

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 RESPONSE
TO ALASKA'S MOTION FOR SUMMARY JUDGMENT ON
COUNT III 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	-1-
DISCUSSION:	
I. The United States Has Concluded That Congress Did Not Intend To Retain Title To All Submerged Lands Within The Exterior Boundaries Of The Tongass National Forest Merely Because Those Lands Are Within The Forest Boundaries Set Out In The 1902, 1907 And 1909 Presidential Proclamations	-4-
II. The Conclusion That Congress Did Not Clearly Intend To Retain Title To Submerged Lands Merely Because They Are Within The Boundaries Of The Tongass National Forest Does Not Entitle Alaska To Summary Judgment Quieting Title To All Submerged Lands Within Those Boundaries	-6-
III. The Special Master Should Postpone Action On Alaska’s Motion For Summary Judgment On Count III To Allow The Parties To Develop A Stipulation For The Master’s Review That Would Allow Formulation Of A Consent Decree Resolving The Precise Extent Of Alaska’s Title	-9-
CONCLUSION	-12-

TABLE OF AUTHORITIES

FEDERAL CASES

Hynes v. Grimes Packing Company, 337 U.S. 86 (1949) 5

United States v. Alaska, 521 U.S. 1 (1997) 4, 7, 9

Peratrovich v. United States, No. A92-734 (D. Alaska) 2

FEDERAL STATUTES

Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3111 *et seq*
..... 2

Alaska Statehood Act, note prec. 48 U.S.C. § 21 9

Submerged Lands Act, 43 U.S.C. 1301 *et seq* 1, 6, 8, 10

16 U.S.C. 471 (repealed 1976) 5

16 U.S.C. 475 5

28 U.S.C. 2409a(m) 7, 10

INTRODUCTION

The State of Alaska brought this original action to quiet title to marine submerged lands in the vicinity of the Alexander Archipelago. The Special Master’s Report on Intervention describes the nature and scope of the four counts of Alaska’s amended complaint. *See* Report of Special Master on the Motion to Intervene 1-3 (Nov. 2001) (*Intervention Report*). In Count III, Alaska seeks to quiet title to marine submerged lands within the boundaries of the Tongass National Forest, as they existed on the date of Alaska’s statehood, on the theory that those submerged lands passed to the State under the equal footing doctrine and the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*¹

Alaska has moved for summary judgment on Count III. *See* Alaska’s Motions for Summary Judgment – Introduction and Background (AK Intro. Memo.). Alaska argues that the 1902, 1907, and 1909 presidential proclamations establishing the Tongass National Forest did not reserve the marine submerged lands within the reservation boundaries, even though those boundaries extend beyond the low water mark of the forest uplands. *See* Memo. in Supp. of Alaska’s Motion for Summary Judgment on Count III (AK Count III. Memo. 16-34). Alaska also urges that “the background of the 1958 Alaska Statehood Act demonstrates that Congress intended the lands underlying marine waters in the Tongass to pass to Alaska at Statehood.” *Id.* at 42-49. Alaska accordingly seeks a ruling from the Master that Alaska’s grant of submerged lands under the equal footing doctrine and the Submerged Lands Act “was not defeated by the reservation of the Tongass National Forest.” AK Intro.Memo. 14.

¹ The parties previously agreed that Count III would be limited to the reservation of the Tongass National Forest and would not include reservations or ownership for other purposes that are located in the same area, but are not under the administration of the Department of Agriculture’s Forest Service. *See* Brief for the United States on Motion for Leave to File a Bill of Complaint. 17-20.

The United States has not moved for summary judgment on Count III. To the contrary, it has entertained significant questions, predating this litigation, respecting federal ownership of marine submerged lands within the Tongass National Forest. As the Master recounted in the *Intervention Report*, the United States has been involved in litigation in federal district court with certain Alaska Natives respecting their subsistence rights under the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3111 *et seq.* See *Intervention Report* 6-10 (discussing *Peratrovich v. United States*, No. A92-734 (D. Alaska)). The issue whether the United States owns marine submerged lands within the Tongass has arisen in that litigation, and the United States has expressed doubts therein over whether Congress had intended to retain the lands at issue in that case at the time of Alaska's statehood. See *id.* at 8-10. The United States recognized that the State of Alaska, which was not a party in the *Peratrovich* litigation, had a non-frivolous claim of title to those lands. *Id.* at 9. The United States accordingly opposed entry of a preliminary injunction and "asked the district court to dismiss the *Peratrovich* case for failure to join an indispensable party, namely, Alaska." *Ibid.*²

While the *Peratrovich* litigation was pending, the State of Alaska filed this original action, claiming ownership of marine submerged lands in the Tongass National Forest. The United States acquiesced in the original action, in part, because it provided a suitable forum for resolving that inter-sovereign dispute. In accordance with its obligation to investigate, identify, and defend the United States' claims of title, the United States filed an answer disputing Alaska's claim. The district

² As the Master recognized, "the United States argued that the plaintiffs had not shown that the United States had title to the marine submerged lands in the Tongass National Forest area" but "never actually admitted that Alaska has title to the submerged lands." *Intervention Report* 10. In the view of the United States, it could not enter into a binding admission respecting millions of acres of submerged lands within the Tongass National Forest without first discovering, researching, and analyzing Alaska's specific claims.

court accordingly stayed proceedings in *Peratrovich*. The United States has proceeded to conduct discovery and analyze the issue. With the filing of Alaska's motion for summary judgment, the United States now has the benefit of Alaska's full articulation of the basis for its claim.

Upon analysis of the materials that are now available, the United States has determined that there is considerable merit to Alaska's claim respecting the Tongass National Forest. The United States agrees that Congress did not make clear its intent to retain all of the submerged lands within the Tongass National Forest at the time of Alaska's statehood. Congress's actions with respect to the Tongass National Forest are in sharp contrast to its actions with respect to other federal reservations, such as Glacier Bay National Monument. As a result, it is the position of the United States that the State of Alaska does have a valid claim to the majority of the disputed marine submerged lands within the Tongass National Forest. The United States has also concluded, however, that Congress retained title to numerous discrete parcels of marine submerged lands within the boundaries of the Tongass based on government actions apart from the 1902, 1907, and 1909 presidential proclamations that created the forest reserve. Alaska's amended complaint does not address lands reserved or otherwise set aside through those other governmental actions. Indeed, many of those tracts have not been identified, and they may not in fact give rise to a current case or controversy that could, or should, be resolved in this proceeding.

The United States accordingly proposes that the Master postpone resolution of Alaska's motion for summary judgment on Count III pending discussions between the United States and Alaska aimed at developing a stipulation identifying those marine submerged lands to which Alaska possesses title. The United States' acknowledgment that Congress did not clearly intend to retain title to all submerged lands within the Tongass National Forest merely because those lands are within

the proclaimed forest boundaries eliminates the only legal issue that Alaska briefed in its summary judgment papers. The United States and Alaska should therefore direct their energies toward developing a stipulation for the Master's review that would resolve, to the extent possible, the precise extent of Alaska's title.

DISCUSSION

I. The United States Has Concluded That Congress Did Not Intend To Retain Title To All Submerged Lands Within The Exterior Boundaries Of The Tongass National Forest Merely Because Those Lands Are Within The Forest Boundaries Set Out In The 1902, 1907, And 1909 Presidential Proclamations

As the United States explained in its memorandum in support of its motion for summary judgment on Count IV of Alaska's amended complaint, the United States can retain title to submerged lands by reserving those submerged lands prior to statehood with the intent of preventing passage of title to the State. *See* U.S. Count IV Memo. 2, 4-6. *See, e.g., United States v. Alaska*, 521 U.S. 1 (1997). Whether the United States intended to reserve submerged lands as well as uplands and whether Congress intended to prevent passage of title are "ultimately a matter of federal intent." 521 U.S. at 36. The Court identified two controlling principles that are directly applicable to Alaska's claim here. First, a reservation order will be deemed to reserve submerged lands when it "necessarily embrace[s] certain submerged lands," or where the purpose of the reservation would be undermined if it did not include the submerged lands. *Id.* at 39. Second, Congress manifested its intent, at the time of Alaska's statehood, to retain federal ownership of certain categories of submerged lands that are critically important to federal activities. *Id.* at 41-43, 55-57.

In the case of the Tongass National Forest, the United States would dispute Alaska's contentions (AK Count III Memo. 24-34) that the 1902, 1907, and 1909 presidential proclamations

did not “necessarily embrace” marine submerged lands within the Forest boundaries. But there is no occasion for the Master to reach the question whether the proclamations embraced those lands, because the United States has concluded that Congress did not clearly intend, at or before the time of Alaska’s statehood, to retain marine submerged lands on the basis that they were encompassed within the Tongass National Forest at the time Alaska was admitted to the Union. The United States accordingly has determined not to claim title based solely on those proclamations.³

In assessing whether to contest Alaska’s claim of title, the United States must make a legal judgment, on behalf of all its citizens, based on a faithful and fair-minded analysis of congressional intent. *See Intervention Rep. 23*; *see also Intervention Hearing Tr. 54*, lines 7-12. The United States has conducted that analysis and has concluded that Congress did not clearly express its intent, at or before the time of Alaska statehood, to retain title to all submerged lands within the boundaries of the Tongass National Forest merely because those lands are within the forest boundaries set out in

³ If the question were properly presented for determination, the United States would challenge Alaska’s various arguments respecting the scope and effect of the 1902, 1907, and 1909 presidential proclamations. For example, Alaska argues that submerged lands may never be reserved as a national forest because they are not public lands. Alaska fails to distinguish the use of the term “public lands” as it relates to disposal of submerged lands out of federal ownership from the use of “public lands” when reserving lands for a federal purpose. In the latter context, “public lands” may include submerged lands. *See, e.g., Hynes v. Grimes Packing Company*, 337 U.S. 86, 114-116 (1949). Alaska also argues that submerged lands cannot be reserved for national forest purposes because submerged lands are not forested. But the relevant statute, 16 U.S.C. 471 (repealed 1976), requires only that *portions* of the reserved area be forested; indeed, numerous forests include acreage that is above the tree line or otherwise lacking a current capability of producing timber. Alaska further contends that submerged lands may not be reserved as part of a national forest because they are unrelated to the purposes of the forests. Given the crucial role that submerged lands, and particularly tidelands, play in transporting logs from coastal forests to processing plants and markets, those lands manifestly support Congress’s objective of assuring a steady supply of timber. *See* 16 U.S.C. 475. Those examples illustrate the danger of accepting Alaska’s arguments respecting the scope and effect of the presidential proclamations creating the Tongass National Forest and counsel against offering an advisory opinion on the matter.

the 1902, 1907, and 1909 presidential proclamations. The United States accordingly acknowledges that Alaska has a valid basis for asserting title to some of the marine submerged lands within the Tongass National Forest, and the relevant question is the extent of Alaska's ownership.

II. The Conclusion That Congress Did Not Clearly Intend To Retain Title To Submerged Lands Merely Because They Are Within The Boundaries Of The Tongass National Forest Does Not Entitle Alaska To Summary Judgment Quieting Title To All Submerged Lands Within Those Boundaries

The conclusion that Congress did not clearly intend to retain marine submerged lands within the Tongass National Forest based merely on their location within the forest reserve does not mean that the State is entitled to all of the marine submerged lands within the boundaries of the Tongass. As a practical matter, Congress's failure to express such an intent will result in the ultimate recognition that Alaska has title to the majority of the acreage in dispute. Nevertheless, there are significant areas of marine submerged land within the boundaries of the Tongass that do not belong to the State. Some of those lands are readily identifiable and remain incontrovertibly in federal ownership. Other lands are known to exist but have not been specifically identified.

First, the boundaries of the Tongass National Forest extend beyond the seaward boundaries of the State of Alaska. The Amended Complaint seeks to quiet title to only those marine submerged lands that are within Alaska. Indeed, Alaska generally can make no claim to ownership of those lands and correspondingly lacks jurisdiction or standing to dispute the United States' title. *See* 43 U.S.C. 1301(b).

Second, there are, within the boundaries of the Tongass National Forest, numerous withdrawals and reservations under the jurisdiction of agencies other than the Department of Agriculture's Forest Service. The Quiet Title Act requires a State to give 180 days' written notice

of intent to sue to the head of the federal agency with jurisdiction over the land. 28 U.S.C. 2409a(m). Alaska gave written notice only to the Secretary of Agriculture with regard to lands within the exterior boundaries of the Tongass. *See* Brief for the United States on Motion for Leave to File a Bill of Complaint 17-20. During the proceedings on Alaska's motion for leave to file a complaint in this action, Alaska agreed that the scope of this action did not include marine submerged lands that, although within the boundaries of the Tongass National Forest, were subject to a withdrawal placing the land under the jurisdiction of any agency other than the Forest Service. *Id.* 20. The 1958 Atlas of Federal Withdrawals and Reservations shows numerous non-Forest Service withdrawals within the area of the Tongass. US-III-1.⁴

Third, the Submerged Lands Act itself excepts from the confirmation and establishment of States' title:

(a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and any rights the United States has in lands presently and actually occupied by the United States under claim of right;

(b) such lands beneath navigable waters held, or any interest in which is held

⁴ Such withdrawals include, for example, the numerous pre-statehood lighthouse reserves that embrace submerged lands. Because the United States held the lighthouse reserves for Coast Guard purposes, Section 11(b) of the Alaska Statehood Act withheld from the State those submerged lands. *See Alaska*, 521 U.S. at 42. (Section 11(b) withheld all submerged lands held for "military, naval, Air Force or Coast Guard purposes, including naval petroleum reserve numbered 4"). The lighthouse withdrawals represent only a fraction of the pre-statehood withdrawals that are outside the scope of this action. *See* 1958 Atlas of Federal Withdrawals. US-III-1.

by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians; and

(c) all structures and improvements constructed by the United States in the exercise of its navigational servitude.

43 U.S.C. 1313. Alaska's amended complaint and its motion for summary judgment challenge the United States' title on the basis that the presidential proclamations establishing the Tongass did not expressly retain the submerged lands at statehood. Alaska has not challenged or addressed any of the other exceptions to the confirmation of a State's title under the Submerged Lands Act. Yet such exceptions apply to numerous locations in the Tongass.

For example, Subsection 1313(a) excludes from confirmation to the States "all lands filled in, built up, or otherwise reclaimed by the United States for its own use." In order to transfer logs to water for shipment to processing plants or market, it is generally necessary to build a log transfer facility. Declaration of Kenneth D. Vaughan, US-III-2. Such facilities in most cases are built partially on uplands and partially on submerged lands. *Ibid.* The federal government's preliminary investigations reveal approximately 350 sites where timber harvest occurred prior to Alaska statehood. *Ibid.* The construction of a log transfer facility in some form was likely at these sites. *Ibid.* In addition to log transfer facilities, the Forest Service built docks and other facilities on tidelands. *See, e.g.*, US-III-3, US-III-4, US-III-5, US-III-6, US-III-7. The Forest Service has also acquired tidelands by purchase. US-III-9. Other agencies filled tidelands prior to Alaska's statehood. *See* US-III-8. Some sites filled by the Forest Service have subsequently been conveyed to the Department of the Army. US-III-6.

Similarly, Subsection 1313(c) withholds from a State "all structures and improvements constructed by the United States in the exercise of its navigational servitude." Numerous such

improvements were made to some submerged lands within the exterior boundaries of the Tongass before Alaska's admission to the Union. Alaska's own exhibits show that the United States has been constructing improvements in its exercise of the navigational servitude in the Archipelago since the 1800's. *See* AK-21 through 23.

Furthermore, before Alaska's admission, the Forest Service administratively set aside significant portions of the Tongass for the protection of wildlife. US-III-10 At least some of those wildlife set-asides included marine submerged lands. US-III-11 (Naha River set aside including Roosevelt lagoon); US-III-12 (Anan Creek set aside including salt lagoon). Congress retained submerged lands in such areas in federal ownership by virtue of Section 6(e) of the Alaska Statehood Act, note prec. 48 U.S.C. note prec. 21. *Alaska*, 521 U.S. at 57.

III. The Special Master Should Postpone Action On Alaska's Motion For Summary Judgment On Count III To Allow The Parties To Develop A Stipulation For The Master's Review That Would Allow Formulation Of A Consent Decree Resolving The Precise Extent Of Alaska's Title

The United States' acknowledgment that Congress did not clearly intend to retain title to marine submerged lands merely because they are within the boundaries of the Tongass National Forest eliminates the fundamental legal issue at stake in Count III. That acknowledgment recognizes that Alaska has a legal entitlement to marine submerged lands in the Tongass National Forest that are within the seaward limits of Alaska, provided that those submerged lands have not been retained by the United States through means other than the 1902, 1907, and 1909 proclamations. The acknowledgment leaves two remaining issues, neither of which is currently susceptible to resolution through Alaska's motion for summary judgment.

First, the United States' acknowledgment does not resolve the precise limits of Alaska's

entitlement. There are potentially hundreds of small parcels of submerged lands within the boundaries of the Tongass that either are beyond the jurisdiction of the Court because of Alaska’s failure to serve a notice of intent to sue on any agency other than the Secretary of Agriculture, or are subject to a Submerged Lands Act exception that would prevent passage of title to the State. *See* 43 U.S.C. 1313. Although these parcels are numerous, they encompass only a small portion of the marine submerged lands that are within both the State of Alaska and the boundaries of the Tongass National Forest. Assessing the status of those parcels individually through adversarial proceedings—an exercise that would be beyond the contemplated confines of this original action—would be prohibitively time consuming and expensive.⁵

The United States submits that both the federal and state governments would benefit if they could specifically identify those parcels through a collaborative, rather than an adversarial, process. The United States accordingly proposes that the Special Master stay the proceedings on Count III to allow the United States and Alaska an opportunity to develop a stipulation that would identify and resolve the status of the relevant parcels. If the parties are able to reach agreement on that

⁵ The United States explained in its Brief on Motion for Leave to File Complaint (at 17-21), that Alaska had failed to give the notice of intent to sue with regard to the numerous small reserves within the boundaries of the Tongass as required by 28 U.S.C. 2409a(m). The federal government observed at that time that the parcels for which no notice had been given “though generally small, are potentially numerous and varied.” *Id.* at 19. It noted that, “apart from those jurisdictional concerns, considerable resources could be expended by this Court and the parties in determining the location and status of small tracts that would be more appropriately litigated— if at all—through an action in federal district court.” *Ibid.* The lack of suitability of original jurisdiction is just as apparent in the case of the parcels that were filled prior to statehood or that are subject to special purpose withdrawals and set asides (*e.g.*, Forest Service game refuges and dock sites). Alaska’s motion for leave to file a complaint, which challenges only the legal sufficiency of the 1902, 1907, and 1909 presidential proclamations as a source of federal retention of submerged lands within the Tongass, did not invoke the Supreme Court’s original jurisdiction over the time-consuming and factually intensive adjudication of pre-statehood fill sites and other small exceptions to the Submerged Lands Act.

stipulation, it would then provide the basis for formulating a consent decree respecting Count III.

Second, the United States anticipates that the amici curiae, Franklin H. James *et al.*, may object to the United States' conclusion that Congress did not clearly intend, at or before statehood, to retain all of the marine submerged lands within the Tongass National Forest. The appropriate point for the amici curiae to articulate their objections, however, would be at the conclusion of the collaborative process that the United States envisions for reaching a stipulation respecting the federally retained parcels. If the United States and Alaska are able to reach agreement, then the amici curiae would be able to present their perspective based on the precise resolution that the United States and Alaska contend is appropriate. If the United States and Alaska are unable to reach agreement, the Special Master could convene a status conference to determine the proper mechanism for the resolution of the remaining issues.

The United States proposes to submit a formal motion for a stay of further proceedings on Count III at the conclusion of the briefing on motions for summary judgment. The United States intends to consult with Alaska and hopes to reach agreement on the time period and form of the proposed stay.

CONCLUSION

The motion of the State of Alaska for summary judgment on Count III of the Amended Complaint should be held in abeyance in accordance with a motion for stay that shall be submitted, after consultation with Alaska, at the conclusion of the briefing on motions for summary judgment.

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: _____

Bruce M. Landon
*Trial Attorney, General Litigation Section
Environment and Natural Resources Division
United States Department of Justice
801 B Street, Suite 504
Anchorage, AK 99501
(907) 271-5452*

November 8, 2002

TABLE OF EXHIBITS

EXHIBITS SUBMITTED BY THE UNITED STATES RESPECTING ALASKA'S MOTION FOR SUMMARY JUDGMENT ON COUNT III OF THE AMENDED COMPLAINT

US-III-1	Atlas of Federal Reservations in Alaska, Bureau of Land Management 1958 (excerpts)
US-III-2	Declaration of Kenneth D. Vaughan
US-III-3	Executive Order 6189 Withdrawal of Lands for Docksites Alaska, July 5, 1933
US-III-4	Letter to Senator Stevens from Judith Brady dated February 12, 1988, regarding Petersburg docksite
US-III-5	Documents relating to Sitka docksite
US-III-6	Documents relating to Rock Dump Dock in Juneau
US-III-7	Memorandum dated September 15, 1980 from Director of Lands, Minerals and Watershed Management to Forest Supervisor, Chatham, re "Ownership of a small boat harbor dock in Juneau
US-III-8	State of Alaska Tidelands Patent No. 9, February 7, 1962.
US-III-9	Letter to Curtis McVee from James Calvin dated August 17, 1979 regarding Craig Administrative Site tideland reserve areas.
US-III-10	Memorandum from H.L. Shantz to Regional Forester dated April 21, 1939 regarding game refuges on National Forests of Alaska
US-III-11	Documents relating to Naha River wildlife reserve
US-III-12	Documents relating to Anan Creek recreation area

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 Response To Alaska's Motion For Summary Judgment On Count III 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.
Darron C. Knutson
Julie Fishel

Dated this 8th day of November, 2002

Lorraine Carter

* Two copies were served on counsel unless the individual counsel requested that he or she receive only one copy.