

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
—————

UNOPPOSED MOTION OF THE UNITED STATES FOR CONFIRMATION OF
DISCLAIMER OF TITLE TO MARINE SUBMERGED LANDS WITHIN THE TONGASS
NATIONAL FOREST AND MEMORANDUM IN SUPPORT OF MOTION
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MOTION OF THE UNITED STATES FOR CONFIRMATION OF DISCLAIMER OF TITLE
TO MARINE SUBMERGED LANDS WITHIN THE TONGASS NATIONAL FOREST

The United States hereby moves, pursuant to 28 U.S.C. 2409a(e) for entry of an order confirming the United States' disclaimer of certain marine submerged lands within the Tongass National Forest, as follows:

- (1) Pursuant to the Quiet Title Act, 28 U.S.C. 2409a(e), and subject to the exceptions set out in paragraph (2), the United States disclaims any real property interest in the marine submerged lands within the exterior boundaries of the Tongass National Forest, as those boundaries existed on the date of Alaska Statehood.
- (2) The disclaimer set out in paragraph (1) does not disclaim:
 - (a) any submerged lands that are subject to the exceptions set out in Section 5 of the Submerged Lands Act, ch. 65, Tit. II, § 5, 67 Stat. 32, 43 U.S.C. 1313;

- (b) any submerged lands that are more than three miles seaward of the coast line;
 - (c) any submerged lands that were under the jurisdiction of an agency other than the United States Department of Agriculture on the date of the filing of the complaint in this action;
 - (d) any submerged lands that were held for military, naval, Air Force or Coast Guard purposes on the date Alaska entered the Union.
- (3) For purposes of this disclaimer:
- (a) The term "coast line" means "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters," as defined in Section 2(c) of the Submerged Lands Act, ch. 65, Tit. II, § 5, 67 Stat. 32, 43 U.S.C. 1301(c).
 - (b) The term "submerged lands" means "lands beneath navigable waters" as defined in Section 2(a) of the Submerged Lands Act, ch. 65, Tit. II, §5, 67 Stat. 32, 43 U.S.C. 1301(a).
 - (c) The term "marine submerged lands" means "all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide."
 - (d) The term "jurisdiction" has the meaning of that word in the Quiet Title Act, 28 U.S.C. 2409a(m).
 - (e) The exception set out in Section 5 of the Submerged Lands Act for lands "expressly retained by or ceded to the United States when the State entered the Union" does not include lands under the jurisdiction of the Department of Agriculture unless, on the date Alaska entered the Union, that land was:
 - (i) withdrawn pursuant to act of Congress, presidential proclamation, executive order, or public land order of the Secretary of Interior, other than the presidential proclamation of August 20, 1902 (32 Stat. 2025), which established the Alexander Archipelago Forest Reserve; the presidential proclamation of September 10, 1907 (35 Stat. 2152), which created the Tongass National Forest; or the presidential proclamations of February 16, 1909 (35 Stat. 2226) and June

10, 1925 (44 Stat. 2578), which expanded the Tongass National Forest; or

- (ii) subject to one or more of the following pending applications for withdrawal pursuant to 43 C.F.R. Part 295 (Supp. 1958), designated by Bureau of Land Management serial numbers: AKA 022828; AKA 026916; AKA 029820; AKA 031178; AKA 032449; AKA 033871; AKA 034383; AKJ 010461; AKJ 010598; AKJ 010761; AKJ 011157; AKJ 011168; AKJ 011203; AKJ 011210; AKJ 011212; AKJ 011213; AKJ 011291.

The United States submits the attached memorandum in support of the motion.

Respectfully submitted.

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May 30, 2003

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MEMORANDUM IN SUPPORT OF MOTION

—————

STATEMENT

The United States moves, pursuant to 28 U.S.C. 2409a(e), for confirmation of a disclaimer of title to the majority of the marine submerged lands within the Tongass National Forest. The United States has acknowledged Alaska's claim that Congress did not intend to defeat Alaska's title to marine submerged lands within the exterior boundaries of the Tongass National Forest solely because those submerged lands are within the exterior boundaries set forth in the proclamations establishing and expanding that Forest. The United States' acknowledgment resolves the issue in controversy under Count III of Alaska's amended complaint. There are potentially some submerged lands within the Tongass National Forest, however, that remain in federal ownership for reasons apart from the proclamations establishing and expanding the Forest. The United States has formulated a disclaimer, with the assistance and advice of Alaska, that disclaims those lands at issue

in this litigation while excepting those lands that are not at issue at this time.

The United States and Alaska have agreed upon a disclaimer embodied in three paragraphs. Paragraph 1 generally disclaims the marine submerged lands within the exterior boundaries of the Tongass National Forest, while Paragraph 2 enumerates four exceptions. Paragraph 3 defines particular terms for purposes of the disclaimer, including the recurring terms “submerged lands,” “coast line,” and “marine submerged lands,” which are defined by reference to terminology employed in the Submerged Lands Act. See 43 U.S.C. 1301(a) and (c). The full text of the disclaimer states:

- (1) Pursuant to the Quiet Title Act, 28 U.S.C. 2409a(e), and subject to the exceptions set out in paragraph (2), the United States disclaims any real property interest in the marine submerged lands within the exterior boundaries of the Tongass National Forest, as those boundaries existed on the date of Alaska Statehood.
- (2) The disclaimer set out in paragraph (1) does not disclaim:
 - (a) any submerged lands that are subject to the exceptions set out in Section 5 of the Submerged Lands Act, ch. 65, Tit. II, § 5, 67 Stat. 32, 43 U.S.C. 1313;
 - (b) any submerged lands that are more than three miles seaward of the coast line;
 - (c) any submerged lands that were under the jurisdiction of an agency other than the United States Department of Agriculture on the date of the filing of the complaint in this action;
 - (d) any submerged lands that were held for military, naval, Air Force or Coast Guard purposes on the date Alaska entered the Union.
- (3) For purposes of this disclaimer:
 - (a) The term "coast line" means “the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters,” as defined in

Section 2(c) of the Submerged Lands Act, ch. 65, Tit. II, § 5, 67 Stat. 32, 43 U.S.C. 1301(c).

- (b) The term “submerged lands” means “lands beneath navigable waters” as defined in Section 2(a) of the Submerged Lands Act, ch. 65, Tit. II, §5, 67 Stat. 32, 43 U.S.C. 1301(a).
- (c) The term “marine submerged lands” means “all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide.”
- (d) The term “jurisdiction” has the meaning of that word in the Quiet Title Act, 28 U.S.C. 2409a(m).
- (e) The exception set out in Section 5 of the Submerged Lands Act for lands “expressly retained by or ceded to the United States when the State entered the Union” does not include lands under the jurisdiction of the Department of Agriculture unless, on the date Alaska entered the Union, that land was:
 - (i) withdrawn pursuant to act of Congress, presidential proclamation, executive order, or public land order of the Secretary of Interior, other than the presidential proclamation of August 20, 1902 (32 Stat. 2025), which established the Alexander Archipelago Forest Reserve; the presidential proclamation of September 10, 1907 (35 Stat. 2152), which created the Tongass National Forest; or the presidential proclamations of February 16, 1909 (35 Stat. 2226) and June 10, 1925 (44 Stat. 2578), which expanded the Tongass National Forest; or
 - (ii) subject to one or more of the following pending applications for withdrawal pursuant to 43 C.F.R. Part 295 (Supp. 1958), designated by Bureau of Land Management serial numbers: AKA 022828; AKA 026916; AKA 029820; AKA 031178; AKA 032449; AKA 033871; AKA 034383; AKJ 010461; AKJ 010598; AKJ 010761; AKJ 011157; AKJ 011168; AKJ 011203; AKJ 011210; AKJ 011212; AKJ 011213; AKJ 011291.

The disclaimer effectively recognizes that Alaska holds title to the majority of marine submerged lands within the exterior boundaries of the Tongass National Forest. It excludes, however, four

categories of submerged lands within the exterior boundaries of the Forest that are not at issue in this litigation.

First, Paragraph 2(a) excludes from the disclaimer submerged lands that remain subject to the federal retention provisions set out in Section 5 of the Submerged Lands Act, 43 U.S.C. 1313. It thereby preserves the United States' claims to submerged lands that the United States holds for reasons apart from the particular reservations at issue in this case. Paragraph 2(a) mirrors similar provisions in other Supreme Court decrees respecting Submerged Lands Act disputes,. *See, e.g., Alaska v. United States*, (84 Orig.), 530 U.S. 1021, 1022 (2000); *United States v. Louisiana*, 525 U.S. 1 (1998); *United States v. Louisiana*, 507 U.S. 7 (1993); *United States v. Louisiana*, 452 U.S. 726, 727 (1981); *United States v. Maine*, 423 U.S. 1, 2 (1975); *United States v. Louisiana*, 422 U.S. 13, 14 (1975). The terms of Paragraph 2(a) are defined with greater specificity, for purposes of this disclaimer, in Paragraph 3(e). That definition clarifies that the Submerged Lands Act's provision for federal retention of submerged lands "expressly retained by or ceded to the United States when the State entered the Union," 43 U.S.C. 1313, includes lands under the jurisdiction of the Department of Agriculture only if those lands were, on the date Alaska entered the Union, either withdrawn through federal actions other than the presidential proclamations at issue in this litigation that established and expanded the Tongass National Forest or subject to an application for withdrawal listed in Paragraph 3(e)(ii).

Second, Paragraph 2(b) excludes any submerged lands more than three miles seaward of the coast line. Alaska's claims in this case are predicated on the Submerged Lands Act, which does not grant the State any submerged lands that are more than three geographic miles from the coast line. See 43 U.S.C. 1301(b), 1311(a). Accordingly, those submerged lands that are within the exterior

boundaries of the Tongass National Forest, but are more than three miles from the coast line, are not at issue in this litigation.

Third, Paragraph 2(c) excludes any submerged lands that were under the jurisdiction of an agency other than the United States Department of Agriculture on the date of the filing of the complaint in this action. The Quiet Title Act provides that a State seeking to quiet title to lands in which the United States claims an interest must give the head of the federal agency with jurisdiction over the land 180 days' notice of intent to file a Quiet Title Act action. 43 U.S.C. 2409a(m). In this instance, Alaska gave notice only to the Secretary of Agriculture with regard to lands within the exterior boundaries of the Tongass National Forest. Any submerged lands within the Forest, but under the jurisdiction of any agency other than Department of Agriculture, within the meaning of the Quiet Title Act, are therefore not within the scope of Count III of Alaska's amended complaint and are not at issue in this litigation.

Fourth, Paragraph 2(d) excludes any submerged lands that were held for military purposes (including naval, Air Force or Coast Guard purposes) on the date that Alaska entered the Union. The Alaska Statehood Act, Pub. L. 85-508, § 11(b), 72 Stat. 347, retains in federal ownership submerged lands held for military purposes on the date of Alaska's Statehood, even if the military withdrawal is later revoked. *See United States v. Alaska*, 521 U.S. 1, 41-43 (1997) (No. 84, Original); *Alaska v. United States*, 213 F.2d 1092, 1097-98 (9th Cir. 2000). Because such lands are not at issue in this litigation, they are excluded from the United States' disclaimer.

DISCUSSION

The United States urges that confirmation of the proposed disclaimer is appropriate in accordance with Section 2409a(e) of the Quiet Title Act, which provides:

If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

28 U.S.C. 2409a(e). The confirmation of a disclaimer is largely ministerial, and the courts have indicated that they will affirm a disclaimer unless it is not made in good faith. *See Leisnoi v. United States*, 313 F.3d 1181, 1184 & n.5 (9th Cir. 2002); *Lee v. United States*, 809 F.2d 1406, 1409-1410 (9th Cir. 1987).

The Master should recommend that the Court confirm the disclaimer and include it as part of the judicial decree that the Court will eventually enter in this case. The United States' disclaimer is unquestionably made in good faith. The United States had noted, in separate litigation involving private parties before the commencement of this original action, that Alaska might have a valid claim to marine submerged lands within the Tongass National Forest. *See* U.S. Count III Resp. 2-3; *see also* First Report of the Special Master 6-10. The United States has now determined, after analysis of Alaska's arguments in support of its motion for summary judgment, that Congress did not clearly manifest its intent, at or before the time of Alaska's admission to the Union, 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 the proclamations creating and expanding the Forest. *See* U.S. Count III Resp. 4-6. Based on that determination, the United States has properly concluded that the appropriate course is to disclaim the submerged lands at issue through the mechanism that the Quiet Title Act provides. *See Leisnoi*, 313 F.3d at 1184 & n.5; *Lee*, 809 F.2d at 1409-1410.

The confirmation of the disclaimer would terminate the Court's jurisdiction over Count III of Alaska's amended complaint. *See* 28 U.S.C. 2409a(e). The United States and Alaska would

retain the option, however, to resolve title to the marine submerged lands that the United States may hold on account of other federal executive or legislative actions “when the parties have a reason for doing so, outside the scope of this action.” AK Count III Reply at 5-6.

Counsel for the State of Alaska has authorized the United States to state that Alaska does not oppose the motion for confirmation of the disclaimer.

CONCLUSION

For the foregoing reasons, the Special Master should continue the stay of current proceedings on Alaska's motion for summary judgment on Count III and recommend that the Court confirm the United States's disclaimer.

Respectfully submitted.

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