IN THE SUPREME COURT OF THE UNITED STATES

No. 128, Original

STATE OF ALASKA,
Plaintiff

v.

UNITED STATES OF AMERICA,
Defendant

Before the Special Master
Gregory E. Maggs

REPLY OF THE UNITED STATES IN SUPPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT II OF THE AMENDED COMPLAINT

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INTRODUCTION

The United States has moved for summary judgment on Court II of Alaska's Amended Complaint, contesting the State's claim that Article 7 of the Convention requires that the waters of the Alexander Archipelago be divided, through assimilation of certain islands to the mainland, into two enormous and two smaller juridical bays. Alaska has filed its own motion for summary judgment on Count II, to which we have responded. In this filing, we reply to Alaska's memorandum opposing our motion. We divide the reply into three parts, following the organization of Alaska's memorandum in opposition.

In Part I, the U.S. responds to Alaska's contentions that its theory of island assimilation would not adversely affect the U.S.'s foreign policy interests. Alaska mistakenly contends that foreign nations would not adopt its "complex" approach to island assimilation and would instead employ Article 4's optional method of straight baselines to similar island formations. We agree that Article 4 provides the appropriate mechanism for addressing coastal archipelagos. Article 4, however, preserves a right of innocent passage, and if a foreign nation wishes to exclude vessels from adjacent waters, which is the U.S.'s foreign policy concern, the foreign nation will follow Alaska's lead of expansively claiming that islands are mainland for purposes of Article 7. Contrary to Alaska's assertions, the U.S. does not deny the existence of genuine Article 7 bays within the Alexander Archipelago, or elsewhere. But no one, including Alaska, has heretofore understood, or even suggested, that the enormous areas identified by Alaska are "bays." The fact that large islands parallel the mainland coast does not make the intervening waters "landlocked" within the meaning of Article 7. Indeed, the Convention makes clear that "North Bay" could not have qualified as an Article 7 bay at the time of Alaska's statehood even if all of Alaska's arguments were accepted.

In Part II, the U.S. explains why Alaska's island-complex cannot be assimilated to the

mainland to create Alaska's "North Bay" and "South Bay." Contrary to Alaska's contentions, the U.S. makes all measurements relevant to Alaska's assimilation arguments from low water. More importantly, Alaska's assimilation analysis deviates from the Supreme Court's criteria in *United States v. Maine*, 469 U.S. 504 (1985). Alaska reinvents the Court's criteria through result-oriented tests, selectively invoking Convention terms without regard to their context, and selectively disregarding the Court's guidance on how to apply the assimilation concept, which is a narrow *exception* to the Convention's rules. The Court's criteria, properly applied with regard to the "intervening waters," *id.* at 516, rather than through Alaska's novel concept of "assimilation zones," do not justify assimilation of the island-complex to the mainland. The intervening waters are too wide, too deep, or relied upon too heavily as navigation routes to be treated as land. The Court's decisions in *Maine* and other cases demonstrate that the straits that separate the islands of the island-complex from the mainland cannot be ignored and treated as dry land.

In Part III, the U.S. tests Sitka Sound and Cordova Bay against the Supreme Court's criteria and precedents. With respect to Sitka Sound, we accept, for purposes of summary judgment, Alaska's contention that Partofshikof Island is connected to Kruzof Island at low water and that the two should be treated as one. That fact alters the location of the southern entrance to the intervening waters between Baranof and Kruzof Islands, but it does not affect the federal analysis. Those intervening waters are the principal route in and out of Sitka Sound. That utility for waterborne traffic prevents those waters from being treated as land. Cordova Bay presents a vivid illustration of why Alaska's "assimilation zone" theory departs from the Court's conception of "intervening waters." Alaska's treatment of Cordova Bay demonstrates that its "assimilation zone" need not be a "zone" at all, but is simply the point at which two land forms come closest to one another.

Alaska's approach would justify the assimilation of two triangular shaped features that face each other at their apexes. The Supreme Court surely envisioned, however, that such features may be assimilated only if their sides oppose one another.

ARGUMENT

I. Adoption Of Alaska's Proposals Could Adversely Affect The United States' International Interests

A. Straight Baselines And Juridical Bays Have Different International Consequences

Alaska asserts that the recognition of its juridical bay claims will set no international precedent that is inimical to U.S. foreign policy interests. It relies on two propositions.

First, Alaska reasons that nations with coastal archipelagos will, if they want to claim intervening waters as inland, simply employ Article 4 and construct straight baselines, eschewing "the more complex standards of Article 7." AK Count II Opp. 11. But Alaska overlooks the different consequence of those two means of establishing inland waters. The U.S. seeks, as a matter of foreign policy, to maximize the right of maritime passage. Article 5 guarantees such passage within straight baselines. 15 U.S.T. 1609. *See also* Law of the Sea Convention (1982), Article 8(2). In contrast, foreign vessels have no right of innocent passage within juridical bays. If a foreign nation seeks to prevent innocent passage through adjacent waters, it would follow Alaska's example and stretch the application of Article 7 principles for identifying juridical bays. Indeed, Alaska's approach would allow a foreign nation to curtail innocent passage in the case of geographic features, such as single islands, where Article 4 would not apply.

Second, Alaska mistakenly contends that the Supreme Court's decision in *United States v. Maine*, 469 U.S. 504 (1985), already provides the precedent that undermines U.S. foreign policy.

As an initial matter, the waters at issue there, Long Island Sound, were inland water prior to the *Maine* decision. The United States had already claimed, and foreign nations had recognized, Long Island Sound as historic inland waters. *Id.* at 509. Foreign vessels had no right to innocent passage through the Sound, which was not, in any event, used for international travel. The Alexander Archipelago, in contrast, is a regular route for foreign flag vessels and has been for more than a century. U.S. Count II Memo. 43-44; U.S. Count II Opp. 38-40. But more importantly, as we show below, Alaska seeks to transform *Maine* from a narrow exception to a broad new rule that would erode the Convention's limitations and provide a basis for foreign nations to claim unjustified restrictions on the freedom of the seas.

Alaska claims that the U.S. fails to identify specific examples of foreign waters that could become juridical bays, to the detriment of the U.S., under Alaska's assimilation theory. The possibilities for extravagant claims are virtually limitless, depending upon the extent to which a foreign nation is willing to follow Alaska' lead in treating islands as mainland. An example close to home is Johnstone Strait, which lies between Vancouver Island and the British Columbia mainland. Using Alaska's criteria, Canada could identify an "assimilation zone" within that strait that is less that a mile wide and less than ideal for maritime navigation. Queen Charlotte Sound to the north and the Straits of Georgia to the south would then become juridical bays. *See* US-II-54 p.1; US-II-55 pp.4-6. The same could be done between Princess Royal and Pitt Islands and the mainland. *See id*. at 9. If Canada were to adopt Alaska's theories, there would be no right of innocent passage through more than 300 nautical miles of the existing Inside Passage between Seattle and Southeast Alaska—a route regularly followed by the Alaska state ferry system as well as other U.S. vessels.

B. The United States Recognizes Proper Article 7 Bays

Alaska suggests that the United States fails to give "fidelity" to Articles 4 and 7 of the Convention, characterizing the U.S. position as denying that there can be Article 7 juridical bays within an area suitable for straight baselines. AK Count II Opp. 14. The U.S. has made no such suggestion. *See* U.S. Count II. Memo. 17 n.5. The federal point is that the Convention addresses island archipelagos, such as the Alexander Archipelago, through Article 4, and not by treating strategically selected islands as mainland. The Archipelago embraces numerous small juridical bays, but the Archipelago itself is not the equivalent, as Alaska would have it, of two gigantic "bays." Under Alaska's island-assimilation theory, its newly discovered "North Bay" and "South Bay" would have mainland-to-mainland mouths of 154 and 120 nautical miles (nm), and, according to Alaska, they would have respective areas, "conservatively measured," of 5,592 and 4,949 square nm. AK Count II Opp. 45. Together, they are the larger than the combined area of Maryland, Delaware and the District of Columbia, and, very roughly, six times the size of Long Island Sound. "North Bay" and "South Bay" are unlike anything that Article 7's drafters could have envisioned.

Indeed, Alaska now makes the remarkable suggestion that the entire Alexander Archipelago could have been claimed as a single juridical bay:

> Alaska to date has not proceeded on the theory that the entirety of Southeast Alaska could be considered a very large juridical bay extending from Cape Spencer to Tree Point. It may be that because of the presence of islands forming multiple mouths, such a large bay could meet the definitional standards of Article 7.

AK Count II Opp. 4 n.1. *See* US-II-56 (illustrating that "bay"). Alaska's statement reveals how easily Alaska's theory can be extended to undermine the Convention's rules for delimiting juridical bays. The Convention's limits should be set by Article 7, rather than by the bounds of lawyers'

imagination. It is Alaska that fails to give fidelity to the Convention.

1. *"North Bay" and "South Bay" are not recognizable as juridical bays.* The parties agree that juridical bays should be, at a minimum, visually recognizable as bays. Alaska suggests that anyone with "a rudimentary understanding" of the subject would identify "North Bay" and "South Bay" as juridical inland waters. AK Count II Opp. 8. That has not been the case. The explorers who first identified these waters typically named them "straits" and "passages," reserving the term "bay" for indentations into the mainland or an island, as the U.S. would. Similarly, they named what Alaska now calls a "peninsula" as three separate "islands"—which is how Article 10 defines them. 15 U.S.T. 1609.

Other interested parties, each with more than a "rudimentary understanding" of the subject matter, reached the same conclusions. Most significantly, in 1971, the federal Coastline Committee, whose members included State Department Geographer Dr. Robert Hodgson, produced charts depicting the territorial sea of the United States that failed to discover "North Bay" and "South Bay." A year later, when Alaska objected to the Committee's conclusion that the Archipelago waters were not inland, Alaska based its objection on historic bay arguments—specifically acknowledging that the Archipelago waters "do not geographically possess the status of bays, but are more properly characterized as straits." U.S. Count II Memo. 20-21 (emphasis omitted); US-II-57 p.21. Alaska now contends that this statement, by a mere "assistant attorney general" who was "not involved in litigation of the area" was simply a failure to "rely" on a juridical bay claim—and, as such, is "immaterial." AK Count II Opp. 7 n.4.

Alaska's statement cannot be so easily disregarded. Alaska selected Mr. Cranston to speak authoritatively on the specific issue of the status of the Archipelago waters to the U.S. Senate's

Committee on Commerce. He headed a panel of state officials that included: the Commissioner of Fish and Game; the Commissioner of Natural Resources; the Director, Division of Protection; Department of Public Safety; and a Professor of History from the University of Alaska. US-II-57 p.18. The panel's principal objective was to convince the Committee that the waters of the Archipelago were inland. Mr. Cranston did not merely fail to rely on a juridical bay claim—he affirmatively, without equivocation, in a prepared statement, declared that the waters of the Archipelago "do not geographically possess the status of bays." *Id.* at 21.[1]

Mr. Cranston was not new to the law of the sea. He had just litigated Alaska's historic waters claim to Cook Inlet in district court. *See United States v. Alaska*, 352 F. Supp. 815 (D. Alaska 1972). But, if it is important that one be involved in litigation over the Archipelago waters, more recent history is enlightening. In November 1999, Alaska filed the present action, which set out three counts, none of which identified "North Bay" and "South Bay" as juridical inland waters. Months later, Alaska filed its amended complaint, proclaiming, for the first time in recorded history, the discovery of "North Bay" and "South Bay." Clearly those imaginary features did not spring from a "rudimentary understanding" of Article 7 principles, but rather from an unwarranted extension of a narrow exception to Article 7's terms.

2. *Non-assimilated islands do not create landlocked waters.* Prior to the Convention, waters partially screened by coastal islands, such as the Alexander Archipelago, were sometimes referred to as "fictitious bays." *See United States v. California*, 381 U.S. 139, 170-171 & n.38 (1965). The Convention now deals with those geographic features through Article 4's optional approach of

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[1]Alaska's Senator Stevens appeared to agree, saying that Article 4 straight baselines were "the only thing that could save our inland waters." US-II-57 p.17.

straight baselines. A coastal nation may decline to utilize Article 4, as the U.S. has done, and instead rely on Article 7's provisions in delimiting its coast. The U.S. has applied Article 7 in accordance with the Supreme Court's guidance to a wide variety of coastal features.

Alaska nevertheless asserts that the U.S. "reveals a blindness to the legitimate purpose and justification for Article 7." AK Count II Opp. 10. Alaska quotes the Court's statement that "[t]he ultimate justification for treating a bay as internal waters . . . 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 statement is not sufficient to justify Alaska's assimilation theory. The Court did not say, as Alaska seems to think, that any partially enclosed coastal area qualifies as inland water. The Court has often declined to recognize inland water claims to coastal areas partially protected by islands despite the fact that each "implicate[d] the interests" of a State more than waters beyond an open coast.[2]

Alaska compounds its misconception by introducing the concept of "landlockedness" into the assimilation inquiry. AK Count II Opp. 14-18. The initial step in the Article 7 inquiry is identification of the mainland headlands, which Alaska seeks to create through assimilation of islands. That question of assimilation must be answered before turning to Article 7's two tests for determining whether the proposed juridical bay contains landlocked waters. Alaska's continued confusion on this matter requires us to emphasize that important point. As we have explained at

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[2] Examples include: Nantucket Sound, *United States v. Maine*, 475 U.S. 89, 93-105 (1986); Block Island Sound, *Maine*, 469 U.S. at 510-526; Florida Bay, *United States v. Florida*, 420 U.S. 531, 533 (1975) and 425 U.S. 791, 793 (1976); Caillou Bay, *United States v. Louisiana*, 394 U.S. 11, 67 n.88 (1969); the Santa Barbara Channel, *California*, 381 U.S. at170-172; and the Arctic coast of Alaska, *United States v. Alaska*, 521 U.S. 1, 7-22 (1997).

length in opposing Alaska's motion for summary judgment, the presence of non-assimilated islands has no bearing when applying the Convention's primary "indentation" test for determining whether waters are landlocked. U.S. Count II Opp. 31-39. Article 7 takes account of the affect of non-assimilated islands through the secondary "semi-circle" test. *Id*. at 32-33. As the Court stated in *Louisiana*, "[t]he clear purpose of the Convention is not to permit islands to defeat the semicircle test by consuming areas of the indentation." 394 U.S. at 53 (quoted at AK Count II Opp. 18). But in any event, neither the indentation test nor the semi-circle test has a bearing on whether islands should be *assimilated*, which is the subject of the U.S.'s motion for summary judgment. U.S. Count II Opp. 33-39.[3]

Alaska further contends, with respect to "landlockedness," that "[t]he only clear difference between the indentations resulting from the assimilation of Long Island to the coast and the assimilation of the island peninsula is the presence of islands in and forming multiple mouths to Alaska's North and South Bays." AK Count II Opp. 17. That is not so. The clear difference is that, once Long Island is determined to be assimilated to the mainland, Long Island Sound easily satisfies Article 7's "indentation" test. It has a width-of-mouth to depth-of-penetration ratio of more than 1:6, easily meeting the indentation test for landlockedness. US-II-5. By contrast, *even if* Alaska's island-

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[3] We note that Alaska erroneously implies that the presence of non-assimilated islands affects the indentation test. AK Count II Opp. 17-18. Alaska mistakenly relies on Commentary of the International Law Commission referring to an early draft of Article 7 that combined the indentation and semi-circle tests. In the context of that combined test, the Commission noted that "the presence of islands at the entrance to an indentation links it more closely with the territory, which may justify some alteration of the proportion between the length and depth of the indentation." AK-156 p.37. The final version of Article 7, as the Court has noted, separates those two tests, *Louisiana,* 394 U.S. at 54 , and makes non-assimilated islands relevant only to the semi-circle test. *See* U.S. Count II Opp. 33-39.

complex were assimilated, "North Bay"and "South Bay" would still be mere curvatures in the coast. U.S. Count II Opp. 41-44.

3. *"North Bay" was not an Article 7 bay at Alaska's statehood.* Alaska alleges that it seeks in this litigation only its "constitutional due under the equal footing doctrine." AK Count II Opp. 2. Alaska defines what is "due" as all submerged lands beneath inland water on the date of statehood. *See* AK Count I Memo. 26. But even if Alaska were correct in all of its Count II arguments, "North Bay" was not an Article 7 bay at the time of statehood.

Article 7(1) provides that "[t]his article relates only to bays the coast of which belong to a single State," meaning a single nation. On January 3, 1959, "North Bay," if a bay at all, was a multi-national bay. As Dr. Bruce Molnia explains in his expert report, glaciers that empty into Glacier Bay retreated steadily up the Bay from approximately 1750 until 1948:

> Soon after 1912, the retreating Grand Pacific Glacier . . . retreated into Canada, resulting in the northernmost point of Tarr Inlet being more than a mile into Canada. Hence, Pacific Ocean waters extended more than a mile into Canada and a marine access to Canada existed from the open Pacific Ocean through the northern end of Glacier Bay.
>
> Grand Pacific Glacier's terminus remained in Canada for more than 45 years, as did the Canadian connection to the Pacific Ocean. In 1948, the Grand Pacific Glacier slowly began to advance, reaching the US-Canada border in 1961.

US-II-42 p.4. Alaska does not dispute that expert's conclusion. Since Glacier Bay was not an Article 7 bay at statehood, neither are the more seaward waters of "North Bay" into which it opens. Under Alaska's theory, Canada would be denied access to its own coast.

II. The Island-Complex Is Not Part Of The Alaska Mainland

A. The United States Does Not Use Mean High Water For Any Relevant Measurement

Alaska contends that the U.S. applies the Supreme Court's assimilation criteria to the wrong tidal datum: "Throughout its brief, the United States makes reference to and relies upon measurements based on the location of mean high tide. See Ex. US-II-10 at 3, para. 4." AK Count II Opp. 23. Alaska is incorrect. The U.S. employs measurements based on a high water line only in the one U.S. exhibit that Alaska cites, which sets out surface area measurements for Mitkof, Kupreanof, and Kuiu Islands, and the channels that separate them from the mainland. The U.S. used the mean high water line in that instance because it is available through the Alaska Department of Natural Resources. US-II-10 p.3, para.4. The use of conveniently available high water lines for this purpose understates (by a de minimis percentage) the size of the islands relative to the channels, but that has no consequence to the issues here. By either measure, the channels, as identified by the U.S., meet the Hodgson-and-Alexander area requirements. Their length is more than three times their width and they are smaller than the islands proposed for assimilation. Alaska has also measured from the high water line where that choice is inconsequential. AK Count II Opp. 44 n.26. Measurements critical to the federal position, for determining the average width of the intervening waters, *are* measured from low water lines, which are depicted for the island complex at US-II-10 p.1. And, of course, the U.S. has consistently submitted that "depth and utility of intervening waters" are not to be determined at any arbitrary tidal datum, any more than those determinations are tied to a particular season or weather condition. *See* U.S. Count II Opp. 11-12.

B. Alaska Misinterprets The Supreme Court's Criteria

Each of Alaska's four juridical bay claims requires application of a legal fiction that specified islands are not islands at all, but rather extensions of adjacent mainland or larger islands. The Supreme Court has employed that fiction in appropriate circumstances and has provided criteria for evaluating particular examples, saying "whether a particular island is to be treated as part of the mainland would depend on such factors as it size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast." *Maine*, 469 U.S. at 516; *Louisiana*, 394 U.S. at 66. The U.S. and Alaska disagree on the meaning of those criteria.

A number of the Supreme Court's assimilation criteria depend, in the first instance, on identifying the waterway that separates two land forms to be assimilated. That waterway is analyzed to establish "distance from the mainland," "depth," "utility," and relationship of the "configuration" of the two features. The U.S. understands the Court's term "intervening waters" to describe all waters across which the land forms "face" each other. Alaska erroneously searches those "intervening waters" for a point at which the two features "perceptively come together." AK Count II Opp. 26. Hodgson and Alexander correctly recognized that, if the concept of "intervening waters" is to have objective content, the limits of those "intervening waters" should be determined by the 45-degree test. US-II-16 p.17. That test establishes the points at which two opposing coasts either face each other or face upon an adjacent waterbody. *Id.* at 10, 11. Those geographers recognized that, with respect to the "configuration" criteria, assimilation is not appropriate unless those "intervening waters" are "channel-like," having a length-to-width ratio of at least 3:1. *Id.* at 20, 21.

The Court has recognized the usefulness of the 45-degree test in determining the limits of

waterbodies. *Maine*, 469 U.S. at 522 n.14. Nevertheless, Alaska objects that "[u]nder the United States' approach, any water even remotely between the island and the adjacent feature is treated as part of the assimilation zone or intervening waters . . . ." AK Count II Opp. 28. In fact, the objective 45-degree test sensibly identifies "intervening waters" based on where two shores face each other. Alaska's determination of what it calls the "assimilation zone" rests on an entirely subjective selection of a *portion* of the intervening waters. The State offers no objective criteria by which this "zone" can be recognized beyond the entirely result-oriented test of whether the "coasts perceptively come together." *Id.* at 26. That approach is not only unprincipled, but it deprives Article 7 of its "self-executing" character in critical circumstances. Without objective principles for determining the limits of intervening waters, a mariner or nation will be at a loss to know whether an island should be viewed as an island or as assimilated mainland.

Alaska additionally disregards the Court's concern for the "configuration or curvature of the coasts." Hodgson and Alexander understood islands may be assimilated only if separated by a channel-like intervening waterbody with a length-to-width ratio of at least 3:1. Alaska argues, however, that the intervening waterway need not be "riverine" or "channel-like." Rather, it is enough if one could visualize two separate land forms being connected by "a narrow attachment." AK Count II Opp. 29. Alaska essentially reasons that, because even a narrow peninsula is still a peninsula, an island that would constitute a peninsula—except for the crucial fact it is surrounded by water—may be treated as mainland. *Ibid.* That is not the Court's test.

In pursuing this reasoning, Alaska overlooks the purpose of the assimilation inquiry, which is to determine whether to *depart* from the Convention's specific language. Article 10 expressly states that an island is "a naturally-formed area of land, surrounded by water, which is above water

at high-tide." 15 U.S.T. 1609. Thus, Mitkof, Kupreanof and Kuiu Islands are indisputably islands, rather than mainland, under the Convention's express terms. The object here is to apply, in a reasoned manner, the Supreme Court's criteria for permitting an *exception* to that Convention provision. The Court's decision in *Maine* requires an analysis of the "intervening waters," not the point of closest contact. *Maine*'s reference to the "configuration" of the facing coasts makes clear that a belt of waters is envisioned. It does not matter that, under the Convention, a true peninsula that is narrow is nevertheless a peninsula. AK Count II Opp. 28-29. The Court envisioned that *Maine*'s exception would turn on an objective analysis of the character of the "intervening waters," and not on a subjective inquiry into whether an island is "almost" a peninsula.

Alaska asserts that the Court's actual treatment of Long Island Sound supports its novel theory. The opposite is true. The parties and Master agreed that the East River was the intervening waterway, so that the issue of *what* was the intervening waterway was not before the Court. As Alaska says, the East River marks the end of Long Island Sound. AK Count II Opp. 27. But nothing here is equivalent. It is not reasonable, for example, to identify Rocky Pass as the "end" of "North Bay" or "South Bay." It does not matter that Kuiu and Kupreanof Islands are "perceptively" close in the vicinity of Rocky Pass. The question here is what are the "intervening waters" between Kuiu and Kupreanof Islands. The parties, the Master, and the Court in *Maine* did not search out an "assimilation zone" within the East River where Manhattan and Brooklyn are closest. They applied the assimilation criteria that the Court first announced in *Louisiana* to the *entire* East River.

C. Alaska Misapplies The Supreme Court's Criteria

1. *Kuiu Island is not part of the mainland*. Alaska's proposed headland of "North Bay" and "South Bay" is Cape Decision on Kuiu Island. If Kuiu Island is not part of the mainland, the inquiry into the status Alaska's "bays" need go no farther. And it is not. Three substantial waterways separate Kuiu Island from the mainland of Southeast Alaska. Most directly, Keku Strait, separates Kuiu and Kupreanof Islands, which face each other across the Strait's entire length. US-II-10, p.1. The entire Strait "intervenes" between the two islands. Alaska attempts to avoid that fact by identifying a short stretch of those intervening waters, Rocky Pass, as an "assimilation zone." It then applies the Court's assimilation criteria to that "zone" alone. But every natural channel will have stretches within which the opposing land features will be closer together than they are at other points, and the Court gave no indication in *Maine* that its assimilation tests applied to anything less than the entire area of intervening waters. Once Alaska's error is laid bare, it is clear that the intervening waters of Keku Strait are too wide and too useful to navigation to permit the assimilation of Kuiu and Kupreanof Islands. U.S. Count II Memo. 38, U.S. Count II Opp. 15-17. But even if Kuiu and Kupreanof Islands were one, they would not be assimilated to the actual mainland, as we next explain.

2. *Kupreanof Island is not part of the mainland.* Kupreanof Island is separated from the mainland by an arm of Frederick Sound. Its "intervening waters" are much too wide, deep and regularly navigated by large vessels to be treated as land. Alaska appears to accept this reality and, rather than take the direct route from Kupreanof to the mainland, it detours through Mitkof Island. But Kupreanof and Mitkof are separated by the most navigable of the three channels through the island-complex. Wrangell Narrows is an important section of Alaska's famous "Inside Passage."

Wrangell Narrows is, and always has been, a critical link in "Alaska's Marine Highway." As Alaska has elsewhere stated:

> The sounds, straits, canals, channels, and narrows of Southeast Alaska — known collectively as the Inside Passage — form its "roads." The state ferry system that travels through these waters is thus aptly called the Alaska Marine Highway.

AK Compl. Br. 2. (footnote omitted). Alaska contends that the U.S. relies only on the current utility of the strait in applying the Court's criteria, AK Count II Opp. 35, but we do not. The U.S. has shown that this strait has carried a majority of the vessel traffic between the northern and southern portions of the Alexander Archipelago and beyond, both before and since navigational improvements. U.S. Count II Memo. 36-38; U.S. Count II Opp. 17-20.

Alaska argues that vessels drawing more than 10 or 12 feet have been delayed in their transit of the Narrows, AK Count II Opp. 38, and that "the Narrows' utility was a significant limiting factor for transport to and from Southeast Alaska along the Inside Passage." *Id.* at 38-39. An occasional "delay" does not prevent a strait from being useful for navigation, particularly when the alternative is a lengthy voyage around the island-complex. History is clear that, while Wrangell Narrows— like most waterways— was and is susceptible to navigational improvements, it has *always* been part of the preferred route through the Alexander Archipelago. *See* U.S. Count II Opp. 19. Most vessel traffic between what Alaska now calls "North Bay" and "South Bay" does not enter through the mouths of those "bays." It passes through the island-complex that Alaska contends should be treated as land. That strait (for which Alaska curiously does not identify an "assimilation zone," *see id.* at 18 n.6) prevents the assimilation of Kupreanof and Mitkof Islands. However, even if Kuiu, Kupreanof, and Mitkof Islands were one, Alaska must yet make another large leap to reach the actual mainland of Southeast Alaska.

3. *The island-complex is not part of the mainland.* The intervening waters that separate the entire island-complex from the mainland run for approximately 54 nautical miles and average at least 5 miles in width. US-II-10 p.1. The island-complex and opposite mainland simply are too far separated to be assimilated. Alaska attempts to overcome this problem (notwithstanding its unexplained inconsistent treatment of Wrangell Narrows) by returning to its theory that assimilation does not depend on the character of the whole "intervening waters," but rather should be analyzed on the basis of a subjectively determined "assimilation zone." In this instance, it chooses Dry Strait, near the southern limit of the intervening waters. But Mitkof Island faces the Alaska mainland across a 19-mile waterway running from Petersburg to Blaquiere Point. Alaska's chosen "assimilation zone" is only a 4-mile portion of those intervening waters. The Court's assimilation criteria must be applied to the entire waterway across which Mitkof Island faces the mainland. When that is done, Mitkof Island is clearly not part of the mainland. U.S. Count II Memo. 36.

The breadth of the intervening waters is dispositive, but it is not Alaska's sole problem. Alaska avoids any discussion of what constitutes the actual mainland for purposes of its assimilation argument. It consistently uses the term "mainland" apparently in reference to the insular features, such as Dry Island, in the mouth of the Stikine River. AK Count II Opp. 31-35. But Alaska never specifically contends that those features are assimilated to the mainland. At one time, Alaska seemed to assume that such features can be considered mainland as a matter of law because they lie in the mouth of the Stikine River, an inland waterway. AK Count II Memo. 7-8. But there is no justification for that conclusion. U.S. Count II Memo. 32 n.15; U.S. Count II Opp. 21-22. Alaska now admits that that analysis "is flawed." AK Count II Opp. 22 n.9. *See* 3 Reed. *Shore and Sea Boundaries* 82-88 (2000). Yet Alaska's entire analysis focuses on the passage between Mitkof and

those insular features, rather than Mitkof and the actual mainland. Alaska ignores, without explanation, the fact that the actual mainland is 5 miles to the east. Alaska offers no explanation how, if those features are deemed "mainland," they nevertheless have not prevented navigation of the Stikine River for more than 175 years. This is no small matter, because navigation of the Stikine River has been sufficiently important to Great Britain and Canada to warrant protection through treaty guarantees from both Russia and the United States. U.S. Count II Opp. 9, 13-14.[4]

In response to these difficulties, Alaska tests a new theory, without seeking leave to amend its complaint. Contrary to its averments, Alaska now sometimes suggests that Mitkof Island is a true peninsula. *See* AK Count II Opp. 32-35; *but see id*. at 30-32, 43 (arguing otherwise). This new theory is not supported by any credible evidence. The authoritative United States nautical chart, No. 17360, plainly shows that Mitkof Island is *not* a peninsula, and Alaska offers no expert testimony to the contrary. Of the numerous maps, charts, and photographs collected by the State, only one, AK-338 p.9, would support even the notion that no water divides Mitkof from the mainland at low tide. That small-scale Corps of Engineers map suggests that the entire mouth of the Stikine River is dry at low water; that is to say, for some period each day the Stikine River ceases to flow across

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[4] As yet another obstacle for Alaska, the islands of the island-complex do not have the necessary geologic relationship to the actual mainland to qualify for assimilation. The Supreme Court has stated that "the origin of the islands and their resultant connection with the shore is one consideration relevant to the determination of whether they are so closely tied to the mainland as realistically to be considered a part of it." *Louisiana*, 394 U.S. at 65 n.84. Alaska argues that the islands of the Archipelago have been "near" the mainland for a long time. AK Count II Opp. 46. But that is irrelevant to origin. The islands of the Alexander Archipelago are of oceanic origin, having formed in the Pacific far from the Alaska coast. U.S. Count II Opp. 25-27. Furthermore, Special Master Armstrong understood the Court to mean that, unless all five of the primary criteria were met, the islands' "nature and origin is immaterial, although a non-fluvial origin might be a negative factor if all of these tests were met." *Louisiana Report* 39.

the tide flats at its mouth. Clearly this small scale depiction is intended as a generalization of the mouth, and not as an accurate portrayal of the tidal datum. It is unclear whether Alaska really relies on that map as its definitive statement of the low water line in the area, but the low water line depicted on AK-338 is entirely inconsistent with those reflected on Alaska Exhibits 131, 135, 145, 159, 333, 334, 339, 340 and 343.[5]

Because Alaska cannot show that the island-complex is a true peninsula, the island-complex must be treated as what it is: a group of islands subject to evaluation under the Court's assimilation principles. The island-complex is not assimilable because it is separated from the Alaska mainland by a 54-mile strait which, for all but the 4 miles of Dry Strait, is approximately 5 miles wide and from 100 to 600 feet deep. Dry Strait is not effectively a "land bridge," as is evident from the photographs in AK-139. Yet Alaska would have this short portion of the intervening waters, made shallow at low tide by the accumulation of alluvium from the Stikine, transform true islands into mainland and create juridical bays that are larger than some States. The Supreme Court suggests a "common sense approach" to juridical bay determinations—presumably with common sense consequences. That the alluvium in Dry Straits could have such a substantial effect on the extent of United States' maritime jurisdiction seems better described by Alaska's term— "fantastical."

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[5]Alaska Exhibits 335 and 336 include Forest Service drawings of the Stikine Tidal Flats, but there is no indication that a low water line is intended to be depicted.

D. Alaska's Proposed Assimilations Are Not Similar To The Supreme Court's Assimilation of Long Island

Alaska insists that its juridical bay claims "break no new ground" but "follow the precedent set by the Court in *Maine,*" AK Count II Opp. 5, and that "each component of Alaska's case for assimilation is stronger than that presented in *Maine*," *id.* at 9. That is not so. As we have explained, the parties and the Court agreed in *Maine* that the East River is the "intervening waters" separating Long Island from the mainland. It is a distinct waterbody, at the head of Long Island Sound, that connects the Sound with New York Harbor and the Atlantic Ocean to the southwest. In this case, Alaska's proposed "mainland" headland rests on an island that is separated from the actual mainland by three substantial straits. Keku Strait, Wrangell Narrows, and the southern arm of Frederick Sound are each "intervening waters," and each is sufficient to prevent assimilation. *See* U.S. Count II Memo. 22-41; U.S. Count II Opp. 13-22.

The Court concluded in *Maine* that "the existence of one narrow opening to the sea does not make Long Island Sound . . . any less a bay than it otherwise would be." *Maine*, 469 U.S. at 519. By contrast, Alaska's putative "bays," "North Bay" and "South Bay," are plainly straits exhibiting numerous openings, including three interconnecting waterways with a total average width of more than 10 nm. Additionally, Long Island Sound is "used as one would expect a bay to be used. Ships do not pass through Block Island Sound and then Long Island Sound unless they are bound for points on Long Island or on the opposite coast or for New York harbor." *Ibid.* Alaska's "North Bay"and "South Bay"are used as straits by foreign and U.S. vessels bound for destinations well beyond either. U.S. Count II Opp. 27-31. "Long Island Sound is not a route of international passage," *Maine*, 469 U.S. at 519, but both "North Bay" and "South Bay" are. U.S. Count II Opp.

27-31. New York's case for assimilation was considerably stronger than Alaska's for other reasons as well. As Special Master Hoffman pointed out, "Long Island is physically connected to the mainland . . . by twenty-six bridges and tunnels." and "[o]n a daily basis there is an enormous movement of people from Long Island to the mainland"and back. *Maine Report* 45. The intervening waterways in Alaska have nothing comparable.

Furthermore, Alaska cannot ignore the *Louisiana* precedents. The Supreme Court adopted its Special Master's recommendations without additional discussion, but it clearly approved the Master's application of the criteria. The Court had developed those criteria with the expectation that the Master would apply them to the features in *Louisiana*, and the Court's adoption of the Master's recommendations signals the Court's approval. The Court's adoption of the Master's recommendations resulted in a judgment, and the coast line that resulted is set forth in a Court decree. 422 U.S. 13 (1975). The *Louisiana* examples are discussed at U.S. Count II Memo. 24-40 and uniformly weigh against Alaska's more liberal applications of the Court's criteria.

III. The Smaller Bays

A. Sitka Sound Is Not A Juridical Bay

In opposing the United States' motion for summary judgment respecting Sitka Sound, Alaska observes that a federal nautical chart indicates that Partofshikof Island is connected to Kruzof Island at low tide, and Alaska argues that Partofshikof should therefore be treated as part of Kruzof Island. AK Count II Opp. 48. For purposes of the summary judgment motions, the United States will accede to that view, but it makes no difference in the outcome. Under that view, the southern limit of the intervening waters between Kruzof and Baranof Islands runs between the southernmost point on Partofshikof Island and Neva Point on Baranof Island rather than the line to Kruzof Island

depicted on US-II-33. The northern limit is not affected. US-II-58. The average width of the intervening waters is approximately 1 nm. This change does not alter our conclusion with respect to the status of Sitka Sound. As the Coastline Committee determined, Kruzof and Baranof cannot be assimilated because "Neva Strait . . . was too broad and deep to be ignored. Moreover, Neva Strait was an important navigation channel." AK-174, p.3. Alaska seems to denigrate the usefulness of Neva Strait because most of its traffic is going to and from other southeast Alaska ports. AK Count II Opp. 49. That fact is irrelevant. Most vessels entering or leaving Sitka Sound, including the Alaska state ferries, do so by way of Neva Strait. U.S. Count II Opp. 22-23. The Strait is, for practical purposes, the "mouth" of Sitka Sound.

B. Cordova Bay Is Not A Juridical Bay

Alaska contends that the United States "overreaches again" when it defines the intervening waters between Prince of Wales and Dall Islands through application of the 45-degree test. AK Count II Opp. 49. Alaska asserts, "[t]he success or failure of the assimilation . . . should depend instead upon the relationship between coasts where the features meet, at Tlevak Narrows. . . . When the proper assimilation zone is considered, it is readily apparent that Dall Island meets all the Court's standards for assimilation." AK Count II Opp. 49-50, citing AK-179.

Cordova Bay best exemplifies the difference between the parties on what is meant by "intervening waters." The U.S. takes the position that the opposing land forms must be divided by a channel-like waterway, as was the case with the examples discussed by the Court in the *Louisiana Boundary Case* and with the East River in *Maine*. Alaska, by contrast, asserts that formations only need to approach each other at some point. Under the U.S.'s view, the intervening waters across which Prince of Wales and Dall Islands "face" each other at the head of Cordova Bay are the 7 nm

channel depicted on US-II-39. But that channel's average width, among other things, is much too great to permit assimilation. Alaska identifies the Tlevak Narrows, a portion of the intervening waters that is only 300 yards long and 700 yards wide (but at least 11 fathoms deep at mid-water, NOAA Chart 17407 "Northern Part of Tlevak Strait and Ulloa Channel"), as its "assimilation zone." US-II-59. The Narrows are not channel-like, nor does Alaska assert that they are.

Hence, Alaska ultimately abandons any pretense that assimilation requires a channel-like waterway and offers no principle by which its "assimilation zones" can be identified. Alaska's Cordova Bay claim makes clear that Alaska's assimilation zones are not "intervening waters"—they can simply be *points* at which opposite land features come closest together. They are selected to dictate consequences, not to provide the "objective guidance" that the Supreme Court envisioned. *Louisiana*, 394 U.S. at 66. Neither the Court's criteria nor the Court's applications of those criteria to specific features in *Louisiana* and *Maine* justify the approach that Alaska takes in its assimilation analysis for its supposed "bays." Adoption of Alaska's approach would transform the Court's narrow exception from the "general rule" that "islands may not normally be considered extensions of the mainland," *Maine*, 469 U.S. at 519, into an essentially limitless opportunity for foreign nations to assert excessive maritime claims.

CONCLUSION

The motion of the United States for summary judgment on Count II should be granted.

Respectfully submitted.

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December 20, 2002

TABLE OF EXHIBITS

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

To avoid confusion between the exhibits relating to the various motions for partial summary judgment in this action, each exhibit of the United States is designated as "US" followed by a Roman numeral that corresponds to the count in Alaska's Amended Complaint to which the individual motion for partial summary judgment applies, followed by the number of the exhibit and page number (where appropriate). The bottom of each page of the exhibits has been labeled with the number of the exhibit as well as the number of the page in that exhibit. Because many exhibits are excerpts of longer documents or have title pages or tables of contents, the pagination of an exhibit may not correspond to the pagination of the original documents. When we indicate a page number in an exhibit citation in this memorandum, the page number usually refers to the pagination of the original document.

Exhibits US-II-1 through US-II-39 accompanied the Motion of the United States for Partial Summary Judgment on Count II of the Amended Complaint. Exhibits US-II-40 through US-II-53 accompanied the Memorandum of the United States in Opposition to Alaska's Motion for Summary Judgment on Count II of the Amended Complaint. Exhibits US-II-54 through US-II-59 accompany the Reply of the United States in Support of Motion for Partial Summary Judgment on Count II of the Amended Complaint.

US-II-1	Dr. Robert W. Smith, Report On Alaska's Juridical Bay Claims, Alaska v. United States, Supreme Court No. 128, Original
US-II-2	Convention On The Territorial Sea And The Contiguous Zone, Geneva, 1958
US-II-3	Saint Bernard Peninsula, Louisiana (chartlet)
US-II-4	Louisiana Mainland West of Lake Pelto (chartlet)
US-II-5	Long Island Sound (chartlet)
US-II-6	Alexander Archipelago and Inside Passage (chartlet)
US-II-7	The Mainland of Southeast Alaska (chartlet)
US-II-8	The Mainland of Southeast Alaska, with the Island Complex added (chartlet)
US-II-9	The Skjaergaard Coast of Norway
US-II-10	The Island Complex, Water and Land Measurements (chartlet)

US-II-11	Examples of United States' Foreign Policy Statements Regarding Limited Maritime Claims and Recognition of that Policy By International Authorities
US-II-12	Southeast Pass, Louisiana - And Non-Assimilated Islands (chartlet)
US-II-13	Bucket Bend Bay, Louisiana - Non-Assimilated Islands
US-II-14	The Island Complex (chartlet)
US-II-15	Channel Ratio - from Hodgson and Alexander
US-II-16	Hodgson & Alexander, Toward An Objective Analysis Of Special Circumstances, Law of the Sea Institute Occasional Paper No. 13 (Apr. 1972)
US-II-17	The Island Complex As A Single Feature and Channel Separating It From The Mainland (chartlet)
US-II-18	United States Coast Pilot, Vol. 8 (1999) cover and pages 142, 143 and 163-175
US-II-19	Caillou Bay and Caillou Boca, Louisiana (chartlet)
US-II-20	Partial Testimony of Dr. Robert D. Hodgson, The Geographer, United States Department of State, Before Special Master Walter P. Armstrong, Jr., in United States v. Louisiana, Supreme Court No. 9, Original, pages 5411, 5456, 5515, 5525 and 5533
US-II-21	Mississippi Sound, Alabama and Mississippi (chartlet)
US-II-22	East River, New York (chartlet)
US-II-23	Caillou Boca, Louisiana (chartlet)
US-II-24	Low Tide Elevations In The Mouth of Atchafalaya Bay, Louisiana (chartlet)
US-II-25	Shell Keys, Louisiana - Not Assimilated to Marsh Island
US-II-26	United States Coast Pilot, Vol. V (2002), cover and pages 208 and 321
US-II-27	United States Coast Guard - 17th Coast Guard District, Juneau, Alaska, Relevant portions of most recent Waterways Analysis And Management System Reports for channels separating alleged headlands of North Southeast, South Southeast and Cordova Bays and Sitka Sound from the adjacent mainlands
US-II-28	Eastern Frederick Sound, Including Dry Strait (chartlet)
US-II-29	Dry Strait at Mean High Water (chartlet)

US-II-30 Minutes of the Committee for the Delimitation of the United States Coastline of December 7, 1970 and January 4, 1971.

US-II-31 Representative Portions of Maps Indicating Commercial Transit Routes Between Islands Said By Alaska To Be Part Of The Mainland [prepare cover sheet]

US-II-32 Keku Strait (chartlet)

US-II-33 Northern Entrance to Sitka Sound With Islands Deleted (chartlet)

US-II-34 Northern Entrance to Sitka Sound, St. John Baptist Bay, Neva Strait and Olga Strait (chartlet)

US-II-35 Western Shore of Baranof Island with Islands forming, and within, Sitka Sound Deleted (chartlet)

US-II-36 Sitka Sound With Navigation Routes (chartlet)

US-II-37 Cordova Bay (chartlet)

US-II-38 Western Shore of Prince of Wales Island, with Islands forming, and within, Cordova Bay Deleted (chartlet)

US-II-39 Northern Entrance to Cordova Bay, Large Scale (chartlet)

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

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

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

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

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

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

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

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

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

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

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

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

1 - a line connecting the entrance points identified by Alaska

2 - the longest line that can be drawn from line 1 to the head of the Bay

3 - a line drawn 45 degrees from line 1 at the southern entrance point

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

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

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

US-II-54 Henry, The Alaska Inside Passage - Skagway to Seattle (2001)

US-II-55 Wood, Charlie's Charts - North to Alaska (2001)

US-II-56 Southeast Alaska With Closing Line From Cape Spencer To Tree Point (chartlet)

US-II-57 *Provisional U.S. Charts Delimiting Alaskan Territorial Boundaries, Hearing Before the Sen. Comm. on Commerce*, 92d Cong., (May 15, 1972)

US-II-58 Sitka Sound, Northern Entrance (chartlet)

US-II-59 Cordova Bay, Northern Entrance Showing Alaska's "Assimilation Zone" (chartlet)

IN THE SUPREME COURT OF THE UNITED STATES

No. 128, Original

STATE OF ALASKA,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

Before the Special Master
Gregory E. Maggs

CERTIFICATE OF SERVICE

A copy or copies* of the Reply Of The United States In Support Of Motion For Partial Summary Judgment On Count II of the Amended Complaint were served by hand or by standard overnight courier to:

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

Dated this 20th day of December, 2002

____
David Brown

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* Two copies were served on counsel unless the individual counsel requested that he or she receive only one copy. Counsel for amici, Darron C. Knutson requested that only briefs relating to Count III of the amended complaint be sent to him and Ms. Fishel. Accordingly, this motion and brief were not served on counsel for amici.