No. 128, Original

In the Supreme Court of the United States

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

REPLY BRIEF OF THE UNITED STATES IN RESPONSE TO EXCEPTIONS OF THE STATE OF ALASKA

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QUESTIONS PRESENTED

The State of Alaska invoked this Court's original jurisdiction to quiet title to marine submerged lands in the vicinity of the Alexander Archipelago in southeastern Alaska. The Court granted Alaska leave to file a four-count amended complaint setting out its claims. The Special Master has recommended, in response to the parties' motions, that the Court grant summary judgment to the United States on Counts I, II, and IV of Alaska's amended complaint, deny summary judgment to Alaska on Counts I and II, and confirm the United States' proposed disclaimer of title to the submerged lands at issue in Count III. Report of the Special Master on Six Motions for Partial Summary Judgment and One Motion for Confirmation of a Disclaimer of Title (Mar. 2004).

The United States supports the Special Master's recommendations. The State of Alaska has filed three exceptions, which (listed in the order that the issues are addressed in the Special Master's Report) present the following questions:

1. Whether the Special Master correctly determined, in recommending that the Court grant the United States summary judgment on Count I of Alaska's amended complaint, that the straits and channels separating the islands of the Alexander Archipelago from each other and the mainland are not "historic inland waters." Alaska Exception 2.

2. Whether the Special Master correctly determined, in recommending the Court grant the United States summary judgment on Count II of the amended complaint, that the straits and channels separating the islands of the Alexander Archipelago from each other and the mainland do not constitute one or more juridical bays. Alaska Exception 3.

3. Whether the Special Master correctly determined, in recommending that the Court grant the United States sum-

mary judgment on Count IV of Alaska' amended complaint, that the United States reserved, and retained in federal ownership at the time of Alaska's statehood, the marine submerged lands within Glacier Bay National Monument (now Glacier Bay National Park and Preserve) to allow scientific study of tidewater glaciers, to preserve remnants of ancient inter-glacial forests, and to protect wildlife, including the brown bear. Alaska Exception 1.

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REPLY BRIEF OF THE UNITED STATES IN RESPONSE TO EXCEPTIONS OF THE STATE OF ALASKA

INTRODUCTION

On June 12, 2000, this Court granted the State of Alaska leave to file a bill of complaint against the United States seeking to quiet title to marine submerged lands in Southeast Alaska. See *Alaska* v. *United States*, 530 U.S. 1228 (2000). The Court appointed a Special Master, Professor Gregory E. Maggs, to conduct proceedings in this case. 531 U.S. 941 (2000). The Court granted Alaska leave to amend its complaint, 531 U.S. 1066 (2000), and, in accordance with the Master's first report, denied certain individuals leave to intervene, 534 U.S. 1103 (2002). See Report of the Special Master on the Motion to Intervene (Nov. 2001). This case is now before the Court on the Master's 2004 Report, which addresses the parties' respective motions for summary judgment and the United States' unopposed motion for confirmation of a disclaimer of title. 124 S. Ct. 2093 (2004). See Report of the Special Master on Six Motions for Partial Summary Judgment and One Motion for Confirmation of a Disclaimer of Title (Mar. 2004) (Rep.).[1]

The Master's comprehensive 327-page report recommends that the Court: "(1) grant summary judgment to the United States on counts I, II, and IV; (2) deny summary judgment to Alaska on counts I and II; (3) confirm the United States' proposed disclaimer; (4) dismiss count III for lack of juris-

[1] The Special Master's report and the parties' briefs on motions for summary judgment are posted on the Master's Website: http://www.law.gwu.edu/facweb/gmaggs/128orig/docket.htm. In this brief, the United States abbreviates its memoranda in support of its motions for summary judgment as US-[Count No.] Memo.; its briefs in opposition to Alaska's motions for summary judgment as US-[Count No.] Opp.; its reply briefs in support of its motions for summary judgment as US-[Count No.] Reply, and its exhibits as Exh. US-[Count No.]-[Exhibit No.].

diction; (5) dismiss Alaska's motion for summary judgment on count III as moot; and (6) order that Alaska take nothing on counts I, II, and IV of its amended complaint." Rep. 1; see Rep. 294. Specifically, the Master recommends that the Court:

- reject Alaska's contention, in Count I of its amended complaint, that the State possesses title to pockets and enclaves of marine submerged lands within the Alexander Archipelago on the theory that the waters above those lands constitute "historic inland waters." Rep. 9-138.

- reject Alaska's contention, in Count II of its amended complaint, that the State possesses title to pockets and enclaves of marine submerged lands within the Alexander Archipelago on the theory that the waters above those lands constitute heretofore-unnoticed juridical bays. Rep. 138-226.

- reject Alaska's contention, in Count IV of its amended complaint, that Alaska possesses title to marine submerged lands within Glacier Bay National Park and Preserve (formerly Glacier Bay National Monument) on the theory that, when Congress set apart that area for federal use, it retained only the uplands and not the submerged lands therein. Rep. 227-276.

- enter the United States' unopposed disclaimer of title, which makes clear, in response to Count III of Alaska's amended complaint, that the United States makes no claim that the creation of the Tongass National Forest, by itself, has resulted in federal retention of marine submerged lands within the Alexander Archipelago. Rep. 276-294.

The Master's recommendations, if adopted, will resolve all contested issues and end the litigation in this case. See Rep. 1, 294.

STATEMENT

Alaska seeks to quiet title, under the Quiet Title Act of 1972, 28 U.S.C. 2409a(a), to marine submerged lands in a region known as the Alexander Archipelago. That region encompasses an area of southeastern Alaska that extends approximately 500 miles from north to south and 100 miles from east to west and includes more than 1000 islands. See Rep. 2, 302 (map). Alaska claims entitlement under the equal footing doctrine, see *United States* v. *Alaska*, 521 U.S. 1, 5 (1997) (*Alaska*), and the Submerged Lands Act of 1953 (SLA), 43 U.S.C. 1301 *et seq*.

Taken together, the equal footing doctrine and the SLA recognize that a State generally has title to submerged lands beneath inland navigable waters and beneath marine waters within its boundaries, which generally extend 3 geographic (nautical) miles from the State's coastline, but that the United States may prevent title from passing to the State by retaining title at the time of statehood. Rep. 3. See *Alaska*, 521 U.S. at 35; 43 U.S.C. 1301(b), 1311(a), 1313(a). The location of the State's coast line, which generally follows the low-water line and crosses the mouths of rivers and bays, is determined in accordance with principles set out in the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, [1964] 15 U.S.T. 1606, T.I.A.S. No. 5639 (Convention). See Rep. 5-9 (terminology and basic principles).

Alaska claims title to marine submerged lands within the Alexander Archipelago on four distinct theories that are set out, respectively, in the four counts of its amended complaint. Count I alleges that the waters of the Alexander Archipelago are inland waters, even though they do not meet the legal requirements for inland waters, because they have been historically treated as inland waters. Am. Compl. to Quiet Title ¶¶ 7-9 (Am. Compl.). Count II alleges that the waters also qualify as inland waters on the novel theory that, if certain islands are treated as mainland, the waters would

lie within what Alaska characterizes as several juridical bays. *Id.* ¶ 25. According to Alaska, under those theories, the submerged lands located beneath those alleged juridical bays, or within 3 nautical miles seaward of the limits of those alleged juridical bays, passed to the State under the equal footing doctrine and the SLA. *Id.* ¶¶ 15, 38.

Counts III and IV address the question whether the United States retained title to some of the submerged lands at issue; and thereby prevented them from passing to Alaska under the equal footing doctrine and the SLA. Alaska asserts in Count III that the United States did not retain submerged lands on account of the creation and enlargement of the Tongass National Forest, Am. Compl. ¶ 44, while Alaska asserts in Count IV that the United States did not retain submerged lands on account of the creation and enlargement of Glacier Bay National Monument, which now is part of Glacier Bay National Park and Preserve, *id.* ¶¶ 59-61. See Rep. 4.

On cross-motions for summary judgment, the Special Master rejected Alaska's claims of title to submerged lands under Counts I, II, and IV. See Rep. 1, 294. The Master concluded that the waters within the Alexander Archipelago are not historic inland waters (Rep. 9-138), that the supposed juridical bays that Alaska identified in its amended complaint do not qualify as such (Rep. 138-226), and that the United States did retain the submerged lands within Glacier Bay National Monument (Rep. 227-276). The Master also concluded that the United States has properly disclaimed retention of title to submerged lands within the Tongass National Forest insofar as any such claim is based on the creation or expansion of the Tongass National Forest, that the disclaimer moots Alaska's motion for summary judgment on Count III of its amended complaint, and that the entry of the disclaimer would require dismissal of Count III for lack of jurisdiction. Rep. 276-294.

SUMMARY OF ARGUMENT

The Special Master's thorough and comprehensive report correctly resolves Alaska's claims to ownership of marine submerged lands in the vicinity of the Alexander Archipelago. The Master recognized that Alaska, like other coastal States, is generally entitled to submerged lands within 3 miles of its coast line. The Master rejected, however, Alaska's flawed historic and juridical theories that would go further and grant Alaska title to pockets and enclaves of submerged lands more than 3 miles from shore. The Master also recognized that, upon Alaska's entry into the Union, the United States granted the State most of the federally-owned submerged lands within that 3-mile belt. The Master rejected, however, Alaska's improbable contention that the United States relinquished submerged lands within what was then Glacier Bay National Monument and is now Glacier Bay National Park and Preserve. The Master correctly determined that the United States retained all of the Monument, including the submerged lands beneath Glacier Bay itself, to preserve, protect, and allow scientific study of the Monument's unique and treasured natural features, including the tidewater glaciers, remnants of interglacial forests, and flora and fauna that are integrally associated with the submerged lands.

Although Alaska rightly notes that the Alexander Archipelago encompasses a vast area, only a small portion of the associated submerged lands—the pockets and enclaves at issue in Counts I and II and the Glacier Bay submerged lands at issue in Count IV—is actually in dispute. See Rep. 10-11, 302 (map). Contrary to Alaska's exceptions, the Master applied largely settled law to uncontested facts to reach analytically sound conclusions that comport with historic fact, geographic reality, and common sense. The United States addresses Alaska's exceptions in the same logical order that the Master followed in preparing his report.

1. Alaska contends that it is entitled to pockets and enclaves of submerged lands more than 3 miles from shore on the theory that the whole of the Alexander Archipelago should be viewed as an "historic ba[y]." See Convention Art. 7(6), 15 U.S.T. 1609. Alaska acknowledges (Br. 22) that the Special Master identified the correct legal standard for assessing historic inland waters claims: Alaska must show that the United States exercised the power to exclude all foreign vessels from the area and did so continuously with the acquiescence of foreign nations. Rep. 13-14. The Master's exhaustive analysis of the historic record, Rep. 23-138, which specifically focused on the *best* evidence that Alaska could muster, Rep. 115-125, demonstrates that Alaska cannot satisfy that standard, Rep. 129-135, 137-138. Alaska challenges the Master's conclusion based on isolated incidents that have, at best, inconclusive historic significance. See AK Br. 22-37. The Master's report itself squarely answers each of Alaska's objections.

2. Alaska alternatively contends (Br. 37-50) that it is entitled to pockets and enclaves of submerged lands more than 3 miles from shore on the theory that the whole of the Alexander Archipelago should be viewed as two huge—but heretofore unnoticed—juridical bays. See Convention Art. 7, 15 U.S.T. 1609. The Master correctly rejected Alaska's extraordinary contention. He demonstrated that Alaska wrongly seeks to characterize a series of discrete islands, separated by navigable channels, as extensions of the mainland. Rep. 138-198. The Master further concluded that, even if the islands were imagined to be mainland, they would not result in creation of anything that would qualify in law as a juridical bay. Rep. 198-226.

3. Alaska also contends (Br. 10-21) that it is entitled to the submerged lands within Glacier Bay National Monument. The Master applied the controlling principles set forth in *United States* v. *Alaska*, 521 U.S. 1 (1997), and correctly

rejected Alaska's contention. The Master concluded, based on the Monument's boundary description and its purposes, that the United States had clearly reserved those submerged lands as part of the Monument. Rep. 227-264. He further concluded that Congress clearly expressed its intention, in Section 6(e) of the Alaska Statehood Act (ASA), 72 Stat. 340, to retain the submerged lands. Rep. 264-276. The Master explained that Section 6(e) retains federal reservations, including the submerged lands therein, that had been set aside for "the protection of wildlife" and that the Monument had been set aside for that purpose. Rep. 272-273. He specifically rejected, as inconsistent with *Alaska*, Alaska's contentions that application of Section 6(e) depends on which subdivision of the Interior Department manages the refuge or whether the reservation's "sole purpose" was wildlife conservation under certain federal statutes. Rep. 267-276.

ARGUMENT

I. THE SPECIAL MASTER CORRECTLY DETERMINED THAT THE WATERS OF THE ALEXANDER ARCHIPELAGO ARE NOT HISTORIC INLAND WATERS

A. The Special Master's Analysis

The Special Master rejected Alaska's historic inland waters claim based on his exhaustive study of the extensive record that the parties submitted on the characterization and usage of the waters of the Alexander Archipelago. The Master first conducted an "overview" of Alaska's claim, describing the geographic characteristics of the waters at issue, and the Court's past treatment of historic waters claims. Rep. 10-13. He next identified the Court's test for historic inland waters claims:

> [W]here a State within the United States wishes to claim submerged lands based on an area's status as historic inland waters, the State must demonstrate that 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.

Rep. 13-14 (quoting *Alaska*, 521 U.S. at 11 (citation omitted)). The Master recognized that, to meet that test, "the exercise of sovereignty must have been, historically, an assertion of power to exclude all foreign vessels and navigation." Rep. 14, 109 (quoting *United States* v. *Alaska*, 422 U.S. 184, 197 (1975) (*Alaska (Cook Inlet)*)).

The Master next determined that resolution of the dispute on motions for summary judgment was appropriate. Rep. 17-22.[2] He then conducted a detailed examination of documents from 1821 to the present, which constitute the historic record. Rep. 23-107. He organized his examination over five distinct historic periods: (1) Russian sovereignty (1821-1867) (Rep. 23-38); (2) early American sovereignty (1867-1903) (Rep. 38-55); (3) the 1903 U.S.-Britain Boundary Arbitration (Rep. 56-63); (4) later American sovereignty (1903-1959) (Rep. 63-89); and (5) the post-statehood era (1959-present) (Rep. 89-107). Based on that detailed examination, he identified and analyzed the evidence that best supported the parties' respective positions (Rep. 107-128).

The Master concluded that "Russia and the United States historically did not assert authority to exclude vessels from

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[2] The Master noted that: (1) "on nearly every relevant point, the parties do not dispute the material historic facts," but instead "contest the significance or proper interpretation of undisputed facts" (Rep. 20); (2) "even on the few points as to which a factual dispute appears to exist, a closer look reveals that the problem is simply that the available historic evidence is less than complete and that the parties' dispute is still really over the interpretation of the available undisputed facts" (*ibid.*); and (3) the parties' voluminous record exhibits "appear to include all of the evidence that the parties have been able to compile with regard to count I" (Rep. 21). The Master concluded that, under the circumstances, conducting a trial, in which the same evidence would be submitted to the same decisionmaker, would serve no useful purpose and that a resolution through summary judgment is therefore appropriate. Rep. 21-22.

making innocent passage through the waters of the Alexander Archipelago." Rep. 109. He determined that "Alaska, at best, has uncovered and presented only 'questionable evidence' that the United States exercised the kind of authority over the waters of the Archipelago that would be necessary to prove a historic waters claim." Rep. 129. He further concluded that Alaska's inability to establish "this essential element of its historic inland waters claim," by itself, "constitutes a sufficient basis for recommending that the Court award summary judgment to the United States on count I of the complaint." *Ibid.* See Rep. 137-138.

B. The United States' Reply To Alaska's Exception

Alaska challenges the Master's rejection of the State's historic inland water claim, arguing that he gave insufficient weight to particular historic incidents. AK Br. 22-37. The Master correctly determined that those incidents have, at best, inconclusive significance. The United States agrees and responds to Alaska's jumbled series of objections in the same logical chronology that the Master employed.

1. Alaska Has Failed To Show That Russia And The United States Exercised Sufficient Sovereign Authority Over The Archipelago Waters To Establish An Historic Inland Waters Claim. Since Russia first laid claim to Alaska, foreign nations have freely navigated the waters of the Alexander Archipelago. Alaska's claim that those waters should nevertheless be treated as historic inland waters depends on a handful of ambiguous statements and inconsequential events occurring over a period of more than 150 years. Alaska's evidence, whether viewed individually or taken as a whole, does not demonstrate that either Russia or the United States asserted "the power to exclude all foreign vessels and navigation." Rep. 14, 109 (quoting *Alaska (Cook Inlet)*, 422 U.S. at 197).

a. The Dryad, Loriot, And Chichagoff Incidents (1834-1836). Alaska claims (AK Br. 29-31) that Russia asserted the

power to exclude foreign vessels during the period, from 1821 to 1867, when Russia exercised sovereignty over the Alexander Archipelago as part of the Russian Possessions in North America. Alaska relies (Br. 29-31) on three incidents, arising between 1834 and 1836, relating to disputes over the interpretation of Russian-British and Russian-American treaties.[3]

As the Master explained, Russia entered into treaties with the United States in 1824 and Great Britain in 1825 that authorized citizens of the United States and Great Britain to enter recognized inland waters and set foot on shore within Russian America for a 10-year period to engage in trading and fishing—activity that went beyond the right of innocent passage. Rep. 25-30. Those treaties cannot form the basis of an historic inland waters claim because Russia asserted no right in those treaties to restrict either nation from making innocent passage through the Archipelago to reach those inland waters and shore. *Ibid.* To the contrary, the Russian-British Treaty necessarily *assumed* that British ships were entitled to traverse Archipelago waters to reach inland waters, such as the Stikine River, that were the subject of the treaty. Rep. 28-29, 114. Alaska's contrary claim rests on its misunderstanding of three events that occurred between 1834 and 1836.

In the first incident, a Russian brig stopped a British trading vessel, the *Dryad*, from proceeding up the Stikine River. See Rep. 30-31. As the Master explained, that incident "does not define Russian policy with respect to navigation of either

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[3] Alaska does not challenge the Master's conclusion that Czar Alexander I's Ukase of Sept. 4, 1821, which purported to exclude foreign vessels from approaching within 100 Italian miles of the Russian-American coast, does not provide a basis for an historic inland waters claim. See Rep. 24-25. As this Court has itself ruled, the ukase cannot support an historic inland waters claim because it "was unequivocally withdrawn in the face of vigorous protests from the United States and England." Rep. 24-25 (quoting *Alaska (Cook Inlet)*, 422 U.S. at 191 n.11).

the Stikine River or the waters of the Archipelago" because Russia's government "did not admit that the incident had happened, and assured Britain that no interference would occur in the future." Rep. 31-32. Alaska cites the *Dryad* incident (Br. 30 n.18), but the State does not dispute that the apparent cause of this isolated incident was that the ship captains encountered "language difficulties." Rep. 30, 31 (citing Exh. US-I-2 p.21).

In the second incident, the Russian brig *Chichagoff* patrolled the southern border of Russian America in March 1835 to intercept foreign vessels for the purpose of "deliver[ing] written notice of the expiration of the treaty provisions" that had allowed American and British ships to fish and trade with natives. Rep. 32 (quoting Exh. AK-13 p.70). The Master correctly concluded that the Russian brig did no more than "provide traders with notice of the expiration of the treaties. Rep. 33. Alaska argues that the *Chichagoff* conducted a "blockade" (Br. 30), but the Master correctly rejected that speculation, finding no evidence that the *Chichagoff* "sought to prevent foreign vessels from making innocent passage through the waters of the Alexander Archipelago." Rep. 33. As the Master recognized, Russia did not suspend the right of innocent passage by forbidding traders from entering Russian ports, setting foot on Russian territory, or engaging in proscribed fishing and trading activities. *Ibid.*[4]

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[4] The Convention expresses the historical understanding that innocent passage "includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress." Art. 14(3), 15 U.S.T. 1610. It does not include passage that is "prejudicial to the peace, good order or security of the coastal State" or that violates the coastal nation's fisheries laws. Art. 14(4) and (5), 15 U.S.T. 1610. A nation is entitled to "take the necessary steps in its territorial sea to prevent passage which in not innocent." Art. 16(1), U.S.T. 1611. See US-I Opp. 4; 4 M. Whiteman, *International Law* 343-371 (1965) (discussing innocent passage).

In the third incident, a Russian brig stopped the American vessel *Loriot*, which had made land in Russian America in late 1836, and ordered that vessel to leave Russian waters. Rep. 33-37. As the Master explained, the report of that incident establishes that the *Loriot*, which had entered the Russian harbor of Tuckessan and later sought to enter the Russian harbor of Tatesky for the purpose of trading, was not engaged in innocent passage and was therefore subject to exclusion. Rep. 34-37. Alaska contends (Br. 30-31) that the Master "merely speculated" that the Russian brig repelled the *Loriot* from "waters within the distance of a cannon shot [viz., the territorial sea]" (Rep. 37). Alaska, however, bears the burden of establishing that Russia excluded the vessel—which was plainly not engaged in innocent passage—from an area within the Archipelago that would constitute territorial or high seas. The record demonstrates only that the *Loriot* impermissibly entered the inland waters of Russian harbors for the purpose of pursuing proscribed activity and that Russia permissibly exercised its right of exclusion. Rep. 36-37; note 4, *supra*; US-I Opp. 10-11.

In sum, Alaska has produced no evidence that Russia continuously attempted to exclude vessels from innocent passage through the waters of the Alexander Archipelago during the period of Russian sovereignty. See US-I Memo. 32-33; US-I Opp. 6-11; US-I Reply 5-8.

b. The Letter From Secretary Of State Thomas F. Bayard (1886). Alaska's exception does not put forward any affirmative evidence that the United States prevented innocent passage during the period of early American sovereignty (1867-1903). Rather, Alaska attempts only to overcome convincing affirmative evidence to the contrary. Secretary of State Bayard's 1886 letter to Secretary of the Treasury Manning (Exh. US-I-6) expressly states that the United States claims only a traditional 3-mile territorial sea along the coast of Alaska. See Rep. 45-49. The Master con-

cluded that this document, which "unambiguously support[s]" the United States' position, is especially persuasive because it is an express contemporaneous statement from the Secretary of State himself articulating "the official position of the State Department" that foreign vessels could make "free transit" through the Alexander Archipelago. Rep. 45-47, 109-110. "Officials who held this belief could not, and evidently did not, claim that the United States could exclude innocent passage through the waters." Rep. 110.[5]

Alaska argues (Br. 31-32) that Secretary Bayard's letter is "hardly probative" because "it was internal correspondence that primarily addressed a dispute on the East Coast" and did not put foreign nations on notice of the American position. The Master correctly rejected those contentions. Secretary Bayard's 11-paragraph letter sets out the official position of the United States with respect to both the Atlantic and Pacific coasts, noting that the government must maintain a consistent international position on each shore. Rep. 45-49, 109-110. The letter, which was made available to the world, see 1 J. Moore, *Digest of International Law* 718-721 (1906), notes that the United States had "asserted" those rights against Russia and anticipated that foreign nations would expect reciprocal respect of their rights. Rep. 47.

In short, Alaska cannot overcome the obvious import of Secretary Bayard's letter. Furthermore, Alaska has no basis, even apart from Secretary Bayard's letter, for claiming that the United States took any action between 1867 and

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[5] Secretary Bayard's letter specifically underscores that the United States: (1) had consistently claimed a territorial sea of only 3 miles (Exh. US-1-6 pp.14a-16a); (2) measures the territorial sea from the shores of the mainland and the islands and not from lines connecting islands (*id.* at 16a); (3) recognizes the right of innocent passage through its territorial sea (*id.* at 18a); and (4) refused to recognize Russian jurisdiction beyond 3 miles of the shores of Alaska and cannot, therefore, "claim greater jurisdiction against other nations, of seas washing territories which we derived from Russia under the Alaska purchase" (*ibid.*). See Rep. 45-49.

1903 that would give rise to an historic inland waters claim. See Rep. 49-55; US-I Memo. 32-33; US-I Opp. 11-14.

c. The Proceedings Of The Alaska Boundary Tribunal (1903). Alaska predicates its historic inland water claim primarily on several statements that it has extracted from the 7-volume *Proceedings of the Alaska Boundary Tribunal*, S. Doc. No. 58-162 (1903-1904) (*ABT Proc.*). See AK Br. 22-24. The ABT convened to resolve a dispute between the United States and Britain over the *land* boundary between Alaska's southeastern panhandle and Canada. Rep. 58.[6] Alaska contends that the United States' counsel made statements in those proceedings that support Alaska's historic inland waters claim. The Master interpreted the counsel's statements to express the view that the "political coast line" of Alaska runs along the outside edge of the Alexander Archipelago, Rep. 56-63, but the Master ultimately concluded that those statements are not a legally sufficient assertion of authority to establish an historic waters claim, Rep. 116-119.[7]

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[6] As the Master noted (Rep. 56), the report of the special master in the *Alaska* litigation "provides a concise and accessible summary of [the ABT] proceedings." See Report, *Alaska*, No. 84 Orig., at 61-65 (Mar. 1996).

[7] The United States disagrees with the Master's characterization of the counsel's statements as expressing an authoritative position of the United States. See Rep. 61. The counsel's statements, read in context, merely attempted to show that, if Britain's arguments in that case were accepted, they would lead to the absurd consequence that the Alexander Archipelago would have two political boundaries. See US-I Memo. 22-27; US-I Opp. 14-17; US-I Reply 10. The counsel did not purport to make a maritime claim, and his written brief was careful to point out, under the argument heading, "The Political Coast Line Not Involved In This Case," 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." Exh. US-I-30, Pt. 1, at 17-18. See US-I Memo. 27; US-I Opp. 16; US-I Reply 10. Moreover, other government statements from that period contradict any suggestion that counsel may have made that the United States draws 10-mile closing lines around coastal archipelagos. US-I Memo. 15-16. This Court, however, need not resolve the proper characterization of the counsel's statements. As the Master concluded, those statements, even when

Alaska challenges the Master's conclusion (Br. 22-24), contending that the counsel's statements—which referred to a coast delimitation theory that was inconsistent with U.S. practices before and after the ABT proceedings (*e.g.*, Rep. 45-49, 63-65, 69-71, 72-75)—were sufficiently public that foreign nations, other than Britain, would have been aware of a United States claim. The Master, however, has fully answered Alaska's objections, explaining why the statements of counsel before the ABT were an inadequate foundation for an extraordinary international claim:

> The status of the waters of the Alexander Archipelago was not at issue before the Tribunal. The Tribunal did not discuss the arguments of counsel or rule on their validity. The arguments take up only a few paragraphs in a seven volume record. For these reasons, it would be unrealistic to conclude that counsel's assertions at the tribunal should have made foreign nations (other than Britain) aware that the United States was asserting a right to exclude them.

Rep. 118.[8] The Master's reasoning is especially compelling in light of the precedent that a contrary conclusion would set. As the Master pointed out, if this Court were to recognize an historic inland waters claim on so fragile a basis, the United States would itself become vulnerable to similarly weak

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interpreted as Alaska urges, are insufficient to establish an historic inland waters claim. Rep. 118-119.

[8] Alaska notes (Br. 23) that Norwegian counsel discovered and cited the United States counsel's statements during a 1951 dispute with Britain over the scope of Norway's inland waters. But that was nearly 50 years later and, as the Master pointed out, the United States had made clear to Norway *in 1949* that the United States did *not* claim the Archipelago waters as inland. Rep. 84-85; US-I Memo. 41-42. In any event, "[t]he ability of one foreign nation to discover the United States' argument when litigating a related issue * * * does not mean that foreign nations should have known of the United States' position." Rep. 118 n.34. Alaska has produced no evidence that those involved in actual navigation of the Archipelago waters knew of, or relied on, the counsel's statements.

claims by other nations that would restrict the freedom of the seas. Rep. 118-119. See US-I Memo. 21-24.

d. Fisheries Enforcement And The Marguerite Incident (1924). Alaska challenges (Br. 25-29) the Master's rejection of its argument that the federal government's enforcement of fisheries regulations in the Alexander Archipelago, and in particular its seizure of a Canadian fishing vessel, the *Marguerite*, supports an historic inland water claim. The Master noted that "Alaska presents no definitive examples of actual enforcement of fishing regulations against foreign nationals within the [Archipelago's] pockets and enclaves." Rep. 119. In the only example that Alaska offered—the seizure of the *Marguerite*—the location of the seizure "remains unsettled." *Ibid.*; see Rep. 66-68. The Master correctly recognized that, in any event, the federal government's enforcement of fisheries regulations is immaterial because "even if Alaska could prove the factual premise of its argument— that the United States enforced fishing regulations in the pockets and enclaves at issue—this proof would not lead to the conclusion that the United States regarded the waters of the Archipelago as inland waters or territorial sea." Rep. 120-121. As this Court ruled in *Alaska (Cook Inlet)*, the federal government's fisheries enforcement jurisdiction "frequently differs in geographic extent from the boundaries claimed as inland or even territorial waters." 422 U.S. at 198-199. See Rep. 120-121.[9]

Alaska first challenges (Br. 27) the Master's determination that "[t]he record does not establish with clarity where the Coast Guard seized the *Marguerite*." Rep. 67. Alaska concedes (Br. 27 n.17) that "[t]he Coast Guard initially de-

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[9] For example, the United States currently maintains an Exclusive Economic Zone extending 200 miles from the United States coast and prohibits foreign fishing, without permission, within that zone. 16 U.S.C. 1811 *et seq.* The federal government's enforcement of that prohibition cannot support an historic inland waters claim because the United States continues to allow passage through those waters. See note 4, *supra*.

scribed the seizure as having occurred at a non-existent location." See Rep. 67-68; US-I Opp. 19; Exh. US-I-20. But Alaska contends (Br. 27) that a "contemporaneous Coast Guard map" shows "precisely where the *Marguerite* was intercepted, in an area unquestionably more than three miles from land." See Exh. AK-462 (reproduced at AK Br. 10a). That map, however, was prepared long after the incident, and the Master correctly concluded, in light of the Coast Guard's inconsistent positions, that Alaska failed to establish that the Coast Guard seized the *Marguerite* for fishing within a pocket or enclave. Rep. 67, 119. See US-I Opp. 18-20.[10]

More generally, Alaska is wrong in contending (Br. 28-29) that fisheries enforcement that discriminates against foreign vessels supports an historic inland waters claim. As the Master explained, Alaska based that contention on an erroneous reading of a passage from this Court's decision in *Alaska (Cook Inlet),* 422 U.S. at 197-198. See Rep. 121-122. The Court did not state that a government's prohibition of foreign vessel fishing alone manifests an inland waters claim; rather "the Court simply recognized that the Alien Fishing Act was the only law cited in the case that clearly applied to foreign vessels." Rep. 121. Alaska's distinction, moreover, makes no sense; a nation can prohibit foreign fishing in its territorial waters, and beyond, without restricting innocent

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[10] Alaska is mistaken in characterizing Exh. AK-462 as a "contemporaneous map." The Coast Guard plotted the seizure on an edition of the U.S. Coast and Geodetic Survey Chart 8102 that was published in October 1925, at least 15 months after the *Marguerite* incident. See Exh. AK-461. (Exh. AK-462 is derived from Exh. AK-461, but does not include the chart's publication and issuance dates.) The Coast Guard apparently prepared the plot long after the incident took place, presumably in response to a British protest. See Rep. 67; Exh. AK-461. The British protest underscores that, even if the *Marguerite* were seized for fishing in a pocket or enclave, foreign nations did not acquiesce in any claim that the seizure was legitimate. Rep. 132. And of course, an isolated enforcement action would not satisfy the requirement of a continuous assertion of sovereignty for an extended period.

passage, which is the prerequisite for an inland waters claim. See Rep. 120-122; notes 4 & 5, *supra*; US-I Opp. 18.[11]

Alaska's reliance on the United States' fisheries enforcement and the *Marguerite* incident is especially infirm when considered against the United States' repeated refusal, from 1903 until Alaska's statehood, to treat the waters of the Alexander Archipelago as inland waters. Of particular significance, the Departments of Commerce and State exchanged letters expressing their joint position that the Archipelago waters are not inland waters. Rep. 70-71, 110-111. The Master's report answers Alaska's remaining arguments from that era, amply demonstrating that the historic record is fatal to Alaska's claims. Compare AK Br. 26, with Rep. 110-112, 127-128. See US-I Memo. 33-38; US-I Opp. 18-26.

e. Post-Statehood Evidence (1959 to Present). Alaska makes mention (Br. 24, 27) of several post-statehood documents, including judicial proceedings culminating in *Metlakatla Indian Community* v. *Egan*, 362 P.2d 901 (Alaska 1961), government statements in a Supreme Court brief in *United States* v. *California*, 381 U.S. 139 (1965) (Exh. US-I-6

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[11] Alaska's quotation (Br. 29) from a United Nations study provides no support for its contention. That study merely indicates that a nation's continuous assertion of exclusive fishing rights might give rise to an historic fisheries claim, not an historic inland waters claim. *Ibid.* Alaska's reference to the Court's recounting of the Shelikoff Strait incident (Br. 28) in *Alaska (Cook Inlet)* also provides no support for its contention. The Court "scutini[zed]" Alaska's 1960 seizure of a Japanese vessel "more than three miles from shore" because the State's seizure in that case was evidence of *Alaska's* "assertion of sovereignty to exclude foreign vessels altogether." 422 U.S. at 201. The Court determined from the record that, at the time of the seizure, "Alaska clearly claimed the waters in question as inland waters," *id.* at 203, and Alaska justified the seizure on *that* basis, see 73-1888 App. 1186. But the Court concluded that Alaska's assertion of authority was insufficient to establish that the United States claimed those waters as inland waters because "the United States neither supported nor disclaimed the State's position." 422 U.S. at 203. The Court did not suggest that any seizure of a vessel beyond the 3-mile limit would necessarily constitute an inland waters claim. Rather, it specifically rejected that contention. See *id.* at 198-199.

pp.130-131), and statements purporting to show government use of the so-called Pearcy charts for fisheries enforcement purposes (Exhs. AK-103 to AK-107). The Master correctly explained that those documents are inconsequential.

The Master carefully examined the *Metlakatla* decision, which affirmed a post-statehood trial court ruling, entitled *Organized Village of Kake* v. *Egan*, 174 F. Supp. 500 (D. Alaska, Terr. 1st Div. 1959), that the Archipelago waters are historic inland waters. Rep. 89-96. He noted that this Court has previously held that state supreme court decisions regarding historic inland waters are not controlling, Rep. 122-123 (citing *California*, 381 U.S. at 173-175), and he concluded that the Alaska Supreme Court's superficial analysis "is not persuasive," Rep. 123. The Master also found that the government's statements in the 1964 Supreme Court brief in *California*, *supra*, which mistakenly characterized the Archipelago's passages as straits leading only to inland waters, had "little relevance" because the character of those waters was not at issue in that case and the misstatements played no role in the Court's decision. Rep. 96-99, 123-124. Finally, the Master concluded that the Pearcy charts "do not support Alaska's claim" because the United States did not adopt them and Alaska's exhibits "do not identify any specific enforcement actions taken in reliance on those charts." Rep. 99-101, 128. See US-I Opp. 32; US-I Reply 12-15.

The Master correctly concluded that two other considerations are far more relevant. First, no published list of the world's historic waters has ever included the Alexander Archipelago waters. Rep. 88-89, 111. The world would not overlook a claim so vast and significant to international traffic. Rep. 111-112. Second, the United States has expressly informed the world, through its 1971 publication of coastal charts, that it does *not* claim the waters of the Alexander Archipelago as inland waters. Rep. 101-103, 112-114. The Master correctly concluded that Alaska's evidence, taken as

a whole, is insufficient to overcome that international disclaimer, which is entitled to a presumption of validity. Rep. 129. As the Master further observed, Alaska cannot prove that the United States claimed the right to exclude innocent passage within the Archipelago even under a less demanding preponderance-of-the-evidence standard. *Ibid.* Alaska's failure of proof on that point, by itself, warrants granting the United States summary judgment on Count I. *Ibid.*

2. Alaska Cannot Meet The Other Requirements For Establishing An Historic Inland Waters Claim. The Master found that, because Alaska cannot establish the requisite assertion of sovereign authority, it cannot establish a continuous exercise of that authority or foreign acquiescence. Rep. 129-133. He further noted Alaska cannot show that the United States' "vital interests" weigh in favor of Alaska's claim. Rep. 133-135. Alaska's contentions to the contrary are without merit.

a. Continuity. This Court's decisions and past special masters' reports indicate that, to establish an historic waters claim, a nation must continuously assert that claim for at least a century. See Rep. 130; US-I Opp. 32-40. The Master correctly concluded that Alaska's claim that the United States continuously excluded innocent passage from 1903 to 1959, even if substantiated, was of insufficient duration. Rep. 130-131. Alaska now contends (Br. 31) that its evidence should be viewed a continuous assertion of sovereign authority during the period from 1903 to 1971. Even if Alaska's claim could be lengthened by 13 years, it still falls nearly one-third short of the century standard. Of course, the fact remains that Alaska has failed to show *any* sufficient assertion of sovereign authority—much less a single, consistent, and continuing theory for exclusion—on which to base its claim. To the contrary, the Inside Passage of the Archipelago is an international route of travel that, for much of its

history, has been dominated by foreign vessels. See US-I Opp. 38-40.

b. Foreign Acquiescence. The Master pointed out that, because "Russia and the United States did not sufficiently assert authority over the waters of the Alexander Archipelago, it follows that foreign nations could not acquiesce." Rep. 131. He went on to note the complete failure of Alaska's proof on this point. Rep. 131-133. Alaska simply repeats (Br. 34) the flawed evidence that the Master rejected, and his report is sufficient, by itself, to rebut Alaska's arguments. See Rep. 132-133. See also US-I Memo. 40-44; US-I Reply 19-20. As the Master observed, "Alaska has not produced any statement by the government of any nation confirming that it would acquiesce in exclusion of its vessels from the waters of the Alexender Archipelago," and "Alaska also has not presented any opinion from any expert in the law or policy of any foreign nation on the question whether the foreign nation would acquiesce." Rep. 132. See US-I Memo. 8-9.

c. Vital National Interests. The Master correctly concluded that "recognizing the waters of the Alexander Archipelago as inland waters is not vital to the interests of the United States." Rep. 135. Alaska's contentions to the contrary (Br. 36) are without merit. As the Master explained, the United States does not stand to gain commercially or militarily from excluding foreign vessels from the Archipelago waters. Rep. 134-135. To the contrary, if the Court were to validate Alaska's plainly deficient historic inland waters claim, the Court would create a significant adverse international precedent restricting the freedom of the seas. Foreign nations might use that precedent to exclude United States vessels from strategically important offshore waters and correspondingly impair the United States' ability to protect its vital overseas interests. See US-I Memo. 9-10; US-I Opp. 27-29; US-I Reply 19-20.

II. THE SPECIAL MASTER CORRECTLY DETERMINED THAT THE WATERS OF THE ALEXANDER ARCHIPELAGO DO NOT CONSTITUTE TWO HERETOFORE-UNNOTICED JURIDICAL BAYS

A. The Special Master's Analysis

The Master also rejected Alaska's alternative argument that the State is entitled to the submerged lands beneath the pockets and enclaves within the Alexander Archipelago. Alaska's argument hinges on the extraordinary theory that the collection of straits that separate the Archipelago's islands from each other and the mainland should be treated, contrary to their actual physical characteristics, as two huge juridical bays. Alaska discovered those imaginary bays, which it has christened "North Bay" and "South Bay," after it filed this original action. Alaska amended its complaint, without objection from the United States, and the Master determined on cross-motions for summary judgment that "North Bay" and "South Bay" (as well as two smaller proposed-but-abandoned bays) do not exist. Rep. 138-226.

The Master first conducted an overview of the controlling legal principles. Rep. 138-142. See US-II Memo. 4-10; US-II Opp. 31-33. He explained that a juridical bay is "a body of water having geographic features that satisfy criteria specified in article 7 of the Convention." Rep. 138. He further explained that Alaska must prevail on "two general issues" to succeed on its theory. Rep. 140. First, Alaska must establish that the islands it wishes to treat as mainland "can be 'assimilated' to each other or to the mainland to form the sides of the alleged juridical bays." *Ibid.* Second, Alaska must establish that the alleged "bays" that result "meet the requirements stated in article 7." *Ibid.* The Master concluded, and neither party contested, that those issues can be appropriately resolved through motions for summary judgment. Rep. 141-142.

The Master next reviewed the physical characteristics of the area at issue. Rep. 142-147. He then conducted a detailed assessment of whether assimilation was appropriate for each island in question, applying the principles that this Court identified in *United States* v. *Maine*, 469 U.S. 504, 514-520 (1985), and *United States* v. *Louisiana*, 394 U.S. 11, 60-66 (1969). Rep. 147-197. The Master determined that assimilation was inappropriate except in the case of two inconsequential channels that "do not suffice to create the juridical bays alleged by Alaska." Rep. 197. He accordingly concluded, on that basis alone, that the United States was entitled to summary judgment. Rep. 198.

The Master nevertheless analyzed whether, if assimilation were appropriate, the resulting water bodies would "have configurations satisfying the criteria for juridical bays under article 7." Rep. 198. See Rep. 198-226. He concluded that, even if the islands could be assimilated, neither "North Bay" nor "South Bay" would qualify as a juridical bay because neither meets Article 7(2)'s requirement that the proposed bay constitute a "well-marked indentation." Rep. 222.

B. The United States' Reply To Alaska's Exception

Alaska challenges the Master's conclusions on three bases. First, Alaska contends, contrary to the Master's detailed analysis, that this Court's decision in *Maine* supports assimilation of the islands that Alaska proposes to treat as part of the mainland. AK Br. 45. Second, Alaska contends that the resulting land forms, "North Bay" and "South Bay," would constitute sufficiently "well-marked indentations" to qualify as juridical bays. *Id.* at 45-49. Third, Alaska contends, more broadly, that the "rationale for bay recognition" and the "nature of the areas" favor juridical bay status. *Id.* at 49-50. As the United States explained in great detail in its briefs on summary judgment, those arguments are without merit.

1. This Court's Decisions Preclude Alaska's Proposed Assimilations. This Court's decisions recognize that, in

exceptional circumstances, islands may be treated as part of the mainland for purposes of applying the Convention's bay-delimitation principles. See *Maine*, 469 U.S. at 517-519 (approving assimilation of Long Island to New York); see also *Louisiana*, 394 U.S. at 61-65. As the Master explained, the Court has employed "a 'realistic' and 'common sense' approach," considering a variety of geographic, physical, and socio-economic factors that bear on the relationship between the islands and the mainland. Rep. 148-149 (quoting *Lousiana*, 394 U.S. at 63, 64), 151-152. The Master identified those factors (Rep. 153-177) and applied them to each of the islands that Alaska contends should be assimilated (Rep. 177-197). His report contains a chart (Appendix E), showing those islands and the intervening waters. Rep. 306 (Exh. US-II-10). The Master correctly concluded that Kuiu Island cannot be assimilated to Kupreanof Island (Rep. 177-181), Kupreanof Island cannot be assimilated to Mitkof Island (Rep. 181-185), and Dry Island cannot be assimilated to the mainland (Rep. 189-193).[12]

a. Kuiu Island—Kupreanof Island (Keku Strait). The Master correctly concluded that Kuiu and Kupreanof Islands cannot be assimilated, primarily because the waterway that separates them—the generally deep and easily navigable 41-mile-long Keku Strait—is too substantial to be ignored. Rep. 177-181. Alaska does not challenge the Master's determination that Keku Strait, taken as a whole, would preclude assimilation. Instead, Alaska contends (Br. 43) that the

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[12] The Master concluded that "assimilation is warranted between Dry Island and Mitkof Island and between Partofshikof Island and Kruzof Island." Rep. 197. The United States believes that the Master erred in concluding that Dry Island could be assimilated to Mitkof Island because he overlooked the most recent nautical chart (NOAA Chart 17360 (31st ed. Mar. 27, 1999)), which shows a channel at low-water between those islands. Compare Rep. 186, with US-II Reply 18-19. The Court need not reach that issue, however, because that assimilation would "not suffice" to create Alaska's proposed juridical bays. Rep. 197.

Master erred because he did not limit his focus to the 18-mile portion of that channel called "Rocky Pass," which is generally narrower and shallower than the rest of Keku Strait.

The Master carefully considered and correctly rejected Alaska's proposed approach. Rep. 153-160. He concluded that the relevant intervening waters are, as the United States urged, "the entire area across which the two landforms of interest face one another." Rep. 154 (quoting US-II Opp. 7). The Master identified three compelling reasons favoring the United States' approach—it provides certainty, it is not subject to manipulation, and it is consistent with this Court's statements that assimilation is limited to "exceptional" circumstances. Rep. 153-160.[13]

A "mere glance at a map of the region" (*Maine*, 469 U.S. at 514) reveals that the Master's position comports with reality and common sense. See Rep. 306. Kuiu and Kupreanof Islands are separate land forms separated by Keku Strait, a substantial intervening waterway that cannot be realistically ignored. The Master correctly evaluated all of the evidence and properly treated Kuiu and Kupreanof Islands in law as what they are in fact—two distinct islands separated by a navigable strait. Rep. 177-181.

b. Kupreanof Island—Mitkof Island (Wrangell Narrows). The Master similarly concluded that Kupreanof and

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[13] The Master explained that the United States' position provides certainty because it identifies the intervening waters through an accepted objective measure—the "45-degree test"—that the Court has used in other contexts. Rep. 154-158. By contrast, Alaska's position, which identifies the intervening waters through a subjective evaluation of where the waters are "pinched," would inevitably generate controversies over where the intervening waters begin and end. Rep. 155. Because Alaska relies on subjective criteria, its approach is "highly manipulable" and could lead foreign nations to "argu[e] for assimilation of islands that are not 'realistically' parts of other land forms." Rep. 158. And because "Alaska's approach would make assimilation substantially easier than the United States' approach," it would erode the understanding that assimilation is limited to the "'exceptional case.'" *Ibid.* (quoting *Maine*, 469 U.S. at 517).

Mitkof Islands cannot be assimilated, primarily because the waterway that separates them—the heavily-used 15-mile-long Wrangell Narrows—is also too substantial to be ignored. Rep. 181-185. In the case of Wrangell Narrows, Alaska has abandoned its approach of identifying "pinched waters." Rep. 181. Rather, Alaska primarily takes issue (Br. 40-41) with the Master's determination that the waterway has "significant navigational utility" (Rep. 183).

Alaska characterizes Wrangell Narrows as a "shallow, rocky and tortuous channel" (Br. 41), neglecting to describe its *actual* utility. Since the 1800s, Wrangell Narrows has served as a vitally important route for ships of various flags engaged in commercial navigation. For example, as the Master pointed out, even before dredging, Wrangell Narrows was part of "the regular route taken by vessels running to all southeastern Alaska points from the ports on the Pacific coast of the United States and Canada." Rep. 183 (quoting Exh. AK-146).[14] Today, Wrangell Narrows is a part of what Alaska "aptly call[s] the Alaska Marine Highway." AK Compl. Br. 2. It is currently used by large vessels, including "cruise ships, State ferries, barges and freight boats." Rep. 183 (quoting 8 NOAA, *U.S. Coast Pilot* ¶251, at 168 (1999)). See US-II Memo. 36-38.[15]

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[14] In 1902 alone, "the 'large traffic' through Wrangell Narrows included 19,090 passengers and 124,681 tons of cargo." Rep. 183 (quoting Exh. AK-146 p.5). Two steamship companies made 187 transits through the Narrows in one year. *Ibid.* The historic documents show that Wrangell Narrows has long been the favored navigation route for national and international traffic from Seattle to Skagway. See Exh. US-II-31.

[15] The Coast Guard reports that Wrangell Narrows is regularly used by Alaska state ferries of up to 410 feet in length with a 75-foot beam drawing 17 feet; tugs up to 120 feet long and 17 foot draft; barges up to 320 feet long and 22 foot draft with an average length of tow of 500 feet; cruise ships up to 407 feet long and 53 feet across with drafts of 16 feet; and fishing vessels up to 150 feet long drawing 15 feet. Exh. US-II-27 p.3; Exh. US-II-1 p.50.

The Master correctly concluded that Wrangell Narrows conspicuously separates Kupreanof Island from Mitkof Island and precludes assimilation. Rep. 183-185. Wrangell Narrows is an important shipping lane that is heavily used in international commerce as "*a principal channel of navigation*." Rep. 184.[16] That important international sea route cannot be treated as if it were dry land. Contrary to Alaska's contentions (Br. 41-42), Kupreanof and Mitkof Islands also lack a geologic and socio-economic connection, which further weighs against assimilation. See Rep. 185.

c. Dry Island—Alaska Mainland. If Kuiu Island cannot be assimilated to Kupreanof Island, and Kupreanof Island cannot be assimilated to Mitkof Island, then "North Bay" and "South Bay" do not exist, and it makes no difference whether Dry Island can be assimilated to the Alaska mainland. Rep. 193. In any event, that assimilation would be inappropriate. The Master correctly rejected Alaska's contention below that an island can "automatically become part of the mainland, for the purpose of creating a bay," merely because "the island may form part of the coast line." Rep. 191. Alaska does not renew that argument here. Alaska did not attempt to establish before the Master that Dry Island could be assimilated under the analysis set forth in *Maine*. See Rep. 192-193. The Court should accordingly reject Alaska's unsubstantiated (and forfeited) assertion (Br. 44-45) that those factors "all favor assimilation." Alaska's failure to provide a basis for assimilating Dry Island to the mainland is fatal, by itself, to Alaska's associated juridical bay claims.

2. Even If Alaska's Proposed Assimilations Were Appropriate, Alaska's Proposed "North Bay" And "South Bay" Would Not Qualify As Juridical Bays. Alaska chal-

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[16] Alaska's comparison of Wrangell Narrows to the New York's East River is unpersuasive. Wrangell Narrows, unlike the East River, "serves as the principal opening between two bodies of water" and is heavily used by foreign flag vessels, not as a destination, but rather as a route for international transit. Rep. 184-185.

lenges (Br. 46-49) the Master's determination that, assimilation issues aside, neither "North Bay" nor "South Bay" would qualify as a "well-marked indentation" under Article 7 of the Convention (15 U.S.T. 1609). The Master reached the correct result in the case of each supposed bay on essentially the same rationale. He reasoned that an indentation is "well marked" if it possesses "physical features so that a mariner looking at charts that do not show bay closing lines may perceive the limits of the bay and avoid making illegal entry into inland waters." Rep. 215.[17]

To say the least, both North Bay and South Bay lack the characteristic of "geographic obviousness." Rep. 216. The Master agreed with the United States that the juridical bays that Alaska seeks to create in this case "are not only impossible for mariners to identify, but they went undiscovered by numerous geographic experts and Alaska's own legal counsel until after the commencement of this quiet title suit." *Ibid.* (quoting US-II Memo. 20).[18]

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[17] The Master also concluded, correctly, that "South Bay" does not qualify as a juridical bay because its "depth of penetration" is insufficient. See Rep. 223-225. In doing so, the Master correctly rejected Alaska's flawed approach to measuring the mouth of a juridical bay. Compare Rep. 201-205, with AK Br. 47-49. Although the United States agrees with most of the Master's interpretations of Article 7, see US-II Opp. 31-45, it disagrees with his methodology for measuring the endpoint of penetration. See Rep. 207-208. The United States urged that the endpoint should not extend into waterways adjacent to an asserted bay (such as Lynn Canal in the case of "North Bay") that independently qualify as inland waters. US-II Opp. 42. The Master rejected that approach, despite its "logical appeal," based on his understanding of a pre-Convention decision of the International Court of Justice. Rep. 207-210. The United States suggests that resolution of that issue should await a case in which the answer affects the outcome. See Rep. 198 n.53.

[18] For example, explorers consistently identified the Archipelago waters as "straits" and "passages" rather than "bays"; the State Department's renowned geographer S. Whitmore Boggs did not detect "North Bay" or "South Bay" in his extensive studies of the Archipelago waters; the United States' Coastline Committee did not detect them in preparing its 1971 charts of those waters; and Alaska itself did not detect them in

Alaska contends that its proposed bays are discernible if the mariner simply has the perspicacity to detect Alaska's discredited "island peninsula" and the additional foresight to erase, on that basis, the maze of other Archipelago islands from his charts. AK Br. 46. Alaska plainly demands too much of the mariner, who must navigate on the basis of nautical charts and discernible physical features rather than lawyers' theories. The Master correctly concluded that "if the standard is geographic obviousness, then actual charts of the area and the actual record of observation by experienced navigators and geographers must carry more weight than depictions having islands or other features removed." Rep. 217; see Rep. 223.

3. The Principles Governing The Recognition Of Juridical Bays Counsel Strongly Against Alaska's Proposed Bays. Alaska quotes (Br. 49) this Court's statement in *Maine* that "[t]he ultimate justification for treating a bay as internal waters, under the Convention and under international law, is that, due to its geographic configuration, its waters implicate the interests of the territorial sovereign to a more intimate and important extent than do the waters beyond an open coast." *Maine*, 469 U.S. at 519. That consideration weighs decisively in favor of the United States' position. Article 4 of the Convention recognizes that a "fringe of islands," like the Alexander Archipelago, presents a geographic configuration that is not the equivalent of a bay and does not necessarily implicate the interests of the territorial sovereign to the same extent; it accordingly gives the coastal nation the discretion to determine whether that configuration should be enclosed by straight baselines. 15 U.S.T. at 1608. The United States has declined to draw straight baselines, concluding on balance that the national interest is not well served by treating such areas as inland

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objecting to the 1971 charts or even in its initial complaint in this case. Rep. 216-217. See US-II Memo. 16-22.

waters. See US-II Memo. 4-6, 14-17, 22-24. That self-restraint is essential if the United States is to avoid setting precedents that would inhibit this Nation's ability to navigate off foreign shores.

Alaska's extravagant bay definition theories would nevertheless *require* the United States to treat the Alexander Archipelago as inland waters. Those theories do not simply ignore geographic reality; they overlook the most fundamental sovereign interest at issue—the United States' foreign policy interest in maintaining a consistent and coherent approach to coast line delimitation to promote this Nation's longstanding policy of freedom of the seas. If this Court were to adopt Alaska's expansive theories, it would encourage foreign nations to do the same. Those theories would find similar application on analogous foreign coasts, impairing the United States' right of free navigation off other nation's shores. See US-II Memo. 22-24; US-II Opp. 1-3; US-II Reply 1-2, 3-4. In short, not only do Alaska's theories rest on an artificial and unrealistic vision of the geography of the Alexander Archipelago, they also reflect a short-sighted view of the national interests at stake.

III. THE SPECIAL MASTER CORRECTLY DETERMINED THAT THE UNITED STATES RESERVED AND RETAINED TITLE TO THE SUBMERGED LANDS WITHIN GLACIER BAY NATIONAL MONUMENT

A. The Special Master's Analysis

The Master rejected Alaska's remarkable claim that the very heart of Glacier Bay National Park—Glacier Bay and its submerged lands—belongs to the State. The Master began with an historic overview, Rep. 227-229, explaining that President Coolidge invoked the Antiquities Act of 1906, 16 U.S.C. 431, to create Glacier Bay National Monument, Proclamation No. 1733, 43 Stat. 1988 (1925) (1925 Proclamation), and President Roosevelt expanded the Monument to

include more of Glacier Bay and to extend the Monument's western boundary 3 nautical miles out to sea, Proclamation No. 2330, 4 Fed. Reg. 1661 (1939) (1939 Proclamation). President Eisenhower altered the boundary to exclude specifically described uplands and submerged lands. Proclamation No. 3089, 20 Fed. Reg. 2103 (1955) (1955 Proclamation). In 1980, Congress expanded the boundaries and designated the Monument as part of Glacier Bay National Park and Preserve. 16 U.S.C. 410hh-1(1).[19]

The Master then set forth the legal standards that this Court has enunciated in its four most recent decisions addressing title to submerged lands within the boundaries of federal reservations. Rep. 229-230. Those cases create a "two-step test" of congressional intent to retain submerged lands in federal ownership. *Idaho* v. *United States*, 553 U.S. 262, 273 (2001). The two-step test is satisfied when an Executive reservation clearly includes submerged lands and Congress recognizes the reservation in a way that demonstrates an intent to retain title. *Alaska*, 521 U.S. at 45.

The Master concluded, after careful examination of the record, Rep. 231-264, that the Monument, "as it existed at the time of statehood, clearly included the submerged lands within its boundaries," Rep. 263-264. He considered both "whether Congress was on notice that the Executive reservation included submerged lands" and whether "the purpose of the reservation would have been compromised if the submerged lands had passed to the State." Rep. 230. He concluded that "the text of the documents creating and expanding the Monument and their interpretation by the executive branch supplied notice to Congress that the Glacier

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[19] The Act creating Glacier Bay National Park provides that "[l]ands, waters and interests therein withdrawn or reserved for the former Katmai and Glacier Bay National Monuments are hereby incorporated within and made a part of the Katmai National Park or Glacier Bay National Park." 16 U.S.C. 410hh-2.

Bay National Monument included the submerged lands within its boundaries." Rep. 232.[20]

The Master concluded that the boundaries of both the 1925 and 1939 Proclamations necessarily embrace submerged lands. The 1925 Proclamation states that the reservation contains "approximately 1,820 square miles," a figure that includes both uplands and submerged lands. Rep. 233; Exh. US-IV-9 p.3. The boundary of the 1925 Proclamation, like the boundary of the Coeur D'Alene Reservation in *Idaho*, 533 U.S. at 266-267, 274, crosses Glacier Bay rather than meandering along its shore, and it additionally bends from island to island. Rep. 233-235. As the Master correctly recognized, this Court held in *Alaska*, 521 U.S. at 38-39, that a boundary line drawn in a similar manner around islands off the Arctic Coast of Alaska demonstrated an intent to include submerged lands within the boundary. Rep. 234.

The Master additionally observed that the boundary of the 1939 Proclamation similarly runs along "the principal channel of Excursion Inlet," along "the center of Icy Passage, North Passage, North Indian Pass and Cross Sound to the Pacific Ocean," and then extends 3 nautical miles into the

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[20] The Master's conclusion that Congress had notice of the reservation of submerged lands went beyond what is strictly necessary under the first part of this Court's test. The Court has examined whether Congress had notice of a reservation of submerged lands where the President had arguably exceeded his authority to reserve such lands, in order to determine whether Congress had ratified the executive action. See *Alaska*, 521 U.S. at 44. That inquiry is unnecessary in the case of the Antiquities Act because that Act clearly authorizes the President to include submerged lands within national monuments. *United States* v. *California*, 436 U.S. 32, 36 (1978). See US-IV Memo. 29 n.15. The unique characteristics of the Antiquities Act are also relevant to the second part of this Court's test—whether Congress intended to retain the submerged lands at statehood. Congress intended that national monuments would be permanent; they can be abolished only by Act of Congress. US-IV Memo. 39-40. Congress was aware of that rule and rejected attempts to reduce the Glacier Bay Monument, which indicates that Congress intended to retain those lands at statehood. See *id.* at 40-45.

Pacific Ocean. Rep. 237-238.[21] Furthermore, President Eisenhower's 1955 Proclamation removed a portion of the Monument that the 1939 Proclamation had added. The 1955 Proclamation specifically stated that the eliminated area included "approximately 14,741 acres of land and 4,193 acres of water." 20 Fed. Reg. at 2103. See Rep. 240.

The Master also found notice to Congress from the 1958 atlas of withdrawals in Alaska that the Interior Department submitted to Congress during statehood proceedings. That atlas showed the boundary of the Monument enclosing submerged lands. Rep. 241; Exh. US-IV-45 p.3. This Court relied on that very same atlas in *Alaska*, 521 U.S. at 56, when it determined that the Arctic National Wildlife Range contained submerged lands. Rep. 242.[22]

The Master concluded that failure to include the submerged lands would undermine at least three purposes for

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[21] Those boundary descriptions cannot be explained by a desire to include certain islands and exclude others. The boundary line runs through Excursion Inlet even though that inlet contains no islands on its western shore. Rep. 238. The line would not need to run 3 miles off the Pacific coast for the purpose of allocating islands because no islands lie more than 2 miles from the coast. *Ibid.*

[22] Additionally, the United States demonstrated that National Park Service (NPS) officials who were responsible for preparing a report supporting the 1939 Proclamation and developing the expanded boundaries specifically stated that the 1925 Proclamation included the submerged lands and that the 1939 Proclamation would add submerged lands, calculating the specific acreage in each situation. See Exh. US-IV-9 pp.ii, 2, 3. One week after President Roosevelt issued the 1939 Proclamation, the Interior Department issued a press release noting the presence of whales, porpoises, and seals "in Glacier Bay and adjacent waters" and stating that the 1939 Proclamation extended the Monument "to the three-mile limit off the coast." Exh. US-IV-11. The United States also demonstrated that, since creation of the Monument, the NPS has consistently administered the Monument's submerged lands as part of the Monument. The NPS has regulated seal hunting and aircraft landings, included the submerged lands in management plans, conducted studies of wildlife and fish on or over the submerged lands, and built structures on submerged lands without seeking state tidelands leases. See US-IV Memo. 20-24.

which Glacier Bay National Monument was established. First, excluding submerged lands would impair the Monument's purpose of enabling scientific study of Glacier Bay's magnificent tidewater glaciers. Rep. 245-251.[23] Second, excluding submerged lands would impair study—and threaten the destruction—of "interglacial forests," which exist both above and below the tideline. Rep. 251-253.[24] Third, excluding submerged lands from the Monument would compromise the Monument's object of protecting Glacier Bay's rich and varied flora and fauna, which are an integral part of the Monument. Rep. 255-264.[25] The Master concluded that, to the extent those conclusions rest on determinations of fact, there is no disputed issue of material fact warranting a trial. Rep. 250-251, 255.[26]

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[23] The 1925 Proclamation identified, as a principal feature of Glacier Bay, "tidewater glaciers of first rank," which extend into the Bay. Rep. 245. Those glaciers, which rest on fjord bottoms but can advance or retreat more than a kilometer per year, have been subjects of scientific investigation for more than a century. Rep. 247-249. The Master recognized that Glacier Bay's "complete glacier system includes the mountain peaks as well as the ocean depths," and the Monument "would not be an effective area for the study of tidewater glaciers if the submerged lands were excluded." Rep. 247 (quoting Exh. US-IV-5 pp.6-7).

[24] The 1925 Proclamation specifically identified those forests, which are the "remnants of ancient trees that had been buried underneath ice for millenia," as subjects of scientific study. Rep. 251.

[25] Congress has decreed that a fundamental purpose of national monuments is the protection of the wildlife therein. 16 U.S.C. 1. The 1925 Proclamation identifies the study of the movements of flora and fauna as a purpose of the Monument, and the 1939 Proclamation expanded the Monument to extend those protections, especially with respect to the brown bear. The United States submitted expert evidence that brown bears make extensive use of marine submerged lands and have customarily been hunted from vessels. Exh. US-IV-6 pp.6-13. The expert confirmed that, to protect brown bears, it is necessary to "protect both the intertidal habitat and an adjacent zone of nearshore marine water." *Id.* at 19. Alaska submitted no contrary evidence. Rep. 255.

[26] The Master considered and rejected Alaska's contrary contention. He concluded that, despite substantial discovery and ample time for preparation, Alaska had not presented any affidavit, expert report, or other

The Master next analyzed whether "Congress recognize[d] the reservation in a way that demonstrates an intent to defeat state title." Rep. 264-276. He correctly recognized that the ASA and this Court's decision in *Alaska* spoke directly to that issue. Rep. 264-266. The Court stated:

> In § 6(e) of the Statehood Act, Congress clearly contemplated continued federal ownership of certain submerged lands—both inland submerged lands and submerged lands beneath the territorial sea—so long as those submerged lands were among those "withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife."

Alaska, 521 U.S. at 57. See Rep. 266. The Master concluded, consistent with this Court's holding in *Alaska*, that "§ 6(e)'s proviso operates as an independent retention clause and does not merely except certain property from the transfer effected by § 6(e)'s main clause." Rep. 272.

Against this background, the Master determined that Section 6(e) retained Glacier Bay National Monument's submerged lands in federal ownership because the Monument had been set apart "for the protection of wildlife." Rep. 273-276. The Master observed that Congress has decreed in 16 U.S.C. 1 that a fundamental purpose of national monuments is the protection of the wildlife therein. Rep. 273-274. Furthermore, "the texts of the 1925 Proclamation and the 1939 Proclamation indicate that the Monument was created in part for the purpose of preserving wildlife." Rep. 274.

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evidence contradicting the United States' evidence. Rep. 249-250, 255. Moreover, at oral argument, the Master specifically asked what further evidence the State might present at trial. Rep. 250. Counsel for Alaska responded: "it is not that there are facts that the State needs to come forward with, but that there's been a failure of proof on the United States' part." *Ibid.* (Tr. 155 (Feb. 3, 2003)). The Master recognized that Rule 56(e), Fed. R. Civ. P., requires no defense if the movant fails to meet the burden of showing the absence of any genuine issue of fact, but he concluded that the United States had met its burden here. Rep. 250-251, 255.

The Master accordingly concluded that "the United States retained title to the submerged lands in the Glacier Bay National Monument through § 6(e) of the Alaska Statehood Act" and is entitled to summary judgment on Count IV of Alaska's amended complaint. Rep. 276.

B. The United States' Reply To Alaska's Exception

Alaska challenges the Master's recommendation that the United States is entitled to summary judgment.[27] Alaska does not dispute the controlling legal principles. The United States can retain title to submerged lands by reserving those submerged lands prior to statehood with the intent of preventing passage of title to the State. *Alaska*, 521 U.S. at 33-34. Whether the United States intended to reserve submerged lands, and whether Congress intended to prevent passage of title, are "ultimately a matter of federal intent." *Id.* at 36. In determining whether submerged lands have been "expressly retained" so that they do not pass to the State under the equal footing doctrine and the SLA, the Court asks "whether the United States clearly included submerged lands within [a reservation] and intended to defeat state title to such lands." *Id.* at 50.

The Court's decision in *Alaska* has identified two further points that are directly applicable here. First, a reservation order will be deemed to reserve submerged lands if the reservation description "necessarily embrace[s] certain submerged lands" or if the purpose of the reservation would be "undermined" if the submerged lands are excluded. *Alaska*, 521 U.S. at 39 (emphasis omitted). Second, Congress mani-

[27] Alaska actually goes even further, requesting (Br. 21) this Court to enter summary judgment in its favor, even though Alaska did not file a written motion for summary judgment before the Master. Alaska made an oral request for such relief at the Master's hearing on the United States' motion for summary judgment. See Rep. 228-229. The Master did not address Alaska's oral request (Rep. 1, 294), which apparently reflects his view that the request did not constitute a proper motion for summary judgment.

fested its intent, at the time of Alaska's statehood, to retain federal ownership of certain categories of submerged lands that are critically important to federal activities, including lands reserved or otherwise set apart for the protection of wildlife. *Id.* at 41-43, 55-57. The Master correctly determined that Glacier Bay National Monument was set apart for the protection of wildlife and that Congress retained the submerged lands within the Monument at the time of Alaska's statehood.

1. The United States Reserved The Submerged Lands Within The Exterior Boundaries Of Glacier Bay National Monument. The Master concluded that "Glacier Bay National Monument, as it existed at the time of statehood, clearly included the submerged lands within its boundaries." Rep. 263-264. Alaska states in a footnote (Br. 10 n.4) that it disagrees with the Master's conclusion that the Executive reservations establishing the Monument included submerged land, but Alaska has neither identified that issue as one of its exceptions nor developed the argument in its brief. Alaska has wisely refrained from excepting from the Master's conclusion that both the boundary descriptions and the purposes of the Monument indicated a clear intent to include the submerged lands.[28]

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[28] Alaska contends in its footnote (Br. 10-11 n.4) that "the Monument's borders were drawn partly through water to denote islands and other uplands to be included, not to clearly include the submerged lands" and that the "failure to reserve the *entire* seabed would not have defeated the United States' asserted purpose for the reservation." The Master correctly rejected Alaska's first contention because the water boundaries of the Monument traverse water bodies where there are no islands to allocate between those in and outside the Monument. Rep. 237-238. The Master rejected the second contention because the Court has never second-guessed the extent of the submerged lands reserved by the United States once the Court has determined that exclusion of all submerged lands would undermine a purpose of a reservation. Rep. 252 (citing *Alaska*, 521 U.S. at 40-41); see US-IV Reply 10-11.

2. Congress Retained Title To Glacier Bay National Monument, Including Its Submerged Lands, At the Time Of Alaska's Statehood. As the Court explained in *Alaska*, the ASA set forth the general rule that the United States retained title to all property it owned before Alaska's admission to the Union, while Alaska acquired title to all property held by the Territory or its subdivisions. 521 U.S. at 55. Section 6(e) sets out one of several exceptions to that general rule. Section 6(e) provides that Alaska shall receive federal property "used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of [three specific statutes addressing fish and game management]." Rep. 265. Section 6(e) additionally contains a proviso that clearly expresses the intent of Congress that the United States shall retain lands set apart for the protection of wildlife. That proviso states that

> such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife nor facilities utilized in connection therewith, or in connection with general research activities relating to fisheries or wildlife.

Ibid. This Court categorically held in *Alaska* that Section 6(e)'s proviso "reflects a very clear intent to defeat state title" to submerged lands "so long as those submerged lands were among those 'withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife.'" 521 U.S. at 57.

Alaska seeks to escape this Court's controlling decision in *Alaska* by arguing that: (1) the Monument was not set apart for the protection of wildlife (AK Br. 19-21); (2) the Section 6(e) proviso applies only to lands that were both set apart for wildlife and administered by the Interior Department's Fish and Wildlife Service (FWS) (*id.* at 14-17); and (3) the Section 6(e) proviso is merely an exception to the main clause that

has no application in this case (*id.* at 12-13, 17-19). The Master correctly rejected each of those contentions.

a. The United States Set Apart Glacier Bay National Monument "For The Protection Of Wildlife." The Master concluded, for two reasons, that the Monument was "withdrawn or otherwise set apart as [a] refuge[] or reservation for the protection of wildlife." Rep. 273-276. First, since their inception, national parks and monuments have had, as a core purpose, the protection of wildlife. See US-IV Memo. 38. Congress codified that wildlife-protection purpose in the National Park Service Organic Act of 1916, which directs the NPS to administer all national "parks, *monuments*, and reservations" in accordance with

> the fundamental purpose of the said parks, *monuments* and reservations, which purpose is to conserve the scenery and the natural and historic objects and the *wild life therein* and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. 1 (emphasis added). The Master correctly rejected Alaska's argument that, because "some national parks do not have any wildlife," the language of 16 U.S.C. 1 cannot render all national monuments reservations for the protection of wildlife. Rep. 273-274. As he explained, Alaska's argument overlooks the word "therein" in the statute. While a monument with no significant wildlife may not have a wildlife purpose, Glacier Bay National Monument "undisputedly contains abundant wildlife within its boundaries, and therefore was set aside for the preservation of this wildlife." Rep. 274.

Second, the Master correctly recognized that the texts of the 1925 and 1939 Proclamations expressly state that the Monument was created in part for the protection of wildlife. Rep. 274. The 1925 Proclamation expressly identifies the study of flora and fauna as one of the purposes. The study of fauna necessarily requires its preservation. Rep. 254. The

1939 Proclamation indicates that the purposes of the expansion include the "proper care, management, and protection of the objects of scientific interest" within the Monument. Rep. 274. The 1925 Proclamation states that those objects of scientific interest include flora and fauna.

Furthermore, as Alaska specifically alleged in its original and amended complaints, a primary purpose of the 1939 expansion of the Monument was to "set aside a refuge for brown bears." Am. Compl. ¶ 57. Alaska has since purported to disavow that allegation, but it has never moved for leave to amend the complaint to repudiate the allegation. The Master has generously recommended that the Court not hold Alaska to the allegation in the complaint. Rep. 256.[29] He therefore examined the detailed evidence and considered the arguments of the parties. Rep. 256-264. The Master correctly concluded that the great weight of evidence supports the position of the United States—and the position of Alaska until the United States moved for summary judgment— that a primary purpose of expanding the Monument in 1939 was to create a refuge for brown bear. Rep. 263-264. See US-IV Memo. 15-19, 33-34; US-IV Reply 14-19.[30]

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[29] The United States suggests that the Court should not ignore a judicial admission, such as the allegations of a complaint, when the party who made the admission has neither moved for nor received leave to amend the complaint. See *Martinez* v. *Bally's La., Inc.*, 244 F.3d 474, 477 (5th Cir. 2001); *Solon* v. *Gary Cmty. Sch. Corp.*, 180 F.3d 844, 858 (7th Cir. 1999); *Missouri Hous. Dev. Comm'n* v. *Brice*, 919 F.2d 1306, 1314 (8th Cir. 1990); 2 J. Strong, *McCormick on Evidence* § 254, at 138, § 257, at 142 (5th ed. 1999). The usual rule requiring amendment is particularly appropriate in cases such as this one, in which the admission goes to a crucial element of the case and the party has had ample time and opportunity to seek leave to amend.

[30] That evidence shows that the Executive and Congress repeatedly discussed plans to expand the Monument to create a brown bear refuge. In 1931, the Special Senate Committee on Wildlife Conservation (Special Committee) recommended that the NPS study an expansion of the Monument "which would protect a certain number of large brown bears." Exh. US-IV-19 p.253. In 1932, the head of the Alaska Game Commission testif-

b. Congress Retained Title To Glacier Bay National Monument Without Regard To Whether The Wildlife Lands Therein Were Administered By The National Park Service Or The Fish And Wildlife Service. This Court has squarely ruled that Section 6(e) of the ASA demonstrates that "Congress clearly contemplated continued federal ownership of certain submerged lands—both inland submerged lands and submerged lands beneath the territorial sea—so long as those submerged lands were among those 'withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife.'" *Alaska*, 521 U.S. at 57. Alaska seeks to avoid that holding by arguing (Br. 14-17), without textual support, that Section 6(e)'s proviso applies only to lands that the FWS administers. That argument is inconsistent with

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ied in support of a proposal to enlarge the Monument "as a bear sanctuary." Exh. US-IV-15 p.32. The Committee's chairman put on record that "this committee [has] made that specific recommendation that Mr. Terhune has just described." The chairman later wrote to the NPS director that he supported "an executive order to extend the confines of the Glacier Bay National Monument to include some of those coast forests and the further protection of the brown bear." Exh. US-IV-21. In 1937, the Administration reported to Congress on a ten-year program for Alaska, stating, in a section entitled "Refuges," that "wild animals and birds are especially protected by the [NPS] in * * * Glacier Bay National Monument." Exh. US-IV-19 p.147. The report, which provided an abbreviated description of the boundary of the proposed expansion running through water bodies, stated the proposed expansion had been urged since 1927 to "provid[e] a suitable wildlife refuge for the Alaska brown bear." *Id.* at 252-253. The report specifically stated that the "chief reasons" for expanding the Monument included "mak[ing] a suitable reserve for the brown bear." *Id.* at 260 n.73. In 1940, the Committee reported on the expansion using an acreage description that included submerged lands and stating that the expansion "gave much-needed protection to the giant brown bear and other subarctic species." Exh. US-IV-25 p.353. President Roosevelt himself took a personal interest in expanding the Monument to protect brown bears. When the President expressed shock that persons were shooting Alaskan brown bears from yachts, Secretary Ickes responded that the Interior Department planned to expand the Monument to protect the bears. Exh. US-IV-6 p.16. See Rep. 258-260.

Section 6(e), its history, and this Court's holding in *Alaska*. Rep. 274-276.

First, Section 6(e)'s text does not state that the United States retains only FWS-administered lands. If Congress had intended that result, it would have said so. Instead, Congress used the broad language proposed by Interior Secretary Chapman, who stated that *all* lands and waters set apart for wildlife protection would be retained regardless of the mechanism or statutory authority employed. See Exh. US-IV-40 p.49.[31]

Second, Alaska bases its argument on legislative history that does not support its contention. Alaska contends (Br. 15) that the Section 6(e) proviso reaches only FWS-administered lands because the 1954 Senate Report on the ASA states, in noting that "wildlife refuges" are specifically excepted from the grants to the State, that the FWS has "valuable installations" in Alaska (Exh. AK-451 p.31). That report does not say that the United States will retain only FWS-administered wildlife refuges. To the contrary, later committee reports refer more generally to the retention of "withdrawn land used in general wildlife and fisheries research activities" (1957 House Report, Exh. US-IV–62 p.19), or "wildlife refuges or reservations" (1957 Senate Report, Exh. US-IV-63 p.17). Neither the Executive nor Congress employs the term "wildlife refuges" exclusively to signify

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[31] Secretary Chapman stated, in explaining the language that became Section 6(e), that "the United States would retain administrative jurisdiction over the Pribilof Islands and over *all other Federal lands and waters* in Alaska which have been set aside as wildlife refuges or reservations pursuant to the fur seal and sea otter laws, the migratory bird laws or *other Federal statutes of general application*." Exh. US-IV-40 p.49 (emphasis added). The Antiquities Act plainly qualifies as such a statute. See Rep. 253, 261; see also US-I Memo. 37-38; US-I Reply 20-21. Furthermore, both at the time of the 1939 expansion and at the time that Secretary Chapman suggested the language of Section 6(e), NPS regulations provided that the "Parks and Monuments are sanctuaries for wildlife of every sort." 36 C.F.R. 2.8 (1939); 36 C.F.R. 1.9 (1949).

FWS-administered lands.[32] Alaska's reliance (Br. 16-17) on the 1954 Senate Hearings (Exh. AK-452) is likewise misplaced. Alaska portrays the hearings as an explanation of the meaning of Section 6(e), but the hearings barely refer to the Section. The hearings, read as a whole, refute Alaska's contention that Congress sought to retain only FWS-administered refuges.[33]

Third, Alaska's argument is inconsistent with the Court's holding in *Alaska* that the submerged lands within the Arctic National Wildlife Refuge (ANWR) remained in federal ownership because they had been set apart for the pro-

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[32] See Exh. US-IV-19 pp.252-253 (expansion of Glacier Bay National Monument proposed to provide "a suitable wildlife refuge for the Alaska brown bear"); 16 U.S.C. 694 (fish and game refuges within National Forests remain under Forest Service jurisdiction). Both before and after Alaska's statehood, revenue distribution schemes recognized that agencies other than the FWS also administered wildlife refuges. See Refuge Revenue Sharing Act, 1935, ch. 261, § 401, 49 Stat. 383; Act of Aug. 30, 1964, Pub. L. No. 88-523, 78 Stat. 701; H.R. Rep. No. 88-1753, 14, 15-16 (1964) (explaining that receipts from wildlife refuges administered by agencies other than FWS would be distributed pursuant to other statutes). Moreover, the FWS's work and "valuable installations" in Alaska were likewise not limited to FWS-administered refuges, but extended to national monuments as well. See Exh. AK-452 p.32 (testimony of NPS director regarding FWS facility in Katmai National Monument).

[33] Alaska overlooks the most salient features of those hearings. The Senate Committee requested representatives of each land-managing agency to provide information on the lands each administered in Alaska and on whether any reservations could be eliminated or reduced in size. Exh. AK-452 pp.23-24. The FWS witnesses primarily discussed only those lands that the FWS administered, and they objected to the elimination of most FWS-administered reservations. *Id.* at 55-84. The NPS director testified on Glacier Bay National Monument, which he described as a "water park" and as a "series of glaciers on a mountain range, with the Glacier Bay going up though the center." *Id.* at 46. He specifically urged that all of the Monument should remain in federal ownership. *Id.* at 54. Significantly, the Committee considered it irrelevant which Interior Department subdivision administered particular lands for wildlife protection. As Senator Cordon stated, "We are not too much interested in which division of the Department of the Interior does the work. I know you folks might be, but we are not." *Id.* at 66.

tection of wildlife on the date of Alaska's statehood. See 521 U.S. at 46-61. On that date, the FWS did not administer the lands constituting ANWR. See *id.* at 46. Instead, those lands were under the jurisdiction of the Interior Department's Bureau of Land Management. See 43 C.F.R. 295.10(a) (1954).[34]

More fundamentally, Alaska's attempt to exclude national monuments from the lands "set apart as refuges or reservations for the protection of wildlife" would lead to starkly incongruous results. Congress retained federal ownership of lands that had been reserved or otherwise set apart for the protection of wildlife because it concluded that the United States should control those lands, and the wildlife therein, for the benefit of the entire nation. That fundamental policy applies regardless of which particular federal agency is administering a particular wildlife sanctuary. Indeed, Congress has mandated a higher level of wildlife protection in NPS-administered national parks and monuments than in FWS-administered refuges. See 16 U.S.C. 1 (NPS must "conserve" the wildlife "unimpaired for the enjoyment of future generations"); compare Exh. AK-452 pp.32, 48 (monuments closed to hunting and trapping) with *id.* at 65 (Kenai Moose Range open to hunting). Congress would have had no reason to relinquish those wildlife lands for which it had accorded the highest level of national protection.

c. Congress Retained Title To Glacier Bay National Monument Without Regard To Whether The Monument's "Sole Purpose" Was Wildlife Conservation Under Certain Federal Statutes. Alaska seeks to avoid, on yet another ground, this Court's unambiguous ruling that Section 6(e)

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[34] The FWS had applied for a refuge withdrawal, but that withdrawal was not made until after statehood. *Alaska*, 521 U.S. at 46. The regulations in effect at the time of application provided that an application for a withdrawal segregated the land, but that "[s]uch temporary segregation shall not affect the administrative jurisdiction over the segregated lands." 43 C.F.R. 295.10(a) (1954).

expresses Congress's intention to retain federal ownership of lands, including submerged lands, that were "withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." *Alaska*, 521 U.S. at 57. Alaska observes (Br. 11-13) that the main clause of Section 6(e) grants Alaska "real and personal property used for the sole purpose of [wildlife] conservation" under three particular fish and game laws applicable to Alaska. Alaska then argues that Section 6(e)'s proviso, which retains in federal ownership lands set apart "as refuges and reservations for the protection of wildlife," retains only those lands encompassed within Section 6(e)'s main clause. The Master correctly rejected that construction. Rep. 267-272.

The Master recognized, as the appropriate starting point, that "[g]eneralizations about the role of a proviso in a statute cannot resolve th[is] dispute." Rep. 268. He noted that this Court has repeatedly held that, while provisos may "serve merely to create exceptions to general rules," they may also "state independent rules." *Ibid.*[35] The Master accordingly examined the Section 6(e) proviso in light of its context and this Court's decision in *Alaska*. He correctly concluded that Section 6(e)'s proviso does not serve merely to limit the scope of the narrow category of property that Section 6(e)'s main clause transfers to Alaska. Instead, the Section 6(e) proviso independently expresses Congress's intention to retain in federal ownership lands, such as Glacier Bay National Monument, that have been set apart "for the protection of wildlife." Rep. 269-272.

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[35] See *McDonald* v. *United States*, 279 U.S. 12, 20-22 (1929); *Springer* v. *Government of Philippine Islands*, 277 U.S. 189, 207-208 (1928); *United States* v. *G. Falk & Bros.*, 204 U.S. 143, 149 (1907); *United States* v. *Whitridge*, 197 U.S. 135, 143 (1905); *ICC* v. *Baird*, 194 U.S. 25, 37 (1904). See also 2A N. Singer, *Statutes and Statutory Construction* § 47.09, at 238 (6th ed. 2000); F. McCaffrey, *Statutory Construction* § 58, at 118-119 (1953); E. Crawford, *The Construction of Statutes* § 297, at 604-605 (1940); C. Jones, *Statute Law Making in the United States* 203 (1912).

As the Master explained, this Court *held* in *Alaska* that Section 6(e) is an independent retention clause. Rep. 272. Indeed, Alaska itself now concedes that "*this Court held that submerged lands within the [ANWR] were expressly retained under the proviso to Section 6(e)*." AK Br. 18 (emphasis added). Alaska contends, however, that this Court reached that result on the "assum[ption]" that "ANWR lands would have been covered by the main clause but for the proviso." *Ibid.* The United States has pointed out that ANWR does not fit within the express terms of the main transfer provision. See Rep. 269.[36] But as the Master recognized, that debate is of little moment. Rep. 270-271. The important point is that the Section 6(e) proviso *necessarily* functions as an independent retention provision that, by *its* terms, includes Glacier Bay National Monument. Rep. 272, 273.

The Master has explained precisely why this is so. Rep. 271-272. Alaska had argued in *Alaska*—as it argues here—that the Section 6(e) proviso merely creates an exception to Section 6(e)'s main clause. Accordingly, Alaska reasoned, even if the Section 6(e) proviso excluded ANWR from the Section 6(e) main clause, the Section 6(e) proviso would not prevent the submerged lands therein from being transferred to the State under Section 6(m), which makes the SLA applicable to Alaska. AK Reply Brief in *Alaska*, No. 84 Orig., at 44-45 (Oct. 1996). The Court rejected Alaska's argument, ruling that if ANWR had been set apart "for the protection

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[36] Alaska does not contend that Section 6(e)'s main clause actually encompasses ANWR, stating that it "is immaterial to this case whether [the Court's] assumption was correct." Br. 18 n.7. Alaska apparently recognizes that the lands that would constitute ANWR were not, at the time of statehood, "specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska under [the specifically enumerated statutes]." ASA § 6(e). Furthermore, when ANWR was formally established, it was not created or managed pursuant to those statutes. See Pub. Land Order No. 2214, 25 Fed. Reg. 12,598 (1960).

of wildlife," then the Section 6(e) proviso would result in the retention of the upland and submerged lands—notwithstanding Section 6(m)—because the *proviso* expresses Congress's clear intent to retain submerged lands that were "withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." *Alaska*, 521 U.S. at 56-57. See Rep. 271-272. The Court's decision necessarily "treated the proviso as an independent retention clause, not merely as a limitation on a transfer clause." Rep. 272.[37]

Alaska ultimately concedes that this Court's decision in *Alaska* "did treat the proviso as a retention clause." Br. 18. But Alaska retreats to the implausible position that the Section 6(e) proviso retains only some subset of the property encompassed by Section 6(e)'s main clause. Br. 18-19. Section 6(e)'s main clause transfers to Alaska a varied but narrow category of "real and personal property"—such as facilities, vehicles, and equipment—that federal government agencies had "specifically used for the *sole purpose* of conservation and protection of the fisheries and wildlife of Alaska, under [three specific wildlife and fisheries management statutes pertaining to Alaska]." ASA § 6(e) (emphasis

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[37] The Court's holding that the Section 6(e) proviso is an independent retention clause is consistent with Secretary Chapman's explanation of that provision. He stated that the United States would retain "all other Federal lands and waters in Alaska which have been set aside as wildlife refuges or reservations pursuant to the fur seal and sea otter laws, the migratory bird laws or other Federal statutes of general application." Exh. US-IV-40 p.49. He noted that Section 6(e) was designed to "bring[] about a division of the fish and wildlife activities now conducted by the United States in Alaska, along lines of demarcation conforming to the recognized distinctions between Federal and State functions." *Ibid.* Under that division, the State would receive a varied assortment of "real and personal property" used solely for managing Alaska wildlife and fisheries under particular laws in accordance with typical state functions, while the United States would retain "lands withdrawn or otherwise set apart for the protection of wildlife [and] facilities utilized in connection therewith," ASA § 6(e), in accordance with the national interest in preserving wildlife reserves.

added). See note 37, *supra*. Under Alaska's construction, *the United States would retain* submerged lands that are part of any federal reservation that fits within Section 6(e)'s main clause—*viz.*, real property used solely for certain wildlife programs that *Alaska would undertake* upon statehood. But *the United States would relinquish* submerged lands within those federal reservations used for programs *the federal government would continue to administer*, such as fur seal and migratory bird protection or conservation and study of wildlife within national parks and monuments. Alaska's construction produces a counter-intuitive result that is not only illogical, but also accomplishes nothing. Section 6(e)'s main clause, by its terms, does not reach national parks, monuments, or wildlife refuges, which typically serve multiple purposes and are managed under a wide variety of federal laws that protect the interests of the Nation as a whole. Alaska cannot point to a single wildlife reserve that fits within the precisely drafted terms of Section 6(e)'s main clause. Thus, under Alaska's construction, the Section 6(e) proviso would apply to a null set.[38]

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[38] As noted, ANWR does not fall within Section 6(e)'s main clause. See note 36, *supra*. Of the 26 FWS-administered wildlife refuges in existence during Congress' deliberations on the ASA, Exh. AK-452 p.64, Alaska claims that two (the Kenai National Moose Range and Kodiak National Wildlife Refuge) qualify. The executive orders establishing those refuges, however, do not cite the specific statutes identified in Section 6(e)'s main clause. Both executive orders reference the Alaska Game Law of *1925* rather than the Alaska Game Law of *1943*. Exec. Order No. 8857 (Kodiak), 6 Fed. Reg. 4287 (1941); Exec. Order No. 8979 (Kenai), 6 Fed. Reg. 6471 (1941). Moreover, the FWS director testified in the Statehood Act hearings that those refuges were used for purposes beyond game protection. See Exh. AK-452 p.67 (recreation areas in Kenai reserve), p.74 (industrial use zones in Kodiak reserve); see also *Udall* v. *Tallman*, 380 U.S. 1 (1965) (oil and gas leasing on Kenai reserve). Even if those difficulties with Alaska's theory were overlooked, the result would be that the United States retained submerged lands within only those two refuges. But the FWS director recommended, and Congress understood, that all the other refuges would be retained in federal ownership under the ASA, Exh. 452 p.71, and some of those refuges undisputedly include

This Court's decision in *Alaska* embraces, instead, a far more sensible construction of Section 6(e). Section 6(e)'s main clause granted Alaska the real and personal property it needed to exercise traditional state wildlife and fisheries management functions. Section 6(e)'s proviso simultaneously recognized that the United States would retain in federal ownership those lands—including submerged lands—that were set apart "for the protection of wildlife." Congress provided that the "transfer" identified in the main clause excluded lands set aside "for the protection of wildlife," but *not* because Congress envisioned that those lands were a subset of the "real and personal property" that the main clause transferred. Rather, Congress sought to make abundantly clear that the "transfer" contemplated in the main clause would not interfere with what Congress recognized as the overarching principle—namely, that the federal government would retain lands set aside "for the protection of wildlife" and "facilities utilized in connection therewith." ASA § 6(e). This Court's decision in *Alaska* embraces that construction of Section 6(e). See 521 U.S. at 57.[39]

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vitally important submerged lands. See, *e.g.*, Exec. Order No. 5858 (June 17, 1932) (creating the Semidi Islands Wild Life Refuge, which included "reefs and all lands under water appurtenant" to the Semidi Islands).

[39] This Court's decisions make clear that the crucial question is whether the relevant statutory language, read as a whole in its historic context, expresses congressional intent to retain title. See *Idaho*, 533 U.S. at 273-281; *Alaska*, 521 U.S. at 41-46, 55-61. For example, the Court concluded in *Idaho* that Congress retained submerged lands within an Indian reservation because various pre-statehood congressional actions, viewed in historic context, demonstrated that intent. 533 U.S. at 276; see *id.* at 273-281. Similarly, the Court concluded in *Alaska* that Section 11(b) of the ASA retained submerged lands in the National Petroleum Reserve, even though that Section does not specifically discuss "United States' *title* to submerged lands," because the statutory language, read in context, expressed that intent. 521 U.S. at 41-42. Applying the same approach, the Court concluded that Section 6(e) similarly expressed Congress's overarching and "clearly contemplated" intent that the United States would retain submerged lands in "refuges or reservations for the protection of wildlife." *Id.* at 57.

The Court's sensible construction of Section 6(e) in *Alaska* produces a sensible result in this case. Congress granted Alaska title to the vast majority of the submerged lands beneath inland waters and the territorial sea in Southeast Alaska. That grant includes, without objection from the United States, the vast majority of the submerged lands within the Tongass National Forest. See Rep. 276-277. But Congress retained the submerged lands within Glacier Bay National Monument—now Glacier Bay National Park and Preserve—so that the unique natural treasures encompassed within that reserve can be comprehensively managed on an integrated basis for the perpetual benefit of the Nation.[40]

CONCLUSION

The State of Alaska's exceptions to the Report of the Special Master should be overruled.

Respectfully submitted.

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[40] The record includes a video presentation, entitled *Beneath the Reflections*, that vividly portrays those treasures. Exh. US-IV-8 App. 6.

APPENDIX A

28 U.S.C. 2409a—Real Property Quiet Title Actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights.

* * * * *

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

APPENDIX B

Submerged Lands Act of 1953, ch. 65, 67 Stat. 29 (codified as amended at 43 U.S.C. 1301 *et seq.*):

43 U.S.C. 1301—Definitions

When used in this subchapter and subchapter II of this chapter—

* * * * *

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

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43 U.S.C. 1312—Seaward Boundaries of States

The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State

became a member of the Union, or if it has been heretofore approved by Congress.

* * * * *

43 U.S.C. 1313—Exceptions From Operation of Section 1311 of This Title

There is excepted from the operation of section 1311 of this title—

(a) * * * all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea);

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APPENDIX C

Article 7 of the Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1609, 516 U.N.T.S. 205, T.I.A.S. No. 5639:

1. This article relates only to bays the coasts of which belong to a single State.

2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

APPENDIX D

Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (codified at 48 U.S.C. note prec. § 21):

* * * * *

Section 4—Compact With United States.

As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property, (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation * * *.

Section 5—Title to Property.

The State of Alaska and its political subdivisions, respectively, shall have and retain title to all property, real and personal, title to which is in the Territory of Alaska or any of the subdivisions. Except as provided in section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title, including public lands.

Section 6—Selection of public lands, fish and wildlife, public schools, mineral permits, mineral grants, confirmation of grants, internal improvements, submerged lands.

* * * * *

(e) All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301; 48 U.S.C., sections 192-211), as amended, and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478; 48 U.S.C., sections 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U.S.C., sections 221- 228), as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency: *Provided*, That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest: *Provided*, That such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife nor facilities utilized in connection therewith, or in connection with general research activities relating to fisheries or wildlife. Sums of money that are available for apportionment or which the Secretary of the Interior shall have apportioned, as of the date the State of Alaska shall be deemed to be admitted into the Union, for wildlife restoration in the Territory of Alaska, pursuant to section 8 (a) of the Act of September 2, 1937, as amended (16

U.S.C., section 669g-1), and for fish restoration and management in the Territory of Alaska, pursuant to section 12 of the Act of August 9, 1950 (16 U.S.C., section 777k), shall continue to be available for the period, and under the terms and conditions in effect at the time, the apportionments are made. Commencing with the year during which Alaska is admitted into the Union, the Secretary of the Treasury, at the close of each fiscal year, shall pay to the State of Alaska 70 per centum of the net proceeds, as determined by the Secretary of the Interior, derived during such fiscal year from all sales of sealskins or sea otter skins made in accordance with the provisions of the Act of February 26, 1944 (58 Stat. 100; 16 U.S.C., sections 631a-631q), as supplemented and amended. In arriving at the net proceeds, there shall be deducted from the receipts from all sales all costs to the United States in carrying out the provisions of the Act of February 26, 1944, as supplemented and amended, including, but not limited to, the costs of handling and dressing the skins, the costs of making the sales, and all expenses incurred in the administration of the Pribilof Islands. Nothing in this Act shall be construed as affecting the rights of the United States under the provisions of the Act of February 26, 1944, as supplemented and amended, and the Act of June 28, 1937 (50 Stat. 325), as amended (16 U.S.C., section 772 et seq.).

* * * * *

(m) The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.