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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO ALASKA'S MOTION FOR SUMMARY JUDGMENT ON COUNT II OF THE AMENDED COMPLAINT

Theodore B. Olson
Solicitor General

Edwin S. Kneedler
Deputy Solicitor General

Jeffrey P. Minear
Assistant to the Solicitor General

Gary B. Randall
Bruce M. Landon
Michael W. Reed
Trial Attorneys

United States Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT:

I. Alaska's Supposed Bays Are Straits Separating Islands 3

A. Alaska's Proposed Assimilation Theory Is Flawed 4

1. Alaska does not properly identify the intervening waters 6

2. Alaska does not properly assess the depth and utility of the intervening waters . . . 11

B. Alaska's Application Of Assimilation Principles To The Features In This Case Is Mistaken 13

1. Mitkof, Kupreanof, and Kuiu Islands are not one land-form, nor are they part of the mainland 14

a. Kuiu Island cannot be assimilated to Kupreanof Island 15

b. Kupreanof Island cannot be assimilated to the mainland directly or through Mitkof Island 16

c. The proposed island-complex cannot be assimilated to the mainland 20

2. Kurzof Island cannot be assimilated to Baranof Island 22

3. Dall Island cannot be assimilated to Prince of Wales Island 23

C. Additional Considerations Preclude Entry Of Summary Judgement In Favor Of Alaska 24

1. The geologic origin of the islands weighs heavily against assimilation 24

2. "North Bay" and "South Bay" are not used as bays 27

3. Alaska's approach to assimilation undermines the United States' foreign policy interests 29

II. "North Bay" and "South Bay" Are Mere Curvatures Of The Coast 31

A. Alaska's Formulation Of Article 7's Indentation Test Is Flawed 33

1. The width-of-mouth determination measures a single line connecting the mainland-to-mainland headlands 33

2. The depth-of-penetration determination measures a single line from the mouth to the head of the waterbody 39

3. The ratio of depth-to-width must be at least one-to-one 40

B. Alaska's Application Of The Indentation Test To The Features In This Case Is Mistaken 41

1. "North Bay" is not a juridical bay 41

2. "South Bay" is not a juridical bay 43

3. Sitka Sound is not a juridical bay 44

4. Cordova Bay is not a juridical bay 45

CONCLUSION 46

TABLE OF AUTHORITIES

Page

Cases:

Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948) 5

County of Washington v. Gunther, 452 U.S. 161 (1981) 3

Department of the Navy v. Egan, 484 U.S. 518 (1988) 2, 31

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) 31

United States v. Louisiana, 394 U.S. 11 (1969) 5, 9, 11, 24, 25, 32, 33, 35, 36, 37, 44, 45

United States v. Louisiana, 420 U.S. 529 (1975) 25

United States v. Maine, 469 U.S. 504 (1985) 5, 6, 7, 8, 9, 12, 20, 21, 25, 27, 28, 29, 35, 36, 37

United States v. Stuart, 489 U.S. 353 (1989) 1, 10, 31, 36

Statutes and rules:

Convention on the Territorial Sea and the Contiguous Zone, Sept. 10, 1964.,
15 U.S.T. 1606 *et seq*., T.I.A.S. 5639 1

Art. 7, 15 U.S.T. 1609 . . . . 5, 32, 33, 34, 42

Art. 10, 15 U.S.T. 1609 5

Fed. R. Civ. P.:

Rule 56(e) 27

Treaty To Resolve Pending Boundary Differences And Maintain The Rio Grande And Colorado Rivers As To The International Boundary, 23 U.S.T. 373 (1970) 7

Miscellaneous:

Page

Hodgson & Alexander, *Toward an Objective Analysis of Special Circumstances*,
Law of the Sea Institute Occasional Paper No. 13 (Apr. 1972) 6, 7, 39

Miscellaneous (continued): Page

NOS Chart 17360 11

1 O'Connell, *The International Law of the Sea* (1982) 41

Prescott, *The Maritime Political Boundaries of the World* (1985) 34

Proceedings of the Alaskan Boundary Tribunal, S. Doc. No. 58-162 (2d Sess.) (1903-1904) . . . 14

Provisional U.S. Charts Delimiting Alaskan Territorial Boundaries, Hearing Before the Sen. Comm. on Commerce, 92d Cong., (May 15, 1972) 13

3 Reed, *Shore and Sea Boundaries* (2000) 6, 32, 37

Report of the Special Master, *United States v. Alaska*, (*Alaska Report*) (Mar. 1996)) 40

Report of the Special Master, *United States v. Louisiana*, (*Louisiana Report*) (July 31, 1974) 25, 36

Report of the Special Master, *United States v. Maine*, (*Maine Report*) (Oct. Term 1983) 7, 9, 25, 36

Roach and Smith, *United States Responses To Excessive Maritime Claims* (1996) 30

Strohl, *The International Law of Bays* (1963) 37, 41

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Alaska has moved for summary judgment on Count II of the Amended Complaint, which seeks to quiet title to certain disputed submerged lands on the theory that they are encompassed within one or more juridical bays under the principles set out in Article 7 of the Convention on the Territorial Sea and the Contiguous Zone, Sept. 10, 1964, 15 U.S.T. 1606 *et seq*. The United States disagrees and has moved for summary judgment on Count II. The United States' memorandum describes the relevant provisions of the Convention and the controlling precedents. U.S. Count II Memo. 4-10.[1]

An inspection of the competing motions brings this controversy into focus. The parties agree that the Convention provides the controlling principles and that those principles must be articulated in a way that nations and mariners alike can readily understand. U.S. Count II Memo. 19; AK Count II Memo. 29. But they dispute certain aspects of Article 7. First, the United States and Alaska disagree on the scope of the exception to Article 7's normal delimitation principles that allows islands to be treated as part of the mainland. The United States urges a narrow view of that exception, based on Supreme Court precedent and the international consequences of enlarging that departure from the normal rule, while Alaska must take a broader view of that exception to establish its title to the offshore enclaves at issue in this case. Second, the United States and Alaska disagree on the primary Article 7 test for determining juridical bays, which requires a comparison of the width of mouth of the proposed bay to its depth of penetration. The United States submits that this

[1] The United States continues its prior practice of numbering exhibits, adding additional exhibits in response to Alaska's submission. See Table of Exhibits. The United States also employs the same abbreviations employed in the prior memoranda.

question should not be reached on summary judgment, but in any event disputes Alaska's approach. The United States urges that Alaska's approach is squarely inconsistent with settled practice, while Alaska takes the opposite view.

The United States and Alaska have also adopted different conceptual approaches, which themselves have broad international consequences. Because Article 7 is self-executing in the sense that juridical bays are treated as inland waters regardless of whether they are identified on nautical charts, the United States deems it essential, to avoid international conflict, that Article 7's terms be applied in a clear and coherent manner. Foreign nations and individual mariners must have understandable rules that can be readily applied to a virtually limitless variety of coastal features. The United States therefore relies on a cohesive and identifiable body of principles, drawn from objective criteria, that it consistently applies both nationally and internationally. By contrast, Alaska, which is not constrained by international implications, picks and chooses among principles and frequently offers conclusions without identifying principles on which they can be justified. As a consequence, the approach that Alaska adopts in pursuit of its claim of title to the small enclaves of submerged lands at issue here would also justify extravagant foreign claims of maritime jurisdiction in internationally sensitive waters.

Foreign policy is "the province and responsibility of the Executive," *e.g.*, *Department of the Navy v. Egan*, 484 U.S. 518, 529-530 (1988), and the Executive's construction of treaty terms "is entitled to great weight," *e.g.*, *United States v. Stuart*, 489 U.S. 353, 369 (1989). The United States' exposition of the Convention's terms, particularly those relating to the scope of inland waters, has important international ramifications. Foreign nations rightfully expect that the United States would apply those principles consistently in both the international and domestic contexts. The Master

accordingly should be mindful of the international precedent that this case will establish. The international community is unlikely to treat the United States' internal application of Article 7 in this case as if it were "a restricted railroad ticket, good for this day and train only." *County of Washington v. Gunther,* 452 U.S. 161, 183 (1981) (Rehnquist, J., dissenting).

ARGUMENT

Alaska' motion for summary judgment on Count II should be denied because the juridical bays that Alaska seeks to create do not satisfy Article 7's requirements. First, as the United States has explained in its motion for summary judgment, the waters at issue consist of straits separating islands and cannot reasonably be considered an "indentation" into the mainland coast. Alaska's contentions that certain strategically selected islands should be treated as mainland are inconsistent with the Convention, not justified under the Supreme Court's decisions, and rest on factually mistaken premises. If the United States is correct, then the Special Master should proceed no further because the United States is entitled to judgment on that basis. Second, as Alaska acknowledges, even if the islands Alaska has selected qualified as mainland, the State would face the additional burden of showing that the waters at issue also meet Article 7's criteria for identifying juridical bays. Alaska has erred in its application of those criteria. Neither "North Bay" nor "South Bay" satisfies the primary "indentation" test. Assuming arguendo that the waterbodies Alaska claims are bays, Alaska has failed to apply accepted principles for identifying the entrance points and closing lines for those bays.

I. Alaska's Supposed Bays Are Straits Separating Islands

Alaska's theory that the waters of the Alexander Archipelago consist of several large juridical bays depends on its assertion that, if certain islands therein are treated as mainland, then the

intervening waters can be considered bays rather than straits. Alaska's theory does not coincide with the geographic reality of the region, which exhibits the phenomenon of fringe islands that the Convention expressly addresses through the *optional* use of straight baselines. U.S. Count II Memo. 14-24. Alaska responds to that reality by invoking the "poetically stated observations" of John Muir. AK Count II Memo. 17-18, 38. But even in his poetic musings, Muir distinguished fact from fiction. He expressly acknowledged that he was sailing over "ocean ways" amid "islands." *Id.* at 17-18.

The issue for adjudication is whether certain islands, despite their insular status, should be treated as mainland based on an established body of generally applicable legal principles that the United States must apply in both foreign and domestic disputes. *See* U.S. Count II Memo. 24-46. Those principles find expression in the Convention, the Supreme Court's decisions, and objective criteria that the State Department follows in ascertaining maritime boundaries. Alaska urges the Master to apply those principles selectively and decide the issues based on criteria that Alaska has formulated to dictate the outcome in this case. We therefore first identify our key disagreement with Alaska over the appropriate principles before turning to the specific land-forms at issue.

A. Alaska's Proposed Assimilation Theory Is Flawed

The United States urges that the islands at issue here cannot be assimilated because they do not satisfy the specific factors that the Supreme Court has determined relevant. In evaluating those factors, the United States applies the same objective principles that the United States applies in evaluating the claims of foreign nations. *See* U.S. Count II Memo. 24-39. By contrast, Alaska follows the practice of some foreign nations and selectively picks and chooses among principles when it suits its purposes, without regard to maintaining a generally applicable approach that can be applied to other factual contexts. The practical result of Alaska's approach is an entirely ad hoc

process in which "[a]ll is left to case-by-case conjecture." *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 45 (1948) (Jackson, J., dissenting). Contrary to Alaska's implicit premise, there are concrete legal criteria for evaluating the assimilation issue.

The starting point is the Convention. Article 7 provides that a bay is an indentation into the "coast," 15 U.S.T. 1609, a term that the Supreme Court has recognized to be "used in contrast with 'islands' throughout the Convention." *United States v. Louisiana*, 394 U.S. 11, 67 (1969). Indeed, Article 10 specifically defines an island as "a naturally-formed area of land, surrounded by water, which is above water at high tide," 15 U.S.T. 1609. The parties agree that the five land-forms that Alaska seeks to treat as part of the mainland are islands under that definition and, accordingly, cannot qualify as headlands of bays under a literal reading of the Convention. Rather, Alaska must rely on the Supreme Court's determination that, in extraordinary circumstances, land-forms that are surrounded by water "may be so closely linked to the mainland as realistically to be assimilated to it." *Louisiana*, 394 U.S. at 66. But that judicially authorized departure from the treaty text is a narrow exception from the governing rule. As the Court cautioned, "[o]f 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 . . . ." *Id.* at 62 (footnote omitted; emphasis in original); *accord United States v. Maine*, 469 US 504, 519-520 (1985).

The Court has provided general guidance for determining when this exception to the Convention's rules might apply, stating that "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." *Louisiana,* 394 U.S. at 66. The federal government has

adopted those principles and refined them in light of objective criteria developed by Drs. Robert Hodgson and Lewis Alexander, who each held the position of Geographer of the Department of State. *See* Hodgson & Alexander, *Toward An Objective Analysis Of Special Circumstances, Law of the Sea Institute Occasional Paper No. 13* (Apr. 1972) (US-II-16). The Supreme Court has since cited those principles with approval in determining the entrance points of a bay. *See Maine*, 469 U.S. at 522. n.14. They have similar utility in determining whether an island may be assimilated to the mainland. *See* US-II-16 at 17; 3 Reed, *Shore and Sea Boundaries* 275-278 (2000).

The Convention, the Court's decisions, and the principles developed by the State Department's geographers thus provide substantial guidance in determining whether islands should be assimilated to the mainland. Taken together, they indicate that assimilation is the exception, rather than the rule, that at least five specific factors should be considered, and that those factors should be evaluated based on objective criteria. The United States identifies and applies those principles in its motion for summary judgment, freely acknowledging when particular principles are satisfied and when they are not. *See* U.S. Count II Memo. 24-41. As explained below, Alaska follows those principles when they support its position, but ignores or modifies them, without explanation, when they cut against Alaska's desired result. Alaska's approach departs from generally accepted principles in two fundamental respects. Those departures help to explain why the view of the United States and Alaska diverge.

1. *Alaska does not properly identify the intervening waters.* Although Alaska cites Hodgson and Alexander approvingly, and claims consistency with their objective criteria, Alaska freely discards those criteria when they undermine its litigation position. Alaska most strikingly departs from the Hodgson-and-Alexander principles in identifying what the Supreme Court has consistently

called the "intervening waters" (*e.g.*, *Maine*, 469 U.S. at 516) that separate an island from the mainland. Hodgson and Alexander provide objective guidance for identifying and determining the "character of the channel":

> Closing lines may be drawn at the natural entrance points. These would, of course, be determined by the application of the 45° 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 the mid-points of the two closing lines. To be [truly] channel-like the ratio of length to average width should be 3:1 or greater.

US-II-16 pp.17-20. Hodgson and Alexander include Figure 11 to illustrate the concepts (*id*. at 21), which we have reproduced, for convenience, as Appendix A herein. *See id*. at 10-12 (describing the 45-degree test).[2]

Alaska generally embraces the Hodgson-and-Alexander principle that the intervening waters should be channel-like in character and that a 3:1 ratio of length-to-average-width is an appropriate measure. AK Count II Memo. 12-14, 26-27, 54; *but see id*. at 57 (suggesting an exception is appropriate for Ulloa Channel). At the same time, Alaska utterly ignores the Hodgson-and-Alexander objective criteria for identifying the extent (and therefore the length and average width) of the intervening waters. Under the Hodgson-and-Alexander principles, those waters include the entire area across which the two land-forms of interest face one another as defined "by the application of the 45° test as in the bay situation." US-II-16 p.17. When the 45-degree test is applied

[2] The Supreme Court and its special masters have recognized the 45-degree test as a proper method of locating the entrance points of a bay. *Maine*, 469 U.S. at 522 n.14; *Maine Report* 50 n.39. As Hodgson and Alexander note, the test applies equally to locating the entrance points of a channel. Indeed, it has been used by the United States and Mexico to define the mouth of the Rio Grande. Treaty To Resolve Pending Boundary Differences And Maintain The Rio Grande And Colorado Rivers As The International Boundary, 23 U.S.T. 373 (1970).

to the primary intervening waterways at issue here, the entrance points are located as shown on US-II-10 (Appendix B).[3]

Rather than applying the Court's assimilation factors to the intervening waters as a whole, Alaska engages in a result-oriented exercise of focusing only on a very limited stretch of the waterway that actually separates the two land-forms. AK Count II Memo. 13, 26, 57. It then denominates that stretch "the assimilation zone" (*id*. at 13 n.5) and applies the Court's factors and the Hodgson-and-Alexander principles to that often small portion of the intervening waterway. *Id*. at 12, 14, 27. But there is no reason to believe that, when the Court referred to "intervening waters" (*Maine*, 469 U.S. at 516), it meant only a *strategically selected portion* of the channel across which the adjacent land-forms face one another. Hodgson and Alexander did not have that understanding; they specifically provided a principle, the 45-degree test, for determining where the facing shores begin and then accepted the results as the limits of intervening waters. Their Figure 11 makes clear that the entire intervening waterway is to be employed, rather than simply some internal segment that preordains the outcome. *See* Appendix A.

Indeed, Alaska offers no guidelines for defining its "assimilation zone" other than it is a "pinched area" of the intervening waters. AK Count II Memo. 13, 26, 57. That entirely subjective test opens up broad vistas for both national and international controversy. It could be used to justify assimilation of any two land-forms that face each other across a wide channel but whose shores

---

[3] Because the entire island-complex must be treated as a single land-form and assimilated to the adjacent mainland to create Alaska's proposed headland, the intervening waterway between the island-complex and the mainland is the eastern arm of Frederick Sound, including Dry Strait. If Mitkof Island were considered for assimilation separately, the western entrance to the intervening waterway would be a line running northeast from Petersburg to the mainland, but the outcome of the assimilation analysis, using the Hodgson-and-Alexander principles, would be the same.

nearly touch for a short portion of their total distance. Given the Court's classic example of assimilation, the Louisiana marshlands near Lake Pelto (US-II-4), *Louisiana*, 394 U.S. at 63, it is unlikely that the Court contemplated such an extraordinary extension of what it considered a limited exception. Nor can it be justified on the basis of the Court's assimilation of Long Island. *See Maine*, 469 U.S. at 514-520. In that case, the Court identified the "intervening waters" as the East River, without independently applying the 45-degree test, because the parties agreed that the East River was the intervening waterway and the scope of the "intervening waters" was therefore not before the Court. *See id.* at 518-519.[4]

Alaska's selective omission of the Hodgson-and-Alexander principle for defining intervening waters, and its ad hoc creation of "assimilation zones" in its place, does not provide a reasonable, readily applicable, or objective standard for assimilation. Furthermore, it renders resort to the other Hodgson-and-Alexander principles pointless. For example, the Supreme Court has indicated that, once one identifies the "intervening waters" that separate an island from the mainland, the distance between those land-forms should be evaluated. *Maine*, 469 U.S. at 516. Alaska apparently accepts

---

[4] As the Special Master's Report indicates, the Coastline Committee had concluded in 1970-1971 that the presence of the East River, by itself, was sufficient to preclude assimilation, and the United States defended that position in the litigation. *See Maine Report* 42. Because the parties agreed to focus on the East River as the "intervening waters," they had no occasion to apply the 45-degree test, and the Court had no occasion to address the appropriate methodology for determining the scope of "intervening waters." Rather, the parties joined issue on the characteristics of the East River in the specific context of a dispute over whether Long Island Sound was a juridical bay. The Court addressed that fact-specific issue. *See* 469 U.S. at 518-519. In this case, by contrast, Alaska seeks to create assimilated headlands that would divide virtually all of southeastern Alaska into two huge bays. *Compare* US-II-7 *with* US-II-8. The scope of the "intervening waters" is squarely at issue in this case. The United States quite properly insists that the "intervening waters" are defined by the entirety of the channel that separates the island-complex from the mainland in accordance with the 45-degree test. *See* US-II-10; US-II-17; *see also* Appendix C (US-II-40) (illustrating the intervening waters with Dry Island and Farm Island removed).

that the distance should be evaluated on the basis of the average width of the intervening channel. *See* US-II-16 pp.17-21. The ultimate question, of course, is "how far from the mainland is too far for assimilation?" The answer to that question depends critically on whether all, or a pre-selected portion, of the intervening waters will be considered.

The Supreme Court and its special masters have provided guidance by way of example, and their decisions leave little doubt that an island should not be considered for assimilation to the mainland if the intervening waters are more than 1 nautical mile (nm) wide. *See* U.S. Count II Memo. 31-33. Alaska urges that the land-forms it seeks to assimilate are within 1 nm. AK Br. 20, 23, 27. But Alaska can make that representation only because (with the exception of Wrangell Narrows) it determines the average width within its subjectively selected "assimilation zone." Plainly, a determination of average width means little if it is based on an unrepresentative portion of the "intervening waters."

The question of how to identify the scope of the intervening waters accordingly presents a crucial point of disagreement. The United States relies on the same objective principle, developed by State Department geographers, that it utilizes in international maritime delimitation — application of the 45-degree test to the full channel that separates the island from the mainland. The United States' adoption of that approach for applying the Convention is entitled to "great weight." *Stuart*, 489 U.S. at 369. Alaska urges application of its novel and unprecedented practice of subjectively identifying "assimilation zones" based on little more than caprice. The resolution of this dispute has broad consequences. Adoption of Alaska's approach would dramatically expand the concept of assimilation and erode the United States' international effort to establish consistent and objective principles for delimiting juridical bays.

2. *Alaska does not properly assess the depth and utility of the intervening waters.* Although Alaska acknowledges that the "depth and utility of the intervening waters" are factors in the assimilation inquiry, *Louisiana*, 394 U.S. at 66, it employs those considerations in a skewed manner that distorts the inquiry. As the United States explained in its motion for summary judgment, all of the channels at issue have sufficient depth to preclude assimilation, all support significant commercial traffic, and one—Wrangell Narrows, which passes directly through the island-complex that Alaska urges should be treated as mainland—has long been a heavily traveled and important route of international commerce. *See* U.S. Count II Memo. 33-39, 43-45. Alaska avoids confronting those facts by invoking an unnatural approach to the question of utility.

First, Alaska focuses on the utility of those waters at the lowest stages of the tide. AK Count II Memo. 10, 13, 20. Yet the tidal range in southeastern Alaska is enormous. As Alaska's own exhibits reveal, in 1903, the Army Corps of Engineers reported a tidal range of 21 feet at Wrangell Narrows, AK-144 p.5, and modern charts indicate the same range at Petersburg, Alaska, the northern entrance to the Narrows, *see* NOS Chart 17360. At upper reaches of the tide, all of the channels in question are navigable —and are navigated—by commercial vessels. They accordingly have high utility. It does not matter that they have less utility during certain periods. During their period of use, they have far greater utility than other waters that the Supreme Court has refused to ignore in the assimilation inquiry.[5]

---

[5] The Supreme Court's application of assimilation principles to the Louisiana coast, which Alaska disregards, is particularly instructive. *See* U.S. Count II Memo. 31-35. The Court did not assimilate any contested island to the Louisiana mainland, despite the fact that the intervening waters were shallower and had far less utility than the waters at issue here. In numerous instances, the intervening waters, which were not subject to substantial tidal change, were as shallow as 1-15 feet, they did not accommodate large vessels, and they were not routes of international passage. *Id.* at 34-

The utility of channels commonly varies with normal and predictable natural conditions, such as the height of the tides, the amount of daylight, or the seasons. Those variations do not impair utility because mariners routinely adjust their activities—as they have done for centuries—to coincide with predictable changes. It would make no sense—and would dramatically alter the meaning of utility— to conclude that a channel lacks utility unless it can always be used at any time, day or night, during any season. If that were the case, channels that become obstructed by ice during the winter—a common occurrence in arctic and antarctic regions—would be deemed to lack utility, notwithstanding the traffic they support during the ice-free periods. For good reason, the Supreme Court has never suggested that a channel must always be passable to be useful for navigation.

Second, Alaska discounts the navigational utility of channels that have been subject to man-made improvements. AK Count II Memo. 9, 20, 26. The Supreme Court noted in *Maine* that the shallowness and inutility of the East River prior to nineteenth century navigational improvements weighed in favor of assimilating Long Island. 469 U.S. at 519. But the Court did not hold that current utility must be assessed solely on the basis of the original conditions of the waterway. The history of Wrangell Narrows illustrates why that is so. Even before the Army Corps of Engineers improved that waterway, Wrangell Narrows was an essential component of Alaska's "Inside Passage," and vessels with drafts up to 19 feet regularly used the channel. *See* US-II-31; AK-146 p.10, 13. Since that time, commerce in the region has increased, the typical size of commercial vessels has increased, and the Corps has correspondingly deepened the channel, making it accessible to the larger vessels. Those improvements have not transformed Wrangell Narrows from a useless

---

35; US-II-12, 13, 23, 24,and 25.

to a useful navigational route; rather they have enhanced the inherent and historically recognized utility of that channel. *See generally ibid.*

The United States accordingly disagrees, at a fundamental level, with Alaska's conception of navigational utility. Each of the channels that Alaska seeks to ignore is useful for navigation during substantial periods of the tidal range; each is used for commercial navigation; and each has been so used, both before and after navigational improvements. Indeed, Alaska's "Inside Passage" has always run *through* the island-complex that Alaska seeks to treat as mainland, and a majority of commercial vessel traffic has always passed east of Kupreanof Island, traveling from the lower 48 States and Canada to the northern limits of the Alexander Archipelago and beyond. AK-146 p.5; US-II-31 pp.7-13. If the Court were to deem those passages as lacking utility and subject to assimilation, then many other comparable passages throughout the world are likely to be subject to similar claims.

B. Alaska's Application Of Assimilation Principles To The Features In This Case Is Mistaken

The flaws in Alaska's conceptual approach to assimilation result, predictably, in mistaken conclusions respecting the physical features at issue in this case. If assimilation principles are properly applied, they result in a conclusion that comports with the geographic reality of southeastern Alaska. As Alaska itself explained to Congress, the features of the Alexander Archipelago "do not geographically possess the status of bays, but are more properly characterized as straits." *Provisional U.S. Charts Delimiting Alaskan Territorial Boundaries, Hearing Before the Sen. Committee on Commerce*, 92d Cong., 2d Sess. 21 (May 15, 1972) (AK-38). *See* U.S. Count II Memo. 20-21. Alaska was right then, and it is wrong now. We address the three areas at issue

in turn.

1. *Mitkof, Kupreanof, and Kuiu Islands are not one land-form, nor are they part of the mainland.* Alaska's contention that the northern and southern halves of the Alexander Archipelago are separate juridical bays depends on whether three large islands should be treated in law as part of the mainland. Alaska's characterization of those islands as mainland is not only inconsistent with the views it expressed in the 1972 congressional hearings, but it also conflicts with the understandings at the 1903 Alaska Boundary Arbitration, a proceeding that Alaska treats as authoritative in its historic waters claims. *See* AK Count II Memo. 11-15.

The arbitration tribunal did not treat Mitkof, Kupreanof, or Kuiu Islands as part of the continental mainland. As Lord Alverstone explained in his opinion, Russia and Great Britain negotiated the original boundary agreement to resolve the status of "an archipelago of islands off the coast, and some strip of land upon the coast itself." Alverstone Opinion, I Proceedings 38, US-II-41. He observed that, in "common parlance," the narrow channels between islands would not be called "ocean," but

> it is quite clear that the Treaty does regard some of these channels [between the islands and the coast] as ocean. *For instance, to take points as to which no question arises between Wrangell Island, Mitkoff Island, and Kupreanoff Island, . . . it cannot, I think, be disputed that, for the purpose of the Treaty, the waters between these islands and the mainland were included in the word "ocean,"* and that the coast upon which the eastern boundary of the lisiere was to be drawn was the coast of the continent, and the mountains referred to in Article III were to be upon that coast, and the line referred to in paragraph 2 of Article IV was to be measured from those waters.

Id. at 38-39 (emphasis added). The international tribunal clearly understood that the ocean began at the eastern shore of Frederick Sound. *Id.* at 39. The conclusion today should be the same as it was 100 years ago: the land-forms west of Frederick Sound (including Dry Strait) are islands. The

Supreme Court's factors, applied on the basis of objective criteria, produce a result that is consistent with the understanding of the arbitration tribunal.

Alaska nevertheless identifies Cape Decision, the seawardmost point on Kuiu Island, as the mainland headland of what it now calls "North Bay" and "South Bay." In fact, Cape Decision lies approximately 66 nm from the nearest point on the mainland. Alaska does not contend that Kuiu Island can be assimilated as part of the mainland; rather, it says that Kuiu can be assimilated to Kupreanof Island, across Keku Strait. Alaska does not claim that Kuiu and Kupreanof, treated as a single island, may be assimilated to the mainland. Rather, it alleges that they should be assimilated to Mitkof Island, across the Wrangell Narrows. Those assimilations produce a single large island extending 66 nm seaward from an otherwise relatively straight mainland coast. US-II-7 and 8. At this point, Alaska's island-complex remains separated from the mainland by Frederick Sound, a 5-mile-wide channel. Alaska nevertheless argues that the new island is so closely related to the mainland that it must be treated in law as an extension of that mainland. The controlling legal principles, however, restrain that triple-jump across major water channels. Kuiu, Kupreanof and Mitkof are in law what they are in fact—major island components of an archipelago. They cannot supply a mainland headland for two enormous, but heretofore unknown, juridical bays.

a. Kuiu Island cannot be assimilated to Kupreanof Island. Kuiu and Kupreanof Islands face each other across Keku Strait, which is therefore the "intervening waters" that separate these two islands. The Strait runs from the Kupreanof Island landmarks of Point Macartney, in the north, to Point Barrie, in the south. The 45-degree test identifies comparable points on Kuiu Island that assure that coastal points on either island within the Strait are facing across at the other island— not facing seaward on to "North Bay" or "South Bay." US-II-10.

The United States has already explained that, when objective assimilation criteria are applied to the properly defined "intervening waters," Kuiu and Kupreanof must be treated as separate islands. *See* U.S. Count II Memo. 24-43. Alaska disputes that conclusion, but it does so by improperly applying the assimilation criteria to only a small stretch—approximately one-third—of the intervening waters. By focusing only on this limited portion of the waterway, Alaska concludes that Kuiu's distance from Kupreanof averages .57 nm and that the intervening waters are extremely shallow. AK Count II Memo. 25-26. Alaska's only stated justification for excluding the northern and southern thirds of Keku Strait is that they would separately qualify as bays if the islands were connected someplace in the center. *Id.* at 24. But that will always be the case if the controlling principle is to seek out a short stretch, or even a single point, within the intervening waterway, characterize it as the "assimilation zone," and apply the Court's criteria to that portion alone. Bisecting a strait in that manner will invariably produce two bays.

Common sense, fortified by the 45-degree test, dictates that the entire Keku Strait is the relevant "intervening waters" because the islands face each other across the entire length of that waterway. Applying the Hodgson-and-Alexander objective criteria, the average width of that waterway is 9 nm, far in excess of the maximum that *anyone* has suggested would be appropriate for assimilation. By any reasonable measure, the waters that separate Kuiu Island from Kupreanof Island are too wide to treat the islands as a single land feature. *See* U.S. Count II Memo. 38. They are also far too deep, ranging from 18 feet at high tide in the short, but navigable, Rocky Pass to 60 to 600 feet in a majority of Keku Strait. *Ibid.*

b. <u>Kupreanof Island cannot be assimilated to the mainland directly or through Mitkof Island</u>. Kupreanof Island is separated from the mainland in two directions. To its northeast, it faces the

mainland directly across the eastern arm of Frederick Sound. To its southeast it faces Mitkof Island across Wrangell Narrows. In turn, Mitkof Island faces the mainland across the continuation of Frederick Sound and its eastern terminus of Dry Strait. Kupreanof Island cannot be assimilated to the mainland of southeast Alaska by either route.

First, Kupreanof Island cannot be assimilated to the mainland directly. The "common-sense approach" to defining the intervening waters, fortified again by the 45-degree test, dictates that they are that portion of Frederick Sound across which the two land-forms face each other. US-II-10. The Supreme Court's factors, evaluated in light of the objective criteria, are therefore applied to those waters. Kupreanof's distance from the mainland, as determined by averaging the eastern and western limits of the intervening waters, is approximately 6.5 nm. Its minimum distance offshore is approximately 3 nm, so the average distance—no matter how measured—exceeds 3 miles, far in excess of any reasonable distance for assimilation. The depth and utility of the intervening waters also prevent assimilation. Soundings in that stretch of Frederick Sound typically range from 240-600 feet. It is part of Alaska's Inside Passage and marine highway. Furthermore, domestic and international vessels regularly travel those waters. *See* U.S. Count II Memo. 36. Indeed, in light of those considerations, Alaska does not even suggest that assimilation would be appropriate across Frederick Sound—the most obvious and direct route to apply assimilation principles.

Second, Kupreanof Island cannot be assimilated to the mainland through Mitkof Island. Alaska's attempt to assimilate by means of Mitkof Island assumes that Mitkof itself is, as a matter of law, part of the mainland. That assumption is incorrect, as will be shown below. But neither can the two islands be assimilated to one another. Wrangell Narrows are the "intervening waters" that separate Kupreanof and Mitkof Islands. Alaska agrees that this is so. AK Count II Memo. 20.

Alaska's agreement on this point is significant: Wrangell Narrows presents the only instance in which Alaska acknowledges that "intervening waters" are those that separate "facing coasts." *Ibid.* In each of the other channels at issue, Alaska selected from within the actual "intervening waters" a separate "assimilation zone" and analyzed that portion alone.[6]

Alaska's inconsistency on this score reflects the basic flaw in its highly subjective approach. Alaska applies the objective criteria that the United States employs in all circumstances *only* when those criteria produce Alaska's desired result. Alaska's refusal in every circumstance, save Wrangell Narrows, to identify the "intervening waters" based on an objective criterion— the 45-degree test—bespeaks acknowledgment that applying objective principles would lead to rejection of its assimilation claims. But consistency here is paramount. The principles governing island assimilation—a concept that the Supreme Court has largely defined—have no objective content unless they are applied consistently. "Intervening waters" should encompass the entire waterway that separates two land-forms—not some limited portion that one litigant or the other chooses to obtain a desired outcome.

In the case of Wrangell Narrows, the United States acknowledges that the waterway is channel-like, easily meeting Hodgson and Alexander's 3:1 ratio of length to width. But its average

---

[6] Alaska's treatment of Wrangell Narrows cannot by explained by any inability to find comparable "assimilation zones" in that waterway. It could have selected the channel between Burnt Island and North Point, at the southern extreme of the Narrows; between Danger Point and Finger Point, straddling 56 degrees 40 minutes north latitude; or the northernmost section of the Narrows between Turn Point and Frederick Sound. If the State had followed its approach in Keku Strait and Frederick Sound, it would have designated one of these stretches the "assimilation zone" and described the remaining waters of the Narrows as "bays" created by the assimilation. Alaska apparently recognized that its methodology—which would treat a heavily trafficked strait as two "bays"—leads to nonsensical results.

width is almost exactly 1 nm. Apart from its width, Wrangell Narrows cannot be treated as land in light of its navigational utility. US-II-16 p.17. It is an important navigation channel and has been so throughout the nineteenth and twentieth centuries. Alaska emphasizes that, prior to government navigation improvements, Wrangell Narrows had depths of only 10 feet at low water. AK Count II Memo. 21. Alaska does not mention, however, that depths at high water, even before improvement, were 31 feet and that vessels drafting up to 19 feet regularly used the channel. AK-146 pp.2, 10, 13.

Long before the government's improvements, Wrangell Narrows was part of Alaska's famous "Inside Passage" and part of "the regular route taken by vessels running to all southeastern Alaska points from the ports on the Pacific coast of the United States and Canada." AK-146 p.2. According to the Corps, in 1902, "[s]teamers use this channel throughout the year and in summer there is an average of a least one vessel going through per day." *Id.* at 3. One Corps officer indicated that "[t]he channel through Wrangell Narrows is used by all vessels running to southeastern Alaska points from ports on the Pacific coast." *Id.* at 4. In 1902 alone, two steamship companies made 187 trips "using the Wrangell Narrows as a highway to and from southeast Alaska." *Id.* at 13.[7] In that year, 19,090 passengers and 40 tons of gold dust passed through the Narrows. *Id.* at 5. *See* US-II-31 (route maps); *see also* U.S. Count II Memo. 37-38 (discussing current use by large domestic and foreign-flag commercial vessels). In short, the Wrangell Narrows are now, and have always been, an important segment of what Alaska refers to as its "marine highway." The intervening waters have always been used for commercial navigation and cannot reasonably be treated as dry land. The

[7] These large vessels range in size from 158 to 245 feet in length. US-II-48 includes photographs of 3 of the smaller among them.

"utility of the intervening waters" correspondingly precludes treating Kupreanof and Mitkof Islands as a single land-form. *See Maine*, 469 U.S. at 516.

c. The proposed island- complex cannot be assimilated to the mainland. Even if the Master were to conclude that Kuiu, Kupreanof, and Mitkof Islands are legally a single land-form, that island-complex would not be part of the Alaska mainland. To identify the intervening waters that separate the island-complex from the actual mainland, it is helpful to put aside nautical charts momentarily and envision the island-complex as Alaska conceives it—a single island with the intervening waterways included as land. *See* Appendix C (US-II-40). From that vantage point, it is apparent that the portion of Frederick Sound between Cape Fanshaw and Point Rothsay contains the "intervening waters" across which the island-complex faces the mainland. The 45-degree test provides the closing lines. US-II-10. The Supreme Court's assimilation principles must be applied to that channel, which has an average width of 5 nm, is extremely deep for 90% of its length, and supports significant commercial traffic. *See* U.S. Count II Memo. 36. Even if the proper approach were to analyze the channel between Mitkof Island and the mainland, the result would be the same. The average width of that waterway is approximately 5 nm and most of it is at least 100 feet deep. Those facts alone prevent assimilation.

To avoid that result, Alaska does what it did with Keku Strait. Rather than apply the Court's criteria to the entire "intervening waters," it identifies a minor portion as the "assimilation zone" and limits its analysis to that segment. In addition, it treats a major island within that segment as part of the mainland for purposes of its application of the Court's criteria. Neither of those steps is appropriate.

Alaska identifies a four-mile stretch of the channel between the island complex and Dry

Island, known as Dry Strait, as its "assimilation zone." AK Count II Memo. 13. It justifies ignoring the remaining 15 miles of intervening waters with the explanation that they are "parts of the areas potentially enclosed within the indentations [*viz*., "North Bay" and "South Bay"] that might be formed if the islands are assimilated to the coast." *Ibid.* But that is no explanation at all. Bisecting a strait will always produce artificial "bays" of this sort. The first step in the assimilation inquiry is to identify the "intervening waters." If the assimilation inquiry is to take realistic account of the full geographic relationship between the mainland and the island, the "intervening waters" must include of all the waters between the facing coasts – not some strategically selected segment. In the case of the island-complex, those waters are a channel approximately 54 nm long with an average width of more than 5 nm and typical depths of more than 100 feet. The width and depth of the channel that separates the island-complex from the mainland precludes assimilation. *See* US-II-7-8, 10.[8]

Alaska must also confront the problem of Dry Island. It applies the Court's assimilation criteria to Dry Strait based upon the assumption that Dry Island is part of the mainland. Alaska professes to follow that approach because "[t]he North Arm of the Stikine River passes to the north of Dry Island, which together with Farm Island forms one of the Stikine River's mouths." AK Count II Memo. 7-8 (citing the *Coast Pilot*). Alaska reasons that "[u]nder the Convention, river mouths

---

[8]Alaska mistakenly cites the Court's decision in *Maine* as a precedent for its approach. As noted previously, the parties in *Maine* litigated that boundary dispute on the basis that the intervening waters separating Long Island from the mainland consisted of the East River. *See* note 4, *supra*. The parties joined issue, and the Court's decision turned, on the character of those "intervening waters." *See* 469 U.S. at 518-519. In this case, the parties squarely disagree on the identity of the intervening waters, as well as their characteristics. The Court's decision in *Maine* neither addresses nor answers the central issue that divides the parties here.

do not interrupt the coastline." *Ibid.* (citing Article 13) . Alaska is correct in that statement insofar as it means that the "coastline" is a composite of the low-water line and closing lines across inland waters such as the Stikine River. But Alaska is surely mistaken if it believes that an island that is intersected by an inland water closing line becomes part of the mainland. Dry Island (like Farm Island to the east) remains an island. The *mainland* lies on the other side of Dry Island, across the north arm of the Stikine River. Alaska must assimilate to the mainland, not Dry Island. Alaska's failure to do so poses another unanswered obstacle to Alaska's assimilation theory. See Appendix C (US-II-40) (diagram of Frederick Strait with Dry Island and Farm Island removed).

2. *Kruzof Island cannot be assimilated to Baranof Island*. Alaska asserts that Sitka Sound can be made a juridical bay by assimilating Kruzof Island to Baranof Island. Alaska's argument for assimilation focuses on a short stretch of the intervening waterway that has been made safer for navigation by dredging. Alaska describes that protected route to and from Sitka as a "challenging passage," AK Count II. Memo. 50, and notes that "[l]arge ocean going vessels did not use the route," *Id.* at 52. But the assimilation inquiry does not depend on whether the passage is "challenging" or whether some vessels use other routes; rather, it examines whether the "intervening waters," properly defined, are useful for navigation. The passage between Baranof and Kruzof Island, and connecting straits to the northeast and east, are extensively used as the favored route of most vessels between Sitka and other ports in southeast Alaska. AK-177 p.8. Those include the large state ferries that are required by maritime safety regulations to use this channel. *Ibid.*

The Corps of Engineers estimated that, in 1964, a total of 326 vessels operated in and around Sitka. Only 12 were deemed unlikely to use the strait between Kruzof and Baranof Islands. The remaining 314 vessels are estimated to have made 2,950 transits of the strait that year. AK-177

pp.14-15. In 1965, the State ferries alone carried 12,500 passengers and 2,300 vehicles to and from Sitka through this strait. *Id.* at 13. Similar data are not available for other historic periods, but Neva Strait was plainly used by commercial vessels long before man-made improvements. An 1898 map of routes between Vancouver, British Columbia, and the Yukon gold fields includes segments through Neva Strait. US-II-31 p.11. Likewise, an 1899 map of the Harriman Expedition route shows its transit south from Peril Strait to Sitka. *Id.* at 13. *See also id.* at 4 (Alaska Steamship routes using Neva Strait).

As Alaska concedes, the Coastline Committee considered this channel in light of the Court's assimilation criteria and determined that it is too important a navigation route to be treated as land. AK Count II Memo. 49. That determination is well founded. Sitka Sound is not a juridical bay.

3. *Dall Island cannot be assimilated to Prince Of Wales Island.* The last of Alaska's proposed juridical bays is Cordova Bay, which is admittedly not an indentation into a single land-form, but instead is formed by Prince of Wales Island on the east and the adjacent Dall Island on the west. The passage that separates those islands, and provides an exit from Cordova Bay 20 nm north of its mouth, is the relevant "intervening waters." Once again, the parties disagree on the limits of those waters.

The United States identifies the channel through the 45-degree test, which reveals a 7-nautical-mile waterway with a 4:1 length-to-width ratio. *See* US-II-39.[9] Alaska looks for a stretch

[9]The United States' memorandum supporting summary judgment includes an error in the measurement of the length of this channel. The memorandum incorrectly states that the waterway is approximately 4.5 nm long and concludes that it does not, therefore, meet the Hodgson-and-Alexander minimum 3:1 ratio of length to average width. U.S. Count II Memo. 44. In fact, the correct ratio is 4:1, which satisfies the standard.

within that channel in which the opposing coasts are "pinched together." AK Count II Memo. 56. Although Alaska does not precisely describe the portion of the passage that it characterizes as the "assimilation zone," Alaska apparently envisions Tlevak Narrows at Turn Point. The Narrows, however, are not a channel, as Alaska readily admits. *Id.* at 57. Indeed, they appear more wide than long. Alaska nevertheless would assimilate the land-forms at that point. This cannot be done without jettisoning the objective criteria. The islands are not separated by a riverine-like channel, and they therefore lack the necessary "relationship to the configuration or curvature of the [opposing] coast." *Louisiana*, 394 U.S. at 66.

Prince of Wales and Dall Islands are not properly assimilable. Under a proper application of the objective criteria, the intervening waters are sufficiently long and narrow to satisfy the 3:1 length-to-width ratio, but they are too wide, too deep, and too frequently used for commercial navigation to permit assimilation. U.S. Count II Memo. 44-45.

C. Additional Considerations Preclude Entry Of Summary Judgment In Favor Of Alaska

Application of the foregoing assimilation principles to the land-forms at issue provides a sufficient basis for denying Alaska's motion for summary judgment and granting summary judgment in favor of the United States. The islands that Alaska seeks to treat as mainland do not, as a matter of law, satisfy the objective criteria for assimilation. But if the Master wishes to look further, Alaska's contentions raise additional obstacles to assimilation that counsel denial of Alaska's motion. *See* U.S. Count II Memo. 39-40.

1. *The geologic origin of the islands weighs heavily against assimilation.* The Supreme Court has indicated that the geologic origin of an island bears on the assimilation inquiry. If the mainland

and islands have a common geologic origin, they are more readily assimilated, but if they do not, they should not be treated as one. In *Maine*, the Court specifically noted that Long Island was "formed by deposits of sediment and rocks brought from the mainland by ice sheets." 469 U.S. at 519; *see Maine Report* 44-45. In *Louisiana*, the Court noted that "islands created by sedimentation at river entrances are peculiarly integrated with the mainland itself" and that "the origin of the islands" is "one consideration relevant to the determination of whether they are so closely tied to the mainland as realistically to be considered a part of it." 394 U.S. at 64-65 n.84.[10]

Citing those decisions, Alaska relies on the geologic origin of the islands at issue to justify assimilation. AK Count II Memo. 14-19, 23, 27. Alaska cites, in particular, a report by one of its experts, unsupported by an accompanying declaration, that the islands "share a common geologic history" and that the "rocks of the islands and the rocks underlying adjacent marine waters all are classified scientifically as continental crust rather than oceanic crust." AK Count II Memo. 15. Alaska's reliance on geologic origin and the cited report is misplaced. The islands of the Alexander Archipelago—including those of the "island-complex"—are incontrovertibly of *oceanic*, not continental, origin, which weighs strongly *against* assimilation..

The United States' expert, Dr. Molnia, has submitted a report, based on an extensive review of the geologic studies of southeast Alaska, explaining the origin of the islands at issue in this case. US-II-42. Unlike Long Island and the Louisiana islands, the islands of the Alexander Archipelago

---

[10] Louisiana later produced evidence that the islands there were "fluvial" in nature, but Master Armstrong nevertheless concluded that, because they did not meet the criteria, they were not subject to assimilation. *Louisana Report* 38-39. He stated that geologic origin alone could not establish assimilation, but that "a non-fluvial origin might be a negative factor if all of these tests were met." *Ibid.* The Court adopted his recommendations. 420 U.S. 529 (1975).

did not come from the adjacent mainland. As Alaska apparently recognizes, the islands of southeastern Alaska were formed elsewhere and transported, through plate tectonics, to their present location. AK Count II Memo. 15. Indeed, Molnia concludes that they probably came from far south in an ancestral Pacific Ocean, were likely formed "in an intra-oceanic environment," and "could not have been near a continent during their magmatically active period." US-II-42 p.14 (quoting Samson, McClelland, Patchett, Gehrels and Anderson); US-II-43 p.4. Other authorities likewise identify the rocks of the archipelago as having "formed in an ocean environment," US-II-42 p.13 (quoting Gehrels and Berg, AK-144 pp.463-464), and as having a "marine origin," *ibid*. (quoting Gehrels and Saleeby).

Dr. Molnia reports that "the entire area, including the bays, channels, passages, sounds, entrances, and straits around Mitkof, Kupreanof, or Kuiu Islands, and the nearby islands, are underlain by oceanic crust." US-II-42 p.17. He specifically observes:

> They are not made of continental crust but rather, are composed of oceanic crust. Even though these rock assemblages and terranes are now attached to the North American craton as the result of collision, they have not become continental crust, still retaining evidence of their oceanic origin."

Id. at 24. Furthermore, the three islands of the "island-complex" do not have identical geologic origins:

> Geologic mapping has shown that different rocks of different ages occur on Mitkof, Kupreanof, and Kuiu Islands. Gravina Belt rocks completely cover the surface of Mitkof Island. Gravina Belt rocks and Tertiary and Quaternary sedimentary rocks outcrop on Kupreanof Island, along with rocks of the Alexander Terrane. Gravina Belt rocks and Tertiary and Quaternary sedimentary rocks outcrop on Kuiu Island, without any exposed rocks of the Alexander Terrane.

Id. at 25-26. In addition, studies show that the islands and waters of the Archipelago "are separated from the mainland by a major fault zone," known as the Coast Shear Zone, which serves as "a

boundary that separates oceanic crust from continental crust." *Id.* at 17. Recent seismic analyses verify that boundary. *Id.* at 14-15.

In short, the islands of the Archipelago have a different geologic history than the adjacent mainland, are composed of different types of rocks, are underlain by oceanic rather than continental crusts, and are separated by a major fault zone. US-II-42, pp.14-15, 17-21, 24-26. Significantly, those relevant facts are *undisputed*. Dr. Molnia's report is supported by declaration, while the expert report that Alaska has attached as AK-142 is not. Unless Alaska's expert is willing to declare under penalty of perjury that the islands at issue here are of "continental" origin (AK Count II Memo. 15)—in the face of overwhelming scientific authority to the contrary—Dr. Molnia's convincing conclusions on the subject must be accepted. Fed. R. Civ. P. 56(e). The "origin of the islands and their resultant connection with the shore" accordingly weigh heavily against assimilation. *Louisiana*, 394 U.S. at 64-65 n.84.[11]

2. *"North Bay" and "South Bay" are not used as bays.* The Supreme Court's determination that Long Island could be assimilated to the mainland was "buttressed by the fact" that Long Island Sound "is used as one would expect a bay to be used." *Maine*, 469 U.S. at 519. The Court noted:

> 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. 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.

Ibid. Alaska argues that its proposed "North Bay" and "South Bay" are similarly used as "bays"

---

[11] Alaska's discussion of the trends of terranes and lithic assemblages in southeastern Alaska, AK Count II Memo.16, and the post-origin affect of glaciers on the mainland and offshore landscapes, i*d*. at 17-18, have no bearing on the *origin* of the islands and—like the ever-present musings of John Muir, *ibid*.—are irrelevant to the assimilation inquiry.

rather than straits. AK Count II Memo. 44-47. In doing so, however, Alaska tosses aside its basic theory that the Alexander Archipelago really consists of two bays. Alaska discusses traffic through the *entire* "waters of the Alexander Archipelago," *id*. at 44, characterizing its "North Bay" and "South Bay" as if they comprised a single waterway rather than two separate bays. The distinction is important. If "North Bay" or "South Bay" supported vessel traffic similar to that of Long Island Sound, vessels would enter "North Bay" bound only for ports in that "bay," or within or near the island-complex. Similarly, vessels would enter "South Bay" bound only for ports in that "bay," or within or near the island-complex. That is clearly not the case.

To understand why "North Bay" and "South Bay" are used as straits, rather than "as one would expect a bay to be used," one need simply visualize "North Bay" and "South Bay" as Alaska conceives those imaginary features and chart how current vessel traffic utilizes those supposedly inland waters. Ships routinely traverse "North Bay" and "South Bay" bound for points far beyond either. Indeed, "North Bay" and "South Bay" each embrace a *part* of Alaska's Inside Passage. Oceangoing vessels regularly enter "South Bay" from Dixon Entrance, pass through the assimilated "mainland," and head for distant destinations in "North Bay" and beyond. Similarly, vessels enter "North Bay," pass through the assimilated "mainland," and head for distant destinations in "South Bay," Canada, and the lower 48 States. "North Bay" and "South Bay" are used as *straits*. The difference between these traffic patterns and those through Long Island Sound could hardly be more stark. *See Maine*, 469 U.S. at 519.

Furthermore, both "North Bay" and "South Bay," as Alaska conceives them, are simultaneously inland waters *and* routes of international passage. Contrary to Alaska's assertions (AK Count II Memo. 45), those supposedly inland waters have been critical to international

shipping. In 1825, Great Britain acquired a permanent treaty right from Russia guaranteeing use of the Stikine River so that British inland settlements would have access to the ocean. US-II-46. The British vessels crossed "South Bay" when traveling to and from those settlements and British Columbia ports.[12] "North Bay" has likewise been historically used by foreign flag vessels for the international transport of people and goods. Gold prospectors and others traveled to the Yukon gold fields from the coastal ports of British Columbia, through the Inside Passage, to Skagway, at the head of Lynn Canal, and overland back into Canada. Foreign citizens and supplies, carried on foreign vessels, from a foreign port to a foreign destination, accordingly traveled *through* both "South Bay" and "North Bay." US-II-31 pp.7-11. They also followed a second route, traveling from Vancouver, through "South Bay" and "North Bay," to the mouth of the Yukon River, and then back into Canada. US-II-31 p.9 (inset map).

In short, both "North Bay" and "South Bay" have long supported both domestic and international traffic headed for points far beyond their supposedly enclosed confines, and they consequently are not "used as one would expect a bay to be used." 469 U.S. at 519. Rather, the waters they embrace are straits separating islands, and they are used as one would expect such straits to be used.

3. *Alaska's approach to assimilation undermines the United States' foreign policy interests.* The United States has a strong interest in ensuring that maritime boundaries are determined through

---

[12] Significantly, Great Britain perceived no need to acquire a similar right to travserse "South Bay." Great Britain and Russia understood that the waters of "South Bay" were not inland waters, but rather were open to international traffic. *See* U.S. Count I Opp. 9. Following America's purchase of the territory, Great Britain acquired a similar treaty right from the United States. US-II-47 p.872.

clear and consistent rules. Because the Convention's international principles for delimiting juridical bays are self-executing and —unlike straight baselines — need not be depicted on nautical charts, it is especially important that they be clearly understood and easily applied so that mariners can determine when they enter a coastal nation's inland waters. Alaska's proposed approach to assimilating islands would give the mariner no guidance on how to determine whether he is entering a juridical bay. Likewise, that approach provides no meaningful limitations on extravagant foreign claims.

Alaska, which has no institutional stake in promoting clear and consistent international rules, follows the same approach that many foreign nations take. It seeks to expand the scope of inland waters, and it eschews objective criteria whenever they constrain the proposed maritime claim. *See generally* Roach and Smith, *United States Responses to Excessive Maritime Claims* (1996). In this case, Alaska effectively would allow assimilation so long as: (1) the islands proposed for assimilation are relatively close together at some subjectively determined point or series of points; and (2) the waters within that "zone of assimilation" would require, in their natural state, some subjectively determined level of care in navigation. If the Supreme Court were to adopt Alaska's amorphous standards, foreign nations would have a strong incentive to assert excessive maritime claims, citing United States precedent. *See* U.S. Count II Memo. 41-43.

Alaska offers cold assurance that its proposed assimilation has limited precedential consequences. It asserts that, of the "more than a thousand islands" within the Alexander Archipelago, only a "handful" are "so closely related to the mainland or a neighboring island as to be realistically considered a continuation of the mainland or neighboring island." AK Count II

Memo. 1. A glance at a map of southeastern Alaska calls that assertion into question.[13] Similarly, a glance at an atlas, with attention to the many coastal archipelagos and narrow island passages in strategic locations throughout the world, reveals that Alaska's approach has serious international ramifications. *See* U.S. Count II Memo. 42. The United States' assessment of those international consequences, as well as its construction and application of the terms of an international convention, are entitled to considerable deference and respect. *See, e.g.*, *Stuart*, 489 U.S. at 369; *Egan*, 484 U.S. at 529-530; *see generally United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318-322 (1936).

II. "North Bay" And "South Bay" Are Mere Curvatures Of The Coast

The United States has restricted its motion for summary judgment to the assimilation issue. If we are correct that the islands may not be assimilated, there is no reason to inquire whether Alaska's "North Bay" and "South Bay" meet Article 7's tests for juridical bay status. The United States and Alaska each urges that the assimilation inquiry can be resolved through summary judgment (albeit each only in its favor), and the Master's recommendation on that central issue will likely prompt an exception from one party or the other. Hence, the Article 7 inquiry is premature. It is likely to be informed by the Court's resolution of exceptions on the assimilation issue, and, if the inquiry is ultimately necessary, the Master might benefit from testimony on the controlling legal principles. U.S. Count II Memo. 3. Nevertheless, Alaska has moved for summary judgment on that

---

[13] *Compare, e.g.,* Yakobi Island/Chichagof Island; Douglas Island/mainland; Chichagof Island/Baranof Island; Krestof Island/Hallock Island; Woewodski Island/ Mitkoff Island; Kosciusko Island/Prince of Wales Island; Tuxekan Island/ Prince of Wales Island; Wrangall Island/mainland; Etolin Island/Wrangell Island; Sukkwan Island/Prince of Wales Island; Bell Island/mainland; Revillagigeda Island/Bell Island; Gravina Island/Revillagigedo Island.

issue, and the United States therefore responds to Alaska's arguments on the merits.

Article 7 provides two separate tests, the "indentation" test, and the "semi-circle" test. The Supreme Court treats the indentation test as the primary one. *See Louisiana*, 394 U.S. at 54. That test, which is applied first, measures the ratio of the waterbody's width-of-mouth to depth-of-penetration. If that ratio is sufficient to indicate an "indentation" rather than a "mere curvature" in the coast, then the semi-circle test is employed. *Ibid.* It measures the area of the waterbody in comparison to a semi-circle drawn in accordance with the special rules set out in Article 7(3). If both tests are met, the waterbody is a bay. *Ibid.* *See generally* Reed, *supra*, 224-256.

The Article 7 tests are applied in distinct steps. For the indentation test, one first erases islands that are not legally part of the mainland. Reed, *supra*, 240; US-II-1 p.6. Mainland headlands are then identified that may create landlocked waters, and specific points are located on those headlands that represent the "entrance" to the waters. *Id.* at 33-36. The distance between those entrance points is the "width of its mouth" as that term in used in Article 7(2). *Id.* at 36-38. The indentation test next requires that "depth of penetration" be determined. *Id.* at 38-41. The United States measures that depth on the longest straight line from any point on the just described "mouth" to the head of the waterbody being evaluated. *Id.* at 41. The widths and depths of Alaska's "North Bay" and "South Bay" are depicted in Appendices D and E (US-II-51 & 52). To complete the test, one measures and compares the two lines. If depth-of-penetration is the same as, or greater than, width-of-mouth, the indentation test is satisfied.

If the indentation test is met, the semi-circle test is then applied in accordance with Article 7(3). Reed, *supra*, 240-241; US-II-1 pp.43-46. The area of the waterbody must be as large as a semi-circle whose diameter is determined by reference to the mouth of the indentation. Article 7(3)

provides special rules for determining the semi-circle diameter and the area of the proposed bay. *Id*. at 43. For purposes of the semi-circle test only, Article 7(3) provides that unassimilated islands are reintroduced in two respects. First, if those islands create multiple entrances to the indentation, the length of the mouth is treated as the sum of the length of those individual entrances, rather than the mainland-to-mainland distance. *Ibid*. Second, islands within the waterbody are treated as water area. *Id* at 45. Those modifications effectively relax the semi-circle test when islands are present.

Article 7 requires that a waterbody satisfy both tests to qualify as a juridical bay. The United States disputes Alaska's formulation and application of the primary "indentation" test.[14]

A. Alaska's Formulation Of Article 7's Indentation Test Is Flawed

The United States' disagreement with Alaska over the indentation test centers on Alaska's method for making the width-of-mouth determination. That determination, in turn, affects the depth-of-penetration and ratio-comparison inquiries.

1. *The width-of-mouth determination measures a single line connecting the mainland-to-mainland headlands*. The United States measures the width-of-mouth by the straightforward means of determining the mainland-to-mainland distance without regard to the presence of intervening, unassimilated islands. US-II-1 p.36-38. Alaska, by contrast, would measure that width according

[14] The United States does not dispute that, *if* the island-complex were part of the mainland, and *if* the areas denominated "North Bay" and "South Bay" met Article 7's indentation test, then those features would also satisfy the semi-circle test. This should come as no surprise. If bays may be constructed by the selective assembly of islands within a coastal archipelago, and islands within the assimilated headlands are excluded from the width-of-mouth measurement and treated as part of the water area in accordance with Article 7(3), then the semi-circle test is likely to be satisfied in most any case. The Supreme Court has made clear, however, that satisfying the semi-circle test alone does not establish the existence of a bay. *Louisiana*, 394 U.S. at 53-54.

to the methodology set out in Article 7(3) for the special case of applying the semi-circle test. *See* AK Count II Memo. 32. In other words, if islands create multiple entrances (as in the case of "North Bay" and "South Bay"), Alaska would include only the distances between the islands. Alaska feigns "great surprise" (*id*. at 35) at the United States' methodology, but the United States' approach rests on Article 7's language and reflects established practice.

Article 7(2) states 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." The primary factor in determining whether a feature constitutes an indentation is the ratio between a waterbody's width of mouth and its depth of penetration into the mainland. The "mouth" of a waterbody is ordinarily understood as the line between mainland headlands. As Alaska's expert witness, Dr. Prescott, has stated, "[s]ince there is reference [in Article 7(2)] to 'the mouth of that indentation' it follows that a bay can have only one mouth, even though islands in that mouth may create a number of entrances." Prescott, *The Maritime Political Boundaries Of the World* 53 (1985). If Article 7 said nothing more, it would indicate that, when applying the indentation test, the mouth should be measured as the total distance between mainland headlands, disregarding intervening islands.

Article 7(3) provides further guidance that confirms that view. It provides special rules for applying the semi-circle test, stating:

> Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum of the total lengths of the lines across the different mouths.

Article 7(3)'s specification of that practice when applying the semi-circle test indicates that the practice is not to be employed when applying the indentation test. Contrary to Alaska's assertions

(AK Count II Memo. 33), Article 7(3) does not automatically extend that practice to the indentation test. As Alaska acknowledges (*id*. at 28), the indentation test is distinct from the semi-circle test. The Convention signatories could have drafted Article 7(3) to apply that practice to both tests, but they did not. Instead, they restricted its application to the semi-circle test.[15]

The Supreme Court has effectively rejected Alaska's approach through its application of the indentation test in *Maine*. *See* 469 U.S. at 514. The Court invoked Article 7 to determine whether, in the absence of assimilation, Long Island and Block Island Sounds qualified as a bay. The Court concluded that, if the presence of Long Island is *ignored*, "neither Long Island Sound nor Block Island Sound satisfies Article 7's requirements for a bay." *Ibid.* The Court left no doubt that, when applying Article 7(2)'s indentation test, one disregards any intervening islands. Indeed, it made the point twice, stating, "*in the absence of Long Island*, the curvature of the coast is no more than a 'mere curvature' and is not an 'indentation,'" and, "*absent Long Island*, the waters of the Sounds would not be sufficiently surrounded by land so as to be landlocked." 469 U.S. at 514-515 (emphasis added).

The Court's special masters have also followed that practice. Special Master Hoffman stated in the *Maine* case that the "inquiry to make is, whether there is an indentation into the mainland . . . when Long Island is viewed strictly as an island thereby requiring the island to be ignored when

---

[15] That distinction makes practical sense. The indentation test, which attempts to distinguish true indentations from mere curvatures, is meant to be a more demanding that the semi-circle test. *See Louisiana*, 394 U.S. at 54. The semi-circle test focuses on the proper measurement of the area of the proposed bay. The drafters concluded that the semi-circle test should be relaxed to take account of the presence of islands in the waterbody, and they did so, in part, by adjusting the diameter of a representative semi-circle to which the proposed bay is compared. Alaska offers no reason why the indentation test should be similarly relaxed—eliminating the need for a true indentation—in the absence of a comparable textual basis for doing so.

applying the indentation test." *Maine Report* 25. He also observed that this methodology reflects "the practice of the United States." *Id.* at 24 n.17. Likewise, Special Master Armstrong applied that methodology in *Louisiana.* He concluded that Caillou Bay did not satisfy Article 7 because "[i]t is obvious that were it not for the existence of the Isles Dernieres, there would be no question of the existence of a bay at this location, for *without them* there is no indentation in the coastline enclosing landlocked waters between clearly defined natural entrance points." *Louisiana Report* 49 (emphasis added). Thus, the practice that the United States urges here is well established and should not elicit "great surprise." The United States' views on this matter of treaty construction is, of course, entitled to "great weight." *Stuart*, 489 U.S. at 369.

Alaska's argument for a contrary approach relies on isolated statements wrenched from their original context. None of the authorities that Alaska cites either discusses or applies the indentation test. For example, Alaska cites a general passage from *Maine* (AK Count II Memo. 32) respecting the need for a "common-sense approach" to assimilation that has nothing to do with the indentation test. *See* 469 U.S. at 517. Alaska states that the Court "unambiguously ruled" in *Louisiana* that "lines across the various mouths are to be the baselines for all purposes" (AK Count II Memo. 33), but the Court's statement there addressed how to *locate* bay closing lines *after a* bay has been identified. The Court recognized that lines drawn between island headlands are also the closing lines that separate inland waters from the territorial sea. 394 U.S. at 55. The Court said nothing about application of the indentation test. Alaska also cites passages from the Reed treatise without regard to context. Those passages, when examined in full, confirm that the United States has long followed

the practice of applying the indentation test through the use of mainland-to-mainland measurement.[16]

Alaska's alternative approach is not only unprecedented, but it is also fraught with difficulties. Alaska begins by erasing non-assimilated islands, AK-149-150, but then reaches the entirely subjective conclusion that, within North Bay and South Bay, "[each coast enjoys a configuration that is more than a mere curvature," with "mainland headlands between which there are indentations too obvious and pronounced to be dismissed as mere bights in the coast." AK Count II Memo. 30. Alaska accordingly determines that there is an "indentation" without making any measurement whatsoever! To be sure, there are situations when the presence or absence of an indentation can be discerned from a "mere glance at a map." *Maine*, 469 U.S. at 514-515. But when the existence of a bay is seriously contested, the actual width-to-depth measurements must be made. An indentation cannot be discerned merely by identifying changes in direction of the coast. *See* AK Count II Memo. 30-31.[17]

---

[16] The Reed treatise specifically discusses application of the indentation test, stating:

> Thus, where there is a question as to whether an indentation into the mainland exists in the vicinity of offshore islands, the United States first inspects a chart of the area with the islands erased. *Any indentation into the mainland is then tested for bay status without regard to the islands*. [citing figures illustrating Caillou Bay]. *If a bay exists*, the islands are restored to determine whether they form multiple mouths to the bay and thereby affect the closing line.

Reed, *supra*, 240 (emphasis added; footnote omitted); *see also id.* at 229-233. Alaska selectively extracts passages from other parts of the treatise that discuss the role of islands in *locating the closing lines* of an *already established* bay when, for example, "screening islands" are present. AK Count II Memo. 35 (quoting Reed, *supra* 297 n.302, 299). *Compare Louisiana*, 394 U.S. at 55-60. Those discussions having nothing to do with application of the indentation test, which is concerned with the antecedent step of identifying a bay.

[17]Mitchell Strohl's example of a mere curvature—Apalachee Bay, Florida—makes the point. Strohl, *The International Law of Bays* 74 (1963) (Figure 16, reproduced at US-II-49). The mouth

Having concluded that a bay exists, Alaska replaces the islands and reduces the mainland-to-mainland measurement by the length of the intervening islands—avoiding the true width-to-depth measurement that the Convention requires. AK Count II Memo. 31. Like the apocryphal economist who plans a jailbreak by assuming a key, Alaska creates a bay by assuming an indentation —ignoring the reality of the Convention's objective criterion. The indentation test has subjective aspects, and its application requires the exercise of judgment, which explains why the United States believes that the Master would benefit from testimony on the matter. Nevertheless, the test must be applied, and its application should proceed, to the maximum extent possible, based on objective criteria. Rather than striving to make that test more objective, Alaska's approach renders the test meaningless.

Alaska's approach is particularly troubling because a single width-depth comparison cannot rationally be made if the waterbody is treated as having multiple mouths. Geographic experts agree that the indentation test requires that the width of the waterbody be compared to a line extending from a single point on the feature's mouth to a point on the feature's head. US-II-1 pp.38-41 (Smith); US-II-16 p.8 (Hodgson/Alexander); *Alaska Report* 205-207 (testimony of Prescott). But if Alaska is correct, and multiple mouths are to be used for Article 7's width-to-depth test, from which of the several mouths does one make the depth measurement? That question has never even been considered by the Court, or the experts, because never before has anyone argued that multiple mouths play a role in the indentation test. Alaska does not attempt to answer it here. To measure the depth-of-penetration in "North Bay," Alaska ignores the multiple mouths created by Chichagof

---

of that "bay" is too wide in relation to depth to create an indentation. Yet there are many "shifts in direction" of the coastline within Apalachee Bay.

and Baranof Islands. It offers three alternative means of measurement, each of which originates on a *mainland-to-mainland* mouth. AK-158. That is the same line that Alaska argues *cannot* be used for measuring width-of-mouth. See AK-149. To measure depth-of-penetration in "South Bay," Alaska adds only more confusion. It offers four alternative depth measures, two of which originate on the mainland-to-mainland line advocated by the United States. The other two begin on one of the multiple mouths to the waterbody. AK-159. But Alaska gives no explanation of how that particular mouth is selected over the other five mouths that it identifies. AK-155.

In short, Alaska's novel articulation of the indentation test, which would define the "mouth" of the bay one way for the "width" measurement (summing lines between screening islands) and differently for measuring "depth" (adopting a mainland-to-mainland line), cannot be justified on the basis of the Convention, the Court's decisions, established practice, or objective criteria. Alaska's result-driven methodology is internally inconsistent and confuses, rather than clarifies, the principles that mariners and coastal nations alike are to apply in identifying juridical bays. The proper "width-of-mouth" measure is, and should remain, the distance between mainland headlands.

2. *The depth-of-penetration determination measures a single line from the mouth to the head of the waterbody.* The indentation test requires measurement of the waterbody's depth of penetration into the mainland. Article 7 does not specify how to choose the appropriate line, but geographic experts have suggested five possibilities that all begin from a point on the mainland-to-mainland line. They have focused on three alternatives: (1) a perpendicular from the mid-point of the mouth to the mainland shore; (2) a perpendicular from any point on the mouth to the deepest point of the indentation; and (3) the longest straight line that can be drawn between any point on the mouth and the head of the waterbody in question. *See* US-II-1 pp.38-41(Smith); US-II-16 pp.8-9

(Hodgson/Alexander); *Alaska Report* 205-206 (testimony of Prescott). Hodgson and Alexander also suggest the possibility of using a median line from the mouth to the head of the bay (US-II-16 pp.8-9), while Prescott has suggested a modification of that alternative that he describes as "the shortest line from the point of deepest penetration to the closing line of the bay." (*Alaska Report* 206).

Drs. Hodgson and Alexander prefer the third method—the longest straight line—because "[i]t represents, for any configuration of a bay, the practical line determining true penetration of the water into the land." US-II-16 p.8. In the past, the United States has been reluctant to settle on a single test for all applications. *Alaska Report* 206. The United States now concludes, however, that the need for clarity and simplicity of application dictates identification of a generally applicable test. As a general matter, the third method, favored by Hodgson and Alexander, best meets the purposes of Article 7. Sensibly applied, it provides clear and consistent guidance for mariners and foreign nations alike, and it does not result in arbitrary anomalies that may accompany use of perpendicular lines. Unlike a median-based test, it is easily applied by mariners. The United States accordingly endorses application of that measure here and in the general case, recognizing that the head of the bay must be properly identified. *See* US-II-1, at 38-41; US-II-16 pp.6-7.

3. The ratio of depth-to-width must be at least one-to-one. The Convention does not dictate what ratio of depth-to-width indicates that the coastal feature is an indentation and not a mere curvature. That ratio logically depends upon the method selected for making the width and depth measurements. Geographic experts generally conclude that, if the width is measured mainland-to-mainland and the depth is measured by the longest straight line from the mouth to the head of a bay, then the depth should equal or exceed the width. As Hodgson and Alexander explain, "true land-locked conditions should require that the opening (of the bay) be narrower than a principal lateral

axis of the bay," and, hence, "[a] lateral dimension greater than the mouth would be vital to ensure isolation." US-II-16 p.8. *Accord* US-II-1 p.43 (Smith); Strohl, *supra*, 56 & Fig.11 (US-II-50); *see also* I O'Connell, *International Law of the Sea* 393 n. 19 (1982) (citing Strohl).

The proper elements of the indentation test accordingly require that: (1) the width-of-mouth determination measures a straight line between mainland headlands; (2) the depth-of-penetration determination measures a straight line from the mouth to the head of the waterbody in question; and (3) the waterbody must be at least as deep as it is wide. Those general principles should be applied to the features in this case.

B. Alaska's Application Of The Indentation Test To The Features In This Case Is Mistaken

As a general matter, the Court's special masters have found a trial format useful for assessing how to apply Article 7's tests to particular features, and the Master might find similar benefit here. Nevertheless, the application of the foregoing principles can be described in a relatively straightforward way. In the absence of assimilation, none of the features at issue here constitutes a juridical bay. Assuming arguendo that the islands Alaska seeks to assimilate are part of the mainland, "North Bay" and "South Bay" would not satisfy the indentation test, Sitka Sound would satisfy the indentation test, but not on the closing lines that Alaska urges, while Cordova Bay would meet the indentation test.

1. *"North Bay" is not a juridical bay*. Unless islands are treated as mainland, "North Bay" plainly is not an indentation. Visual inspection of a map, with islands removed, makes that point obvious. US-II-7. If Alaska's island-complex were assimilated, North Bay still would fail to qualify as an indentation. Alaska identifies the entrance points of North Bay as Cape Spencer and Cape

Decision. But a line between those points encloses a substantial water area which is not landlocked. The entire western coast of Kuiu Island faces on the open sea rather than into the supposed bay. US-II-8. Application of the 45-degree test to locate the natural entrance points for "North Bay" reveals what visual inspection suggests—Cape Decision cannot serve as the southern entrance point to the supposed bay. US-II-51. The indentation test further establishes that the supposed bay is not an indentation into the mainland. The distance from Cape Spencer to Cape Decision is approximately 154 nm long. US-II-51. The longest straight line that can be constructed between that mouth and the head of North Bay is approximately 100 nm long, well short of the minimum 1:1 ratio considered acceptable using this liberal method for measuring depth. US-II-51.

Alaska offers three alternative depth-of-penetration measurements, none of which actually connects the mouth of "North Bay" with the head of that supposed bay. AK-158. Each of Alaska's depth-of-penetration lines continues beyond "North Bay" into a separate, and admittedly inland, waterway. Alaska is not measuring "North Bay." Instead, Alaska measures "North Bay" plus Lynn Canal, or "North Bay" plus Port Snettisham, or "North Bay" plus the eastern arm of Frederick Sound. AK-158. Alaska's proposal does not reflect the "common sense" approach that the Supreme Court has urged.

Furthermore, Alaska's own measurements indicate that its chosen closing lines total more than 24 nm. AK-154 p.1. Article 7(5) of the Convention provides that, if the distance between natural entrance points exceeds 24 miles, "a straight baseline of twenty-four miles," commonly called a "fallback" line, "shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length." Thus, even if "North Bay" were an indentation into the mainland, its inland waters would not extend to the natural entrance points

identified by the State. Alaska's Exhibits 154 and 164 indicate that it is using Coronation Island and the Spanish Islands in constructing a fallback line. That is impermissible, even under Alaska's theory. Alaska argues that Cape Decision marks the seaward limit of "North Bay" in that area. Any fallback line seaward of the Cape-Spencer-to-Cape-Decision line is not "within the bay" and therefore not authorized by Article 7(5).

The non-existent "North Bay," even as Alaska imagines it, is not a juridical bay.

2. *"South Bay" is not a juridical bay*. "South Bay" suffers from the same initial infirmity that afflicts "North Bay." In the absence of assimilation, South Bay plainly is not an indentation into the mainland. US-II-7.[18] If Alaska's island-complex were assimilated, "South Bay" still would fail to qualify as an indentation. Like "North Bay," its width exceeds its depth of penetration. A closing line from Cape Decision to Tree Point on Cape Fox —Alaska's entrance points—is approximately 120 nm long. US-II-52. The longest straight line that can be constructed to the head of South Bay is approximately 75 nm long, less than two-thirds the width of the mouth. South Bay is "a mere curvature of the coast."[19]

---

[18] US-II-7 reveals a potential indentation east of the Cleveland Peninsula, within the area Alaska designates "South Bay." Although Alaska does not specifically argue the point, that feature, almost completely filled by Revillagigedo Island, could satisfy Article 7's requirements.

[19] Alaska constructs two lines which are approximately 116 and 124 nm long, but they do not begin on the mainland-to-mainland closing line that the United States believes to be appropriate and that is used by Alaska for all other depth-of-penetration measures. AK-159. They begin instead on what Alaska may assert is one of the multiple mouths of "South Bay," but that is never proposed as a baseline because it is well seaward of Alaska's 24-mile fallback line. AK-165. The particular line was apparently chosen for the sole purpose of finding some straight line that is arguably within "South Bay" and is longer than the feature's mouth. Drawn from the proper mainland-to-mainland closing line, each of these depth measures is shorter than the mouth of "South Bay." Alaska's lines suffer from an additional shortcoming; they are not drawn to anything which could be rationally considered the head of "South Bay." AK-159. They measure nothing of relevance.

Even if the island-complex were part of the mainland, and "South Bay" were more than a mere curvature of the coast, its inland waters would not extend to the entrance points that Alaska identifies. Those mouths total 47.49 nm, almost twice the distance for a permissible bay closing. AK-153. If "South Bay" were a bay at all, it would be an overlarge bay. A 24-mile fallback line, or series of lines, would need to be constructed, similar to what is depicted in AK-165, to define the limits of its inland waters.

The non-existent "South Bay" envisioned by Alaska is not a juridical bay.

3. *Sitka Sound is not a juridical bay*. Sitka Sound is a strait, accommodating ocean going traffic, to and from Sitka, from either the north or south. US-II-36. With Kruzof Island and the adjacent Partofshikof Island erased, Sitka Sound is not an indentation into the coast of Baranof Island. *If* Kruzof Island were part of Baranof Island, Sitka Sound would satisfy Article 7's criteria. We do not agree, however, with Alaska's closing lines for Sitka Sound. They have two shortcomings.

First, the northwestern terminus of Alaska's closing line is not a proper entrance point. AK-173 shows that the coast of Kruzof Island, for almost 1 nm east of that terminus, faces the open sea rather than the landlocked waters of the "bay." The 45-degree test confirms that conclusion. The angle between Alaska's entrance and Sitka Point is only approximately 8 degrees. US-II-53. *If* Sitka Sound were a juridical bay, Sitka Point would be the proper northwestern entrance point.

Second, Alaska appears to assume that the Necker Islands create multiple mouths to Sitka Sound. Most do not. The Supreme Court has said that islands create multiple mouths if they are intersected by the mainland-to-mainland closing line, or they "cover[] a large percentage of the distance between the mainland entrance points," *Louisiana*, 394 U.S. at 58, 60. A "large

percentage" is understood to mean more than 50%. US-II-16 p.17. The Necker Islands screen only about one-third of Alaska's closing line. As a group, they do not create multiple mouths to Sitka Sound.[20]

In the absence of assimilation, Sitka Sound is not an indentation into the mainland. If assimilation were allowed, its landlocked waters would not be those identified by the State.

4. *Cordova Bay is not a juridical bay*. Cordova Bay is not an indentation into a single landform. It is formed by Prince of Wales Island on the east and Dall Island on the west. US-II-37. With Dall Island removed, the area denominated "Cordova Bay" is not an indentation into Prince of Wales Island. US-II-38. The passage between these two islands is too wide and too heavily utilized to permit their assimilation. If it were not for those intervening waters, Cordova Bay would meet the requirements of Article 7. Its entrance points would appear to be the easternmost point on Cape Muzon and a point on Marsh Point at approximately 54.43. N, 132.18. W.

* * * * *

In sum, a proper application of Article 7 reveals that, even if Alaska's expansive view of assimilation were accepted, the resulting features, by and large, would not qualify as juridical bays. Alaska's proposed departures from established principles and objective standards would undermine the United States' important interest in the articulation of clear, consistent, and confined international rules for delimiting maritime boundaries.

---

[20] Three of the Necker Islands appear to be intersected by a mainland-to-mainland closing line. They are Elovoi Island, near the southeastern headland of the Sound, and two very small islands that lie west-northwest of Elovoi Island. A mainland-to-mainland closing line might be altered slightly so that it runs to the natural entrance points of those islands. *Louisiana*, 394 U.S. at 56.

CONCLUSION

The motion of Alaska for summary judgment on Count II should be denied.

Respectfully submitted.

Theodore B. Olson
Solicitor General

Edwin S. Kneedler
Deputy Solicitor General

Jeffrey P. Minear
Assistant to the Solicitor General

Gary B. Randall
Bruce M. Landon
Michael W. Reed
Trial Attorneys

United States Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

By:________________________
Michael W. Reed
Trial Attorney, General Litigation Section
Environment and Natural Resources Division
United States Department of Justice
1205 Via Escalante
Chula Vista, California 91910-8149
(619) 656-2273

November 8, 2002

TABLE OF APPENDICES

Appendix A Hodgson and Alexander's Figure 11, Channel Ratio (US-II-6 p.21)

Appendix B The Island Complex, Water and Land Measurements (US-II-10, p.1)

Appendix C The Island Complex As A Single Feature and Channel Separating It From The Mainland With Island Deleted (US-II-40)

Appendix D North Bay with: (1) a line connecting the entrance points identified by Alaska; (2) the longest line that can be drawn from line 1 to the head of North Bay: and (3) a line drawn 45 degrees from line 1 and the southern entrance point (US-II-51)

Appendix E South Bay with: (1) a line connecting the entrance points identified by Alaska; and (2) the longest line that can be drawn from line 1 to the head of South Bay (US-II-52)

TABLE OF EXHIBITS

EXHIBITS SUBMITTED BY THE UNITED STATES RESPECTING MOTIONS FOR SUMMARY JUDGMENT ON COUNT II OF THE AMENDED COMPLAINT

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.

Exhibits US-II-1 through US-II-39 accompanied the Motion of the United States for Partial Summary Judgment on Count II of the Amended Complaint. Exhibits US-II-40 through US-II-53 accompany the Memorandum of the United States in Opposition to Alaska's Motion for Summary Judgment on Count II of the Amended Complaint.

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)

US-II-40 The Island Complex As A Single Feature and Channel Separating It From The Mainland With Islands Deleted

US-II-41 1903 Decision of Lord Alverstone on the Fifth Question Before The Alaska Boundary Tribunal

US-II-42 Dr. Bruce F. Molnia, Corrections to, and Analysis of Professor James Beget's Geologic Origin and Scientific Classification of Islands and Bays, Straits, Sounds, Entrances, Channels, and Passages of southeast Alaska

US-II-43 Samson, McClelland, Patchett, Gehrels & Anderson, Evidence from neodymium isotopes for mantle contributions to Phanerozoic crustal genesis in the Canadian Cordillera (1989)

US-II-44 Morozov, Smithson, Chen and Hollister, Generation of new continental crust and terrane accretion in Southeastern Alaska and Western British Columbia: constraints from P- and S-wave wide-angle seismic data (ACCRETE) (2001)

US-II-45 Haeussler, Coe and Onstott, Paleomagnetism of the Late Triassic Hound Island Volcanics: Revisited (1992)

US-II-46 Treaty Between Great Britain And Russia, signed at St. Petersburg February 16/28, 1825

US-II-47 Treaty Between the United States and Great Britain, signed May 8, 1871

US-II-48 Alaska Steam - A Pictorial History of the Alaska Steamship Company (1984), photographs from pages 21, 22 and 25

US-II-49 Strohl, The International Law of Bays (1963), Figure 16 from page 74

US-II-50 Strohl, The International Law of Bays (1963), Figure 11 from page 57

US-II-51 North Southeast Bay Employing The Island Complex but with Other Islands Deleted and with the following lines added:

1 - a line connecting the entrance points identified by Alaska
2 - the longest line that can be drawn from line 1 to the head of the Bay
3 - a line drawn 45 degrees from line 1 at the southern entrance point

US-II-52 South Southeast Bay Employing the Island Complex but with other Islands Deleted and with the following lines added:

1 - a line connecting the entrance points identified by Alaska
2 - the longest line that can be drawn from line 1 to the head of the bay

US-II-53 Sitka Sound Mouth, As Alleged By Alaska, With 45 Degree Test Applied to Northwest Headland

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 Memorandum For The United States In Opposition To Alaska's Mtion For Summary Judgment 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 8th day of November, 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.