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 I OF THE AMENDED COMPLAINT

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TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. Alaska's Motion Rests Upon An Incomplete Statement Of The Requirements For Establishing Historic Inland Waters 3

II. Russia Did Not Treat The Waters Of The Archipelago As Inland Waters 6

III. The United States Did Not Make A Historic Waters Claim Between The Time of The Alaska Cession And The 1903 Boundary Arbitration 11

IV. The United States Made No Claim That The Waters Of The Archipelago Were Inland Waters At The 1903 Arbitration Proceedings 14

V. The United States Did Not Treat The Waters of the Archipelago As Inland Waters Prior To Alaska Statehood 18

A. The Fishing Regulations That Alaska Cites Are Insufficient To Establish Historic Inland Waters 18

B. The United States' Position During The "AB" Line Negotiations Confirms That The United States Did Not Claim Inland Water Status For The Waters Of The Archipelago 23

VI. Congress Defined The Boundaries Of Alaska As The "Territory Together With The Territorial Waters Appurtenant Thereto" 26

VII. Other Nations Did Not Acquiesce To A Historic Inland Waters Claim 27

A. Britain Did Not Recognize A Historic Inland Waters Claim In The 1893 Fur Seal Arbitration 27

B. Britain Did Not Recognize A Historic Waters Claim In The 1910 Fisheries Arbitration 28

C. Neither Norway Nor Britain Recognized A Historic Waters Claim During the Anglo-Norwegian Fisheries Case 29

VIII. The Supreme Court Has Already Held That The United States Did Not Have A Consistent Policy Prior To Alaska's Statehood Of Claiming Inland Status For Waters Enclosed By Coastal Islands 30

IX. The United States Did Not Claim The Waters Of The Archipelago As Inland Waters After Alaska's Statehood 30

A. *Organized Village of Kake v. Egan* 31

B. The 1964 Brief in *United States v. California* 31

C. The Pearcy Charts 32

X. The United States' Position On Chandeleur And Breton Sounds Provides No Support For Alaska's Claim 33

XI. The 1971 Coastline Committee Charts Accurately Reflect The Long Established Position Of The United States That The Waters Of The Archipelago Do Not Constitute Historic Inland Waters 35

A. The Historic Record Establishes That The Waters Of The Archipelago Are Not Historic Inland Waters 35

B. Alaska Conflates the Doctrines of Straight Baselines and Historic Waters . . 37

XII. The United States Has Never Excluded Innocent Passage From The Archipelago Despite Ample Opportunities To Do So 38

XIII. The Vital Interests Of The United States Weigh Against Historic Inland Water Status For the Archipelago 40

CONCLUSION 45

TABLE OF AUTHORITIES

CASES

Louisiana v. Mississippi, 202 U.S. 1 (1906) 16

Manchester v. Massachusetts, 139 U.S. 240 (1891) 16

Organized Village of Kake v. Egan, 174 F. Supp. 500 (D. Alaska 1959) 31

United States v. Alaska, 422 U.S. 184 (1975) 1, 2, 4, 7, 9, 18, 20, 23, 44

United States v. Alaska, 521 U.S. 1 (1997) 1, 17, 30, 37

United States v. California, 381 U.S. 139 (1965) 5, 6, 32, 33, 37

United States v. Louisiana, 394 U.S. 11 (1969) 2, 4, 32, 34, 37

United States v. Louisiana, 470 U.S. 93 (1985) 1, 4, 5, 17, 35, 43

STATUTES AND RULES

Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea of May 9, 1930, 47 Stat. 1872 21

Submerged Lands Act (SLA), 43 U.S.C. 1301 *et seq* 26

Treaty with Great Britain of May 8, 1871, 17 Stat. 863, 872 .... 9, 12, 13

16 U.S.C. 1811 18

33 C.F.R. 160.201 40

48 U.S.C. note prec. 21 26

MISCELLANEOUS

I J.B. Moore, *International Law Digest* (1906) 7

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Alaska Report, Report of Special Master in *United States v. Alaska*, (Mar. 1996) (Alaska Reports) 5, 14, 15, 17, 29, 33

California Report, Report of the Special Master in *United States v. California*, (1952)(California Reports) 16, 28

Louisiana Report, Report of the Special Master in United States v. Louisiana, (July 31, 1974) 19, 20, 34

Proceedings of the Alaskan Boundary Tribunal, S. Doc. 58-162 (2d Sess) (1903-1904) 6, 7, 13, 16, 17

Proclamation 2668 of September 28, 1945, 59 Stat. 885-886 (Truman Proclamation) 22

Roach and Smith, *United States Responses to Excessive Maritime Claims* (1996) 41, 42, 43

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Alaska has moved for summary judgment on Count I of the Amended Complaint on the theory that the waters of the Alexander Archipelago are historic inland waters. Alaska's arguments reinvoke matters decided in *United States v. Alaska*, 521 U.S. 1 (1997) (*Alaska*) and *United States v. Alaska*, 422 U.S. 184 (1975) (*Cook Inlet*) . Those arguments, to the extent they survive collateral estoppel and res judicata, are no more persuasive now than they were before. The United States has itself moved for summary judgment on Count I, describing the controlling law and highlighting the most obvious obstacles to the historic waters claim. U.S. Count I Memo. 5-16, 20-44.[1]

Alaska's historic inland waters claim is literally of historic proportions. Alaska seeks to create what would be, by a large margin, the largest historic inland waters in the United States. In rejecting Alaska's claim that Lower Cook Inlet is historic waters, the Supreme Court noted that the Inlet "dwarfs Chesapeake Bay, Delaware Bay, and Long Island Sound," the three classic examples of United States historic waters. *Cook Inlet*, 422 U.S. at 186 n.1. The waters of the Archipelago, in turn, dwarf Cook Inlet. Alaska's proposed historic waters would also embrace an important lane of international commerce. In the only case in which the Court has found historic inland waters despite a United States disclaimer, the absence of foreign flag passage was crucial to the Court's decision. *United States v. Louisiana*, 470 U.S. 93 (1985) ("*Mississippi Sound*").

To prevail, Alaska must prove that the United States exercised authority over the waters of the Archipelago commensurate in scope with inland waters status, *i.e.*, that the United States claims

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

the right to deny innocent passage of foreign vessels. *Cook Inlet*, 422 U.S. at 197; *United States v. Louisiana*, 394 U.S. 11, 24-26 (1969). The United States' exercise of authorities over fish and wildlife, customs and fiscal enforcement; sanitation, and continental shelf resources (which are all consistent with territorial sea status) cannot form the basis for a historic inland waters claim. *Cook Inlet* at 196-198.

Alaska cannot show the denial of innocent passage. The waters of the Archipelago have long constituted an important route of international traffic from Vancouver and other ports in British Columbia, through the British Columbia portion of the Inside Passage, into the waters of the Archipelago, and thence either up the Stikine River into the northern portion of British Columbia; through the Archipelago to Haines and Skagway and thence overland to British Columbia and the Yukon Territory; and through the Archipelago and out Cross Sound to western Alaska. Foreign flag vessels not only participate in this traffic, they have often dominated it.

Indeed, in 1824, Britain obtained from Russia a permanent right to navigate the Stikine River through Alaska to the portion of British Columbia inland from Southeast Alaska. In 1871, Britain obtained that same right from the United States. Navigation rights on the Stikine are meaningless without the commensurate right to innocent passage through the Archipelago. Had the parties understood the waters of the Archipelago to constitute inland waters, they would have included navigation rights through the Archipelago in the two treaties. The understanding that the waters of the Archipelago do not constitute historic inland waters continued into the Twentieth Century. During the 1930s, United States and Canadian authorities engaged in extensive analysis of the "AB" line that divides the islands of southeastern Alaska from the islands of British Columbia. The Under-Secretary of State made clear that "Canadian fisheries may operate north of line AB so long as they

remain outside the three-mile limit." US-I-14 p.3. During negotiations, Canada and the United States also discussed the possibility of making a *future* historic waters claim for the Inside Passage, but decided not to do so. *See* AK-73 p.3.

At the time that the 1958 Convention on the Territorial Sea and the Contiguous Zone (US-I-7) was being negotiated, the international community understood that the United States claimed only a 3-mile territorial sea for the islands of the Archipelago. The United Nations Preparatory Document No. 15 discussed "State Practice Concerning Coastal Archipelagos," stating:

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

US-I-3 p.24 (emphasis added).

Alaska cannot point to a single instance in which the United States has denied innocent passage through the waters of the Archipelago. Instead, the United States has repeatedly made clear that the waters of the Archipelago are not inland waters.

ARGUMENT

I. Alaska's Motion Rests Upon An Incomplete Statement Of The Requirements For Establishing Historic Inland Waters

Alaska cites *Alaska* for the proposition that a waterbody is a historic bay if the United States "(1) exercises authority over the area; (2) has done so continuously; and (3) has done so with the acquiescence of foreign nations." AK Count I Memo. 4. That shorthand description captures the essence, but not the full extent, of the controlling law. *See* U.S. Count I Memo. 5-11. Alaska's

exposition overlooks the principle that the authority a nation exercises over an area must be commensurate to the claim made. *Cook Inlet*, 422 U.S. at 197; *United States v. Louisiana*, 394 U.S. at 24-26. A nation's exercise of any authority that could be exercised over territorial sea, or even waters seaward of the territorial sea, cannot be used to establish an inland waters claim. As Article 24 of the Convention makes clear, a coastal nation may exercise authority with regard to fisheries, wildlife, continental shelf resources, customs, fiscal matters, and sanitation in its territorial sea and, indeed, beyond. US-I-7. Even the most aggressive exercise of those rights should not be confused with the assertion of inland waters status.

The essence of inland waters status is the right to deny innocent passage. Consequently, a historic inland waters claim must be based upon the denial of innocent passage when the opportunity arises. *Cook Inlet*, 422 U.S. at 197. Article 14 of the Convention defines "passage" as "navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters or of proceeding to internal waters, or of making for the high seas from internal waters." US-I-7. Article 14(4) states that passage is not "innocent" if it is "prejudicial to the peace, good order or security of the coastal [nation]." Nor is passage innocent if fishing vessels "do not observe such laws and regulations as the coastal [nation] may make and publish in order to prevent these vessels from fishing in the territorial sea." *Ibid*. While a coastal nation may not hamper innocent passage through the territorial sea, Article 15(1), foreign ships must comply with all laws and regulations of the coastal nation relating to transport and navigation, Article 17.

The establishment of historic title requires the effective "exercise" of authority over the waters involved, not merely a claim divorced from such exercise. *Mississippi Sound*, 470 U.S. at 102; Juridical Regime of Historic Waters, Including Historic Bays (Juridical Regime), US-I-4 p.15.

Where, as in the case of Mississippi Sound, no foreign nation attempts to exercise innocent passage in the waters involved, it is not necessary to show that innocent passage has actually been denied. *Mississippi Sound*, 470 U.S. at 113-115. However, it is "essential that to the extent that action on the part of the [nation] and its organs was necessary to maintain authority over the area, such action was undertaken." *Id.* at 114, quoting Juridical Regime 43. The Juridical Regime specifically states: "If the claimant [nation] allowed the innocent passage of foreign ships through the waters claimed, it could not acquire an historic title to those waters as internal waters, only as territorial sea." US-I-4 p.23.

The exercise of authority must also continue sufficiently long to become a "usage." The Supreme Court has not established a precise length of time as necessary to build the usage on which the historic title claim must be based. *Mississippi Sound*, 470 U.S. at 102 n. 3. The decisions of the Court and its special masters indicate, however, that the time must be very long indeed. *See* U.S. Count I Memo. 8-9. If the government has disclaimed historic title before that title has ripened, the continuity requirement is not met. *Ibid.*

Alaska argues that the inquiry regarding the establishment of historic bays "necessarily focuses on the waters at *statehood*, which is when title passed to Alaska." AK Count I Memo. 4. Historic inland water claims, however, do not depend exclusively on the status of the waters on statehood. *See Mississippi Sound*, 470 U.S. at 103; *see also United States v. California,* 381 U.S. 139, 161-67 (1965); *Alaska Report* 50. Alaska's focus upon the statehood date appears to be an attempt to avoid the United States' 1971 express disclaimer that the Archipelago waters have historic inland waters status. *See* U.S. Count I Memo. 39-40. Alaska overlooks that the federal government's disclaimer controls the *quantum* of proof necessary for a State to establish historic waters. A disclaimer,

whether before or after statehood, is "decisive" unless the "evidence of continuous and exclusive assertions of dominion" is "clear beyond doubt." *United States v. California*, 381 U.S. at 175. Indeed, not only has the United States never made historic inland waters claims for the Archipelago, but it has repeatedly disclaimed such claims both before and after Alaska's statehood.

Alaska bears an extraordinary burden of proof because a historic waters claim violates the normal rules of international law to the detriment of the freedom of the seas. According to the Juridical Regime:

> If the right to 'historic waters' is an exceptional title which cannot be based on the general rules of international law or which even may be said to abrogate these rules in a particular case, it is obvious that the requirements with respect to proof of such title will be rigorous. In these circumstances, the basis for the title will have to be exceptionally strong.

US-I-4 p.7. The exceptional nature of historic water claims is important for an additional reason. The essence of a historic waters claim is that it is contrary to the normal international rules delimiting maritime boundaries. If the enclosure of the water body were merely the result of the application of the normal rules of international law, there would be no basis for a foreign protest or a finding of foreign acquiescence.

II. Russia Did Not Treat The Waters Of The Archipelago As Inland Waters

In 1821, the Tsar issued an ukaze prohibiting all foreign vessels from entering waters within 100 miles of the coasts of Alaska. II Proceedings of the Alaskan Boundary Tribunal, S. Doc. 58-162 (2d Sess) (1903-1904) at App.25-26 (Proceedings) (US-I-28). The Tsar explained:

> the trade of our subjects on the Aleutian Islands and on the north-west coast of America appertaining unto Russia, is subject to secret and illicit traffic, to oppression and impediments; and finding that the principal cause of these difficulties is the want of rules establishing the boundaries for navigation along these coasts . . . we had

> deemed it necessary to determine these communications by specific Regulations, which are hereto attached.

Id. at 25. The United States and Britain protested almost immediately. II Proceedings, US-I-28 App. 39-40, 113-114. In response to those and other protests, Russia promptly withdrew the ukase. *Cook Inlet*, 422 U.S. at 191-192. Russian warships were instructed to confine their operations to the "waters generally recognized by other nations as territorial." II Proceedings, US-I-28 p.14. Russia directed its naval officers "to restrict their surveillance of foreign vessels to the distance of cannon shot from the shore mentioned." I J.B. Moore, *International Law Digest* 926 (1906) (US-I-15). *See* US-I-1 p.71-75. Owing to its prompt withdrawal, the ukase is inadequate to establish historic waters. *Cook Inlet,* 422 U.S. at 191-192.

While conceding the withdrawal of the 1821 ukase (AK Count I Memo. 7), Alaska insists that Russia immediately turned around and raised an extraordinary claim to the waters of the Archipelago. Furthermore, Alaska contends (*ibid.*) that the United States and Britain allegedly acquiesced to that claim through treaties with Russia in 1824 (United States) and 1825 (Britain). Alaska's argument rests on a rewriting of both treaties and fails to address provisions of the 1825 Treaty that are plainly inconsistent with the extraordinary claim posited by Alaska.

Alaska paraphrases the 1824 Treaty as follows:

> Thus Article IV of the 1824 Treaty between the United States and Russia on Navigation and Fisheries provided that, for only ten years, ships of both powers could "frequent, without any hindrance whatever, *the interior seas, gulphs, harbors, and creeks*, upon the coast [of the Archipelago], for the purpose of fishing and trading with the natives of the country."

AK Count I Memo.7-8 (bracketed material and emphasis added by Alaska).

Articles III and IV of the Treaty actually provide:

> ARTICLE THIRD
> It is moreover agreed, that, hereafter, there shall not be formed by the citizens of the United States, or under the authority of the said States, any establishment upon the Northwest Coast of America, nor in any of the islands adjacent, *to the north of* fifty four degrees and forty minutes of north latitude; and that, in the same manner, there shall be none formed by Russian subjects, or under the authority of Russia, *south* of the same parallel.
>
> ARTICLE FOURTH
> It is, nevertheless understood, that during a term of ten years, counting from the signature of the present convention, the ships of both powers, or which belong to citizens or subjects, respectively, may reciprocally frequent the interior seas, gulphs, harbours, and creeks, upon the coast mentioned in the preceding article, for the purpose of fishing and trading with the natives of the country.

AK-10 (emphasis in original).

Alaska's paraphrase of the Treaty is based upon the erroneous assumption that the "Northwest Coast of America" is shorthand for the "Alexander Archipelago." As the language quoted above from the 1821 ukase shows, Russia used the term "north-west coast of America" to refer to all its possessions in Alaska. Article III of the 1825 Treaty with Britain likewise uses the term "Northwest Coast" to refer to the entirety of Alaska and British Columbia. US-I-16. During the US-British Fur Sealing Arbitration of 1889, the British demonstrated conclusively, and the Tribunal agreed, that the "Northwest Coast" extended to the Bering Straits. US-I-17 p.639-651, 668.

Article IV merely constitutes an agreement that the Russians and Americans could both enter the marine territorial waters of the other party on the "Northwest Coast of America" for the purposes of trade and fishing.[2] As the British delegation at the Fur Seal Arbitration noted:

> Article IV [of the 1824 Treaty] gives to United States subjects rights of access to interior seas, to gulfs, to harbors, and to creeks, all of which, or the greater part of which would be strictly territorial waters; and therefore, to which upon the general

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[2] "Creeks," or "criques" in the original French version of the treaty, US-I-16, means "small bays." Webster's New College Dictionary; *Petit Larousse.*.

rule of international law, the United States would not have any right of access at all. AK-79 p.142. Article IV was not intended to grant Russia the right to ban access to those portions of waterbodies having the shape of "gulfs" or "internal seas" but not satisfying international rules for the delimitation of maritime boundaries. Alaska's construction would require the Court to view the 1824 Treaty not only as an extraordinary claim to the waters of the Archipelago, but to "gulphs" such as Cook Inlet – a theory that the Supreme Court has already rejected. Russia followed the 3-mile cannon-shot rule for territorial waters. US-I-15; *Cook Inlet,* 422 U.S. at 191-192. The three-mile rule also represented the United States' position at the 1902 US-Russian Fur Seal Arbitration. US-I-18.

The 1825 Treaty with Britain confirms that Alaska's theory is erroneous. Article VI of that treaty provides:

> It is understood that the subjects of His Britannic Majesty, from whatever quarter they may arrive, whether from the ocean, or from the interior, shall forever enjoy the right of navigating freely, and without hindrance whatever, all the rivers and streams which, in their course towards the Pacific Ocean, may cross the line of demarcation upon the line of coast described in article 3 of the present convention.

US-I-16 p.15. Prominent among the rivers described in Article VI is the Stikine River, which empties into the waters of the Archipelago. The British right to navigate the Stikine River is meaningless unless the British have a right to navigate the waters of the Archipelago. The fact that the 1825 Treaty includes no provision linking navigation of the Stikine to navigation of the Archipelago illustrates the understanding of both parties that Britain already enjoyed a right of innocent passage through the Archipelago to the mouth of the Stikine. The United States shared that understanding. After Russia ceded Alaska to the United States, the United States signed its own treaty with Britain providing for British navigation of the Stikine with no mention of the waters of the Archipelago.

Article 26, Treaty with Great Britain of May 8, 1871, 17 Stat. 863, 872.

Despite the clear language of the treaties, Alaska insists that Russia treated the waters of the Archipelago as inland waters with the acquiescence of the United States and Britain. To the contrary, the record shows that Russia merely exercised its right under international law to prevent foreign traders and fishermen from entering harbors and landing on the coast for the purposes of trade and fishing.

First, Alaska erroneously asserts that "[i]n 1836, Russia ordered the American brig *Loriot* to leave the waters of the Archipelago." AK Count I Memo. 8. Alaska has inserted "the waters of the Archipelago" into a text where the term nowhere appears. The text cited by Alaska states that the *Loriot* was "anchored in the Harbor of Tuckessan" when boarded by a Russian naval vessel and "ordered to leave the dominions of His Majesty the Emperor of Russia." AK-11 p.232. When the captain of the *Loriot* asked permission to enter the harbor of Tateskey, he was ordered to "leave the waters of His Imperial Majesty." AK 11 pp.232-233. An incident plainly occurring in harbors cannot form the basis for a claim of inland water status for all the waters of the Archipelago. Moreover, far from acquiescing in the *Loriot* incident, the United States made a series of protests to Russian authorities. AK-11 pp.232-247.

As Alaska correctly points out, the State Department advised American vessels in 1845 not to "frequent the interior seas, gulfs, harbors and creeks upon that coast at any point north of latitude 54 degrees, 40 minutes." AK Count I Memo. 8. But Alaska's next sentence —"This acquiescence marked full recognition by the United States of Russia's 'complete sovereignty' over the waters of the Archipelago."— is a misstatement of the cited document. The cited text states that, by virtue of the 1845 notice, "whatever question had been previously raised by the United States, it finally

recognized the complete sovereignty of Russia over the Northwest Coast of America north of latitude 54 degrees 40 minutes." AK-13 p.72. The United States recognized Russian sovereignty over the *entire Northwest Coast*, not over the waters of the Archipelago. Previously, the United States had taken the position that Russia possessed sovereignty over only those portions of Alaska uplands where actual Russian settlements existed, but not to unoccupied portions of the coast. AK-11 pp.239-242.

The Russians did not make an extraordinary claim to all the waters of the Archipelago in the *Loriot* case. Rather, Russia claimed the right to prohibit American vessels from landing at *harbors* north of 54 degrees 40 minutes. In response to the *Loriot* Claim, Russia's Foreign Minister noted that the United States had placed a newspaper notice advising that "the governor of the Russian colonies had formally notified the commanders of American vessels in that quarter that they could no longer claim the right to land, without distinction, at all *harbors* belonging to Russia on the coast." AK-11 p.239 (emphasis added). Despite that warning, the *Loriot* "anchored in the harbor of Tuckessan," and "ventured upon an expedition to coasts where they had been interdicted from landing." *Ibid.* The Russian right to prevent entry into harbors or landing on the coast is clear under international law and required no extraordinary claim to the waters of the Archipelago.

Consequently, Russia never established a historic waters claim to the waters of the Archipelago to which the United States could succeed.

III. The United States Did Not Make A Historic Waters Claim Between The Time Of The Alaska Cession And The 1903 Boundary Arbitration

Alaska cites a number of documents from the period between the Alaska Cession and 1903 for the proposition that the United States considered the waters of the Archipelago to be historic

inland waters. Examination of these documents reveals that they either relate to the waters of Alaska generally, without defining the same, or use the term "inland waters" in a non-legal sense. They fall far short of the clear statement of an extraordinary claim required for historic waters. More importantly, the record shows that numerous foreign vessels exercised their right of innocent passage through the waters of the Archipelago during the period.

The 1868 House Report on the Treaty of Cession did indeed state that "[t]he command of all the bays and straits of the northwest coast resorted to by the whale will give very great advantages to our whalers," AK-14 p.33, but the term "northwest coast" refers to *Alaska as a whole*, rather than to the Archipelago. Indeed, the preceding paragraph of the report discusses whaling in many parts of Alaska, but not in the Archipelago. The report describes the advantage of acquiring Alaska as it relates to fisheries as a right to *land* and wind-dry fish rather than salting them on board. *Id.* at 31-33. The report likewise describes the advantages to whalers in terms of activities possible by virtue of landing rights. *Id.* at 33.[3]

Alaska claims that the Commander of the *U.S.S. Jamestown* referred to the "'inland waters' of the Archipelago, without in any way indicating that some of the waters of the Archipelago included the high seas." AK Count I Memo. 10. As used in the Commander's report, "inland waters" appears merely to refer in a non-legal sense to protected waters not directly on the Gulf of Alaska. AK-15**.** Alaska also relies on an 1888 memorandum of an official of the U.S. Geological Survey recounting his informal conversations with a Canadian counterpart. In those conversations, they agreed that "navigation of these coast and territorial waters might be wholly or partly withheld by either power

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[3] The British case before the Fur Seal Arbitration likewise analyzed the legislative history of the Alaska Cession and demonstrated that the United States did not understand that it was acquiring any extraordinary territorial waters claim. US-I-17 pp.661-63.

from the citizens and vessels of the other." AK-16 p.10. The memorandum falls far short of a historic waters claim by either sovereign. The informal conversations between two non-lawyers, employed on the basis of their knowledge of the physical nature of Southeast Alaska rather than their legal expertise, cannot constitute a claim to historic waters. The two scientists recognized that their belief that either power could deny use of the coast by the other would render Britain's treaty right to the Stikine nugatory, but they failed to perceive that the treaty provision was a clear indication that neither the United States nor Britain believed that the United States had the right to prevent innocent passage through the Archipelago.[4]

The Proceedings of the 1903 Boundary Arbitration contain an extensive collection of correspondence relating to the navigation of the Stikine. IV Proceedings, US-I-29, App. to the Counter-Case of the United States 53-86. Owing to the discovery of minerals in the Stikine basin, the area was extensively navigated. *Id.* at 79. Canadian ships claimed the right to travel from any port in British Columbia, up the Stikine, and into Canadian territory without clearing at any U.S. customs port. *Id.* at 61-62. Far from considering the waters of the Archipelago inland waters over which the United States had exclusive claims, the Secretary of State described the Stikine as flowing "though the Alaska possessions of the United States to the Ocean." *Id.* at 76; *see also* at 78, 80 (referring to Archipelago waters as "ocean").

Contrary to the allegation of Alaska (AK Count I Memo.10), the Secretary of Interior did not refer in 1890 to"the 'inland channels' of the Archipelago" in urging an appropriation for a vessel. Rather, the Secretary merely included statements from military governors of Alaska and the

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[4] Alaska states that there is no indication that anyone disagreed with the statement of the two geologist-geographers. The report, however, is merely a compilation of documents containing no no critique or analysis. AK-16 p.1.

Secretary of War suggesting that a vessel was necessary for the practical governance of the Territory. In requesting a vessel, Governor Knapp described the vessel he desired as "adapted to our inland channels." AK-17 p.2. That statement is not a claim of the right to exclude innocent passage from the Archipelago, but refers to the need for a boat that could operate in shallow, protected waters. The Governor had just complained about the difficulty of serving process "for lack of a light-draught vessel." *Ibid.* Indeed, the need for the vessel was not limited to the waters of the Archipelago. Rather, it was to go to St. Michaels near the mouth of the Yukon and even to Point Barrow. AK-18 p.4. The correspondence is about boat design, not maritime jurisdiction.

Alaska also interprets the use of the term "Alaskan waters" in reports dealing with the need for navigational aids as a claim of inland water status for the Archipelago. The reports use the term "Alaskan waters" to refer, however, to the waters of both western and southeastern Alaska in a sense that means the waters off Alaska generally. AK-21 p.2-3; AK-22 p.2; AK-23 p.1. Finally, Alaska relies on the 1902 statement of the Collector of Customs that Sitka has "interior connections with inland waters." AK-25 p.2. The statement refers not to maritime jurisdiction, but to the difference between Sitka, on the Gulf of Alaska, and other towns on the Inside Passage through which almost all ships passed at that time. Indeed, the Collector's letter demonstrates that foreign vessels were not being denied access to the waters of the Archipelago. AK-25 p.2-3.

IV. The United States Made No Claim That The Waters Of The Archipelago Were Inland Waters At The 1903 Arbitration Proceedings

We explain in detail (U.S. Count I Memo. 22-27) why the statements of United States counsel at the 1903 Boundary Arbitration did not, and could not, constitute a claim of historic inland waters. The question before the Arbitration Tribunal was the location of the land boundary between Alaska

and British Columbia. *Alaska Report* 61. That boundary was to extend not more than 10 leagues inland from the "windings of the coast." *Ibid.* The United States took the position that the word "coast" meant the land-water interface of the mainland. *Id.* at 63. Britain took the position that "coast" meant the physical mainland coast except where a closing line of less than 10 miles could be drawn across a mainland bay. *Ibid.*

Hannis Taylor, representing the United States, argued that if one is to consider 10-mile closing lines, then, under the maritime boundary principles Britain employed, they could just as easily be drawn from island to island rather than merely across mainland bays. He did not represent that the United States, in fact, had a position that 10-mile closings were appropriate. Rather he argued:

> But for the purposes of international law, instead of following all the convolutions and sinuosities of the coast, it is permitted to go across the heads of bays and inlets, and in that particular that the rule of international law comes in as to the width of bays and inlets, either 6 or 10 miles. We are not encumbered with that question, because the British Case contends that it is 10 miles, and we do not dispute it, and these outside inlets are 10 miles. So we are not encumbered with that question.

AK-27 at 611.

Thus, Taylor merely took the ten-mile closing line proposed by the British and applied it to the islands. He argued that although international law recognized an artificial coastline for closing bays and inlets, there could not be two artificial coastlines (one for the mainland and one for the islands). *Id.* at 610-611. Because an artificial coastline drawn between the islands would be more than 10 marine leagues from the mainland, measuring the boundary from an artificial coastline rather than the actual land-water interface of the mainland was absurd.

It is impossible to view Taylor's argument as a statement that the United States had, in fact, adopted a rule that ten-mile closing lines should be drawn between islands or across bays. The United

States' position was quite the contrary. Secretary of State Bayard advised the Treasury Secretary in 1886 that the sovereignty of the United States did not extend beyond three nautical miles from the coast of the mainland; that islands had their own three-mile zone; and that the United States rejected the "headland to headland" method. *California Report* 14-15. In 1891, the Supreme Court used a six-mile bay closing line in *Manchester v. Massachusetts*, 139 U.S. 240, 257 (1891). In 1902, the Secretary of State confirmed to the US- Russian Fur Seal Arbitration that the United States limited its territorial water claims to one marine league. US-I-18. In 1906, the Supreme Court described Mississippi Sound as an "enclosed arm of the sea . . . . The openings from this body of water into the Gulf are neither of them six miles wide." *Louisiana v. Mississippi,* 202 U.S. 1, 48 (1906). During the North Atlantic Coast Fisheries Arbitration, which concluded in 1910, the United States took the position that bays were limited to six-mile closing lines. *California Report* 15-16.

Finally, viewing Taylor's argument as an actual claim to specific maritime boundaries would be inconsistent with the United States' written argument to the Arbitration Tribunal. Under the argument heading, "The Political Coast Line Not Involved In This Case," the United States assured the Tribunal that "[t]he artificial coast line created by international law for purposes of jurisdiction only, which, following the general trend of the coast, cuts across bays and inlets is not involved in this case in any form." V *Proceedings,* US-I-30, pt. 1, 17-18. Taylor merely applied, for the sake of argument, the ten-mile headland-to-headland rule advanced by Britain to the islands rather than the mainland. Certainly, Britain did not accede to Taylor's argument. It continued to press for ten-mile closings for mainland bays. IV Proceedings, US-I-29, Counter-Case of Great Britain 29-32. The British likewise continued to maintain that Russia gained no right in 1824 to the waters of Alaska beyond "such as annexed by international law to the sovereignty of the land" and had no desire to

"limit their use for the ordinary purposes of innocent navigation." *Id.* at 34. Nor did the opinions of the Arbitration Tribunal address the location of the political coastline. *Alaska Report* 65.

In addition to the Hannis Taylor argument, Alaska relies on the statements in the United States' argument during the 1903 Arbitration to the effect that "the United States in 1867, entered into possession of, and has exercised jurisdiction over, all of these interior waters and coasts to the present time," and that "from [the purchase of Alaska] to this [day] the United States has constantly asserted and exercised jurisdiction over that coast and adjacent waters." AK Count I Memo. 13-14; AK-8 p.4, 152. The "interior waters" and "adjacent waters" to which Alaska refers were not the waters of the Archipelago in general, but rather the heads of inlets such as Lynn Canal, which Britain claimed in the proceedings. After making the statement at AK-8 p.152, American counsel provided examples of the United States' consistent exercise of authority "over the coast and adjacent waters." Those examples are limited exclusively to the uplands of and indentations into the mainland. V Proceedings, US-I-30 pp.151-162.

Finally, Alaska relies on dictum from *Mississippi Sound* to the effect that the United States adopted a ten-mile closing line policy for offshore islands before 1961 and that that rule "represented the publicly stated policy of the United States at least since the time of the Alaska Boundary Case in 1903." AK Count I Memo. 14, quoting *Mississippi Sound*, 470 U.S. at 106-107. Both the Special Master and the Supreme Court analyzed that dictum extensively in *Alaska* and concluded that the dictum was incorrect. 521 U.S. at 15-20; *Alaska Report* 61-128. Not only did the Special Master and Supreme Court determine that there was no firm policy of applying ten-mile closing lines, but the Special Master expressed scepticism whether the United States had even asserted such a policy at the 1903 Arbitration Proceedings. *See Alaska Report* 65, 127.

V. The United States Did Not Treat The Waters of the Archipelago As Inland Waters Prior To Alaska Statehood

Not only did the United States not claim the waters of the Archipelago as inland waters, the United States did not treat them as such during the pre-statehood period.

A. The Fishing Regulations That Alaska Cites Are Insufficient to Establish Historic Inland Waters

Alaska rehashes the arguments relating to fisheries enforcement that Alaska made and the Court rejected in the *Cook Inlet* case. The establishment of historic inland water status must be based upon "an assertion of power to exclude all foreign vessels and navigation." *Cook Inlet,* 422 U.S. at 197. Fisheries jurisdiction is not commensurate with a claim of historic inland waters status because "[t]he assertion of national jurisdiction over coastal waters for purposes of fisheries management frequently differs from the boundaries claimed as inland or even territorial waters. *See, e.g.*, Presidential Proclamation No. 2668, 59 Stat. 885 (1945)." 422 U.S. at 198-199. At present, the United States claims fisheries jurisdiction over the 200-mile Exclusive Economic Zone ("EEZ"), *see* 16 U.S.C. 1811, but no jurisdiction to prohibit innocent passage in the EEZ.[5]

Even if fisheries regulations were probative of historic inland water claims, Alaska's statement that "[i]n the Archipelago, however, United States fishing regulations were consistently enforced against foreign nationals well beyond three miles from shore," (AK Count I Memo. at 16) does not withstand scrutiny. In fact, during the entire period since the United States' acquisition of Alaska,

[5] Virtually all Alaska's allegations regarding the assertion of fisheries and other jurisdiction in the Archipelago have a counterpart in the district court's findings in *Cook Inlet.* US-I-19 . The Supreme Court concluded that those findings were insufficient to support a historic inland waters claim. Alaska relies, for example, on the fact that fisheries management units in various regulations enclosed all of the Archipelago. Those same regulations, however, enclosed all of Cook Inlet. The Court's resolution of those issues in *Cook Inlet* precludes relitigation here.

the State points only to a single enforcement action —the *Marguerite Incident*—against a foreign vessel. That incident occurred in an ambiguous location. In any event, a single enforcement action does not meet the continuity requirement for historic waters. *Louisiana Report* 20-21.[6]

The *Marguerite* incident arose on July 22, 1924. A United States cutter seized a Canadian halibut boat in Dixon Entrance, north of the "AB" line drawn by the 1903 Arbitration Tribunal. The seizure occurred at a point that the Coast Guard report described as "seven miles W.S.W. of Tree Point and seven and one half miles north of the boundary line." AK-33. Such a point does not exist. Any point 7.5 nautical (or indeed statute) miles W.S.W. of Tree Point cannot be seven and one half miles north of the AB line because Tree Point is less than 7.5 miles north of the AB line. US-I-20. The British Embassy promptly sent a request for an investigation, noting that Canadian vessel- owner had alleged that the seizure occurred more than five miles from land. AK-34 p.1.

On December 23, 1925, a representative of the State Department responded that "the

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[6] Alaska cites the 1972 Senate hearings on Alaska's boundaries, in which various former fisheries officials made broad statements regarding enforcement of fishing regulations in the Archipelago against foreign vessels. AK Count I Memo. 18 (citing AK-38). With the exception of the *Marguerite* incident, those enforcement actions appear to have been within United States territorial waters. For example, Clarence Olsen knew of only one instance of Canadian fishing within the Archipelago and cited an enforcement action near Dixon Entrance. AK-38 p.183. That enforcement action, however, occurred in Pearse Canal. AK-38 p.184. Pearse canal never exceeds three miles in width and therefore is not probative of the treatment of foreign vessels more than three miles from shore. H.C. Scudder mentioned Canadian fishermen arrested in Portland Canal. AK-38 p.183. That water body forms a portion of the delimitation between Canada and Alaska and is too narrow to be probative of the treatment of waters more than 3 miles from shore. Scudder also mentions "a possible Canadian Halibut vessel fishing in area three off [sic] Baranof Island." AK-38 p.183. Seton Thompson mentioned the arrest of a Canadian halibut boat "in Icy Strait." AK-38 p.180. Icy Strait is almost completely within the three-mile lines shown on the 1971 charts, and there is no indication that the arrest took place in the small areas outside those lines. At the 1972 Hearings, the State submitted virtually identical statements and argument regarding Shelikof Strait and the Shumagin Archipelago. In the *Cook Inlet* litigation, the State made the same type of showing for Cook Inlet.

Marguerite was seized while attempting to catch halibut in that part of the waters of Dixon Entrance which are within the jurisdiction of this Government." The State Department representative clarified that seizure had occurred "north of a line drawn from Yellow Rocks to Tree Point." AK-35. If one charts a point seven-and-one-half miles W.N.W. of Tree Point and the same distance from the AB line, the resulting point is within three nautical miles of Yellow Rocks or East Island. *See* US-I-20. Indeed, although the descriptions of the location of the *Marguerite* cannot be precisely plotted, almost any plotting approximately 7.5 miles west of Tree Point is within the territorial sea of those two minor island groups. The *Marguerite* incident cannot constitute an unambiguous claim to the waters described by Hannis Taylor. At most, it might suggest that the United States was treating the AB line as a maritime boundary line.

Alaska claims that, "[i]mportantly, far from contesting the asserted jurisdiction of the United States, the Master of the *Marguerite* pleaded guilty, *id.*, and Britain did not pursue the matter." AK Count I Memo.17. In fact, as AK-34 states, the Master denied that he was fishing in American waters, but pleaded guilty and paid his fine so that he could return to Canada before his fish spoiled. There, he promptly requested that British authorities file a protest. The British authorities did indeed file a note seeking to have the matter investigated. *Ibid.* Alaska alleges that Britain acquiesced in the United States' "claim" by failing to pursue the matter further. It is unclear what further action Alaska would have expected from Britain. The *Marguerite* incident and its aftermath closely parallel the seizure of Japanese vessels in Shelikof Straits and subsequent protest that the Supreme Court held insufficient to establish inland waters in *Cook Inlet. See* 422 U.S. at 202-203.

As described below, shortly after the *Marguerite* incident took place, the United States made clear its position in negotiations with Canadian authorities that the AB line did not constitute a

maritime boundary between the waters of the two nations, but merely divided the islands north and south of the line between the two sovereigns. There was no need for either Britain or Canada to challenge a potential United States claim to the waters north of the AB line that the United States was no longer making. Moreover, the United States and Britain (on behalf of Canada) entered the Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea of May 9, 1930, 47 Stat. 1872. That convention gave the International Fisheries Commission regulatory authority over United States and Canadian vessels in "convention waters," which included both territorial seas and the high seas off the west coast of both countries. Under those circumstances, Britain had further reason not to pursue the *Marguerite* incident, and its failure to do so simply does not constitute acquiescence.

Alaska cites AK-39 for the proposition that the Commerce Department took the position in 1930 that waters within headlands less than ten miles wide were not international waters. AK Count I Memo. 19. The State Department, however, quickly caused the Commerce Department to retract that position. The Secretary of Commerce acknowledged in a letter to the Secretary of State: "in accordance with the desire expressed by you, the enforcement of the fishery laws and regulations by the Bureau of Fisheries in this region will be in conformance with the view that Canadian fishermen may operated north of the 'AB' line so long as they remain outside the three-mile limit." US-I-14 p.1. The Under-Secretary of State expressed his appreciation for the Commerce Department's agreement that "the waters north of a line from Cape Muzon to Portland Canal [AB] are high sea except within the three-mile limit," stating that "I appreciate your assurance that the fishery laws and regulations will be enforced by the Bureau of Fisheries in conformity with the view that Canadian fisheries may operate north of the line AB so long as they remain outside the three-mile limit." US-I-

14 p.3.[7]

As Alaska points out (AK Count I Memo. 19-20), the Chief of the Branch of Alaska Fisheries proposed in 1955 to define the area subject to existing fishing regulations as follows:

> All waters for a distance 3 miles seaward (1) from the coast and lines extending from headland to headland across all bays, inlets, straits, passes, sounds, and entrances, and (2) from the shores of any island or group of islands, including the islands of the Alexander Archipelago and the waters between such groups of island and the mainland.

AK-59. That proposal is unrelated to any historic inland waters claim in the Archipelago. It includes *all* bays, straits, sounds, and *all* offshore islands. The memorandum states that it would include Bristol Bay, for example, a bay much less closed than Cook Inlet. It would, by its terms, include Shelikof Strait and the waters between the Alaska Peninsula and the Shumagin Islands. The definition of "waters of Alaska" in the 1957 regulations (AK-60 pp.26-27) would likewise apply to extraordinarily broad areas beyond the waters of the Archipelago. There is no indication that the fishing regulations were intended to represent a claim of inland water status for all the areas described as "waters of Alaska." Rather, as reflected in the Proclamation 2668 of September 28, 1945, 59 Stat. 885-886 (Truman Proclamation), the United States claimed the right to create fisheries conservation zones off its coasts and beyond previously recognized limits, but provided that "[t]he character as high seas of the areas in which such conservation zones are established and the right to their free and unimpeded navigation are in no way affected." *Id.* at 886. As the Supreme Court concluded in *Cook Inlet,* "the scope of the fish and wildlife enforcement efforts was determined primarily, if not

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[7] As those documents show, contrary to Alaska's allegation (AK Count I Memo. 18-19), the regulations from 1928 onward addressing "territorial waters" were not consistently interpreted to apply to all waters of the Archipelago. The boundaries of the districts are certainly not written to follow the line described by Hannis Taylor. See AK-37.

exclusively by the needs of effective management of the fish" rather than as an assertion of national sovereignty. 422 U.S. at 199.

Alaska's reliance on Canada's agreement, in 1957, on the "Gharret-Scudder line" is also misplaced. AK Count I Memo. 20-21. That line identified "offshore waters" for purposes of prohibiting citizens of the two countries from fishing with nets for salmon in international waters in the North Pacific – not to establish maritime boundaries. Alaska made, and the Supreme Court rejected, the same argument in *Cook Inlet.* 422 U.S. at 194-196. The Court noted that the Canadians asked for charts showing the delimitation, and the United States provided such charts to the Canadians with express disclaimers that the line was intended to bear any relationship to the territorial waters of the United States in a legal sense. *Id.* at 195-196 & n.16. Thus, the official United States position, transmitted to Canada, relied upon by the Supreme Court, and available to the world, was that the United States' lines defining "waters of Alaska" for fisheries purposes had no maritime boundary significance.

B. The United States' Position During The "AB" Line Negotiations Confirms That The United States Did Not Claim Inland Water Status For The Waters Of The Archipelago

Alaska asserts that, in negotiations regarding the AB line in the 1930s, the United States argued that the waters of the Archipelago were territorial waters of the United States. AK Count I Memo. 21-26. The record repudiates that assertion. The United States took the position in those negotiations that territorial waters were to be determined by three-mile arcs-of-circles.

Alaska correctly states that, in the 1930s, the United States and Canada disagreed whether the AB line was a maritime boundary or merely a line allocating upland islands. Alaska incorrectly asserts (AK Count I Memo. 22), however, that Canada also sought to claim sovereignty over the

waters of Dixon Entrance and Hecate Strait. Alaska's exhibits show that, despite the urgings of some of its citizens and legislators, the Canadian Government consistently declined to extend its boundaries beyond three miles in the Dixon Entrance area. AK-31, 61, 62, 64 p.23. The AB controversy arose primarily because the United States believed that the three-mile arcs-of-circles test entitled the United States to territorial sea immediately south of Capes Muzon and Chacone on the Canadian side of the AB line.

Summing up the issue in 1932, State Department Geographer Boggs articulated the United States' objection to treating the AB line as an international maritime boundary:

> The [American] objection to it is that it would appear to imply that all land and water to the north is American and all to the south is Canadian."

AK-64 p.33. Apparently, the Bureau of Fisheries was in favor of taking the position that all waters north of the AB line were American, but both the State Department and Customs Service used the three-mile arcs-of-circles. AK-64. The American Boundary Commissioner wrote to his Canadian counterpart on February 6, 1931, suggesting that

> the two Governments agree that the line "AB" . . . is to be intepreted solely as a line of allocation . . . and that the part of the line passing through waters other than territorial waters has no boundary significance whatsoever.

AK-64 p.6.

During the Conference Concerning the United States-Alaska Boundary, held in Ottawa on June 27-28, 1938, the State Department Geographer

> explained that the reasonable interpretation is that the line "AB" simply allocates land on the north to the United States and land on the south to Canada, and that *all such lands have their normal belt of territorial waters of three marine miles*, except where there are islands of different sovereignty less than six miles apart through which the line "AB" passes.

AK-65 p.11 (emphasis added). Mr. Boggs prepared a chart showing "American territorial waters" as arcs-of-circles everywhere in the area covered, including portions of Clarence Strait and Revillagegido Channel north of Alaska's proposed ten-mile closing lines. AK-65 p.10. Mr. Boggs' statement to the Canadians that the three-mile arcs-of-circles applied to the Archipelago was consistent with advice he gave to the Tariff Commission in 1930 (US-I-33) and to the Coast Guard in 1952 (US-I-10).

Alaska's suggestion (AK Count I Memo. 22) that Mr. Boggs believed that the waters of the Archipelago were inland waters because he referred to the "Inland Passage," "inland navigation routes," and "important inland waters of Southeast Alaska," is unpersuasive. The first two terms have no jurisdictional meaning. The third term cannot support Alaska's inference because there are "important inland waters" in Southeast Alaska regardless of whether the waters of the Archipelago as a whole constitute inland waters. Alaska also asserts (*id.* at 23) that "Boggs quoted from the description of the 'outer coast line' of the Archipelago advanced by the United States at the 1903 Alaska Boundary Arbitration and commented that all enclosed waters are 'territorial waters.' Ex. AK-68 at 8." While Boggs did quote from Taylor's description and argument, Boggs' nowhere commented that waters enclosed by Taylor's description are "territorial waters." *See* AK-68 p.8. To the contrary, Boggs commented immediately after the quote from Taylor that "Great Britain affirmed the three-mile limit in its counter case." *Ibid.*

Alaska finds significance (AK Count I Memo. 23) in the fact that a "draft 'understanding'" regarding Dixon Entrance (AK-69 p.1) provided how the two countries would treat each others' vessels if either of the two nations were to make a future historic waters claim to the "bays, straits, sounds, entrances, and inlets" contiguous to Alaska and British Columbia. As Alaska acknowledges,

the "draft 'understanding'" never ripened into a formal agreement. AK Count I Memo. 25. Moreover, Alaska overlooks that the proposal would have addressed *future* claims, indicating that both parties understood that no such claims existed at that time. Alaska also develops an elaborate argument attempting to show that Boggs believed that all of the Archipelago constituted inland waters. AK Count I Memo. 24. Alaska asserts that Boggs suggested substituting "national waters" for "adjacent waters" in a proposed agreement and that, according to Shalowitz, "national waters" are "inland waters." Boggs' own memorandum states, however, that "we do not define national waters in the agreement and I do not believe that there will be found in international law any clear definition of the term that is applicable here . . . ." AK-74 p.1. In any event, the language relates to areas of Dixon Entrance and nearby waters where the parties were considering making a *new claim* of historic waters. AK-73 Art. II. The two countries ultimately declined to enter into any agreement.

VI. Congress Defined The Boundaries Of Alaska As The "Territory Together With The Territorial Waters Appurtenant Thereto"

Section 2 of the Alaska Statehood Act (ASA) provides that "[t]he State of Alaska shall consist of all the territory, together with the territorial waters appurtenant thereto, now included in the Territory of Alaska." 48 U.S.C. note prec. 21. Congress made no attempt to define what those territorial waters were. The legislative history at AK-78 reveals two things. First, Congress did not have a specific understanding on the extent of Alaska's territorial waters. Second, the definition of Alaska's boundaries was an issue separate from the question of what submerged lands Alaska would receive through the the Submerged Lands Act (SLA), 43 U.S.C. 1301 *et seq*. AK-78 pp.280-281. The legislative history of the ASA provides Alaska no help. Alaska's assertion (AK Count I Memo.

26) that "[w]hat the United States had consistently claimed as its own would become Alaska's – including the waters of the Archipelago" begs the question of what the United States had consistently claimed. The historical record makes clear that United States has consistently declined to claim the waters of the Archipelago as inland waters.

VII. Other Nations Did Not Acquiesce To A Historic Inland Waters Claim

Because the United States had neither claimed nor treated the waters of the Archipelago as historic inland waters, it should come as no surprise that foreign nations did not acquiesce in that non-existent claim.

A. Britain Did Not Recognize A Historic Inland Waters Claim In The 1893 Fur Seal Arbitration

Alaska asserts that Britain took the position at the 1893 Fur Seal Arbitration that "the 1824 United States-Russia treaty granted freedom to navigate the internal waters of the Archipelago for only ten years." AK Count I Memo. 27-28. Alaska once again inserts "waters of the Archipelago" where the document contains no such reference. The argument of British counsel contains no indication that Britain viewed the 1824 Treaty as creating a historic inland waters claim to the Archipelago. Rather, he explained that Article IV referred generally to the "internal seas, to gulfs, to harbours, and to creeks" along the "whole of the northwest coast right up to the Behring Strait." AK-79 p.142. The types of waterbodies described in the Article "would be strictly territorial waters," *i.e.,* what today are called inland waters, from which the Russians would have the right to exclude foreigners under general rules of international law. *Ibid.* Far from agreeing that the Archipelago constituted historic inland waters, the British representatives reasoned that Article IV of the 1824 Treaty merely extended a ten-year trading right to waters off Alaska that otherwise would qualify as

territorial waters. The British argument is a refutation of the thesis that the waters of the Archipelago are entitled to special treatment.

B. Britain Did Not Recognize A Historic Waters Claim In The 1910 Fisheries Arbitration

______Alaska also mistakenly looks for acquiescence in the North Atlantic Fisheries Arbitration of 1910. AK Count I Memo. 28-29. That arbitration involved the interpretation of an 1818 treaty that allowed each nation to exclude fishermen of the other country from "bays." *California Report* 15-16. The United States took the position that "bays" were limited to indentations whose closing lines were six miles or less, while Britain maintained that it could exclude foreign ships from any bay regardless of the length of the closing line. *Ibid.* In opposing the United States' case, the British counsel argued that "neither at the time of the 1818 treaty, nor at any time since, would Great Britain or the United States have admitted the existence of" a six-mile closing line limitation. AK-80 p.83 Britain then enumerated a list, stretching back to 1779, of instances in which the United States had allegedly asserted jurisdiction at greater lengths from shore. *Id.* pp.83-86. Among those examples was the 1903 Arbitration, which the British counsel erroneously described as involving 25-mile closing lines. *Id.* p.86.

In response, the American counsel painstakingly explained that the American statements in the 1903 Arbitration were made "in order to controvert the principle stated by Great Britain in its submission" and that "the United States made a statement that shows most clearly the line that would result from following the principle suggested for adoption by Great Britain in that arbitration." AK-81 p.1093. In response to a question from the President of the 1910 Tribunal whether the 1903 Arbitration "had a direct bearing on the extent of maritime limits, or the limits of territorial waters,"

the United States counsel responded that it had "none whatsoever." *Ibid.* Britain cannot have acquiesced to a historic inland waters claim to the Archipelago in the 1910 proceedings because the United States disavowed any such claim in those very proceedings. Britain's mere enumeration of alleged United States claims cannot be viewed as British acquiescence in those claims.[8]

C. Neither Norway Nor Britain Recognized A Historic Waters Claim During the Anglo-Norwegian Fisheries Case

Alaska argues that Britain and Norway recognized the Archipelago as historic inland waters when they cited arguments from the 1903 Arbitration in the Norwegian-British Fisheries Case (Fisheries Case). AK Count I Memo. 29-30. The Special Master in *Alaska* effectively rejected that argument. *Alaska Report* 93-98; US-I-1 pp.120-126. He found that Norway misrepresented Hannis Taylor's argument in 1903 (as involving straight baselines) and Britain distinguished it (as not involving straight baselines). Neither country had occasion to acquiesce in the ten-mile closing lines described by Hannis Taylor because the issue in the Fisheries Case was the propriety of the straight baseline method. Furthermore, both Norway and Britain knew that, whatever had been the position of the United States regarding closing lines in 1903, the position at the time of the Fisheries Case was that the United States would follow its proposals made during the 1930 Hague Conference and explained below. *Alaska Report* 95-97, 97 n. 68; *see* U.S. Count I Memo. 41-42.

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[8] The British, for example, cited the United States' position in the 1892-1893 Bering Sea Sealing Arbitration, where the two countries had opposing views. AK-80 p.86. *See* US-I-17 p.72 (British argument in the 1892-1893 Arbitration that the Treaty of Cession contains no "reference to any extraordinary or special dominion over the waters of the Behring Sea, nor, indeed over any other portion of the North Pacific Ocean" and "[n]either is there a suggestion that any special maritime right existed which could be conveyed"). The British could not have acquiesced in the United States' view there, because the British position prevailed.

VIII. The Supreme Court Has Already Held That The United States Did Not Have A Consistent Policy Prior To Alaska's Statehood Of Claiming Inland Status For Waters Enclosed By Coastal Islands

Alaska cites (AK Count I Memo. 31) *Mississippi Sound* for the proposition that, until relatively recently, the United States' general practice was to consider as inland waters those waters enclosed by near-shore coastal islands less than ten miles apart. Alaska made the same argument in *Alaska.* After careful scrutiny, the Special Master and the Supreme Court determined that the statement in *Mississippi Sound* regarding the alleged general practice was not only dictum, but incorrect. 521 U.S. at 11-21. The Court squarely ruled that "Alaska has not identified a firm and continuous 10-mile rule" for inland waters. *Id.* at 20.[9] The Court recognized that, from at least 1930 to 1949, the United States followed the proposals it had made at the Hague Convention, which employed the three-mile arcs-of-circles test, but in certain instances provided for the "assimilation" to the territorial sea (*not* to inland waters) of pockets of high sea created by the arcs. *Id.* at 17. Any policy of enclosing islands with 10-mile closing lines could not have arisen before the early 1950s, *Id*. at 18, and necessarily would have been abandoned shortly thereafter when the United States signed the Convention. A supposed policy of such short duration cannot give rise to a historic waters claim.

IX. The United States Did Not Claim The Waters Of The Archipelago As Inland Waters After Alaska's Statehood

The United States maintained its pre-statehood policy respecting the waters of the Archipelago after Alaska's admission to the Union. Alaska's three examples of a supposedly different policy are unpersuasive.

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[9] Indeed, as discussed above, the United States disclaimed 10-mile closing lines even for bays in 1886, 1891, 1906, 1910.

A. *Organized Village of Kake v. Egan*

Contrary to Alaska's assertion, the decision in *Organized Village of Kake v. Egan*, 174 F.Supp. 500 (D. Alaska 1959) did not "declare[] the waters of the Archipelago 'inland waters of the United States.'" AK Count I Memo. 37. The case involved the enforcement of Alaska's prohibition against fish traps. The district court stated:

> I find the following statements of the law determinative of the issues in this case. The state owns the tidelands and controls all areas wherein traps were threatened to be installed. In other words, the proposed trap sites are located in inland waters over which the State of Alaska has dominion.

174 F. Supp. at 502. The succeeding paragraph, discussing the SLA's cession of submerged lands beneath the three-mile territorial sea, makes clear that the district court used the term "inland waters" to mean both inland waters proper and territorial seas. *Ibid.* There is nothing to indicate that any of the traps of the Villages of Kake or Angoon were more than three miles from land.

B. The 1964 Brief in *United States v. California*

Alaska also relies on the United States' brief to the Supreme Court in *United States v. California*, AK Count I Memo. 37-38, which we discuss extensively elsewhere, U.S. Count I Memo. 27-31. The United States countered California's attempt to use closing lines longer than 10 miles with regard to Santa Barbara Channel. The brief showed that, contrary to California's representation, the closing lines described by Hannis Taylor in 1903 were ten miles or less. AK-9 p.106-107. Later in the brief, the United States distinguished the treatment of straits connecting two areas of high seas from those that lead only to inland waters, the latter of which are treated as bays. The United States mistakenly gave "the straits leading to the Alaska Archipelago" as an example of straits leading only to inland waters. AK-9 p.130-131. The brief cited back to an earlier passage, AK-9 p.106-107,

which contains no statement that the waters of the Archipelago lead only to inland waters. In fact, as shown below, the waters of the Archipelago link the high seas of Dixon Entrance with the high seas of the northern Gulf of Alaska above Cross Sound, a major route of international trade and travel. State Department Geographer Boggs never treated the waters of the Archipelago as straits leading only to internal waters. In the negotiations with the Canadians over the AB line, he used the three-mile arcs-of-circles method and proposed assimilation of high sea pockets into the territorial sea. AK-65 p.10, 11.

C. The Pearcy Charts

Alaska also relies on the maps (AK-103) prepared shortly after Alaska's statehood by Department of State Geographer Pearcy. AK Count I Memo. 38-39. The maps are irrelevant because they show what would be the baseline in Southeast Alaska if the United States were to adopt the optional system of straight baselines envisioned in Article 4 of the Convention. US-I-7. Pearcy did indeed believe that Article 4 would permit the drawing of straight baselines in Southeast Alaska. *See* AK-102 p.971. But the United States ultimately decided not to apply straight baselines anywhere in the United States, and the Supreme Court has repeatedly upheld that decision. *Louisiana* 394 U.S. at 67; *California*, 381 U.S. at 168; *see* 3 Reed, *Shore and Sea Boundaries* 343-351 (2000). Because the Pearcy charts merely show what waters would be inland if the United States were to adopt the straight-baselines method, the charts are irrelevant to any historic waters claim.[10]

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[10] An Assistant Legal Advisor of the State Department testified in the 1972 Senate Hearings on the Coastline Committee's charts in Alaska. He noted that the United States had never used straight baselines for any part of the coastline of the United States and had never applied straight baselines to foreign fishermen. AK-38 pp.5, 8. He also clarified that the fisheries regulations' definition of "waters of Alaska" enclosing the Archipelago had "never been applied against foreign nationals, and there has never been a claim that they did so apply." AK-38 p.18. In any event, the straight-baselines method results in a significantly different baseline than the line described in Hannis Taylor's *reductio*

X. The United States' Position On Chandeleur And Breton Sounds Provides No Support For Alaska's Claim

Alaska relies on the United States' position on Chandeleur and Breton Sounds in *United States v. Louisiana*, *supra*, for the proposition that the United States continued a policy, after Alaska's statehood, of enclosing island groups whose mouths were no wider than 10 miles. AK Count I Memo. 34-36. To understand the fallacy of Alaska's position, it is necessary to understand the history of adjudicating maritime boundaries in the period shortly after the passage of the SLA.

After the SLA's enactment in 1953, the United States took the position that, for purposes of determining the baseline from which the territorial sea is measured, the rules that the United States used on the date of passage of the SLA were controlling. *See California,* 381 U.S. at 163-165. The United States therefore prepared charts (the so-called Chapman lines) showing the baselines for Louisiana using the position of the United States in 1953. *Alaska Report* 83-93. In 1965, however, the Supreme Court held that boundaries under the SLA should be drawn in accordance with the rules of the Convention. *United States v. California*, 381 U.S. at 163-165.

Before the Court's 1965 decision in *California*, the United States had conceded the ownership of the submerged lands in Breton and Chandeleur Sounds in the *Louisiana* litigation. AK-114 pp.78-79. After the 1965 decision, the United States considered whether it should seek relief from the concessions. Ultimately, the Solicitor General determined that the United States would not do so. The Solicitor General explained:

> [w]e do not ask for such relief because we think that it would not be in the public interest, at this late date, to upset a fundamental assumption that has guided the conduct of both parties and their lessees in a large area over a long period of time.

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ad absurdum argument.

AK-114 p.89.

In 1971, the United States stipulated that Louisiana owned the lands beneath Chandeleur and Breton Sounds. In the stipulation, the United States stated its view that both of those sounds contained areas of high seas. *Louisiana Report* 63-66**.** Lousiana agreed that it would not rely on the stipulation for its argument for inland water status for the two sounds or any other waters. *Id.* at 65. Thus, although the United States stipulated to Louisiana's *ownership* of the lands below the two sounds because of the reliance on the prior concessions, the United States maintained its position that parts of those sounds did not in fact constitute inland waters. In subsequent proceedings in the case, the United States litigated the baseline to be drawn in the area of other island groups whose mouths to the sea did not exceed ten miles and prevailed—most notably in regard to Caillou Bay. *Louisiana,* 394 U.S. at 66-67 nn87 & 88.

The United States' treatment of Chandeleur and Breton Sounds is the result of factual anomalies not present here. The resolution of Caillou Bay's status teaches that the waters of the Archipelago would not constitute inland waters even if they satisfy the methodology used for drawing the Chapman Lines. Indeed, the argument for treating the Archipelago as inland waters is even weaker than the argument for Caillou Bay. The Chapman line represented the United States' approach to inland waters when the SLA was enacted in 1953. Alaska became a State in 1959, *after* the United States had already signed the Convention. Under the rationale of the Court's *California* decision, the policy of the United States in drawing closing lines necessarily changed with the 1958 signing.

XI. The 1971 Coastline Committee Charts Accurately Reflect The Long Established Position Of The United States That The Waters of the Archipelago Do Not Constitute Historic Inland Waters

In 1971, the United States published for the first time a complete series of charts of the territorial sea boundary of the entire country. Reed, *supra*, at 359-360; *Mississippi Sound*, 470 U.S. at 111. Alaska's assertion (AK Count I Memo. 42-45) that the 1971 charts represent a "belated change" in the federal government's position has two fatal flaws. It ignores the historic record, and it conflates the question of whether straight baselines should be drawn in the Archipelago with the question of whether the waters of the Archipelago constitute historic inland waters.

A. The Historic Record Establishes That The Waters Of The Archipelago Are Not Historic Inland Waters

A claim of historic inland waters must be based upon a *continuous* exercise of authority to exclude innocent passage over a long period of time. As we have shown, both the United States and Russia repeatedly disclaimed inland water status for the Archipelago. The chronology warrants reiteration:

1821 Russia issues, and promptly withdraws, a ukase making extraordinary claims to waters within 100 miles of the Alaska coast.

1825 Russia and Britain enter into a treaty allowing British navigation of rivers through Russian uplands, including the Stikine River. Although the Stikine can only be reached by navigating the Archipelago, neither country seeks a provision granting permission to navigate through the Archipelago.

1871 The United States and Britain enter into a treaty allowing British navigation of the Stikine. Once again, neither nation considers a treaty provision necessary to navigate through the Archipelago. Thereafter, Canadian companies advertise routes from Vancouver through the Archipelago to the Stikine, Lynn Canal, and out Cross Sound to St. Mary's in western Alaska.

1903 Hannis Taylor argues in the 1903 Arbitration that, assuming *arguendo*, the political "coast" can be defined by drawing ten-mile closing lines, using those

lines rather than the actual mainland land-water interface leads to absurd results. The American delegation explicitly states that the political coastline is not at issue and the Arbitration Tribunal did not address the location of the political coastline.

1910 American counsel at the North Atlantic Fisheries Arbitration makes clear that the lines described by Taylor in 1903 have no bearing on maritime limit in the Archipelago.

1930 The United States proposes at the Hague Convention negotiations that islands should have their own three-mile territorial sea and that pockets between islands and the mainland should be assimilated to the territorial sea when a strait links international waters.

1934 On advice of the State Department, the Commerce Department agrees that Canadian fishermen may fish north of the AB line so long as they are outside the three-mile limit.

1930s In discussions with Canada regarding the AB line, the United States insists that the AB line is not a maritime boundary and that the territorial waters of the respective nations north and south of the line are to be measured using three-mile arcs-of-circles. The two nations consider proposed treaty language that would continue innocent passage by each others' vessels even if either nation makes a *future* historic waters claim for the waters adjacent to the coasts of British Columbia and Alaska.

1949 The United States informs Norway that the United States continues to follow the closing rules contained in the United States' proposal at the 1930 Hague Conference.

1952 The State Department advises the Coast Guard that the three-mile rule applies to the American side of the AB line in the vicinity of Dixon Entrance.

1957 A United Nations study reports that the United States is one of the strongest opponents of enclosing coastal archipelagos and that it treats each island of a coastal archipelago as having its own three-mile territorial sea.

1958 The United States signs the the Convention.

1965 The Supreme Court holds that principles of the Convention control grants under the SLA.

1971 The United States publishes the Coastline Committee charts.

There is no belated change of position in the 1971 charts. At best, Alaska can point to a few isolated and ambiguous statements that might be considered inconsistent with the long-term insistence on the three-mile limit. Those isolated statements cannot satisfy the "strict evidentiary requirements" for a historic inland waters claim. *Alaska*, 521 U.S. at 11.

B. Alaska Conflates The Doctrines of Straight Baselines And Historic Waters

After the publication of the 1971 charts, the Governor of Alaska and Senator Stevens requested that the United States reconsider the charts for the area of the Archipelago under the doctrines of straight baselines and historic waters. AK-118 pp.2-3. The United States considered the request, which generated discussion among governmental components, but ultimately declined to change the charts. AK-118 – AK-125. As Alaska notes (AK Count I Memo. 43-44), an internal State Department memorandum evaluated various options and concluded that, should the United States decide to use the system of straight baselines, the Archipelago would meet the requirements of Article 4 for drawing such lines. AK-118 p.10. The United States, however, adhered to its longstanding policy of not using straight baselines, which the Supreme Court has repeatedly upheld. *Louisiana* 394 U.S. at 67; *California*, 381 U.S. at 168. Thus, Alaska's assertion that the State Department concluded that the Archipelago was an obvious candidate for straight baselines is correct, but irrelevant. The United States likewise refused to make a historical claim to the waters of the Archipelago. Significantly, the internal memorandum notes that "there is a substantial question as to whether there is sufficient evidence in this case to establish such a claim" and that "the United States must take care to comply with standards of proof employed in international law." AK-124 pp.1-2. In view of the history set out above, the refusal to make a historic inland waters claim was

indubitably correct.[11]

XII. The United States Has Never Excluded Innocent Passage From The Archipelago Despite Ample Opportunities To Do So

The Inside Passage of the Archipelago is a major international route of travel that, for much of its history, has been dominated by foreign vessels. *See* US-I-12 (list of the vessels entering the Archipelago in late 2001 and early 2002); US-I-2 (expert report of Prof. Barry Gough, tracing the history of foreign vessels in the Archipelago). For example, a Klondike Gold Rush period map shows the route taken by Canadian ships from Vancouver through British Columbia, entering the Archipelago in the south and exiting the Archipelago at Sitka or Cross Sound, then continuing across the Gulf of Alaska and around the Alaska Peninsula to St. Michael's at the mouth of the Yukon River. US-II-31 p.9 (inset map).

The first field report written after the expansion of Glacier Bay National Monument in 1939 listed the Canadian Pacific and Canadian National Railways as steamship lines with regular sailings to Alaska. US-I-21 p.6. In 1941, the Superintendent of Glacier Bay reported that "50,000 people annually sail past Glacier Bay," US-I-22 p.1126, adding that "Canadian Lines specialize in tourist travel more than the American companies," *ibid.*, and "Americans commonly prefer the Canadian ships," *id.* at 1139. The Superintendent recommended that the Customs Service provide authority to allow tourists on Canadian vessels to land at Glacier Bay. *Ibid.* Although Canadian-flagged vessels were most prominent in the tourist trade, the *Corsaire*, a Canadian-owned but Panamanian-

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[11] Alaska alleges (AK Count I Memo. 20) that the State Department described certain Alaska fisheries regulations as "[a]doption by the United States of straight baselines" and concluded that there were no high seas in the Archipelago. The cited exhibits (AK-31 pp.25-26; AK-61 pp.19-20; AK-62 pp.13-14) actually state that the Interior Department issued regulations "that appeared to adopt the straight baseline method." The exhibits nowhere conclude that there were no high seas in the Archipelago.

flagged vessel, likewise brought tourists to Southeast Alaska, including Glacier Bay. US-I-23 p.1. Canadian vessels also brought tourists to Sitka. US-I-24 p.48.

The National Park Service developed its administrative facilities at Bartlett Cove "because of its strategic location at the entrance of the Great Bay and proximity to the existing airline and steamer routes. The ocean-going steamer route through the Inside Passage and thence through Icy Strait is within about 8 miles of Bartlett Cove." US-I-25 p.3; *id.* at 7 (map showing steamer route). In 1949, the Canadian Pacific steamer *S.S. Kathleen* inaugurated a schedule of approximately eight cruises into the Bay each summer. US-I-26 p.3. In 1955, visitation at the Sitka National Monument was down because "[s]trike activities caused the shutdown of passenger service being offered by the Union Steamship Company of Canada." US-I-31 p.3. During the summer preceding Alaska's statehood, Southeast Alaska experienced one of its best travel seasons because "vessels of the Canadian Pacific Railway Company which have been held inactive by strikes so far this season began making trips with capacity passenger lists during the later part of the month." US-I-32 p.1. Even after statehood, "[p]assenger cruise ships serving Juneau are owned and operated by Canadians and depart from Vancouver, British Columbia during the summer months only." US-IV-30 p.5 (Glacier Bay 1964 Master Plan).

Quite obviously, the United States has not interfered with the longstanding innocent passage in the Archipelago, which precludes a claim of historic inland waters. *See* Juridical Regime, US-I-4 p.23 ("If the claimant [nation] allowed the innocent passage of foreign ships through the waters claimed, it could not acquire an historic title to those waters as internal [i.e., inland] waters, only as territorial sea."). Despite the ample evidence of innocent passage, Alaska alleges (AK Count I Memo. 44) that a 1972 internal State Department memorandum "confirmed that 'no right of innocent

passage has generally been accorded in the Alexander Archipelago.'" Actually, the cited document states:

> We understand informally from Coast Guard officers familiar with practice in Alaska that no right of innocent passage has generally been accorded in the Alexander Archipelago. Moreover, vessels entering the waters of the Archipelago *en route* to U.S. ports apparently have been required to give notice before entering those waters. There is apparently an exception in the "Inside Passage" along the Alaska and Canadian coasts, where U.S. and Canadian vessels (only) transit freely.

AK-118 p. 8.

That internal memorandum is incorrect and utterly insufficient to support a historic inland waters claim. The memorandum relies on the alleged statements of unnamed Coast Guard officers that are inconsistent with the historic record. Additionally, the requirement that vessels entering waters of the Archipelago *en route* to U.S. ports must give notice before entering those waters establishes nothing. That requirement, now found at 33 CFR 160.201, does not involve a restriction on innocent passage. It applies only to ships headed for U.S. ports and applies to both United States and foreign vessels. Under Article 17 of the Convention, foreign ships exercising the right of innocent passage must comply with such requirements. US-I-7.

XIII. The Vital Interests Of The United States Weigh Against Historic Inland Water Status For the Archipelago

The United States, as the world's preeminent naval power, has a strong interest in the freedom of the seas and the right of innocent passage. This interest is not new, but has been a consistent pillar of the United States' position on submerged lands before the Supreme Court. *See, e.g.* US-I-6 pp.49-51 (1964 brief of United States in *United States v. California)*. If the United States ignores, or only pays lip service, to the standards of proof under international law for the establishment of historic inland waters, other nations will be encouraged to do the same, and the United States will find it more

difficult to oppose the extravagant claims of others.

In this regard, it is important to recognize a crucial distinction between historic inland waters and inland waters created by drawing of Article 4 straight baselines. Historic inland waters are not subject to a right of innocent passage. Article 5 provides, however, that if a nation establishes straight baselines through Article 4, and the waters enclosed by those straight baselines had previously been territorial sea or high seas, those waters shall continue to be subject to a right of innocent passage. The theory that the United States should no longer be concerned about the strict requirements for historic inland waters, because other nations can exercise the option of drawing straight baselines, ignores that basic difference between the two types of waters. Moreover, many countries have claimed, as historic inland waters, areas that do not involve coastal archipelagos. See Roach and Smith, *United States Responses to Excessive Maritime Claims* 33-34 (1996) (US-I-27). If the standard of proof is relaxed for coastal archipelagos, the same relaxation can be expected for other types of waters. The United States therefore has a vital national interest in limiting historic inland water claims to those that are clear beyond doubt.

As Alaska notes (AK Count I Memo.46) "the vital interests of a coastal nation" can "fortify" a finding of historic waters status. The United States, however, must look to the vital interests of the *nation*, and not to the preferences of a single State. The United States has determined that its vital interests are best met by maintaining freedom of the seas, which permits protection of the United States, and its long-term interests, from points well beyond its coasts. If the Supreme Court were to accept Alaska's arguments, it would undercut the very arguments the United States has made in countering the unjustified historic waters claims of other nations. Those extravagant foreign claims include such strategically important areas as Peter the Great Bay near Vladivostok, the straits

separating the Laptev and East Siberian Seas, the Gulfs of Sidra, Tonkin, and Thailand, the Strait between India and Sri Lanka, and the Rio de La Plata between Uruguay and Argentina. *See* US-I-27 pp.33-34. Many foreign nations – like the State of Alaska – undoubtedly have strong sentiments respecting waterways that they associate with adjacent mainland, but the United States has concluded that consistent application of the governing principles warrants protestation of their claims.

In our relations with other nations, the United States has consistently emphasized the need for clarity and notoriety in historic water claims. In protesting Australian historic water claims to certain bays, the United States noted that no such claim was

> mentioned in the United Nations Secretariat study on historic bays, published in 1957 as UN Document A/CONF.13/1 and in 1958 in volume I Preparatory Documents of the first United Nations Conference on the Law of the Sea, UN Doc. A/CONF.13/37, at pages 1-38, or in any other compilation of historic bay claims of which the United States is aware.

US-I-27 p.36. The waters at issue here similarly appear on no listing of historic waters. US-I-1 p.133. In its protest to Australia, the United States also noted that, in view of the increased maritime jurisdiction of coastal nations under the 1982 Convention on the Law of the Sea, "no new claim of historic waters is needed to meet resource and security interests of the coastal state." US-I-27 p.37. Likewise, all of the waters of the Archipelago enjoy the protection of falling within the United States' territorial sea and Exclusive Economic Zone (EEZ). The United States also communicated to Australia that "the United States considers that there must be an actual showing of acquiescence, i.e., a failure to protest what is clearly known to a foreign State as a historical claim." *Id.* at 38. If the United States is to maintain consistency, it must apply the same high standards to its own historic waters claims.

The United States has emphasized that historic waters claims must be based on long and continuous exercises of authority. *See, e.g.*, US-I-27 p.39-40 (protest against Vietnamese-Cambodian claim to part of Gulf of Thailand). For example, the United States protested Italy's claim to the Gulf of Taranto, *id*. at 43-44, notwithstanding legal commentary from 1856 suggesting that the Gulf constituted territorial waters. US-I-13 p.3 n.4. The United States has also expressed concern over claims to broad expanses of historic waters, consistently opposing claims to large waterbodies such as Hudson Bay, US-I-13 p.6, Peter the Great Bay, and Arctic seas and straits north of Russia, US-I-27 pp. 49-52. Again, if the United States is to maintain consistency, it must apply the same standards to waters such as those involved in this case.

Alaska asserts that "geographic configuration, economic interests, and the requirements of self-defense" support its claim. AK Count I Memo. 46-49. But none of those factors is persuasive in this case. As an initial matter, geographic configuration is relevant to historic waters claims because geography influences whether the waters are used solely by the coastal nation. In this instance, the waters of the Archipelago, open at both ends, constitute an important international route of travel rather than a shallow cul-de-sac used only by American vessels in the intra-coastal trade. *See Mississippi Sound*, 470 U.S. at 102. With respect to economic interests, Alaska makes the obvious point that the waters of the Archipelago serve as the region's roads. AK Count II Memo. 47. But they will continue to serve as the region's roads regardless of whether they are inland waters. Significantly, the international cruise ships, on which the Southeast Alaska economy relies, can traverse the waters of the Archipelago precisely because those waters are subject to innocent passage. Economic considerations do nothing to bolster Alaska's claim.

Finally, considerations of national defense weigh decisively against Alaska's claim. Alaska argues that, if the waters of the Archipelago do not constitute historic inland waters or juridical bays, then high seas would have existed in Chatham Strait and Frederick Sound at the time of Alaska's statehood, allowing foreign vessels to penetrate "into the heart of the United States" a distance of "more than 70 miles." AK Count I Memo. 48. Of course, on the date of Alaska's statehood, foreign vessels had a right of innocent passage 70 miles up Lower Cook Inlet, an area of far greater strategic importance on account of its mineral resources and the location of the Anchorage population center. *See Cook Inlet,* 422 U.S. at 185-186. Significantly, on that date, the high seas also extended to within three miles of Los Angeles, as Santa Monica Bay does not constitute a juridical bay or historic inland waters. That particular concern carries even less weight today. The waters of the Alexander Archipelago are now within the United States' 12-mile territorial sea, and Article 5(4) of the Convention makes clear that the right of innocent passage through those waters does not include "passage that is prejudicial to the peace, good order or security of the coastal state."

Ultimately, of course, the United States, rather than Alaska, has responsibility for determining the Nation's foreign relations and defense interests. It must make those assessments in light of the United States' global role in a complex, dangerous, and constantly changing world. Its determinations on those matters warrant deference. In this instance, the United States is entitled to conclude that its interest in free navigation in strategic overseas waters outweighs the potential threat that Alaska posits of foreign invasion through Chatham Strait.

CONCLUSION

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

Respectfully submitted.

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November 8, 2002

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 Motion For Summary Judgment On Count I of the Amended Complaint were served by hand or by standard overnight courier to:

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

Dated this 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. 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.

TABLE OF EXHIBITS
TO UNITED STATES' OPPOSITION TO ALASKA'S
MOTION FOR PARTIAL SUMMARY JUDGMENT
ON COUNT I OF 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-I-1 through US-I-14 accompanied the Motion of the United States for Partial Summary Judgment on Count I. Exhibits beginning with US-I-15 accompany the Memorandum of the United States in Opposition to Alaska's Motion for Summary Judgment on Count I of the Amended Complaint

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

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

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

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

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

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

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

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

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

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

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

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

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

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

US-I-15 I. J.B. Moore, *International Law Digest* (1906) (excerpts)

US-I-16 Treaty Between Great Britain and Russia, Signed at St. Petersburg, February 16/28 1825 (French original followed by English translation)

US-I-17 Sen. Ex. Doc. 106, 50th Cong., 2d Sess. (1889) Proceedings of the US-British Fur Seal Arbitration (excerpts)

US-I-18 Statement of Mr. Peirce, the delegate for the United States during the arbitration of the whaling and selaing claim of the United States against Russia held at the Hague in 1902, made on July 4, 1902 (Foreign Relations of the United States 1902, Appendix I, 440)

US-I-19 *United States v. Alaska*, Civ. No. A-45-67 (D. Alaska, Findings of Fact and Conclusions of Law, January 29, 1973)

US-I-20 *Alaska Atlas and Gazeteer,* pages 16-17 (excerpt) map scale 1"= 4.8 statute miles or 4.2 nautical miles

US-I-21 Earl A Trager, "Glacier Bay Expedition" 1939 (excerpts)

US-I-22 Memorandum for Regional Director, NPS, from Frank Been submitting

information for preparation of a Master Plan for Glacier Bay National Monument.

US-I-23 Memorandum to Regional Director, NPS Region Four, from Superintendent, Sitka National Monument dated August 17, 1949, regarding “Patrol and reconnaissance trip to Glacier Bay National Monument.”

US-I-24 “Field Notes for inspection Richardson Highway, Kennicott, Thompson Pass, Glacier Bay and Way points by Frank Been, July 19-August 29, 1941"

US-I-25 National Park Service, Glacier Bay National Monument (undated, but believed to be from approximately 1946 based upon dates appearing in the text)

US-I-26 Glacier Bay National Monument brochure, 1950

US-I-27 Roach and Smith, *United States Responses to Excessive Maritime Claims* (excerpts)

US-I-28 Excerpts from Part II of the Proceedings of the 1903 Alaska Boundary Arbitration

US-I-29 Excerpts from Part IV of the Proceedings of the 1903 Alaska Boundary Arbitration

US-I-30 Excerpts from Part V of the Proceedings of the 1903 Alaska Boundary Arbitration

US-I-31 Memorandum from Supt. Sitka and Glacier Bay to Director, NPS, “Monthly Narrative Report, Sitka and Glacier Bay National Monuments,” August 2, 1955

US-I-32 Memorandum from Supt. Sitka and Glacier Bay to Director, NPS, “Monthly Narrative Report, Sitka and Glacier Bay NM July 1958,” August 12, 1958

US-I-33 Memorandum dated August 5, 1930, from U.S. Dept. of State, Office of the Historical Advisor re: Alien Fishing in Territorial Waters and on the High Sea

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