not now decide that Louisiana's evidence of historic waters is 'clear beyond dispute,' neither are we in a position to say that it is so 'questionable' that the United States' disclaimer is conclusive."). Special Master Armstrong thereafter recommended rejection of Louisiana's historic waters claims, which rested on evidence of oyster leases, mineral leases, pollution control measures, and fisheries enforcement in the disputed areas. Report of the Special Master in *United States v. Louisiana* (July 31, 1974) (*Louisiana Report)*, at 21-22. The Court overruled Louisiana's exceptions without opinion. 420 U.S. 529 (1975).

that '[t]he enforcement of fish and wildlife regulations . . . was patently insufficient in scope to establish historic title to Cook Inlet as inland waters." *Alaska*, 422 U.S. at 197. "The assertion of national jurisdiction over coastal waters for purposes of fisheries management frequently differs in geographic extent from the boundaries claimed as inland or even territorial waters." *Id*. at 198-199. The state actions were likewise insufficient. *Id*. at 202-203.

In *United States v. Maine*, 475 U.S. at 93-105, Massachusetts claimed that Nantucket Sound constituted historic inland waters based on the theory, known as "ancient title," that the Massachusetts colonists laid claim to those waters before the principle of freedom of the seas became established in the middle of the 18th century. The Court concluded that the evidence was insufficient to establish Massachusetts' claim, and the Court expressed its unwillingness "to enlarge the exception in Article 7(6) of the Convention for historic bays to embrace a claim of 'ancient title' like that advanced in this case." *Id*. at 105.[10]

Finally, in *United States v. Alaska*, 521 U.S. at 11-22, Alaska proposed a variation on an historic waters claim respecting Stefansson Sound along the Arctic coast. As the Court explained:

> Recognizing these strict evidentiary requirements [for demonstrating an historic waters claim], Alaska does not contend that the waters of Stefansson Sound are historic inland waters. Alaska does not purport to show any *specific* assertion by the United States that the waters of Stefansson Sound are inland waters. Rather, Alaska argues that, at the time it was admitted to the Union, the United States had a general, publicly stated policy of enclosing as inland waters areas between the mainland and closely grouped fringing islands.

Id. at 11-12. Alaska urged that this policy should be applied to Stefansson Sound to prevent the United States from "impermissibly" contracting the State's territory. *Id*. at 12. The Court rejected

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[10]Massachusetts also claimed historic title to Vineyard Sound and the Special Master recommended a ruling for the State on that question. The United States did not take exception.

that argument, concluding that "Alaska has not identified a firm and continuing 10-mile rule that would clearly require treating the waters of Stefansson Sound as inland waters at the time of Alaska's statehood." *Id.* at 20-21. *See* Report of the Special Master in *United States v. Alaska* (Mar. 1996) (*Alaska Report*), at 52-174.

2. The decision upholding an historic waters claim. The five foregoing cases, taken together, demonstrate that the Court has consistently adhered to the "strict evidentiary requirements" that govern historic waters claims, which require a clear showing that all three criteria for an historic waters claim are satisfied. *Alaska*, 521 U.S. at 11. The sole case in which the Court has recognized a disputed historic waters claim, *United States v. Louisiana*, 470 U.S. at 101-115, likewise demonstrates that a State must meet a high standard to establish such a claim.

In *Louisiana*, Mississippi claimed that Mississippi Sound, a shallow and relatively small "cul de sac" on the Gulf coast, constituted historic inland waters. 470 U.S. at 102-103. That body of water "has been an intracoastal waterway of commercial and strategic importance to the United States" but of "little significance to foreign nations." *Id.* at 102. It is "not readily navigable for oceangoing vessels" except by means of artificially maintained channels leading to Gulfport and Pascagoula, and such vessels have "no reason . . . to enter the Sound except to reach the Gulf ports." *Id.* at 103. The Court observed at the outset that "[t]he historic importance of Mississippi Sound to vital interests of the United States, and the corresponding insignificance of the Sound to the interests of foreign nations, lend support to the view that Mississippi Sound constitutes inland waters." *Ibid.*

The Court ultimately concluded that Mississippi Sound constituted historic inland waters because the United States had made "specific assertions of the status of the [Mississippi] Sound as inland waters." *Id.* at 107. Most significantly, the Court itself had previously decided in *Louisiana*

v. Mississippi, 202 U.S. 1 (1906), that the Sound constituted inland waters. 470 U.S. at 107-108. The Court also recited additional specific facts establishing that claim, including : (1) "the United States historically and expressly has recognized Mississippi Sound as an important internal waterway and has exercised sovereignty over the Sound on that basis throughout much of the 19th century" (*id.* at 106); (2) "[t]he United States continued to openly assert the inland water status of Mississippi Sound throughout the 20th century until 1971" (*id*. at 106); (3) foreign nations, which "have little interest in Mississippi Sound," had acquiesced in the United States' claim (*id*. at 110-111, 114); and (4) "historic title to Mississippi Sound had ripened" prior to the United States' "disclaimer of the inland-water status of the Sound in 1971" (*id*. at 112). Thus, the Court found that Mississippi had satisfied all three criteria for an historic water claim.

C. The Basis For Alaska's Historic Waters Claim In This Case

Alaska seeks to satisfy the Court's requirement that a State must demonstrate a "*specific* assertion by the United States" (*Alaska*, 521 U.S. at 11) that the waters of the Alexander Archipelago are inland waters on the basis of two statements, made by United States counsel, in disputes that did not involve the status of those waters. *See* Amend Compl. paras. 7, 14, 22; Alaska Brief in Support Of Motion For Leave To File Complaint (Ak. Compl. Br.) 12-15.

The first statement occurred in the Alaska Boundary Arbitration of 1903, in which the United States and Great Britain disputed the location of the land boundary separating southeastern Alaska from Canada. *See Alaska Report* 61-65 (describing the proceedings); Proceedings of the Alaskan Boundary Tribunal, S. Doc. No. 58-162 (2d Sess.) (1903-1904) (*Proceedings*) (multi-volume compendium of submissions). According to Alaska, when counsel for the United States in those proceedings disputed the British theory respecting the location of the land boundary, he made

"several unequivocal declarations that the waters of the Alexander Archipelago were inland waters of the United States." Ak. Compl. Br. 13. The United States disputes Alaska's characterization of the content and significance of those statements. *See* pp. 24-27, *infra.*

The second statement appears in a brief that the United States filed in *United States v. California*, *supra*. *See* Brief For The United States In Answer To California's Exceptions To The Report Of The Special Master 130-131 (Oct. Term 1964) (1964 U.S. Br.), US-I-6. That brief contains a discussion of the United States' historic delimitation practice indicating, consistent with the Court's conclusion in *United States v. Alaska*, 521 U.S. at 15-22, that the United States did not follow a consistent practice of coastline delimitation during the first half of the 20th century. *See* US-I-6 pp. 45-141. According to Alaska, the United States nevertheless "reiterated its stance" (Ak Compl. Br. 15) that the waters of the Alexander Archipelago are inland waters when it suggested that a rule respecting the treatment of straits, which it initially advocated but later abandoned, might apply to the Alexander Archipelago. The United States disputes Alaska's characterization of the content and significance of that statement as well. *See* pp. 27-31, *infra*.

In Alaska's view, those two statements, which are the lynchpins of its case, justify the conclusion that the waters of the Alexander Archipelago are historic inland waters. Ak. Compl. Br. 16. According to Alaska, those isolated statements, which were not discussed or endorsed by the tribunals, and apparently did not figure in their decisions, nevertheless manifest the United States' actual and continuous exercise of sovereignty over the Archipelago's waters as inland waters, in which foreign nations acquiesced. *Id*. at 17. In the United States' view, those statements are facially insufficient to satisfy the "strict requirements" for establishing an historic waters claim.

SUMMARY OF ARGUMENT

The United States is entitled to summary judgment because Alaska has failed to present a sufficient basis, as a matter of law, to establish an historic inland waters claim. To establish that claim, Alaska must show that the United States: (1) actually exercised sovereignty over the waters of the Alexander Archipelago as inland waters; (2) has done so continuously over a period of time sufficiently lengthy to create a usage among nations; and (3) has done so with the acquiescence of the community of nations. Alaska's case fails on each of those elements without regard to any dispute among the parties over questions of fact.

First, Alaska's case fails as a matter of law because the supposed exercise of sovereign authority that forms the centerpiece of Alaska's case consists of the arguments of government lawyers in arbitral and judicial proceedings where the status of the Archipelago's waters was not even at issue. Statements of counsel in such proceedings cannot constitute the sort of exercise of sovereign authority that is required to establish an inland waters claim because they fail to put the international community on notice of the claim. The United States would not accept such statements as an adequate basis for putting this Nation on notice of a foreign nation's exceptional inland water claims. Under principles of reciprocity, the United States would not expect foreign nations to accept such statements as adequate notice of this Nation's claims. The statements on which Alaska relies in this case are manifestly inadequate because those isolated statements, extracted from voluminous submissions, did not unequivocally assert that the Archipelago's waters were inland. The tribunals neither discussed those statements nor rendered any judgments on the status of those waters. Alaska has no basis, apart from those statements, for claiming that the United States made a "*specific* assertion" that the Archipelago's waters were inland.

Second, Alaska cannot show that the United States has continuously claimed, much less exercised, sovereign authority over the Archipelago's waters for a sufficient period of time to establish a usage. Even if the statements that the United States made in the 1903 arbitration were sufficient to constitute a suggestion of sovereign authority and put the world on notice of an exceptional claim, they were inconsistent with this Nation's prior practice and were promptly and repeatedly contradicted by this Nation's later statements and actions. The United States took a contradictory position in the 1910 North Atlantic Fisheries Arbitration, it proposed an inconsistent position for determining inland waters at the 1930 League of Nations Conference, and it repeatedly rejected the suggestion that the Archipelago's waters were inland from the 1920s through the 1950s. Not surprisingly, the 1957 United Nations study, made in preparation for the 1958 Conference on the Law of the Sea, recognized that the United States delimited the Archipelago's waters as territorial sea. Following the United States' ratification of the Convention in 1961, it publicly disclaimed their inland water status by issuing charts, in 1971, identifying those waters as territorial sea and high seas. Under those uncontroverted facts, Alaska cannot show a continuous claim of sovereignty that ripened into a usage.

Third, Alaska cannot demonstrate that foreign nations acquiesced in any United States claim. Alaska's evidence of acquiescence consists, again, of ambiguous statements drawn from arbitral proceedings in which the status of the Archipelago's waters was not at issue. Those statements are insufficient, as a matter of law, to establish acquiescence. By contrast, incontrovertible facts leave no room for doubt that foreign nations have not acquiesced in the non-existent claim. No foreign nation has publicly recognized the Archipelago's waters as inland waters, no publication describes those waters as inland, and no foreign nation has been deterred from freely entering those waters

pursuant to the right of innocent passage that pertains to the territorial sea. Indeed, foreign flag vessels freely navigate the Archipelago's waters, as they have done throughout this century. The United States' allowance of innocent passage reflects the shared understanding of the international community that the waters of the Alexander Archipelago are territorial sea.

ARGUMENT

ALASKA HAS FAILED TO PUT FORWARD A SUFFICIENT BASIS FOR AN HISTORIC INLAND WATERS CLAIM

Historic waters claims, by definition, are "exceptional" claims that depart from normal baseline principles. Often, the determination whether a particular body of water constitutes historic inland waters involves a fact-intensive inquiry warranting a trial. In this case, however, a trial is unnecessary because the State's proffered historic waters theory, at the threshold, is untenable. Alaska predicates its claim that the waters of the Alexander Archipelago are historic inland waters on the basis of statements, made by government lawyers in arbitral and judicial proceedings, that are insufficient, as a matter of law, to support an historic inlands waters claim. Alaska has not revealed any "*specific* assertions by the United States" (*Alaska*, 521 U.S. at 11), apart from those inadequate statements, for supposing that the disputed waters are inland waters. To the contrary, the Supreme Court's decisions, including two decisions involving similar Alaskan claims, have already foreclosed such arguments.

The historical record has already been thoroughly canvassed in the previous *Alaska* proceedings. *See Alaska*, 521 U.S. at 15-22; *Alaska*, 422 U.S. at 191-204; *Alaska Report* 52-172. It shows that neither Russia, during its ownership of Alaska, nor the United States, thereafter, effectively asserted dominion over Alaska marine areas beyond what international law would allow.

See pp. 32-40, *infra.* To be sure, the status of the Alexander Archipelago, like that of many other marine features around the world, was open to question through the first half of the 20th century because the relevant international rules for determining the limits of inland waters were themselves unsettled and in flux. *See ibid.* But that uncertainty, which the international community has effectively resolved through the Convention on the Territorial Sea and Contiguous Zone, cannot give rise to an historic waters claim. We are aware of no genuine issue as to any material fact that would lead to a different outcome. Accordingly, the United States is entitled to judgment as a matter of law.[11]

I. Alaska Has Failed To Establish A Triable Issue Respecting The United States' Actual Exercise Of Sovereign Authority Over The Waters Of The Alexander Archipelago As Inland Waters

Alaska has made clear, through its amended complaint and its brief supporting its motion for leave to file a complaint, that it predicates its historic waters claim on isolated statements of government lawyers in the 1903 Alaska Boundary Arbitration and a 1964 government brief filed in *United States v. California*, *supra*. Ak. Compl. Br. 16. Those sources provide an insufficient basis for asserting an historic waters claim because such statements do not constitute actual exercises of sovereign authority of the sort required to place the community of nations on notice of the coastal

[11] In light of space limitations, the United States has not put forward all of its evidence, legal authority, and bases upon which it would rely in contesting Alaska's claims at trial. *See* Fed. R. Civ. P. 56(b). Among other matters, the United States does not address in this motion a novel and potentially significant legal impediment to Alaska's claims. The United States has a scientific basis to believe that the Grand Pacific Glacier may retreat into Canada within the foreseeable future (as it did earlier in this century), resulting in Glacier Bay extending into Canada. If that were shown likely to occur, the Master would face the question whether Alaska may insist, under either Count I or II of its amended complaint, that waters adjoining the Canadian coast are nevertheless inland waters of the United States. *See, e.g.,* US-I-5 p.3 (opinion of Alaska Attorney General stating that historic inland waters "must entirely be bounded by the same state or nation").

nation's exceptional claim. Rather, a foreign nation that asserts an "exceptional" claim that departs from international law is under an obligation to publicize and assert that claim through more direct means.

A. Government Arguments In Arbitral Or Judicial Proceedings Are Insufficient As A Matter Of Law To Establish The Exercise Of Sovereign Authority

There is "full agreement in theory and practice" that "the intent of the [coastal nation] must be expressed by deeds and not merely by proclamations." Juridical Regime ¶98. Indeed, the Supreme Court has stated that even "a legislative declaration of jurisdiction without evidence of further active and continuous assertion of dominion over the waters is not sufficient to establish the claim." *California,* 381 U.S. at 174. If proclamations and legislation are insufficient to constitute an adequate exercise of sovereignty, then surely the isolated statements of government counsel in a bilateral arbitration or judicial proceeding cannot provide an adequate predicate for an historic waters claim. Such statements are not sufficient exercises of sovereign authority to create an exceptional claim that runs against the world at large and cannot reasonably be viewed as an adequate means of placing the community of nations on notice of the claim. *See, e.g., Bouchez*, *supra*, at 239 ("the exercise of sovereignty must be effectively demonstrated").

As Alaska well knows, "[t]he adequacy of a claim to historic title, even in a dispute between a State and the United States, is measured primarily as an international, rather than a purely domestic, claim." *Alaska*, 422 U.S. at 203; US-I-5 p.1. The United States would not accept the proposition that statements by foreign government counsel in foreign arbitral or judicial proceedings would place the United States on notice of the foreign government's inland waters claim. By virtue of reciprocity in foreign relations, the United States likewise would not expect foreign nations to

accept such a proposition. The United States, like other foreign nations, cannot be expected to review and evaluate all arbitral and judicial proceedings that might conceivably give rise to statements about a coastal nation's inland water claims. No one could realistically maintain that statements made in an arbitration between, for example, Libya and Tunsia, or China and North Korea, would place the United States, or other nations, on notice of those governments' exceptional claims. Likewise, it would be unrealistic to maintain that a foreign government's statements in its own courts, for example, in Iran, Russia, or Indonesia, would provide the United States, or other nations, with adequate notice of such claims. More generally, there is an obvious potential for abuse and manipulation if a nation could use legal arguments in obscure fora as a basis for such claims.[12]

Alaska suggests that the statements upon which it relies are comparable to the "specific assertions" at issue in *Louisiana*, 470 U.S. at 107. Ak. Compl. Br. 13. But the specific assertion that the Court found controlling in that case was *that Court's own prior decision* in *Louisiana v. Mississippi*, 202 U.S. 1 (1906). *See* 470 U.S. at 107-108. The Court concluded that foreign nations were "put on notice by the decision that the United States considered Mississippi Sound to be inland waters." *Id*. at 108. Foreign nations might well chafe at the notion that they must keep abreast, at their peril, of inland water determinations set out in judicial decisions of other nations' high courts. But foreign nations would certainly rebel (as would the United States) at the utterly unrealistic notion that they must also keep abreast of all statements that those nations might make in arbitral or

[12] It is likewise unrealistic to adopt a rule that some such proceedings or statements therein, but not others, would provide adequate notice. Not only would such a rule be unworkable and an affront to the disfavored proceedings or nations, but it would create pointless, chaotic, and indeterminate litigation over which proceedings or statements provide adequate notice and which do not.

judicial filings. The Supreme Court has not held that such statements are sufficient to establish an historic waters claim.[13]

B. The Statements At Issue, When Read In Context, Do Not Demonstrate That The United States Asserted An Historic Inland Waters Claim

Not only are statements in arbitral or judicial proceedings an unrealistic basis for providing the world community with notice of historic inland waters claims, but the particular statements on which Alaska relies provide an especially unsuitable predicate for such a claim. Those statements share distinct disqualifying features: the status of the Alexander Archipelago was not at issue in the proceedings; the statements at issue, which responded to opposing counsel's arguments, were isolated comments made in the course of voluminous submissions; the statements did not unequivocally assert that the waters of the Alexander Archipelago are inland waters, but rather indicated that the waters would be subject to the applicable international rules; and the tribunals neither discussed those statements nor opined on the status of those waters.

1. The 1903 Alaska Boundary Arbitration. The proceedings of the Alaska Boundary Arbitration are set out in the seven-volume Senate Document No. 58-162 (2d Sess.) (1903-1904)

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[13] To be sure, the Court also stated that "[i]f foreign nations retained any doubt after *Louisiana v. Mississippi* that the official policy of the United States was to recognize Mississippi Sound as inland waters, that doubt must have been eliminated by the unequivocal declaration of the inland-water status of Mississippi Sound by the United States in an earlier phase of this very litigation." 470 U.S. at 108-109 (citing Brief for United States in Support of Motion for Judgment on Amended Complaint in *United States v. Louisiana*, O.T. 1958, No. 10, Original., pp. 254, 261, which in turn cited *Louisiana v. Mississippi*). But the Court did not suggest that those statements, apart from its decision in *Louisiana v. Mississippi*, would have been sufficient to place foreign nations on notice. That dictum, which is not the only statement in that opinion that is "not 'strictly necessary' to the decision," *Alaska*, 521 U.S. at 10-11, 13-15, does not control here. To the contrary, it is highly implausible that the Court would rule, heedless of the practical consequences, that isolated statements in legal briefs are adequate, in themselves, to place the community of nations on notice of historic waters claims.

(*Proceedings*) and summarized in the *Alaska Report* 61-65. The United States and Great Britain convened those arbitration proceedings to resolve the location of the southeastern boundary between Alaska and Canada, which was established pursuant to the 1825 treaty between Russia and Great Britain and the 1867 treaty between Russia and the United States. *Id*. at 61. The focus was the *land boundary*. The 1825 treaty defined the relevant portion of the boundary as following "the summit of the mountains situated parallel to the coast," provided that whenever the summit "was more than 10 marine leagues from the ocean," the boundary would be "a line parallel to the windings of the coast, and which shall never exceed the distance of 10 marine leagues therefrom." *Id*. at 61-62 (quoting translation of the 1825 treaty set out at 1 *Proceedings*, pt. 1, 47). In effect, the land boundary was, at most, 10 leagues from the "coast" and, if the mountains were nearer, the land boundary was at their summit. *Id*. at 62.

The primary point of contention in the arbitration was the location of the mainland coast. "Both sides agreed that the maximum width of the *lisière* was to be measured from the mainland." *Alaska Report* 63. But the United States argued that the coast was the actual "physical" coast, which followed all the sinuosities where the water actually touched the mainland, while Great Britain argued that closing lines, either 6 or 10 miles in length, should be drawn across certain mainland bays. *Id*. at 63-64. Great Britain advocated those closing lines not only because they would increase the British upland territory, but also because they would result in providing Great Britain with sites for ports on the mainland. *See* 3 *Proceedings* pt. 1, 78-79; 4 *Proceedings* 26. The arbitration panel accepted the United States' construction and rejected Great Britain's. *Alaska Report* 65 n.26; 1 *Proceedings* pt. 1, 30-32. In practical effect, the tribunal's decision ensured that the United States' territory included either 10 leagues of upland or all upland to the summit of the mountains,

whichever was less, and denied Great Britain its desired port on Lynn Canal.

Alaska focuses, not on the outcome of the arbitration, but rather on a particular argument that the American lawyers directed to Great Britain's claim. Ak. Compl. Br. 13-15. In presenting its "counter case," the United States argued that Great Britain's approach confused the "physical" coast line, which follows the sinuosities of the actual land-water interface, with the "political" coast line, which determines the baseline for drawing the territorial sea. *Alaska Report* 63-64. As part of its argument, the United States pointed out that Great Britain's approach was absurd, because it applied the closing-line principles that are used in drawing the "outer" or "political" coast to the "inner" or "physical" coast. 5 *Proceedings* pt. 1, 14-18. The United States argued that, in effect, the British approach would result in two "political" coast lines. 7 *Proceedings* 608. In illustrating that point, the United States described an "outer" or "political" coast line for the Alexander Archipelago that enclosed those islands by 10-mile closing lines "according to the authorities quoted in the British Counter-Case." The United States did so to point out an internal inconsistency in the British claim. *Id*. at 15-16; 7 *Proceedings* 610-611; *Alaska Report* 64 n.24.[14]

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[14] At oral argument, the government attorney, Hannis Taylor, stated that the "political" coast line "is permitted to go across the heads of bays and inlets." *Alaska Report* 65 (quoting 7 *Proceedings* 611). He explained that, "it is in that particular that the rule of international law comes in as to the width of bays or inlets, either 6 or 10 miles." *Ibid*. In other words, the United States noted, as Great Britain had acknowledged, that the international rule was unsettled. *See id*. at 63 & n.23 (quoting 3 *Proceedings* pt. 1, 79-80; 4 *Proceedings* pt. 3, 26-32). Taylor added, "We are not encumbered with that question, because the British Case contends that they must be 10 miles, and we do not dispute it, and these outside inlets are 10 miles." *Id*. at 65. In saying so, he was simply accepting a 10-mile line for purposes of argument in opposing the British case. The key point of his argument, however, was that the British was mistaken in applying principles for drawing a "political" coast line to the treaty issue – the location of the physical coastline – that was before the arbitration tribunal. 7 *Proceedings* 610-612. Taylor's illustrative reference to "waters in the Archipelago there of Alexander or the Archipiélago de Los Canarios" (*Alaska Report* 65)" cannot be reasonably understood to articulate a formal United States position on the status of those waters,

Contrary to Alaska's characterizations, the United States was *not* asserting a claim against the world that the waters of the Alexander Archipelago were inland waters. Rather, the United States was simply responding, through the familiar technique of reductio ad absurdum, to the British arguments. The United States' response was expressed according to terminology and concepts, such as "political" coast and "territorial waters," that were not precisely defined at the time. Those ambiguous expressions and statements do not constitute "unequivocal declarations that the waters of the Alexander Archipelago were inland waters of the United States." Ak. Compl. Br. 13. To the contrary, the government made clear that it was making no such claim. The government's written argument states, under the argument heading, "The Political Coast Line Not Involved In This Case," that "[t]he artificial coast line created by international law for the purposes of jurisdiction only, which, following the general trend of the coast, cuts across the heads of bays and inlets is not involved in this case in any form, for the simple reason that *the outer coast*, to which it is exclusively an accessory, is not involved." 5 *Proceedings* pt. 1, 17-18. The sparse statements on which Alaska relies, which were plucked from seven volumes of arbitration proceedings and were neither acknowledged nor discussed by the arbitration tribunal, fall irretrievably short of stating an historic inland waters claim. *See* US-I-1, pp.42-47, 108-118.

2. The 1964 government brief. Alaska's reliance on the government's 1964 brief in *United States v. California* is likewise misplaced. At issue in that phase of the *California* litigation was the Special Master's 1952 Report on the location of the ordinary low water line and the outer limits of

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which were not at issue in the arbitration proceeding. Indeed, the parties were unclear on the meaning or significance of the terms "territorial" and "interior" waters and used the terms interchangeably. *See, e.g.,* 4 *Proceedings* pt. 1, 15-16; 4 *Proceedings* pt. 3, 28; 7 *Proceedings* 611. The government's written submissions were to the same effect. *See Alaska Report* 64 n.24.

inland waters along the California coast. 381 U.S. at 142-143. The Master based his recommendations on the criteria "applied by the United States in the conduct of its foreign affairs as of the date of the California decree, October 27, 1947." *Id*. at 143-144. After he prepared his Report, and exceptions were taken, Congress enacted the SLA. *Id*. at 144-145. Because the SLA's 3-mile grant gave California all of the mineral interests the State then thought important, the Court took no action on the Report, which "was simply allowed to lie dormant." *Id*. at 148-149. When offshore drilling technology "improved sufficiently to revitalize the importance of the demarcation line between state and federal submerged lands," the proceedings resumed. *Id*. at 149. The United States argued that the line the Master drew based on the United States' conduct of foreign relations properly enclosed "inland waters" for purposes of the SLA, while California argued that the term should include "those waters which the State considered to be inland at the time it entered the Union." *Id*. at 149. The Court adopted neither approach, concluding instead that the meaning of the term "inland waters" in the SLA should conform to the recently ratified Convention on the Territorial Sea and the Contiguous Zone. *Id*. at 161, 163-164.

Read against that backdrop, the United States' 1964 brief has scant relevance to this case. The brief sets out the State Department's view of particular inland water principles that the United States followed in 1953, when the SLA was enacted. US-I-6 pp.32, 49-141. The brief is noteworthy in two respects: (1) it identifies the United States' important foreign relations and national security interests in restricting excessive maritime claims (*id.* at 49-51, 95-96); and (2) it shows – as the Supreme Court later confirmed in *Alaska* (521 U.S. at 15-22) – that the principles for determining the limits of inland waters were uncertain and in flux throughout the first half of the 20th century (US-I-6 pp. 49-141). The brief makes mention of the Alexander Archipelago at two points, each of

which simply described the evolving nature of inland waters principles. Neither statement amounted to a public pronouncement that those waters had acquired historic inland water status.

First, the United States' brief responded to California's argument that the United States had agreed to closing lines in *excess* of 10-miles in the 1903 Alaska Boundary Arbitration. The government challenged that assertion, stating that "those lines are not the lines described by the United States in that arbitration." US-I-6 pp.105-106. The government then repeated passages from the government's arguments in those proceedings stating that "the authorities quoted in the British Counter Case" allowed 10-mile closing lines, that "international law" allowed closing lines of "either 6 or 10 miles," and that "[i]t never has been claimed that under the law of nations such a line could be drawn from headland to headland a greater distance than 10 miles." *Id.* at 106-107. Those statements, which describe the perceived state of the law in 1903, plainly did not amount to a claim against the world that the waters of the Alexander Archipelago were inland waters.

Second, the United States responded to California's argument that Santa Barbara Channel and similar straits constituted inland waters. The United States' brief described at length the State Department's position that "[t]erritorial waters begin at low-water line around islands and within straits that connect areas of high seas." US-I-6 pp.119-141. In the course of explaining the State Department's international position, the brief stated:

> 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 . . . .

Id. at 130-131. Thus, the United States indicated that it has not "insisted" on a right of innocent

passage through foreign straits that resembled "the straits leading into" the Alexander Archipelago and that, under the principles the State Department applied in 1953, such waters could be permissibly "treated as a bay." But that passage does not *claim* the waters of the Alexander Archipelago as a bay, or even indicate which of the many straits of the Archipelago would qualify as inland waters if "treated as a bay" under the bay closing rules that were applied in 1953. To the contrary, the tentative nature of those statements is manifest from the footnote that immediately follows the passage:

> The proper application of this principle becomes a matter of some difficulty in situations where several straits lead to the same body of inland water; and a circularity is involved in situations where the "inland" status of that body depends on whether its entrances are to be subject to the ten-mile rule or to three-mile marginal belts. It may be that some of the applications have been unduly liberal – for example, in the case of Chandeleur Sound – but this need not concern us here, for, as we shall show, even accepting those liberal applications as correct, they do not reach the situation in California.

Id. at 131 n.105. Those caveats apply not only to Chandeleur Sound but also to the waters of the Alexander Archipelago, which consist of a collection of interlocking straits. Thus, those caveats amply disqualify the brief as a claim against the world that the waters of the Alexander Archipelago are inland waters, much less that they had assumed historic inland water status.[15]

Like the arbitration tribunal in the 1903 Alaska Boundary Arbitration, the Supreme Court did not discuss or rely upon the passages that Alaska cites, and its decision in no sense suggested that

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[15] Alaska's construction of that passage as a claim against the world is particularly implausible given that, at the time it was made, the United States had ratified the Convention, which makes no allowance for treating "straits leading to inland waters" as bays. The United States' 1964 brief addressed the only issue that the United States thought relevant – the State Department's policy in 1953. Indeed, the State Department's approach to "straits leading to inland waters" was short-lived. The United States proposed that approach to the League of Nations Conference in 1930, *Alaska*, 521 U.S. at 16, but it was not included in the 1958 Convention. US-I-7.

the Alexander Archipelago was inland waters. There is no basis, under international or domestic law, for treating those passages as a "public acknowledgment" (Ak Compl. Br. 15) of inland water status. *See* US-I-1 pp.105-107.[16]

C. Alaska Has Failed To Identify A *Specific* Assertion By The United States That The Archipelago's Waters Are Historic Inland Waters

Alaska has made clear that the 1903 and 1964 statements it cites are the centerpiece of its historic waters claim. Ak Compl. Br. 16 ("The foregoing demonstrates that the United States asserted authority over the waters of the Alexander Archipelago continuously from at least 1903 until well after Alaska joined the Union."). Those statements are plainly inadequate, as a matter of law, to support its request for relief under Count I. Apart from those statements, Alaska has not identified "any *specific* assertion by the United States that the waters of the [Alexander Archipelago] are inland waters." *Alaska*, 521 U.S. at 11 (emphasis in original). In the absence of other evidence, far more compelling than what Alaska has highlighted, the entry of summary judgment is appropriate. It appears clear that Alaska will not be able to produce such evidence because the Supreme Court has already foreclosed any other conceivable argument.

The Court has rejected Alaska's prior claims that the United States had "a well-established rule for treating waters behind the mainland and fringing islands as inland waters." 521 U.S. at 10-11. Rather, "[t]he sources before the Master showed that, in its foreign relations, particularly in the period 1930 to 1949, the United States had advocated a rule under which objectionable pockets of

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[16] Because the passages that Alaska quotes address evolving legal principles, were not relied upon by the Court, and were not necessary to the Court's decision, they would not meet even the threshold requirements for judicial or collateral estoppel in domestic courts. *New Hampshire v. Maine*, 532 U.S. 742, 749-751 (2001); *Arizona v. California*, 530 U.S. 392, 414 (2000).

high seas would be assimilated to a coastal nation's territorial sea." *Id*. at 21. *See Alaska Report* 52-174 (evaluating and rejecting Alaska's historic evidence). The Court has also rejected Alaska's past claims that various Russian, United States, and Alaskan activities provide a predicate for an historic waters claim, concluding that "none of the facts relied upon by the District Court suffice to establish historic title." 422 U.S. at 203-204 n.17. Those rulings are binding on Alaska in this litigation and, under principles of collateral estoppel, may not be relitigated in this proceeding.

II. Alaska Has Failed To Establish A Triable Issue Respecting the Continuous Usage Requirement

Even if the statements that Alaska cites were a sufficient exercise of sovereign authority to place the world on notice of historic water status, the exercise was neither continuous nor lasted for a sufficient period of time to create a "usage" under international or domestic law. The record set out in the prior *Alaska* decisions, the Special Master's *Alaska Report*, and incontrovertible public documents establish that there has never been a continuous exercise of sovereignty over the Alexander Archipelago as inland waters.

A. Alaska Cannot Show Any Assertion Of Sovereign Authority Before 1903

Although Alaska bases its historic waters claim on the 1903 arbitration, it suggests in a footnote that Russia "successfully assert[ed] dominion over the waters of the Alexander Archipelago" and that the United States "merely continued Russia's exercise of authority over these waters." Ak. Compl. Br. 13 n.7. If Alaska means to suggest that Russia successfully claimed authority over the waters of the Alexander Archipelago as inland waters, Alaska is plainly wrong. The only plausible basis for such a claim would be the Russian Imperial Ukase of September 4, 1821, which is reproduced in the 1903 arbitration proceedings. 2 *Proceedings* 25. The ukase

proclaimed regulations prohibiting all foreign vessels, except in case of force majeure, from approaching within 100 Italian miles of the coasts of Russian America. See 2 *Proceedings* 25-26. The United States and Great Britain immediately opposed the Russian claim through diplomatic means. *Id*. at 39, 104-105, 106, 113-114. In response to those protests, Russia withdrew its prohibitions and confined its operations "to the usual limit of seas recognized by other nations." 1 *Proceedings* pt. 2, 11-15; 2 *Proceedings* 14, 115-116, 180; *see* 1 Moore, *International Law Digest* 926 (1906); US-I-1 pp.71-75.

The Supreme Court has already examined that Russian history in relation to Cook Inlet. After rejecting Alaska' various claims based on Russian occupation, it observed:

> Finally, the imperial ukase of 1821 is clearly inadequate as a demonstration of Russian authority over the waters of Cook Inlet because shortly after it had been issued the ukase was unequivocally withdrawn in the face of vigorous protests from the United States and England.

Alaska, 422 U.S. at 191-192 (citing H. Chevigny, *Russian America: The Great Alaska Venture* 174-188 (1965)). The Russian ukase is the only instance of any nation's unambiguous assertion of sovereign dominion over Alaskan waters other than in accordance with international law. The ukase was immediately protested, "unequivocally withdrawn," and never resurrected. Hence, Alaska is wise to confine its comments on 19th century claims to an ambiguous footnote. If Alaska means to assert that the United States either recognized or continued the assertion of Russia's exceptional claim, it is plainly wrong. US-I-1 pp.89-90.

B. Even If The 1903 Statements Could Be Viewed As An Assertion of Authority, They Were Short-Lived

Even if one accepted Alaska's implausible construction of the United States' arguments in the 1903 arbitration as an inland waters claim, the United States promptly repudiated it. The

supposed claim was inconsistent with the United States' policy, immediately before and after the 1903 arbitration, and it did not reflect the United States' internationally stated position during the remainder of the century. Although there are numerous examples of United States statements of position that are inconsistent with Alaska's construction, if suffices for this motion to confine attention to a few.

1. In 1886, Secretary of State Bayard provided an oft-quoted letter to the Secretary of the Treasury Manning explaining the State Department's position on the extent of the territorial sea. The purpose of this letter was to advise Secretary Manning of the limits of the territorial sea in Alaska, for purposes of revenue law enforcement. *See* 1964 U.S. Br. 56. Secretary Bayard stated:

> We may therefore regard it as settled that, so far as concerns the eastern coast of North America, the position of this Department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles from low-water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt.

Report of the Special Master in *United States v. California* (1952) (*California Report)*, at 14-15. He extended that principle to the northwest and Alaskan coasts as well, stating:

> These rights [of innocent passage] we insist on being conceded to our fishermen in the Northeast, where the mainland is under the British sceptre. We can not refuse them to others on our northwest coast, where the sceptre is held by the United States. We asserted them . . . against Russia, thus denying to her jurisdiction beyond three miles on her own marginal seas. We can not claim greater jurisdiction against other nations, of seas washing territories which we derived from Russia under the Alaska purchase.

Ibid.; 1 Moore, *supra*, at 721. Thus, the United States did not view the Alexander Archipelago as inland waters before the 1903 arbitration. Furthermore, the United States adhered to its position on the location of the baseline throughout the 1910 North Atlantic Coast Fisheries Arbitration with

Great Britain, when the issue arose there. *California Report* 15; 1964 U.S. Br. 86. Hence, even if Alaska were correct that the United States embraced 10-mile closing lines in the 1903 arbitration, it promptly repudiated that position when the question of closing lines was squarely placed at issue. *See* Jessup, *supra*, at 365-382.

2. As the international community moved toward acceptance of 10-mile *bay* closing lines, the United States gradually embraced that principle, but it did not endorse 10-mile closing lines for fringing islands. *Alaska*, 521 U.S. at 16. Rather, at the 1930 League of Nations Conference, it proposed the rule that the mainland and the islands are assigned individual 3-mile belts of territorial sea, and if that construction results in enclaves of high seas (as it does in the Alexander Archipelago), then those enclaves are assimilated to the adjacent territorial sea. *Ibid*. That principle is plainly inconsistent with Alaska's construction of the United States' 1903 arguments. Hence, even if the world community had embraced Alaska's implausible construction, the United States expressly repudiated it in what was then the world's most highly publicized arena for developing the law of the sea. *See id.* at 16-17 ("The United States' 1930 'assimilation' proposal is inconsistent with Alaska's assertion that, since the early 1900's, the United States had followed a firm and continuing 10-mile rule for fringing islands.") .

The United States' 1930 proposal also suggested that, while straits with entrances less than 6 miles wide connecting two areas of high seas should be treated as territorial waters, "where a strait is merely a channel of communication with an inland sea, the rules regarding bays apply to such strait." *Alaska Report* 74. But the paragraph stating that proposal does not, by its terms, describe the Alexander Archipelago. As Special Master Mann pointed out:

This last paragraph, however, was apparently not meant to state an independent

> ground for finding inland waters. Read literally, it says that a strait cannot be treated as inland waters unless it qualifies as a bay.

Id. at 74. The rules that the United States proposed for defining bays were "relatively elaborate." *Id*. at 74 n.33. They would not enclose the Alexander Archipelago, which consists of a network of straits providing multiple passages to and from the high seas. *See* US-I-8. No foreign nation would be justified in viewing that proposal as endorsing the closing lines that the United States discussed in the 1903 arbitration or as a basis for otherwise treating the waters of the Alexander Archipelago as inland waters. *See Alaska*, 521 U.S. at 18 ("a rule that straits leading to an inland sea are themselves inland waters is not equivalent to a 10-mile rule").[17]

3. From the 1920s to the 1950s, the United States rejected, both internally and publicly, the idea that the waters of the Alexander Archipelago were inland waters. The Department of State Geographer who developed the 1930 proposal, S. Whittemore Boggs, did not treat the Alexander Archipelago as inland waters when advising boundary negotiators, beginning in the 1920s, on the location of the United States-Canada maritime boundary in the Dixon Entrance area, or when advising the Tariff Commission in 1930 on the location of the territorial sea.[18] When the

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[17] As Master Mann further observed, the United States proposal respecting straits leading to an inland sea changed over time. "There were numerous versions of this rule, which differed not only in wording but also in context. . . . None of the statements of the rule, up to 1952, is anchored to a concrete example of its intended application." *Alaska Report* 108. *See id*. at 108-109.

[18] During the U.S.-Canada negotiations over the significance of the AB line across Dixon Entrance, Boggs consistently employed arcs of circles in defining the limit of United States jurisdiction, as shown, for example, by his reference to arms of high seas which extend northward into the straits of the Alexander Archipelago. US-I-14. When asked by the Tariff Commission how the territorial waters of Alaska should be delimited, he replied "it would be best to represent the limit of American territorial waters as the envelope of the arcs of circles drawn from all points on the Alaska coast . . . ." US-I-9 p.3.

Commandant of the Coast Guard sought advice on the status of those waters in 1952, Boggs replied:

> [I]t is the position of this Government that the territorial waters of Alaska are everywhere the waters within the envelope of arcs of circles whose radius is 3 nautical miles measured outwardly from the coast line, including all islands– . . . They will therefore not include some of the waters measured "3 miles seaward from a line connecting headland to headland regardless of distance between them."

Alaska Report 106; US-I-10 p.1. In other words, 10-mile lines would not be constructed to enclose inland waters and any resulting enclaves of high seas would be assimilated to the territorial sea. Boggs' statement cannot be reconciled with Alaska's construction of the government's statements in the 1903 arbitration proceeding. *Alaska Report* 107. As the quoted passage reveals, Boggs plainly did not view those waters as a strait leading to an inland sea, nor did he view them as historic inland waters.

During preparations for the 1958 Conference on the Law of the Sea, the international community was specifically put on express notice that the United States did not claim the waters of the Alexander Archipelago as inland. Mr. Jens Evensen of Norway prepared a study for the United Nations in advance of the Conference entitled "Certain Legal Aspects Concerning The Delimitation Of The Territorial Waters Of Archipelagos." In his section entitled "State Practice Concerning Coastal Archipelagos," he included the following discussion of American practice:

> United States — This country has been one of the staunchest advocates of the view that archipelagos, including coastal archipelagos, cannot be treated in any different way from isolated islands where the delimitation of territorial waters is concerned. Thus, according to information received, the practice of the United States in delimiting, for example, the water of the archipelagos situated outside the coasts of Alaska is that each island of such archipelagos has its own marginal sea of three nautical miles. Where islands are six miles or less apart the marginal seas of such islands will intersect. But not even in this case are straight baselines applied for such delimitation.

US-I-3 p.24. Thus, little more than a year before Alaska statehood, the world was reminded that

the waters of the Alexander Archipelago are not inland.

In the face of these uncontroverted historic facts, Alaska cannot credibly maintain (Ak. Compl. Br. 17) that the statements that the United States made in the 1903 arbitration were part of a continuous practice that ripened into a usage by the time of Alaska's statehood. Just as the "United States did not have a well-established rule for treating waters between the mainland and fringing islands as inland waters," *Alaska*, 521 U.S. at 10, it did not follow a practice – much less a continuous practice – of treating the Alexander Archipelago as inland waters.[19]

C. Even Assuming That The 1903 Statements Were An Assertion Of Authority, The United States Disclaimed Them In 1971, Eliminating Any Basis For A Claim Of Continuous Usage

In 1971, the Committee on the Delimitation of the United States Coastline issued charts depicting baselines for the Alexander Archipelago drawn in accordance with the Convention's delimitation principles. Reed, *supra*, at 359-361, 415-418; US-I-11. Those charts, which did not adopt the closing lines discussed in the 1903 arbitration, constituted an express disclaimer of any historic inland water claims. *Louisiana*, 470 U.S. at 111. That disclaimer is effective because: (1) historic title had not ripened; (2) Alaska's evidence of historic title is not "clear beyond doubt," but rather consists of "questionable evidence"; and (3) the United States did not issue the disclaimer in the midst of litigation simply to gain an advantage over Alaska.

1. Under any view of the facts, historic title could not have ripened in this case. Neither the Supreme Court nor its masters have found a basis for historic title in the absence of a continuous

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[19] Alaska's reliance on the Pearcy charts and internal government debates respecting the use of straight-base lines (Ak. Compl. Br. 17-19) is misplaced for the reasons described by Master Mann. *Alaska Report* 136 & n.102, 163-172. In any event, by the time those post-statehood matters arose, the United States had already effectively repudiated any conceivable historic waters claim.

claim lasting at least a century. *See* p. 9 n.7, *supra.* Assuming, arguendo, that the government's 1903 statements constituted a claim, the *maximum* duration of the claim is 68 years. But as discussed above, even that 68-year period is frequently punctuated – *e.g.*, in 1910, 1930, 1951, and 1957 – by express governmental statements or acts that are inconsistent with, and repudiate, the claim that the United States supposedly made. *See* pp. 33-38, *supra*. Viewed in the most favorable light, Alaska's claim lacks sufficient duration to establish historic title. *Cf. Louisiana*, 470 U.S. at 112 ("historic title to Mississippi Sound as inland waters had ripened prior to the United States' ratification of the Convention in 1961 and prior to its disclaimer of the inland-water status of the Sound in 1971").

2. The Supreme Court has repeatedly ruled that a government disclaimer cannot be overcome by "questionable evidence." *Louisiana*, 394 U.S. at 28-29; *California*, 381 U.S. at 175. As the foregoing discussion shows, Alaska's evidence supporting its historic claim is highly questionable. Alaska is unable to point to a single instance in which the United States unambiguously proclaimed historic title to the world through internationally accepted means and took actions that translated those words into deeds. Instead, Alaska relies on equivocal and contradicted statements in arbitral and judicial proceedings that could not possibly put foreign nations on notice of the supposed historic claim. In these circumstances, the government's disclaimer is "decisive." *Ibid*.

3. The Coastline Committee did not issue its 1971 charts to gain an advantage over Alaska in pending litigation. Indeed, it could not have done so because there was no litigation pending at that time. *Cf. Louisiana*, 470 U.S. at 112 (refusing to give effect to a disclaimer issued "while the Court retained jurisdiction to resolve disputes concerning the location of the coastline"). Rather, the

Committee issued those charts to fulfill its assigned task of marking the limits of inland water and the territorial sea in conformity with an objective application of the Convention principles. US-I-11. When Alaska objected to the lines drawn on the charts, Congress held hearings to allow the State to explain its objections, *Provisional U.S. Charts Delimiting Alaskan Territorial Boundaries, Hearings Before the Committee on Commerce United States Senate*, 92nd Cong., 18-25 (May 15, 1972), and executive officials considered those concerns. *See* Ak. Compl. App. 28e-48e. But neither Congress nor the Executive Branch ultimately found Alaska's historic water claims persuasive, and neither elected to change those charts. There is no warrant for doing so now on account of a lawsuit commenced nearly 30 years later.

III. Alaska Has Failed To Establish A Triable Issue Respecting The Acquiescence Of Foreign Nations

Alaska's contention (Ak. Compl. Br. 16-17) that foreign nations acquiesced in the United States' supposed claim of historic inland waters is wrong. The evidence that Alaska relies upon – statements of counsel in litigation – suffers from the same defect as Alaska's supposed origin of the historic claim. It is simply not realistic to draw the conclusions that a country has acquiesced in a coastal nation's inland waters claim based on arguments of counsel in past arbitration or litigation, particularly when the waters at issue were not themselves in dispute. As in the case of the United States' arguments, Great Britain's arguments in the 1903 arbitration would not qualify for judicial or collateral estoppel. *See* p. 31 n.16, *supra.* Indeed, the passages upon which Alaska relies show that Great Britain endorsed the approach of employing 10-mile *mainland* closing lines, but rejected

the idea that the Archipelago's waters could be closed to innocent passage.[20] Great Britain had no interest in treating the Archipelago's waters as "inland," and therefore not subject to a right of innocent passage, because inland waters status would have cut off Canadian access to the high seas from the Stikine River and from the envisioned port on Lynn Canal. 3 *Proceedings* pt. 1, 78-79; 4 *Proceedings* pt. 3, 26, 33-49; 6 *Proceedings* 26. *See* US-I-1 pp.119-120.

Alaska's reliance on Norway's and the United Kingdom's arguments in the *Fisheries Case (U.K. v. Nor.)*, 1951 I.C.J. 116, is even more problematic. As Special Master Mann explained, Norway gave an inaccurate account of the United States' position in the 1903 arbitration to bolster its argument respecting the international rules that should apply to Norway's coast. *Alaska Report* 93-96. The United Kingdom was "more careful," arguing that the 1903 arbitration provided no authority for Norway's proposed baselines because the United States' arguments were limited to 10-mile closing lines and the United States' position had since evolved. *Id*. at 96-98. *See id*. at 97 n.68 (quoting the United Kingdom's statement that "the Federal Government before the Supreme Court is vigorously maintaining the principles which it advocated in 1930, . . . [which] are perfectly in line with the United Kingdom's views before this Court."). These ambiguities and inconsistencies underscore the danger of attempting to discern a foreign nation's acquiescence from statements made in litigation involving other geographic areas before tribunals that did not, and had

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[20] *See* 3 *Proceedings* pt. 1, 79 (listing the *mainland* bays claimed to be part of the "coast"); 4 *Proceedings* pt. 3, 26-32 (review of international authorities respecting the length of bay closing lines, British claim of right of innocent passage); 5 *Proceedings* pt. 1, 15-16 (U.S. reference to international authorities); 7 *Proceedings* at pt. 7, 611 (U.S. reference to 10-mile closing lines). The British position focused on mainland bays and was entirely contrary to that espoused by Alaska now. Great Britain never deviated from its contention that the 10-mile closings were across *mainland* bays.

no reason to, address the issue. The problems are especially acute when, as in the case of Norway's submission, the supposed evidence of acquiescence is buried in an argument presented in a foreign language that "covers several hundred pages." *Id.* at 95 n.64.[21]

The United States firmly believes, consistent with its longstanding opposition to excessive foreign maritime claims, that acquiescence should be determined from far more definitive, reliable, and accessible sources. Alaska cannot point to any foreign nation's recognition or acknowledgment that the Archipelago's waters are inland and not subject to a right of innocent passage, nor can it point to circumstances from which that acquiescence can be reliably inferred. To the contrary, none of the published lists and discussions of historic bays of which we are aware describes the Archipelago's waters as historic inland waters. US-I-1 pp.46, 133. The absence is significant because foreign nations rely on those lists to identify excessive claims.[22]

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[21] Alaska's reliance on the *Fisheries Case* is especially dubious because, as one Alaskan authority has explained, the waters of coastal archipelagos were not treated as inland by the international community prior to that 1951 decision. Avrum Gross, who later served as Attorney General of Alaska, wrote:

> The court's approval of the Norwegian system heralded a totally new approach to the delineation of inland waters . . . . Formerly, islands abutting a coast were treated as separate land areas, possessing their own inland waters and marginal seas. Water areas which were between the island and the coast, but outside the marginal-sea belt of either land mass, were defined as high seas. Even if an island were within six miles of a coast, the intervening water areas were considered marginal seas, and were therefore subject to rights of innocent passage by foreign vessels.

Gross, *The Maritime Boundaries of the States*, 64 Mich. L. Rev. 639, 650 (1966) (citations omitted).

[22] In particular, the United Nations' 1957 study on Historic Bays (US-I-13) does not describe the waters of the Alexander Archipelago as historic inland waters. *See* US-I-1 p.133. The absence of any mention of the Archipelago's waters is especially significant because the United States has told foreign nations that a bay's absence from that list is a ground for denying the bay historic waters status. For example, in protesting Australia's historic bay claims, the United States pointed out that

Furthermore, acquiescence cannot be assumed in light of the fact that the Archipelago's waters, throughout history, have been open to innocent passage. As a general rule, to establish historic waters, a coastal nation's "exercise of sovereignty must have been, historically, an assertion of power to exclude all foreign vessels and navigation." *Alaska*, 422 U.S. at 197. The coastal nation is relieved of the obligation to prove interference with innocent passage only if foreign vessels have respected the inland waters claim – for example, by avoiding the waters – so that no enforcement was even necessary. The Court perceived that to be the situation with respect to Mississippi Sound. *Louisiana*, 470 U.S. at 103, 114-115. The situation posed by the Archipelago's waters in no sense resembles that case. Mississippi Sound is a shallow, relatively small, and unimportant "cul de sac." By contrast, the waters of the Alexander Archipelago extend over an area 18 times larger than Mississippi Sound, and they are far deeper, often exceeding 500 feet. They consist of a network of straits, rather than a cul de sac, and they provide important routes for ocean-going vessels transporting persons and cargo to distant destinations. Unlike Mississippi Sound, the Archipelago's waters have long held substantial importance for foreign nations. *Compare id.* at 103.

The waters of the Archipelago historically have been used by ocean-going foreign vessels, and that use continues today. The United States has not interfered with the rights of those vessels to innocent passage. The United States' expert witness, Professor Barry M. Gough, a naval historian who focuses on the northwest coast of North America, has comprehensively reviewed international interest in and use of the Alexander Archipelago. US-I-2. His preliminary report documents the use of those waters by the vessels of at least 9 foreign powers over the last 200 years. The early vessels

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none of those bays was listed in the 1957 study. *Ibid.*

were engaged in exploration, fur-trading, and whaling. The Yukon gold rush later led to regular foreign-vessel traffic through the Archipelago. Canadian vessels transported minerals to Canadian ports until at least 1983. Over the past century, a major foreign-flag cruise ship industry has developed that transports thousands of persons daily through the Archipelago's waters for the purpose of viewing the magnificent scenery. *Ibid.*; *see* US-I-12.

For at least a century, foreign-flag vessels have entered and traversed the Archipelago's waters, without the need to request permission, based on the right of innocent passage that is inherent in territorial seas but not inland waters. This is not a case in which "foreign nations have little interest in [the relevant waters] and have acquiesced willingly in the United States' express assertions of sovereignty." *Louisiana*, 470 U.S. at 114. Foreign nations have a strong interest in those waters, but they have had no need to acquiesce in anything beyond recognition that the waters are territorial sea and subject to appropriate regulation on that basis. Art. 14, 15 U.S.T. 1610. Indeed, the foreign-flag passenger cruise ships, which pass through the Inside Passage solely to provide sight-seeing trips, are engaged in the clearest imaginable embodiment of "innocent passage." The United States has never sought to prohibit those voyages, or those of other foreign-flag ships, even though it might be in the United States' interest to reserve such traffic to American-flag vessels. Rather, the United States' allowance of free passage reflects the understanding, shared by the United States and foreign nations, that the waters of the Alexander Archipelago are territorial sea.

CONCLUSION

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

Respectfully submitted.

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July 24, 2002

TABLE OF EXHIBITS
MOTION OF THE UNITED STATES
FOR PARTIAL SUMMARY JUDGMENT
ON COUNT I

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IN THE SUPREME COURT OF THE UNITED STATES

No. 128, Original

STATE OF ALASKA,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

Before the Special Master
Gregory E. Maggs

CERTIFICATE OF SERVICE

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

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

Dated this 24th day of July, 2002

David Brown

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