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 II 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 II of the Amended Complaint of the State of Alaska in this original action. Specifically, the United States moves for an order ruling that the islands of the Alexander Archipelago cannot be assimilated to the mainland or each other to create one or more juridical bays, decreeing that Alaska does not possess title to the associated submerged lands that it claims on that basis, and entering judgment on Count II 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 II 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 II of the Amended Complaint, Alaska seeks to quiet title to certain disputed lands on the theory that they are encompassed within one or more juridical bays, as defined by 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 that passed to Alaska under the equal footing doctrine. *See* Amended Compl. paras. 23-41; *First Report* 2.[1] Alaska presents this argument as an alternative to its historic waters claim, set out in Count I of the amended complaint, which would have essentially the same results. *See* U.S. Memorandum In Support of Summary Judgment on Count I, 1-2 (U.S. Count I Memo.).

Alaska implicitly acknowledges that, under the Convention's principles and the Supreme Court's decisions, the physical features of the mainland proper do not create the claimed juridical bays. Rather, Alaska contends that, if certain islands are selected from the more than 1000 islands that create the Alexander Archipelago, and those carefully selected islands are collectively treated as mainland, then the "assimilation" of the islands would create indentations in the mainland. *See* Amended Compl. paras. 29, 34. Alaska further contends that those indentations would be sufficiently well-marked, have sufficiently limited closing lines, have sufficient depth of penetration,

[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.

and enclose sufficient waters therein to meet the requirements, set out in Article 7 of the Convention, for juridical bays. *See id.* at paras. 28, 30-31, 33, 35-36. The United States disputes that theory and objects, as a matter of law, to Alaska's juridical bay claims. *See* Amended Answer paras. 29-36.

The United States has compelling reasons to object to Alaska's juridical bay claims. 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. But more fundamentally, Alaska's theory departs from the restrictive international coastline delimitation principles that the United States has invariably followed in the world arena. As we explained in moving for summary judgment on Count I, those principles rest on longstanding and important foreign relations and national defense concerns. US Count I Memo. 2-5. There are numerous examples of the United States' articulation of that policy and of the international community's recognition that the United States adheres to those principles. *See* US-II-11.

Just as the United States must object when a State of the Union asserts an excessive historic waters claim, the United States must object when a State advocates an expansive theory for defining juridical bays that is not only inconsistent with the governing legal principles, but also departs from the position that the United States follows in conducting its foreign affairs. The juridical bay theory that Alaska set out in Count II of its Amended Complaint suffers from those defects. Because there are 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 II. *See* Fed. R. Civ. P. 56(b) & (c).

Although the United States disputes, as a matter of law, both Alaska's contention that the relevant collections of islands bear a sufficient relationship to the mainland to qualify for

assimilation and its further assertion that the islands, if assimilated, would create juridical bays, the United States limits its motion for summary judgment to the first of those contentions. In other words, the United States urges that the islands do not qualify, as a matter of law, for assimilation to the mainland because they lack even the *threshold* requirement of the necessary relationship to the mainland, without considering the additional requirement that the island-complex, as a matter of law, create the claimed juridical bays. The United States limits its motion in this way for two reasons.

First, as we will explain below, it is abundantly clear that the governing legal principles do not permit assimilation of those islands because the islands fail to satisfy even the basic requirements for treatment as mainland. Accordingly, if the Master so recommends, there would be no occasion to reach the further inquiry of whether the resulting configurations of the islands and the mainland satisfy the other requirements for creating juridical bays by assimilation. Second, although the question of whether those configurations create juridical bays does not appear to present any genuine issue of material fact, if the Master found it necessary to consider that question, he might benefit from hearing testimony on the controlling legal principles, which rest, in important part, on international law. In past original actions raising similar issues, the Supreme Court's special masters have followed the practice set forth in Rule 44.1 of the Federal Rules of Civil Procedure for determination of foreign law and have heard testimony from international law experts and geographers on the highly specialized principles that govern the application of Article 7 of the Convention.

Accordingly, the United States moves for summary judgment on the ground that the island-complex that Alaska identifies does not, as a matter of law, constitute part of the Alaska mainland. The United States reserves its objections to other defects in Alaska's juridical bay claim for

determination, if necessary, in subsequent proceedings.[2]

STATEMENT

The resolution of Count II turns on the application of the Convention on the Territorial Sea and the Contiguous Zone, as interpreted by the Supreme Court, to the physical features of the Alexander Archipelago. *See United States v. Alaska*, 521 U.S. 1, 8 (1997); *United States v. California*, 381 U.S. 139, 165 (1965). The discussion that follows: (A) reviews the Convention's requirements for determination of juridical bays; (B) summarizes the Court's decisions (including the recommendations of its Masters) respecting the assimilation of islands; and (C) describes the uncontroverted characteristics of the physical features at issue in this case.

A. The Convention's Requirements

The Supreme Court has determined, and Alaska acknowledges, that the Convention provides the criteria for determining whether a particular body of water is a juridical bay. Three provisions of the Convention are particularly relevant here: (1) Article 7, which provides the specific criteria for delimiting juridical bays (15 U.S.T. 1609); (2) Article 10, which defines an "island" for purposes of the Convention (15 U.S.T. 1609-1610); and (3) Article 4, which allows, but does not require, nations to enclose fringing islands, such as the Alexander Archipelago, within straight baselines (15

[2] As noted in the government's summary judgment memorandum on Count I (U.S. Count I Memo. 21 n.11), there are additional considerations that the United States reserves for later proceedings. 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 this century), resulting in Glacier Bay extending into Canada. If that were shown likely to occur, the Master would face the question whether Article 7 may be employed to create Alaska's claimed juridical bays in light of the fact that Canada would possess a coast line on one of the supposed bays. *See* Art. 7(1), 15 U.S.T. 1609. The Master, however, does not need to reach that issue to resolve the United States' motion for summary judgment here.

U.S.T. 1608). *See* US-II-2.

1. Article 7. Article 7 sets out the specific criteria that must be satisfied to establish that a physical feature constitutes a juridical bay. The full text of that Article is set out at US-II-2. The most significant provision, for present purposes, is Article 7(2), which specifies that "a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast." 15 U.S.T. 1609. *See, e.g., United States v. Louisiana*, 394 U.S. 11 (1969).

2. Article 10. Article 10 of the Convention provides a specific definition of an island that distinguishes that physical feature from the mainland:

> An island is a naturally-formed area of land, surrounded by water, which is above water at high tide.

15 U.S.T. 1609. *See, e.g., Alaska*, 521 U.S. at 22-32 (applying Article 10 to an offshore feature). The Convention makes no express provision for assimilating islands to the mainland.

3. Article 4. Article 4 of the Convention provides an alternative rule for determining the seaward line of inland waters of the territorial sea in "localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity." In those circumstances,

> the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

15 U.S.T. 1608. Article 4 further provides, among other things, that the coastal nation "must clearly indicate straight baselines on charts, to which due publicity must be given." *Ibid.* The Supreme Court has determined that the decision whether to draw straight baselines "is permissive, not mandatory," and rests with the coastal nation. *Alaska*, 521 U.S. at 9-10. The Court has also

recognized that the United States, in keeping with its policy of minimizing inland water claims, "has never opted to draw straight baselines under Article 4." *Id*. at 10. *See* US-II-1 p.5.

B. The Supreme Court's Application Of Island Assimilation Principles

Although the Convention makes no express provision for assimilating islands to the mainland, the Supreme Court has ruled that assimilation is permissible in exceptional circumstances. The Court first recognized that possibility in *Louisiana*, 394 U.S. at 60-66. Nevertheless, in the course of its many decisions delimiting coastlines, the Court has actually considered and held that assimilation of an island is appropriate in the case of only one such insular formation – New York's Long Island. *United States v. Maine*, 469 U.S. 504, 514-520 (1985).

1. United States v. Louisiana. In *Louisiana*, the Court faced the problem of how to delimit the Louisiana coast in the vicinity of the Mississippi River delta, which is "marshy, insubstantial, riddled with canals and other waterways, and in places consists of numerous small clumps of land which are entirely surrounded by water and therefore technically islands." 394 U.S. at 63. *See* US-II-3 and 4. The Court noted:

> Of course, the general understanding has been – and under the Convention certainly remains – that bays are indentations in the mainland, and that islands off the shore are not headlands but at the most create multiple mouths to the bay. In most instances and on most coasts it is no doubt true that islands would play only that restricted role in the delimitation of bays.

Id. at 62. Nevertheless, the Court noted that "much of the Louisiana coast does not fit the usual mode." *Id.* at 63. The Court observed that the United States had treated some "insular configurations, along the Louisiana coast" as "part of the mainland," citing the marshlands that comprise "the western shore of the Lake Pelto-Terrebonne Bay-indentation" and the St. Bernard Peninsula. *Ibid.* *See* US-II-3 and 4. The Court concluded:

> Much of the Louisiana coast on or near the Mississippi River Delta is of the same general consistency as the western shore of the Lake Pelto-Terrebonne Bay-Timbalier Bay complex, and some of the islands may be so closely linked to the mainland as realistically to be assimilated to it. While there is little objective guidance on this question to be found in international law, the question whether a particular island is to be treated as part of the mainland would depend on such factors as its size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast.

394 U.S. at 65-66. The Court noted that its list of factors is "illustrative rather than exhaustive." *Id.* at 66 n.86. *See id*. at 64 n.84 (an island's "origin" and "resultant connection with the shore" may also be considered).

Having provided that guidance, the Supreme Court appointed a Special Master to examine "whether the islands which Louisiana has designated as headlands of bays are so integrally related to the mainland that they are realistically part of the 'coast' within the meaning of the Convention." *Louisiana*, 394 U.S. at 66. Special Master Armstrong subsequently considered and rejected each of Louisiana's claims that particular small islands and low-tide elevations should be assimilated to the mainland. *See* Report of the Special Master in *United States v. Louisiana* (July 31, 1974) (*Louisiana Report*), at 221-228 (Bucket Bend Bay; Blind Bay; Garden Island and Red Fish Bays), 235-239 (Caillou Bay and Atchafalaya Bay). The Court later rejected Louisiana's exceptions to the Master's report. *See United States v. Louisiana*, 420 U.S. 529 (1975).

2. United States v. Maine. In *Maine,* the Court faced the question "whether Long Island Sound and Block Island Sound constitute, in whole or in part, a juridical bay." 469 U.S. at 505. The parties did not dispute that Long Island Sound by itself constitutes inland waters, because the parties agreed that "Long Island Sound is an historic bay under Article 7(6) of the Convention." *Id.* at 509. But Block Island Sound is not an historic bay, and the determination of juridical status was

therefore necessary to determine the limits of inland waters in that area. *See id*. at 509 & n.5. *See also* US-II-5.

The Special Master in *Maine* applied the Court's guidance in *Louisiana* and concluded that Long Island should be assimilated to the mainland. *See* Report of the Special Master in *United States v. Maine* (October Term 1983) (*Maine Report*), at 24-47. After considering the factors set out in *Louisiana*, Special Master Hoffman stated:

> Long Island Sound, without question, would be a juridical bay if the East River did not separate Long Island and the mainland. The fact that the East River is navigable and is a tidal strait, however, does not destroy the otherwise close relationship between Long Island and the mainland when all the factors are considered. Long Island is so integrally related to the mainland that it should be considered an extension of the mainland. If there is ever a situation where a large coastal island will be considered a part of the mainland so the water enclosed between the island and the coast can be a juridical bay, this is it. Long Island is closely linked with the mainland; it is situated such that a body of water that resembles a bay is enclosed, and the enclosed body of water is used like a bay.

Id. at 47.

The Supreme Court agreed with the Master's determination. *Maine*, 469 U.S. at 520, 526. Like the Master, the Court recognized at the outset that the question whether a juridical bay exists depends decisively on the status of Long Island – "if Long Island is to be viewed as a continuation or part of the mainland, it is evident that a bay is formed and that the requirements of Article 7 are satisfied." *Id*. at 514-515. Like the Master, the Court followed the "common-sense approach" set out in *Louisiana*, reiterating that

> an island or group of islands may be considered part of the mainland if they "are so integrally related to the mainland that they are realistically part of the 'coast' within the meaning of the Convention."

Id. at 517 (quoting *Louisiana,* 394 U.S. at 66). The Court stated that "the illustrative list of factors"

set out in *Louisiana* continues "to be useful in determining whether an island or group of islands may be so assimilated." *Ibid.* But it also noted that, "[g]iven the variety of possible geographic configurations, we feel that the proper approach is to consider each case individually in determining whether an island should be assimilated to the mainland." *Ibid.* Applying that "realistic approach," the Court concluded:

> Long Island, which is indeed unusual, presents the exceptional case of an island which should be treated as an extension of the mainland. In particular, its shape and its relation to the corresponding coast leads us to this conclusion.

Id. at 517-518. The Court emphasized that "[t]he island's north shore roughly follows the south shore of the opposite mainland" and that consequently Long Island Sound – the asserted juridical bay – "is almost completely enclosed by surrounding land." *Id.* at 518.

The Court recounted a variety of additional considerations, also noted by the Master, supporting its conclusion: (1) "Long Island helps form an integral part of the familiar outline of New York Harbor"; (2) "Both the proximity of Long Island to the mainland, the shallowness and inutility of the intervening waters as they were constituted originally, and the fact that the East River is not an opening to the sea, suggest that Long Island be treated as an extension of the mainland"; (3) "Long Island and the adjacent shore also share a common geological history"; (4) "Ships do not pass through Block Island Sound and then Long Island Sound unless they are bound for points on Long Island or on the opposite coast or for New York Harbor"; and (5) "Long Island Sound is not a route of international passage, and ships headed for points south of New York do not use Long Island Sound." 469 U.S. at 518-519.

Although the Court concluded that Long Island should be assimilated to the mainland, it recognized that Long Island presents the "exceptional case." 469 U.S. at 517. The Court reaffirmed

"that the general rule is that islands may not normally be considered extensions of the mainland for purposes of creating the headlands of juridical bays." *Id*. at 519-520.

C. The Basis For Alaska's Juridical Bay Claims In This Case

This case presents a situation markedly different from that posed in *Louisiana* or in *Maine*. The physical features at issue here are neither small deltaic mudlumps that form in the marshy estuary of a major river, nor are they a single large island that effectively encloses a bay-like sound between the island and the mainland. Rather, the geographic area at issue here – the Alexander Archipelago – consists of numerous fringing islands of varying size encompassing an area nearly 260 miles long and 55 miles wide. *See First Report* 1; US-II-6. It is undisputed that the islands of the Alexander Archipelago satisfy Article 10's definition of an island – they are naturally formed areas of land surrounded by water at high tide. 15 U.S.T. 1609. It is also undisputed that, if treated as such, the area from Spencer Point to Cape Decision and Cape Decision to Cape Fox cannot be enclosed as bays. *See* US-II-7.

The primary features that Alaska seeks to assimilate are a group of islands – hereinafter the "island-complex" – consisting primarily of Kuiu, Kupreanof, and Mitkof Islands. *See* US-II-8. The assimilation of those islands, according to Alaska, would divide the Alexander Archipelago into two large – but heretofore unnoticed – bays, which Alaska has named "North Southeast Bay" and "South Southeast Bay." See Amended Compl. Exh. 2. The United States disputes that the island-complex can be assimilated and that assimilation would produce enclosed waters that would qualify, under Article 7, as juridical bays. Alaska also seeks to create by assimilation of other islands two smaller bays, known as Sitka Sound and Cordova Bay. *See ibid.* The United States disputes that the associated land forms can be assimilated to produce enclosed waters that would qualify, under

Article 7, as juridical bays.

The central aspects of the physical features at issue here are not disputed. The island-complex on which Alaska relies is part of a classic "fringing islands" feature, like Norway's skjaergaard coast, which originally prompted the use of the "straight baseline" methodology set out in Article 4 of the Convention. *See* 1 Shalowitz, *Shore and Sea Boundaries* 68-72 (1962); US-II-9. Like the skjaergaard, the fringing islands, including the island-complex, are largely surrounded by relatively broad and deep channels. The particular island-complex that Alaska relies upon for its claim of assimilation is not readily distinguishable from the other fringing islands, but, when viewed on a map in isolation, it juts out at right angles from the general direction of the mainland's coastline. *Compare* US-II-6 *with* US-II-8.

Alaska's island-complex is large – the dry land area occupies approximately 1652 square nautical miles at high tide. US-II-10 p.3. In order to assimilate that island-complex, three major sea channels must be ignored: (a) Frederick Sound, which separates Mitkof Island and Kupreanof Island from the mainland; (b) Wrangell Narrows, which separates Mitkof Island from Kupreanof Island; and (c) Keku Strait, which separates Kupreanof Island from Kuiu Island. *Id*. at 1. The water area that would need to be ignored to assimilate the islands is also large – encompassing more than 455 square nautical miles. *Id*. at 3.

Under Alaska's theory, if those sea channels are ignored and the island-complex is treated as mainland, then the so-called North Southeast Bay can be enclosed by a line from Cape Spencer to "the southern or eastern entrance point to Chatham Strait." Amended Compl. para. 27. Alaska's complaint does not identify the precise southern headland, but it must necessarily lie somewhere on

the island-complex. *See* US-II-6.[3] Similarly, under Alaska's theory, the so-called South Southeast Bay would be enclosed by a line from between "the northern or western entrance point to Sumner Strait and Cape Fox." Amended Compl. para. 27.[4] The supposed bays that Alaska seeks to create are extraordinarily large, embracing the entire Alexander Archipelago -- an area of approximately 14,300 square nautical miles. Furthermore, the United States submits that the supposed bays do not satisfy Article 7's requirements for juridical bays and would demonstrate at trial that, even if the island-complex were treated as mainland, the resulting areas that Alaska seeks to enclose would not qualify as juridical bays.

SUMMARY OF ARGUMENT

The Supreme Court has ruled that, under the Convention on the Territorial Sea and the Contiguous Zone, "islands may not normally be considered extensions of the mainland for the purposes of creating the headlands of juridical bays." *Maine*, 469 U.S. at 519-520. Nevertheless, the Court will consider exceptions from that rule if the islands "are so integrally related to the mainland that they are realistically parts of the 'coast' within the meaning of the Convention." *Id.* at 517 (quoting *Louisiana*, 394 U.S. at 66). Alaska bears the heavy burden of establishing that the

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[3] Alaska has provided varying locations for the southern terminus of the closing line. Exhibit 2 of the Amended Complaint colors Coronation Island as part of the bay, yet depicts a closing line to a more landward point north of Cape Decision on Kuiu Island. In its discovery response, Alaska described the headland as "the Northwest point of Coronation Island or Cape Decision." Plaintiff's Responses to Defendant's First Sets of Interrogatories And Requests For Production of Documents, Sept. 4, 2001, at 23.

[4] Alaska has also provided varying locations for the termini of that closing line. Exhibit 2 of the Amended Complaint depicts the closing line as running from Coronation Island to Tree Point. In its discovery response, Alaska identified the termini as "Helm Point, on Coronation Island, or Cape Decision" on Kuiu Island, and Tree Point, just north of Cape Fox.

Alexander Archipelago presents the "exceptional case" that justifies a departure from the normal understanding that islands and mainland are distinct. *Id*. at 517.

The island-complex that Alaska seeks to assimilate falls within the "general rule," and outside the "exceptional case," because that island-complex, particularly when viewed in light of its overall geography and relation to the mainland, "cannot realistically be considered part of the mainland." *Maine*, 469 U.S. at 515, 517, 519. The same conclusion follows upon examination of the specific factors that the Court has identified as "useful in determining when an island or group of islands may be so assimilated." *Id*. at 517. *See* US-II-1 pp.49-56. The island-complex is too large, does not have an appropriate shape and configuration to the mainland, and is too distant from the mainland to justify assimilation. The depth and utility of the intervening waters also weigh heavily against assimilation, as do the geology of the area and the island's lack of socio-economic connection to the mainland. Extending assimilation to these circumstances – which would create two enormous and heretofore unrecognized bays – would seriously undermine the Nation's longstanding efforts to discourage excessive foreign maritime claims.

The same considerations apply, on a smaller scale, to the two smaller "bays" that Alaska seeks to create through assimilation. The features that Alaska seeks to join cannot be assimilated under the principles that the Court has established.

ARGUMENT

I. Alaska's Theory That A Part Of The Alexander Archipelago Should Be Viewed As Part Of The Mainland Is Untenable As A Matter Of Law

The island-complex that Alaska seeks to treat as mainland cannot be appropriately assimilated because: (A) the island-complex, when viewed in light of the geography of the area, "cannot realistically be considered part of the mainland" (Maine, 469 U.S. at 515); (B) the island-complex does not satisfy the specific factors that the Supreme Court has identified as relevant to assimilation; and (C) the United States's foreign relations and national defense interests counsel strongly against extending assimilation principles to the features at issue here.

A. The Island-Complex That Alaska Seeks To Assimilate "Cannot Realistically Be Considered Part of the Mainland"

The Court has adopted a "common-sense approach" to whether islands may be assimilated that focuses on a realistic assessment of the actual geography of the coast in question. *Maine*, 469 U.S. at 517, citing *Louisiana*, 394 U.S. at 64. In this case, the actual geography of the island-complex shows that it is part of a much larger archipelago of fringing islands, rather than a part of the mainland, and that the island-complex does not enclose any geographically obvious bay. The Convention, through Article 4, specifically addresses that type of geographic feature, and it gives the coastal nation the option to determine whether such waters will be treated as inland waters through the construction of straight baselines. A ruling that the United States *must* treat such a feature as assimilated would eviscerate the United States' discretion under Article 4 and undermine the United States's vital national interests while advancing no vital interest of Alaska.

1. The island-complex is part of a system of fringing islands rather than part of the mainland. A "mere glance at a map of the region" (*Maine*, 469 U.S. at 514) reveals the geographic

reality of Southeast Alaska. That coastal area encompasses the Alexander Archipelago, which consists of "fringing islands" along a deeply indented mainland coast. *See* US-II-6. The Alexander Archipelago consists of numerous islands that stretch continuously nearly 260 miles along the mainland. *See ibid.*; *First Report* 1. Alaska does not dispute that the island-complex that it seeks to assimilate is part of that archipelago. Alaska nevertheless would have the Master ignore that reality and selectively treat the island-complex, not as part of the archipelago, but as part of the mainland. By doing so, Alaska would have the Master divide the area into two large – and heretofore unnoticed – "bays" and thereby enclose the entire area as inland waters. *See* US-II-8.

Alaska's proposed course is misguided because the geography at issue here, when viewed in its totality rather than in light of an artificially segmented element, presents a familiar situation that the Convention expressly addresses, rather than an exceptional situation that the Convention does not. The Alexander Archipelago, including the island-complex, present the type of "fringe of islands" that Article 4 provides may, *at the discretion of the coastal nation*, be enclosed by straight baselines. *See* 15 U.S.T. 1608. Indeed, the Alexander Archipelago is strikingly similar to Norway's skjaergaard coast, which inspired the concept of "straight baselines." *Compare* US-II-6 *with* US-II-9. The International Court of Justice ruled in the *Fisheries Case (United Kingdom v. Norway)*, [1951] I.C.J. 116, that Norway was entitled, but not required, to draw straight baselines to enclose the skjaergaard. See 1 Shalowitz, *supra*, at 63-75 (discussing the *Fisheries Case*). Article 4 of the Convention was formulated to allow, but not require, Norway's practice. *See Louisiana*, 394 U.S. at 68-71.

Article 4 explicitly provides that "if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines *may* be employed in drawing the baseline from

which the breadth of the territorial sea is measured." 15 U.S.T. 1608 (emphasis added). Article 4 of the Convention accordingly gives the United States the opportunity, but not the obligation, to enclose the Alexander Archipelago by means of straight baselines and treat all waters landward of those lines as inland waters in accordance with Article 5, 15 U.S.T. 1609. Nevertheless, for important foreign policy reasons, the United States has *never* opted to draw straight baselines there or anywhere else on its coast. *See Alaska*, 521 U.S. at 10. Rather, the United States has strictly followed the Convention's "normal baseline" rules, which result in the pockets of OSCLA lands at issue in this case. *See id.* at 8-9 (noting that the normal baseline principles create analogous enclaves on Alaska's northern coast).

The express text of Article 4 should accordingly inform the juridical status of the waterways created by the presence of the Alexander Archipelago. As the Court explained in *Louisiana*, "it is apparent from the face and the history of the Convention that such insular formations were intended to be governed solely by the provision in Article 4 for straight baselines," 394 U.S. 67-68. There is no warrant for circumventing Article 4 and invoking the extra-textual assimilation principles that the Court developed for those "exceptional" situations that the Convention does not expressly address. As the Court has recognized and repeatedly reaffirmed, Article 4 preserves the option, within the United States' control, to decline to draw straight baselines to effectuate its international policies. *Id.* at 72-73; *see United States v. Maine*, 475 U.S. 89, 94 n.9 (1986); *United States v. Louisiana*, 470 U.S. 93, 99 (1985); *United States v. California*, 381 U.S. 139, 168 (1965). Alaska's proposed application of assimilation principles to selected islands of the Alexander Archipelago, however, would render that option a nullity. Under Alaska' view of the pertinent geography, the selective assimilation of the island-complex would *require* the United States, against its will, to treat

the entire area enclosed within the Alexander Archipelago as inland water. *See* Amended Compl. Exh. 2.

Alaska's result does not comport with a "realistic" assessment of the overall geography of the area at issue. *Maine*, 469 U.S. at 517; *Louisiana*, 394 U.S. at 63. If the Alexander Archipelago is recognized for what it truly is – a fringe of islands in the area of a deeply indented coast – then Article 4 of the Convention would preserve the understanding among the community of nations that the coastal nation – in this case, the United States – has the option of declining to enclose the area as inland waters and thereby maximizing the permissible area of innocent passage for commercial and military vessels. But if selected islands are extracted from the Alexander Archipelago, viewed in isolation, and treated as if they were mainland, then – under Alaska's interpretation of assimilation principles that are nowhere explicitly set forth in the Convention – those areas would become inland waters that, unlike the territorial sea, are not subject to the right of innocent passage. The anomaly that Alaska's theory creates is striking. It does not reflect a "common sense approach" to application of the Convention. *Maine*, 469 U.S. at 517. Rather, it is simply a contrivance designed to evade the clear import of Article 4.[5]

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[5] We do not contend that assimilation principles may never be applied, in any circumstances, to individual islands of an archipelago that might realistically enclose particular reaches of waters within the archipelago. The Court did not foreclose that possibility in *Louisiana*. *See* 394 U.S. at 67 n.88. For example, it might be appropriate to treat an island that bears an appropriately close relationship to the mainland as enclosing, as inland water, an otherwise well-marked and geographically obvious bay within the immediate vicinity of the island. That result would be permissible, of course, only if assimilation were consistent with the Supreme Court's multi-factor test that we discuss below. *See* pp. 24-41, *infra*. But Alaska's primary claim involving the island-complex is entirely different. Alaska seeks to assimilate strategically-selected fringing islands in order to capture all of the waters within the archipelago, when a realistic assessment of the overall geography would instead recognize the area as one in which Article 4 would paradigmatically apply. That contrivance is impermissible, quite apart from application of the Court's multi-factor test.

2. The supposed juridical bays that Alaska seeks to create through assimilation are not geographically obvious. Alaska's assimilation theory introduces another jarring departure from geographic reality. The supposed juridical bays that Alaska identifies – which it names "North Southeast Bay" and "South Southeast Bay" – are entirely figments of this lawsuit. They are not marked or identified on any map – save those produced for this litigation. As previously noted (pp. 2-3, 5, *supra*), a juridical bay must satisfy Article 7's requirements for size, depth of penetration, and the enclosure of landlocked waters, which distinguish bays from mere curvatures of the coast. Under those principles, there are numerous readily identifiable juridical bays along the mainland coast of Southeast Alaska and on the islands of the Alexander Archipelago. But nowhere does any publication identify North Southeast Bay or South Southeast Bay. Rather, the waters that Alaska seeks to capture through assimilation – waters that separate those islands from the mainland and from each other – have the characteristics of straits and are clearly marked as straits on official nautical charts and in all other publications. *See* US-II-6.[6]

Alaska's approach of liberally extending assimilation principles to create new and non-obvious juridical bays represents a marked departure from the realistic, common-sense approach that the Supreme Court has followed in applying the Convention. As the Court has recognized, Article

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[6] Explorers, cartographers, and geographers have consistently identified the waters that comprise the supposed bays as sounds, straits or passages, including: Cross Sound, Icy Strait, Chatham Strait, Peril Strait, Stephens Passage, Frederick Sound, Keku Strait, Wrangell Narrows. These same observers recognized that Mitkof, Kupreanof, and Kuiu Islands are islands, and named them accordingly. Parties to the 1903 Alaska Boundary Arbitration, on which Alaska relies for its historic waters claim, also treated those formations as islands. Although they disagreed on the location of the mainland 'coast' of southeastern Alaska, neither suggested that the "island complex" was part of the mainland. Great Britain did not enclose the Frederick Sound/Dry Strait passage with 10-mile baselines, as it did waterways into the actual mainland.

7 describes a juridical bay as a "well-marked indentation" into the coast. Art. 7(1), 15 U.S.T. 1609. *See, e.g., Maine*, 469 U.S. at 514. In that sense, as one of Alaska's own identified experts has pointed out, a juridical bay must be "geographically obvious" to the mariner:

> It is the quality of geographical obviousness, i.e., the existence of a coastal indentation lying behind identifiable entrance points and having the general configuration of a bay, which is sufficient to put the mariner on notice and which, at last, lends content to the well-marked requirement of paragraph two, sentence one.

Westerman, *The Juridical Bay* 85 (1987). Alaska's approach of employing assimilation to create non-obvious and heretofore unknown juridical bays poses potential dangers for mariners, who must navigate on the basis of charts and landmarks rather than on the basis of creative extensions of legal theories.

The Convention recognizes that the mariner, whether commercial or military, has the right to navigate through territorial seas in innocent passage, but not through inland waters, such as bays. See Art. 14, 15 U.S.T. 1610. Thus, the mariner must be able to identify readily an entrance to inland waters through tools that are readily available, such as nautical charts. For that reason, Article 4 provides that a coastal nation that elects to enclose waters within fringing islands "must clearly indicate straight baselines on charts, to which due publicity must be given." Art. 4(6), 15 U.S.T. 1608. But the Convention imposes no such requirement for juridical bays whose mouths are less than 24 miles wide. Art. 7(4), 15 U.S.T. 1609. To the contrary, waters that satisfy assimilation principles and otherwise qualify as juridical bays are inland waters whether or not the coastal nation has publicly claimed them. *Ibid.* It is therefore imperative, to avoid international conflicts, that United States courts not set precedents that encourage coastal nations to apply assimilation principles in a contrived manner for the purpose of creating geographically non-obvious inland waters.

The juridical bays that Alaska seeks to create in this case are not only impossible for mariners to identify, but they went undiscovered by numerous geographic experts and Alaska's own legal counsel until after the commencement of this quiet title suit. The world's most renown geographers, such as State Department Geographer S. Whitemore Boggs, commented extensively on the Alexander Archipelago without ever discovering North or South Southeast Bays. US Count I Memo. 36-37. The Coastline Committee, which was charged by the Legal Adviser of the Department of State with the responsibility to determine the location of the United States' coastline, including the closing lines of bays (see Reed, *Shore and Sea Boundaries* Appendix F (2000)), did not discern Alaska's supposed juridical bays.[7] When the Coastline Committee published its charts of the Alexander Archipelago in 1971, Alaska objected to the Committee's conclusion that the waters therein were not treated as inland waters. But Alaska did *not* contend that those waters constituted juridical bays; rather the State argued that they should be treated as historic inland waters – an argument that is the subject of Count I of Alaska's Amended Complaint.

The Senate Committee on Commerce subsequently held hearings in Juneau, Alaska, to allow the State to put forward evidence that the Alexander Archipelago, as well as two other areas, the Shumagin Islands and Shelikof Strait, embraced historic inland waters. *See Provisional U.S. Charts Delimiting Alaskan Territorial Boundaries, Hearing Before the Sen. Committee on Commerce*, 92nd Cong. (May 15, 1972). Alaska's Assistant Attorney General, Charles Cranston, specifically testified:

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[7] By contrast, the Coastline Committee gave extensive consideration to whether Long Island Sound, at issue in *Maine,* and various features of the Gulf Coast, at issue in *Louisiana*, constituted juridical bays in light of their geographic configurations. *See, e.g., Maine*, 469 U.S. at 522 n.15; *Maine Report* 41-43;US-II-30 (Coastline Committee minutes).

> The three areas to which the State refers to in its presentation [which included the Alexander Archipelago] *do not geographically possess the status of bays, but are more properly characterized as straits*.

Id. at 21 (emphasis added). Mr. Cranston was well qualified to speak on behalf of Alaska on that subject in light of his experience as Alaska's counsel in litigation over the status of Cook Inlet, which culminated in *United States v. Alaska*, 422 U.S. 184 (1975). When faced squarely with the issue, he nevertheless expressly rejected the position that Alaska now asserts here. Indeed, Alaska did not discover North Southeast Bay and South Southeast Bay until some *30 years* after the Coastline Committee published its charts. That discovery occurred only after the commencement of this litigation, following "[a]dditional study and consultation with experts retained since the Court granted Alaska leave to file its complaint." *See* Brief of Alaska in Support of Unopposed Motion For Leave to File An Amended Complaint 2.

Plainly, North Southeast Bay and South Southeast Bay are not geographically obvious. Rather, "a mere glance at a map of the region" (*Maine*, 469 U.S. at 514) reveals that they owe their existence to a contrivance that bears no realistic relationship to the geography of the area. Indeed, up to this point, Alaska has not been able to settle on the closing lines for those bays. *See* pp. 11-12, *supra*. North Southeast Bay and South Southeast Bay simply do not satisfy Article 7's specific requirements for a juridical bay. Their non-obvious status stands in stark contrast to the situation the Court encountered in *Maine*. In that case, the Court and its Special Master agreed, and the United States did not contest, that "if Long Island is to be viewed as a continuation or part of the mainland, it is *evident* that a bay is formed and that the requirements of Article 7 are satisfied." *Maine*, 469 U.S. at 515 (emphasis added); *see Maine Report* 47 ("Long Island Sound, *without question*, would be a juridical bay if the East River did not separate Long Island and the mainland."

(emphasis added)). Alaska' supposed juridical bays lack such geographic obviousness. Rather, they are the product of an unrealistic conception of the Alaskan coast.

3. The geography of the Alexander Archipelago does not require assimilation to satisfy the interests of the territorial sovereigns. The Supreme Court stated in *Maine* that "[t]he ultimate justification for treating a bay as inland waters, under the Convention and under international law, is that, due to its geographic configuration, its waters implicate the interests of the territorial sovereign to a more intimate and important extent than do the waters beyond an open coast." *Maine*, 469 U.S. at 519. Article 4 recognizes that a "fringe of islands," like the Alexander Archipelago, presents a geographic configuration that is not the equivalent of a bay and does not necessarily implicate the interests of the territorial sovereign to the same extent. The Convention accordingly gives the coastal nation the discretion to determine whether that configuration should be enclosed by straight baselines. The United States has determined that, on balance, the national interest is not well served by treating such areas as inland waters. That self-restraint is essential if the United States is to avoid setting precedents that would inhibit this Nation's ability to navigate in areas off foreign coasts. Alaska has no vital competing territorial interests that warrant undermining the United States' policy of self-restraint under Article 4 through an expansive application of assimilation principles.

As the United States explained in moving for summary judgment on Count I, the waters of the Alexander Archipelago have always been freely navigated and – unlike Long Island Sound – have never qualified as historic inland waters. The OCSLA enclaves that Alaska seeks to control (see Amended Compl. Exh. 1) currently support relatively little activity beyond navigation and fishing. To the extent that Alaska claims distinct sovereign interests in those matters, apart from

those of the Nation as a whole, the United States has attended to those interests. For example, the United States has imposed a pollution control regime on cruise ships that is consistent with Alaska water quality standards, Pub. L. No. 106-554, § 1(a)(4), 114 Stat. 2763a-315, and it has authorized Alaska to regulate fishing within the OCSLA enclaves. *See* 16 U.S.C. 1856(a)(2)(A) and (C). The United States has shown a willingness to address Alaska's interests through special legislation directed to the State's legitimate needs, and there is no reason to expect that the United States would not continue to do so in the future.

The primary force that appears to drive Alaska's assimilation theory, however, is a proprietary one. Alaska devised its assimilation theory specifically for this quiet title action to establish a basis for ownership of the underlying submerged lands. A State's interest in title to submerged lands is undoubtedly a significant one, but Alaska's interest in ownership of the particular lands at stake in this case should be kept in perspective. The United States also claims title to the enclaves, pursuant to the OCSLA, on behalf of all United States citizens, including the citizens of Alaska. Those lands, however, currently have questionable practical worth. It is undisputed that the submerged lands lie beneath deep waters, are not currently commercially exploitable, and have uncertain mineral value. And if those lands are ultimately exploited for oil and gas, then the State of Alaska would share in the resulting royalties whether or not it owns the submerged lands. *See* 43 U.S.C. 1337(g).

At bottom, Alaska's theory of assimilation overlooks the most fundamental sovereign interest that is at stake in this case – the United States' longstanding interest in maintaining a consistent and coherent approach to coast line delimitation to promote this Nation's longstanding policy of freedom of the seas. Alaska's expansive theory of island assimilation, which would override the discretion

that Article 4 grants coastal nations to exercise restraint in claiming inland waters, is inconsistent with that policy. *See* pp. 41-43, *infra*. Alaska's assimilation theory not only rests on an unrealistic vision of the overall geography at issue, but reflects a short-sighted view of the overarching national interests at stake.

B. The Island-Complex Does Not Satisfy The Specific Factors That The Supreme Court Has Identified As Relevant To Assimilation

Alaska's theory of juridical bays is not only squarely in conflict with the overall geography of the Alexander Archipelago, but it is also untenable in light of the physical features at issue. The island-complex that Alaska seeks to assimilate does not satisfy the specific factors that the Supreme Court has recognized as bearing on assimilation. *See Maine*, 469 U.S. at 516; *Louisiana*, 394 U.S. at 63. Each of those factors poses a substantial obstacle to Alaska's theory of assimilation. When the factors are considered in combination, they bear out what a "glance at a map" of the overall geography suggests: there is no warrant under the Convention for treating the island-complex as mainland, and, accordingly, North Southeast Bay and South Southeast Bay do not exist.

1. The size of the island-complex weighs against assimilation. The Supreme Court has indicated that the "size" of an island bears on whether it is assimilable, *Maine*, 469 U.S. at 516 (quoting *Louisiana*, 394 U.S. at 66), and that small features, such as the mudlumps at issue in *Louisiana*, are more readily assimilable than larger ones. *Louisiana*, 394 U.S. at 63 (describing the mudlumps as "small clumps of land that are entirely surrounded by water and therefore technically islands"). Small land forms are more appropriate for assimilation than large ones because islands that are fictionally treated as mainland should not "dwarf the true proportions of the original bay feature and hence change its entire character." See Hodgson & Alexander, *Toward an Objective*

Analysis of Special Circumstances, Law of the Sea Institute Occasional Paper No. 13, at 17 (Apr. 1972), US-II-16. *See* US-II-1 pp.11-12.[8]

In this case, the island-complex that Alaska seeks to assimilate is enormous, measuring 95 miles long and 55 miles wide at its widest point and encompassing a total area, including intervening waterways, of approximately 1945 square nautical miles. *See* US-II-10. Treating the island-complex as part of the mainland, and a headland, would not simply enlarge an original embayment, but would create – in Alaska's view – two enormous bays that would not otherwise exist. The islands of Louisiana, which provided the original impetus for the assimilation theory, are minuscule by comparison. *See* US-II-12 and 13. They typically are less than 1 square mile in size and were urged as candidates for assimilation because they created or extended relatively small embayments. *Ibid.*

The large size of the island-complex, by itself, does not disqualify it from assimilation. *See* Boggs, *Delimitation of Seaward Areas under National Jurisdiction*, 45 Am. J. Int'l L. 240, 258 (1951) ("The size of the island, however, cannot in itself serve as a criterion, as it must be considered in relationship to its shape, orientation and distance from the mainland.") (quoted in *Louisiana*, 394 U.S. at 65 n.85). Long Island is a large formation, but it is also distinctive in other important respects, described below, that are not shared by the island-complex here. *See Maine Report* 47 ("If there is ever a situation where a large coastal island will be considered a part of the mainland so the water enclosed between the island and the coast can be a juridical bay, this is it."). The size of the

[8] Drs. Hodgson and Alexander, like S. Whittemore Boggs, are widely regarded as leading authorities on coastal delimitation. Each held the position of "Geographer of the Department of State" and was responsible for advising the Secretary of State on matters pertaining to determinations of the coast line under international law.

island-complex, particularly when considered in light of other relevant factors, weighs heavily against treating that feature as part of the Alaskan mainland.

2. The island-complex does not have the appropriate shape and configuration to the mainland for assimilation. The Court has stated that the assimilation inquiry should include consideration of "the shape of the island, and its relationship to the configuration or curvature of the coast." *Maine*, 469 U.S. at 516 (quoting *Louisiana*, 394 U.S. at 66). The Court's decisions indicate that two considerations bear importantly on the assimilation inquiry: (a) first, an island, or complex of islands, proposed for assimilation should be oriented in a manner that produces a natural extension of the mainland; and (b) second, the water area that separates the island from the mainland should be riverine, or channel-like, in character.

a. The Court's decisions in *Maine* and *Louisiana* each considered whether an island should be assimilated in the specific context of formations that could be viewed as producing a "natural prolongation of the two dimensional coastline." Hodgson & Alexander, *supra*, at 17. In *Maine*, the single island at issue – Long Island – closely paralleled the mainland coastline in a way that, if the island were "viewed as a continuation or part of the mainland, it is evident that a bay is formed and the requirements of Article 7 are satisfied." 469 U.S. at 515. The Court placed special emphasis on Long Island's "shape and its relation to the corresponding coast," *id*. at 517-518, observing:

> The island's north shore roughly follows the south shore of the opposite mainland, with the island's shore, however, curving slightly seaward and then back, while the mainland has a concave shape. As a result, the large pocket of water in Long Island Sound is almost completely enclosed by surrounding land.

Id. at 518. *See also ibid.* ("The western end of Long Island helps form an integral part of the familiar outline of New York Harbor."). *See* US-II-5. Special Master Hoffman placed heavy

emphasis on those geographic characteristics as well. See *Maine Report* 46.[9] The Court placed similar emphasis on the shape and orientation of the very different land forms at issue in *Louisiana*. 394 U.S. at 60. The mudlumps that Louisiana sought to assimilate could all be described, to some degree, as natural extensions of the mainland. The Louisiana coast is "marshy, insubstantial, riddled with canals and other waterways," *id.* at 63, and the mudlumps interspersed amid those waterways consist of "small clumps of land" that, while "technically islands," *ibid*., more closely resemble "'hummocks of land surrounded by the marsh and swamp,'" *ibid*. (quoting *Louisiana v. Mississippi*, 202 U.S. 1, 45-46 (1906). They are, in that sense, a "natural prolongation" of the mainland.[10]

The island-complex at issue in this case stands in sharp contrast to the formations at issue

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[9] Master Hoffman observed (*Maine Report* 46):

> Two factors are of utmost importance to this conclusion [that Long Island can be treated as part of the mainland]. Long Island's geographic alignment with the coast is the first. Long Island and the coast are situated and shaped such that they enclose a large pocket of water, which closely resembles a bay. By viewing charts of the area, the bay-like appearance of the area is obvious and it becomes readily apparent that the enclosed water has many of the characteristics of a bay. Second, the geographic configuration of Long Island and the mainland forces the enclosed water to be used as one would expect a bay to be used. Ships do not pass through Long Island Sound and the East River unless they are headed for New York Harbor or ports on Long Island Sound.

See also id. at 47 ("If there is ever a situation where a large coastal island will be considered a part of the mainland so the water enclosed between the island and the coast can be a juridical bay, this is it. Long Island is closely linked with the mainland; it is situated such that a body of water that resembles a bay is enclosed, and the enclosed body of water is used like a bay.")

[10] Despite that close association, Special Master Armstrong concluded that they are not eligible for assimilation. *See Louisiana Report* 39, 41, 42 (noting that various mudlumps do not "screen the waters" of the respective bays); *see also id*. at 49-52 (Isles Dernieres are not an extension of the mainland). The Supreme Court rejected exceptions to the Master's report. 420 U.S. 529 (1975).

in *Maine* and *Louisiana*. The island-complex is not a single island that parallels the coast so as to enclose a pocket of water resembling a bay, *Maine*, 469 U.S. 517-518, nor is it a series of hummocks that blend indistinctly with surrounding marshland, *Louisiana*, 394 U.S. at 63. Rather, the island-complex is a group of distinct, identifiable islands strategically abstracted from the much larger Alexander Archipelago. *See* US-II-6. Each island is separated from the mainland and each other by a major waterway, just like the other islands of the Alexander Archipelago. *See ibid.* Even when viewed in isolation from the Archipelago, the islands that form the island-complex are not a natural prolongation of the mainland that follows the curvature of the coast. *See* US-II-7 and 8. Rather, those islands jut out at right angles from an essentially straight mainland coast. *See ibid.* No special master has recommended, nor has the Supreme Court ever approved, the assimilation of an island (much less a group of distinct islands) that runs perpendicular to the mainland.[11]

The island-complex plainly presents a markedly different geographic configuration than Long Island, the only island that the Supreme Court has ever treated as assimilated. Long Island is a single island that creates a "large pocket of water . . . almost completely enclosed by surrounding land" (*Maine*, 469 U.S. at 518). By contrast, the assimilation of the island-complex (which is itself

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[11] For example, Special Master Armstrong believed that Dauphin Island was eligible for assimilation because "[i]t appears from its shape and orientation to be an elongation of Mobile Point," and, "[g]enerally the configuration of Dauphin Island follows the curvature of the shoreline, ..." Report of the Special Master in *United States v. Louisiana* (April, 9, 1984) (*Mississippi Report*), at 16, 17. The Supreme Court, however, did not reach the issue. *See United States v. Louisiana*, 470 U.S. 93, 101 (1985). Similarly, Special Master Maris believed that the upper Florida Keys, which follow the curvature of the adjacent Florida coast, were eligible for assimilation. Report of the Special Master in United States v. Florida (Dec. 1973) (*Florida Report*), at 39. Neither the Supreme Court nor the parties endorsed that view, and the Court did not treat those islands as assimilated. *United States v. Florida*, 425 U.S. 791 (1976) (decree). In *Maine*, the Supreme Court treated Long Island as assimilated in part because "the island's north shore roughly follows the south shore of the opposite mainland." 469 U.S. at 518.

trisected by major navigable straits) would artificially segregate the continuous string of islands that comprise the Alexander Archipelago. And even if the segregated islands were treated as part of the mainland, the waters north and south of the island-complex – the so-called North Southeast Bay and South Southeast Bay – would not be "almost completely enclosed by the surrounding land" (*Maine*, 469 U.S. at 518). *See* US-II-8. Indeed, if it were necessary to reach the issue, the United States would assert that they do not constitute juridical bays. *See* pp.2-4, *supra*. In sum, assimilation of the island-complex would result in a highly artificial and unnatural extension of the mainland.

b. The Court's decisions in *Maine* and *Louisiana* also took account of the characteristics of the water area separating a potentially assimilable island from the mainland in accordance with the view of geographers, who have consistently urged that the water should have the characteristics of a river or narrow channel. *See, e.g.,* Hodgson & Alexander, *supra*, at 17 ("The intervening water area, ideally, should resemble a channel in configuration."); US-II-1 p.20. For example, the Court emphasized in *Maine* that the East River, which separates Long Island from the mainland, is a "narrow and shallow opening." *Maine*, 469 U.S. at 518. The Court specifically stated, in justifying assimilation of Long Island to the mainland, that "the existence of one narrow opening to the sea does not make Long Island Sound or Block Island Sound any less a bay than it would otherwise be." *Id.* at 519. Similarly, the Court noted in *Louisiana* that the mudlumps (which the Court ultimately refused to treat as assimilated) were "small clumps of land" surrounded by marshland, which would necessarily result in a channel-like configuration. *See* 394 U.S. at 63.

The island-complex in this case is separated from the mainland by a waterway that has the characteristics of a relatively wide but proportionately longer channel, which satisfies the objective test that Hodgson and Alexander have proposed for assessing the riverine characteristics of the

intervening waterway.[12] *See* US-II-10. Nevertheless, that channel differs critically from the geographic configuration of the East River, because that channel is by no means narrow and it does not comprise "one narrow opening to the sea" for an area that is otherwise distinctly a bay. Rather, the channel is merely one of several channels of varying widths that separate the islands of the Alexander Archipelago from the mainland and from each other. *See* US-II-6. Indeed, and in sharp contrast to Long Island, the island-complex itself is divided by two other navigable channels. And, of course, none of these channels bears any similarity to the narrow passages that separate the mudlumps at issue in *Louisiana*.

In sum, the shape of the island-complex and its configuration to the mainland weigh against assimilation.

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[12] Hodgson and Alexander suggest a test that computes the average length-to-width ratio of the waterway:

> The character of a channel may be easily established by relating the length of the water course to its average width. Closing lines may be drawn at the natural entrance points. These would, of course, be determined by the application of the 45 degree test as in the bay situation. The average width, assuming nearly parallel banks for the channel, may be determined by averaging the lengths of the two closing lines. The length of the channel may be measured along a line connecting its mid-points of the two closing lines. To be tru[ly] channel-like the ratio of length to average width should be 3:1 or greater. A lesser ratio would not exhibit . . . the true riverine characteristics of a channel (Figure 11). Rather, the feature would be more bay-like in its two dimensional configuration.

Hodgson & Alexander, *supra,* at 17 and 20. Their Figure 11 is reproduced at US-II-15. They explain the 45 degree test in US-II-16 pp.10-11. In the case of the channel separating the island-complex from the mainland, its northwestern entrance, determined under the 45 degree test, is 8 nautical miles wide, and its southeastern entrance, is 5.5 nautical miles wide. The distance between them is 53 nautical miles. The average width to length ratio is more than 7:1, meeting the Hodgson and Alexander minimum requirement as to the linear quality of the intervening water body. US-II-10, 15 to 17.

3. The island-complex is too distant from the mainland for assimilation. The Court has stated that the assimilation inquiry should take into account the island's "distance from the mainland." *Maine*, 469 U.S. at 516 (quoting *Louisiana*, 394 U.S. at 66). As the Court recognized, the farther that an island lies from the true mainland, and the more expansive the water area that must be ignored, the more difficult it is to justify treating the island as assimilated to the mainland. The Court has not specified what distance would be too great for assimilation, but its decisions, the reports of its special masters, and commentary of geographers provide guidance on the question. US-II-1 pp.12-16.

The Court's treatment of Caillou Bay in its *Louisiana* decisions is directly on point. If Caillou Bay is truly a juridical bay, then it is formed by the mainland to the north and by the westernmost of a string of barrier islands known as the Isles Dernieres. US-II-19. *See* 394 U.S. at 66-67 & nn.87-88. As the Court expressly stated, "Louisiana does not contend that any of the islands in question [*e.g.*, the Isles Dernieres] is so closely aligned with the mainland as to be deemed a part of it, and we agree that none of the islands would fit that description." *Id.* at 67 n.88. Later, before the Special Master, Louisiana contended that the islands should be assimilated. The western Isles Dernieres were separated from the mainland by Caillou Boca, a channel which varies in width from .39 to .7 nautical miles, and the islands were separated from each other by an average of 1.18 nautical miles.[13] The Special Master found that the Court had already ruled against assimilation.

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[13] Dr. Hodgson testified on behalf of the United States in those proceedings and provided those measurements. *See* Tr. 5411, 5456, 5517, 5525, 5533; US-II-20 pp.2-6. When asked, "if there were a stretch of water between features such as this where the distance was about a mile, could you conceive of them being part of the mainland?" Dr. Hodgson replied "No." He reiterated that a channel of 1.18 nautical miles average width prevents assimilation of two islands in the chain. Tr. 5525; US-II-20 p.2.

The State of Louisiana took exception to that finding and the Court overruled that exception. 420 U.S. 529 (1975).[14]

Special Master Armstrong revisited the island assimilation issue in a later chapter of *Louisiana*. In that proceeding, Mississippi sought to assimilate Dauphin Island, in the mouth of Mobile Bay, Alabama, in order to establish that Mississippi Sound was inland water. The Master considered the Court's criteria for assimilation and, with respect to the "distance from the mainland" criterion, he found that the nearest point of Dauphin Island to the mainland is 1.6 nautical miles. He concluded that that distance is "more than was contemplated by the Court in [*Louisiana*]." *Mississippi Report* 13. The other barrier islands forming Mississippi Sound, which are further from the mainland, were "apparently conceded not to be extensions of the mainland," *id*. at 12. *See id*. at 8 ("Mississippi has apparently abandoned its contention that the barrier islands lying off of its mainland shore are in fact extensions of that mainland and therefore properly assimilable thereto . . . , a contention which in my opinion is in any event untenable."). Those islands are separated by distances of from 2 to 5 nautical miles. US-II-21.[15]

In the *Maine* case – the only case in which the Court determined that an island should be assimilated – the Supreme Court and Special Master Hoffman placed specific reliance on the much

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[14] In its earlier decision in *Louisiana*, the Court had noted that the United States had treated the marshlands comprising St. Bernard Peninsula and the western shore of Lake Pelto/Terrebonne Bay as assimilated to the mainland. 394 U.S. at 63. The waterways separating the land forms in those areas have typical widths of less than 200 yards. US-II-3 and 4.

[15] Master Armstrong ultimately recommended that Dauphin Island could be assimilated to the mainland on the entirely novel ground that it abutted the admittedly inland waters of Mobile Bay. *Mississippi Report* 18. The United States took strong exception to that justification for assimilation. The Court did not adopt Master Armstrong's juridical bay recommendations, but found that Mississippi Sound qualified as historic inland waters. *See Louisiana*, 470 U.S. at 101, 115.

shorter distance between Long Island and the New York mainland. The Court and the Master focused on the separation created by the East River, which, if ignored, would establish Long Island Sound as a juridical bay. 469 U.S. at 519. As the Master noted, Long Island "is separated from the mainland by only a narrow stretch of water." *See Maine Report* 46. And as the Court observed, "At Throgs Neck, Long Island is about one-half mile from the mainland." *Maine,* 469 U.S. at 518. Indeed, the average width of the East River, computed in accordance with the methodology of Hodgson and Alexander (*see* p. 30 n.12, *supra*), is less than 1 nautical mile. US-II-22. To assimilate Long Island to the mainland, only about 12 square nautical miles of water must be ignored. *Ibid.*

The island-complex at issue in this case stands in sharp contrast to the situation presented in *Maine*. The waterway that must be ignored to assimilate the island-complex and create North Southeast Bay and South Southeast Bay is a major arm of Frederick Sound, which, as previously noted, has an average width of 7 nautical miles. US-II-10. To assimilate the island-complex, a total of more than 455 square miles of water area must be ignored. *Ibid*. That expanse dwarfs the distances and water areas that separated Caillou Island, Dauphin Island, and other features from the mainland and that were considered *too* distant for assimilation. Neither the Supreme Court nor its special masters have suggested that an island so distant from the mainland could be assimilated or that such an expansive water area could be ignored. To do so would vastly broaden the scope of the heretofore limited exception for assimilation.

4. The depth and utility of the intervening waters weigh decisively against assimilation. The Court has stated that the assimilation inquiry should take into account the "depth and utility of the intervening waters." *Maine*, 469 U.S. at 516 (quoting *Louisiana*, 394 U.S. at 66). Plainly, water passages that are shallow or not readily susceptible of navigation are more easily ignored and the

land forms they separate more easily assimilated. *See* Hodgson & Alexander, *supra*, at 20; *see also id*. at 17 ("where conditions of doubt arise, the channel should not be a principal route for navigation which would tend to isolate the island from the coastal headland"). The Court has not precisely quantified what depths or levels of vehicle traffic would preclude assimilation, but its decisions, and those of the Court's special masters, leave no doubt that assimilation cannot be justified merely on the basis that the intervening water is shallow or bears relatively little traffic. The Court has refused to assimilate land forms separated by waters that are no more than 2 feet deep. Such waters clearly cannot accommodate navigation by vessels of significant size, and certainly not those involved in international travel, yet they have not been assimilated.

In *Louisiana*, the Court specifically held that the previously discussed Isles Dernieres are not assimilated to the mainland. 394 U.S. at 66-67 nn. 87-88. Caillou Boca, the channel which separates them from the mainland, ranges in depth from 14 to 23 feet and is not, by any measure, a principal navigation route. US-II-23. Nevertheless, the islands were not assimilated to the mainland to form the headland of a juridical bay. Louisiana urged assimilation of a number of other islands or low tide elevations, that were surrounded by extremely shallow waters, but Special Master Armstrong rejected all of those claims. The waterways (and their depths) include: Bucket Bend Bay, southern headland: 1'-2' (US-II-13); Redfish Bay, eastern headland: 1'-2' (US-II-12); Point au Fer: 1'-15' in natural passages, 23' in dredged channel (US-II-1 pp.16-17, 24).[16] The Master also rejected assimilation of land formations south of Marsh Island: 1'-7' (US-II-25). Those formations

[16] It is clear that it was not the navigation channel that stood in the way of assimilation of Point au Fer because a number of land formations lie between it and Point au Fer and none of those was recommended separately for assimilation. US-II-24.

are described in the Coast Pilot as follows: "numerous oyster reefs, some of which uncover at low water, extend for about 4.5 miles off the S point of the island. The foul area should not be entered without local knowledge. Shell Keys, a low group of small islands 3 miles SSW of Mound Point, the southernmost point of Marsh Island, are only about 2 feet high." US-II-26 ¶265. *See Louisiana Report* 35-53. Despite the State's objections, all of the Master's recommendations were adopted. 420 U.S. 529 (1975); 422 U.S. 13 (1975) (decree).[17]

In *Maine*, the Court and Special Master Hoffman concluded that Long Island qualified for assimilation because the waterway to be ignored – the East River – had limited depth and utility for navigation. The Master heard testimony that the East River was 15 to 18 feet deep in the 1800s. Furthermore, he stated:

> Ships do not pass through Long Island Sound and the East River unless they are headed for New York Harbor or ports on Long Island Sound. Ships bound for ports not in the enclosed area [New York Harbor and Long Island Sound] navigate outside of Long Island and Block Island as they pass up and down the United States coast. Long Island Sound is not a route of international passage; ships merely pass into and out of it as one would expect ships to pass into and out of a bay.

Maine Report 46-47. Similarly, the Court noted that "the shallowness and inutility of the intervening waters as they were constituted originally, and the fact that the East River is not an opening to the

[17] Similarly, in *United States v. Florida*, Special Master Maris recommended that the Moser Channel, west of Knight Key, Florida, prevented assimilation between that Key and the next island to the west. He explained that "this navigable channel so far separates the lower Florida Keys from the upper Keys as to negate a finding that the former should be regarded a further extension of the mainland." *Florida Report* 47. "Moser Channel, 36 miles E of Key West, affords passage between the keys from the Gulf of Mexico to Hawk Channel for vessels of 7 to 8 feet in draft." US-II-26 ¶134.

sea, suggest that Long Island be treated as an extension of the mainland." *Maine*, 469 U.S. at 519.[18]

The waters that separate the island-complex from the mainland in this case are far deeper and more readily navigated than those involved in *Maine* or *Louisiana*. Most of Frederick Sound is extremely deep and accessible to any ocean-going vessel. US-II-28. Entering from the northwest, soundings of from 420-732 feet can be found in the first 40 miles. *Ibid*. That stretch regularly accommodates the ships of the Alaska ferry system and other large, seagoing vessels. US-II-31 p.12. Approximately 10 percent of the waterway is through Dry Strait, a relatively narrow and shallow passage at low water. US-II-28. But at mean high water it is approximately 15 feet deep and almost 1 nautical mile wide. US-II-29. Dry Strait is "extensively used by fishing boats and towboats operating between the towns of Wrangell and Petersburg." US-II-18 p.6 ¶242. According to the Coast Guard, "Tugs up to 82 feet with a beam of approximately 25 feet and a draft of 10 feet transit this waterway towing logs, enroute logging operations to the north and south of Dry Strait in Southeast, AK." US-II-27 p. 6. *See* US-II-1 p. 49. In short, the waterway that separates Mitkof and Kupreanof Islands from the mainland is extremely deep, and accommodates ocean going vessels for most of its length. And even the short portion which requires more careful navigation is regularly used by commercial traffic.

Furthermore, Frederick Sound is not the only waterway that must be ignored to justify treating the island-complex as the headland of a juridical bay. Separating Mitkof and Kupreanof

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[18] Significantly, the Coastline Committee extensively examined and discussed the nature of the East River in considering whether Long Island should be assimilated to the mainland. The Committee ultimately concluded that it should not be assimilated, but, as the Committee's minutes reflect, it was clearly understood to be a close question. *See Maine Report* 41-43; US-II-1 p.15; US-II-30.

Islands is the heavily traveled Wrangell Narrows. US-II-14. Wrangell Narrows is a major navigation channel, and has been since sailors began plying the Inside Passage. The United States Coast Pilot indicates that the waterway carries substantial waterborne commerce consisting of "cruise ships, State ferries, barges, and freight boats carrying lumber products, petroleum products, fish and fish products, provisions, and general cargo." US-II-18 p.7 ¶251. The Coast Guard reports that this passage is regularly used by Alaska state ferries of up to 410 feet in length with 75 foot beam drawing 17 feet; tugs up to 120 feet long and 17 foot draft; barges up to 320 feet long and 22 foot draft with an average length of tow of 500 feet; cruise ships up to 407 feet long and 53 feet across with drafts of 16 feet; and fishing vessels up to 150 feet long drawing 15 feet. US-II-27 p.3; US-II-1 p.50. Furthermore, historic documents show that Wrangell Narrows has long been the favored navigation route for national and international traffic. *See* US-II-31.[19]

Indeed, Wrangell Narrows is part of what Alaska has described in this very case as "[t]he sounds, straits, canals, channels, and narrows of Southeast Alaska – known collectively as the Inside Passage – [which] form its 'roads.'" Ak. Compl. Br. 2. As Alaska acknowledged, "[t]he state ferry system that travels through these waters is thus aptly called the Alaska Marine Highway." *Ibid.* Marine traffic does not enter Wrangell Narrows merely to visit ports within the waterway. U.S. and

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[19] A 1903 Corps of Engineers Report confirms that Wrangell Narrows are part of the 1020 mile route from Seattle to Skagway. *See* Reports of Preliminary Examination and Survey of Wrangell Narrows, Alaska, H.R. Doc. 58-39, at 5 (1903) (2nd Sess.). "Wrangell Narrows is the most difficult portion of the inside passage to southeastern Alaska." Report of Examination of Dry Straits, Alaska, H.R. Doc. 60-556, at 2 (1908) (1st Sess.). But the alternative route around Cape Decision "is about 70 miles longer than the route through Wrangell Narrows, is unprotected and subject to fog, hazardous rocks, and dangerous currents . . . the outside route through Chatham Strait is not always safe, and most of the passenger and freight business of the territory is moved over the inside passage." Report on Resurvey of Wrangell Narrows, Alaska, H.R. Doc. 71-647, at 2-3 (1930) (3rd Sess.).

foreign flag vessels have long used Wrangell Narrows as a route between distant points on either side. Published maps clearly show Wrangell Narrows as a critical segment of the Inside Passage used by prospectors, cruise ships, freight lines, private yachts, and the state ferry system. *See* US-II-31. The utility of Wrangell Narrows as a portion of the preferred navigation route from the contiguous 48 States and Canada to Alaska prevents the islands on either side from being treated as one.

Finally, Keku Strait separates Kupreanof Island from Kuiu Island, the seaward-most point of which is described by Alaska as a headland of North Southeast Bay. Keku Strait is 41 miles long, with mouths of 9 nautical miles on the north and south. The waterway is "riverine," but its average width of 9 nautical miles far exceeds the 1-nautical-mile maximum that is commonly viewed as a limit for assimilation. *See* US-II-10. Indeed, the Strait rarely narrows even to the 1 nautical mile limit. Depths in the wider sections range from 60-100 feet, although they decrease to as little as 5 feet, at low-water, in the central narrows. US-II-32. Nevertheless, according to the Coast Pilot, even there "[i]t is reported that 12 feet can be carried through 40 percent of the time . . . ." US-II-18 p.3 ¶164. "The pass is used by fishing vessels, cannery tenders, and tugs with log rafts . . . with a resultant saving from 30 to 80 miles." *Ibid.* The Coast Guard verifies that use. US-II-27 p.11-12. *See* US-II-1 p.51.[20]

In short, the depth and utility of three separate navigation channels that pass through the

[20] Alaska appears to include Coronation Island as part of its island-complex, but there is plainly no warrant for assimilating it to the other islands or the mainland. The waterway between Kuiu and Coronation Islands is not channel-like. Rather, it is open sea, with no width to length dimension. The intervening passage is a navigation channel one mile wide with soundings of 300 feet. US-II-6. There is no plausible basis for treating Coronation Island as mainland.

island-complex weigh heavily against assimilation. Indeed, Alaska's Inside Passage – the primary navigation route for domestic and foreign bound traffic – passes directly *through* the island-complex and has been an important navigation route for more than a century. Those features distinguish this case from the situation presented by Long Island and counsel strongly against treating the island-complex as assimilated mainland.

5. Other potentially relevant factors weigh against assimilation. The Supreme Court has noted that the foregoing factors are "illustrative rather than exhaustive." *Louisiana*, 394 U.S. at 66 n.86; see *Maine*, 469 U.S. at 517 ("We continue to find the illustrative list of factors quoted above to be useful in determining when an island or group of islands may be so assimilated."). At least two additional factors warrant consideration in this case.

First, the sparsely populated island-complex has no social or economic connection to the similarly populated mainland. It bears no similarity to Long Island, which "helps form an integral part of the familiar outline of New York Harbor." *Maine*, 469 U.S. at 518. As Special Master Hoffman noted:

> On a daily basis there is an enormous movement of people from Long Island to the mainland and from the mainland to Long Island. Additionally, the western end of Long Island is physically connected to the mainland, either directly or indirectly through Manhattan or Staten Island, by twenty-six bridges and tunnels.

Maine Report 45. The island-complex, by contrast, has no similar connection to the mainland; rather, it bears the same relationship to the mainland as the other islands of the Alexander Archipelago. Second, the island-complex is geologically a part of the Alexander Archipelago, rather than the mainland. *See Maine*, 469 U.S. at 516 ("an island's 'origin . . . and resultant connection with the shore' is another factor to be considered" (quoting *Louisiana*, 394 U.S. at 64 n.84)). *See*

also US-II-1 pp.24-25.

6. The Supreme Court's factors, considered in combination, preclude assimilation of the island-complex. The Supreme Court has recognized and reaffirmed "the general rule . . . that islands may not normally be considered extensions of the mainland for purposes of creating the headlands of juridical bays." *Maine*, 469 U.S. at 519-520. A party seeking to overcome that rule must make a strong showing, under the factors that the Court has identified, that an island or group of islands is "so integrally related to the mainland that they are realistically parts of the 'coast.'" *Id*. at 517. As the foregoing discussion demonstrates, application of those factors to the island-complex precludes assimilation.

First, the island-complex, which embraces approximately 1945 square nautical miles, is enormous, which weighs against assimilation. Second, the island-complex neither creates a natural prolongation of the mainland nor encloses pockets of water that would clearly constitute bays, and it therefore lacks the appropriate shape and configuration for assimilation. Third, the island-complex is, on average, 7 miles from the mainland and separated by 261 square nautical miles of water, a distance and area that is simply too large to ignore. Fourth, the intervening waters that Alaska seeks to ignore are substantial navigable waterways that separate the island-complex from the mainland, pass *through* the island-complex itself, and have long supported a large volume of domestic and international traffic and commerce. Finally, the island-complex is not socially, economically, or physically connected to the mainland; to the contrary, the island-complex is part of the Alexander Archipelago and in no sense part of the mainland.

In short, application of the specific factors that the Supreme Court has employed in its assimilation analysis confirms what a "glance at a map" reveals. The islands that Alaska seeks to

assimilate are plainly *not* "so integrally related to the mainland" to justify an exception from the general rule.

C. The United States' Foreign Relations And National Defense Interests Counsel Against Extension Of The Assimilation Principle To This Case

For more than 100 years, the United States has deemed its international interests best served by minimizing national claims of maritime sovereignty. As a naval power and international trader, it has sought to maximize the ability of all vessels to sail the oceans without interference from coastal nations. That interference often begins with liberal interpretations of principles for delimitation of inland waters, typically in the form of excessive claims of historic inland waters or radical applications of straight baseline systems. The United States has identified claims of more than 80 nations whose illegal maritime claims "threaten the rights of other States to use the oceans." Roach & Smith, *United States Responses to Excessive Maritime Claims* 15 (1996). Additionally they note that the historic trend points toward further diminishment of commonly shared rights to free navigation. *Id.* at 4.

"As a maritime nation, the United States' national security depends on a stable legal regime assuring freedom of navigation on, and overflight of, international waters." Roach, *supra*, at 4. The United States has been the world's preeminent advocate of conservative delimitation principles, discouraging excessive maritime claims primarily through diplomacy but also, where necessary, through military intervention. *Id.* at 4-11. "Even though the United States may have the military power to operate where and in the manner it believes it has the right to, any exercise of that power is significantly less costly if it is generally accepted as being lawful." *Id.* at 8. Many of the excessive maritime claims at which those efforts are directed result from coastal nations' stretching

inland water delimitation principles much as Alaska seeks to do here. Alaska's efforts to stretch assimilation principles to turn the straits of the Alexander Archipelago into juridical bays are, in principle, no different than the efforts of foreign nations to stretch Article 4's straight baseline principles or internationally accepted historic waters principles to turn territorial seas into inland waters.

If the Court were to endorse Alaska's approach, the United States' efforts to discourage excessive claims would be seriously undermined. Once unleashed from the status of an "exceptional" claim, the concept of assimilation cannot be readily cabined. For example, if Mitkof, Kupreanof, and Kuiu Islands are assimilated to the mainland, then why not the islands of the Canadian or Russian Arctic? The United States has a long-standing interest in freedom of navigation in both areas and has aggressively opposed those nations' jurisdictional claims. Similarly, under the inevitable extensions of Alaska's theory, is Vancouver Island part of the British Columbia mainland, creating bays of the Straits of Georgia and Queen Charlotte Strait? Are the islands of Tierra del Fuego actually mainland? Why not assimilate Cape Breton Island to Nova Scotia? If the standards of assimilation are so malleable that the Alexander Archipelago can be converted into two juridical bays, with mouths of more than 120 and 150 miles, then the possibilities for foreign excessive claims is vast. In each instance, the foreign nation might point to the Court's decision in this case as justification for the extravagant claim.

The leap from *Louisiana* and *Maine* to this case is enormous. The island assimilations that the Court recognized in *Louisiana* were limited to canal-riddled marshlands that both parties recognized as mainland. The Court's conclusion in *Maine* that Long Island was assimilated to the mainland had limited international consequences, because Long Island is so closely and uniquely

associated with New York City, and the international community had already recognized Long Island Sound as historic inland waters. Neither decision produced a wholesale change in the status of an enormous waterbody. A finding of assimilation here would have exactly that effect.

II. Alaska's Theory That Two Smaller "Bays" Should Be Created By Assimilation Is Also Unsound

The assimilation principles that apply to the island-complex apply equally to the two other features, the islands in the vicinity of Sitka Sound and Cordova Bay, that Alaska seeks to assimilate. It is clear that those features cannot be assimilated and they accordingly do not warrant extended discussion.

A. The Islands In The Vicinity Of Sitka Sound Do Not Qualify For Assimilation

Alaska seeks to treat Sitka Sound as a bay by assimilating the western shore of Baranof Island with Kruzof Island. Assimilation is inappropriate because Sitka Sound cannot realistically be viewed as an indentation into a single land form. US-II-1 pp. 56-57. The channel that separates Baranof and Kruzof Islands leads to Salisbury Sound to the north. Its mouths are approximately 1.5 nautical miles at its northern entrance and 2.5 nautical miles in the south. US-II-33. Its area is largely taken up by yet another feature, Partofshikof Island, which lies in the center of the channel. US-II-34. Nevertheless, a navigation route through Salisbury Sound and Neva Strait connects Sitka Sound to the Pacific Ocean to the north. The intervening channel between Baranof and Kruzof Islands has depths ranging from 200 to almost 400 feet in Salisbury Sound and a maintained depth of 24 feet in Neva Strait. It forms a significant navigation route to and from Sitka accommodating, among other traffic, the Alaska state ferry system. US-II-31 p.13. According to the Coast Guard, referring to the Olga, Neva, Peril Strait area, "[t]he vessel traffic in the waterway is significant

including barges, fishing vessels, charter boats, pleasure craft and Alaska State Ferries with lengths up to 400 ft. and drafts up to 18 ft." US-II-27 p.20.

The assimilation that Alaska proposes would not extend an existing headland, but would create a bay where none can realistically be said to exist. US-II-35. Because Baranof Island and Kruzof Islands are separated by a significant navigation channel, with an average width at its mouths of approximately 2 nautical miles, it is obvious that the two islands cannot be treated as a single land form. US-II-36.

B. The Islands In The Vicinity Of Cordova Bay Do Not Qualify For Assimilation

The last of Alaska's designated bays lies off the western shore of Prince of Wales Island and, like the prior three alleged bays, is not an indentation into a single land feature. Rather, it is formed by Prince of Wales Island and Dall Island to its west. US-II-37. Like Sitka Sound, Cordova Bay is not an indentation into a single land form. When the islands that form and lie within Cordova Bay are erased there is no indentation into Prince of Wales Island. US-II-38. Dall Island is separated from Prince of Wales Island by the eastern arm of Ulloa Channel and Tlevak Strait. US-II-39. The waterway is approximately 4.5 miles long, with a western entrance of 2 miles and an eastern entrance of approximately 1.75 miles. The resulting length-to-width ratio of 2.37:1 is less than the 3:1 minimum suggested by Drs. Hodgson and Alexander to establish the "riverine" character of a waterway and to satisfy the Court's "relationship to the configuration of the mainland" criterion.

What is more, the passage averages almost double the maximum width considered to be acceptable for assimilation. It also exceeds the 1.6 nautical miles that Special Master Armstrong understood to be "more than was contemplated by the Court." *Mississippi Report* 13. Depths in the

passage range up to 60 feet. US-II-39. The Coast Pilot describes these channels as affording passage to Bucareli Bay to the north. *See* US-II-18 p.15-16 ¶¶234-254. And, according to the Coast Guard, as many as 150 commercial fishing vessels a week transit this passage in summer months and barges of up to 221 feet are known to use the route. US-II-27 p.14. The water separating Prince of Wales and Dall Islands has none of the characteristics essential for assimilation of adjacent land forms. It is not long and narrow. It is, on average and for most of its length, almost 2 miles wide. And it is deep. Those waters cannot reasonably be treated as land. For that reason, Cordova Bay is not a juridical bay. Rather, it is a strait through which large vessels can pass between Prince of Wales and Dall Islands. *See* US-II-1 p.57.

CONCLUSION

The motion of the United States for summary judgment on Count II 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 II

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-II-1	Dr. Robert W. Smith, Report On Alaska's Juridical Bay Claims, Alaska v. United States, Supreme Court No. 128, Original
US-II-2	Convention On The Territorial Sea And The Contiguous Zone, Geneva, 1958
US-II-3	Saint Bernard Peninsula, Louisiana (chartlet)
US-II-4	Louisiana Mainland West of Lake Pelto (chartlet)
US-II-5	Long Island Sound (chartlet)
US-II-6	Alexander Archipelago and Inside Passage (chartlet)
US-II-7	The Mainland of Southeast Alaska (chartlet)
US-II-8	The Mainland of Southeast Alaska, with the Island Complex added (chartlet)
US-II-9	The Skjaergaard Coast of Norway
US-II-10	The Island Complex, Water and Land Measurements (chartlet)
US-II-11	Examples of United States' Foreign Policy Statements Regarding Limited Maritime Claims and Recognition of that Policy By International Authorities
US-II-12	Southeast Pass, Louisiana - And Non-Assimilated Islands (chartlet)
US-II-13	Bucket Bend Bay, Louisiana - Non-Assimilated Islands
US-II-14	The Island Complex (chartlet)

US-II-15 Channel Ratio - from Hodgson and Alexander

US-II-16 Hodgson & Alexander, Toward An Objective Analysis Of Special Circumstances, Law of the Sea Institute Occasional Paper No. 13 (Apr. 1972)

US-II-17 The Island Complex As A Single Feature and Channel Separating It From The Mainland (chartlet)

US-II-18 United States Coast Pilot, Vol. 8 (1999) cover and pages 142, 143 and 163-175

US-II-19 Caillou Bay and Caillou Boca, Louisiana (chartlet)

US-II-20 Partial Testimony of Dr. Robert D. Hodgson, The Geographer, United States Department of State, Before Special Master Walter P. Armstrong, Jr., in *United States v. Louisiana*, Supreme Court No. 9, Original, pages 5411, 5456, 5515, 5525 and 5533

US-II-21 Mississippi Sound, Alabama and Mississippi (chartlet)

US-II-22 East River, New York (chartlet)

US-II-23 Caillou Boca, Louisiana (chartlet)

US-II-24 Low Tide Elevations In The Mouth of Atchafalaya Bay, Louisiana (chartlet)

US-II-25 Shell Keys, Louisiana - Not Assimilated to Marsh Island

US-II-26 United States Coast Pilot, Vol. V (2002), cover and pages 208 and 321

US-II-27 United States Coast Guard - 17th Coast Guard District, Juneau, Alaska, Relevant portions of most recent Waterways Analysis And Management System Reports for channels separating alleged headlands of North Southeast, South Southeast and Cordova Bays and Sitka Sound from the adjacent mainlands

US-II-28 Eastern Frederick Sound, Including Dry Strait (chartlet)

US-II-29 Dry Strait at Mean High Water (chartlet)

US-II-30 Minutes of the Committee for the Delimitation of the United States Coastline of December 7, 1970 and January 4, 1971.

US-II-31 Representative Portions of Maps Indicating Commercial Transit Routes Between Islands Said By Alaska To Be Part Of The Mainland [prepare cover sheet]

US-II-32 Keku Strait (chartlet)

US-II-33 Northern Entrance to Sitka Sound With Islands Deleted (chartlet)

US-II-34 Northern Entrance to Sitka Sound, St. John Baptist Bay, Neva Strait and Olga Strait (chartlet)

US-II-35 Western Shore of Baranof Island with Islands forming, and within, Sitka Sound Deleted (chartlet)

US-II-36 Sitka Sound With Navigation Routes (chartlet)

US-II-37 Cordova Bay (chartlet)

US-II-38 Western Shore of Prince of Wales Island, with Islands forming, and within, Cordova Bay Deleted (chartlet)

US-II-39 Northern Entrance to Cordova Bay, Large Scale (chartlet)

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 II 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 brief were not served on counsel for amici.