

Supreme Court of the United States

No. 128, Original

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

**REPLY IN SUPPORT OF ALASKA'S MOTION FOR
SUMMARY JUDGMENT ON COUNT I—HISTORIC WATERS**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
ARGUMENT	3
I. THE UNITED STATES MISCHARACTERIZES THE LAW	3
A. Permitting Innocent Passage Does Not Preclude A Historic Waters Claim	3
B. Historic Waters Claims Do Not Violate Normal Rules Of International Law And Alaska Bears No “Extraordinary” Burden Of Proof	5
C. Alaska Does Not “Conflate” The Doctrines Of Straight Baselines And Historic Inland Waters	7
II. THE UNITED STATES, LIKE RUSSIA BEFORE IT, CONTINUOUSLY CLAIMED AUTHORITY OVER WATERS OF THE ARCHIPELAGO.....	8
A. Russia Claimed The Waters Of The Archipelago As Inland	9
B. The United States Claimed The Waters Of The Archipelago As Inland From The Treaty Of Cession Until 1971	18
1. The United States Considered The Waters Of The Archipelago As Inland From Cession To The 1903 Alaska Boundary Arbitration	18

2.	The United States Claimed The Waters Of The Archipelago As Inland At The 1903 Alaska Boundary Arbitration	19
3.	The United States Continued To Claim The Waters Of The Archipelago As Inland From 1903 Until 1971.....	20
a.	The <u>Marguerite</u> Incident	20
b.	The Dixon Entrance Negotiations With Canada	22
c.	Fisheries Regulations.....	24
d.	Post-Statehood Recognition Of Inland Water Status.....	25
C.	The United States' Claim To The Archipelago Was A Specific Application Of Longstanding Delimitation Principles.....	27
III.	FOREIGN NATIONS ACQUIESCED IN THE UNITED STATES' CLAIM.....	28
IV.	THE VITAL INTERESTS OF THE UNITED STATES DO NOT SUPPORT DENYING ALASKA THE TERRITORY IT RECEIVED AT STATEHOOD	29
	CONCLUSION	32

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES:</u>	
<u>Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)</u> , 1962 I.C.J. 6 (June 15).....	26
<u>Organized Village of Kake v. Egan</u> , 174 F. Supp. 500 (D. Alaska 1959).....	25
<u>The Fisheries Case (U.K. v. Norway)</u> , 1951 I.C.J. 116 (Dec. 18).....	11, 29
<u>United States v. Alaska</u> , 521 U.S. 1 (1997).....	27
<u>United States v. Alaska</u> , 422 U.S. 184 (1975).....	11, 24
<u>United States v. California</u> , 381 U.S. 139 (1965)	7
<u>United States v. Louisiana (“Alabama and Mississippi Boundary Case”)</u> , 470 U.S. 93 (1985)	<u>passim</u>
<u>STATUTE:</u>	
Alien Fisheries Act, 34 Stat. 263 (1906).....	24
<u>TREATIES:</u>	
Convention on Navigation and Fisheries, Jan. 11, 1825, U.S.-Russ., 8 Stat. 302.....	9
International Convention on the Territorial Sea and Contiguous Zone, Sept. 10, 1964, 15 U.S.T. 1606, 516 U.N.T.S. 205, T.I.A.S. 5639	7-8
<u>LEGISLATIVE MATERIALS:</u>	
<u>Proceedings of the Alaska Boundary Tribunal</u> , S. Doc. No. 58-162 (1904)	28

OTHER AUTHORITIES:

American Heritage Dictionary of the English Language (1992) 10

Aaron L. Shalowitz, Shore and Sea Boundaries (1962)..... 9-10

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INTRODUCTION

Alaska has shown that the United States consistently and continuously exercised dominion over the waters of the Alexander Archipelago, with the acquiescence of foreign nations, before 1971. Russia actively claimed these inland waters under its 1824 and 1825 treaties with the United States and Britain. The United States succeeded to Russia's claim under the Treaty of Cession, confirmed its own claim at the 1903 Alaska Boundary Arbitration, and continued asserting it until 1971. Even five years after statehood, the United States expressly informed this Court that the waters of the Archipelago were inland.

In response, counsel for the United States is reduced to arguing that the United States did not really mean what it said when it expressly claimed the

waters as inland, and that the other evidence of inland water status is likewise not really what it seems. Along the way, the United States attempts to erect impossibly high legal standards for Alaska to prove its claim. For example, the United States argues that Alaska must show that the United States actually denied foreign nations the right of innocent passage, even though such a rule would invalidate all the United States' own historic inland waters claims and this Court has expressly rejected such a per se rule. Likewise, the United States argues that Alaska bears an “extraordinary” burden of proof, even though the historic waters doctrine is part of well-settled and longstanding international law and this Court has never applied any elevated or extraordinary burden in cases like this.

Alaska's motion should be decided on the evidence, not through the application of newly-minted per se rules. And despite the United States' current efforts to explain it away, the evidence is overwhelming that the United States, like Russia before it, expressly claimed the waters of the Archipelago as inland and never treated them as otherwise until long after statehood. As shown below, the United States continues to mischaracterize some facts, ignore others, and—as to its own statements that the waters of the Archipelago are inland—simply claims that they were “mistaken.”

The Court must determine which United States to believe—the one that succeeded to Russia's claim to the waters and continued to assert that claim

for the next century, or the one whose current litigation position seeks to disavow that evidence. The answer is clear. The historical record shows that the United States spoke and acted consistently with its claim to the inland waters of the Archipelago before 1971, with the acquiescence of foreign nations. Present counsel for the United States, on the other hand, advance a revisionist view of the United States' maritime delimitation practice constructed solely to fit their litigation posture in this case. The Court should reject that attempt to rewrite history.

ARGUMENT

I. THE UNITED STATES MISCHARACTERIZES THE LAW

A. Permitting Innocent Passage Does Not Preclude A Historic Waters Claim

As it did in its own motion on Count I, the United States mistakenly claims that allowing any innocent passage precludes a historic inland waters claim. See Mem. for the United States in Opp. to Alaska's Mot. for Summ. Judg. on Count I ("US Count I Opp.") at 5. Alaska addressed this argument in its opposition brief, noting that the Court had rejected such per se rules in United States v. Louisiana ("Alabama and Mississippi Boundary Case"), 470 U.S. 93, 113 (1985), and that the first United States' historic waters claim rested on the presence of foreign vessels in those waters, not their exclusion. See Alaska's Opp. to the United States' Mot. for Summ. Judg. on Count I ("AK Count I Opp.") at 33-36.

The United States nonetheless argues that “a historic waters claim must be based upon the denial of innocent passage when the opportunity arises.” US Count I Opp. at 4. Such a rule, however, would invalidate all of the United States’ historic waters claims, for there is no evidence that the United States denied innocent passage to any foreign vessels entering the waters the United States claims as historic inland waters. Indeed, the United States does not require foreign vessels to obtain permission to transit inland waters. Ex. AK-307 (answer to interrogatory 11). Under the United States’ argument, this failure to deny innocent passage in Delaware Bay, Chesapeake Bay, Long Island Sound, and Mississippi Sound would invalidate its claims to them as historic inland waters.¹ The United States nevertheless rightly claims them as such. Failure to deny innocent passage thus does not preclude a historic inland waters claim.

The rule advanced by the United States also makes no logical sense. A nation generally has no reason to deny truly innocent passage in its inland waters, even though it can. When some foreign vessels engage in non-innocent conduct, however, the host nation has both a reason and the legal right to deny innocent passage, which is precisely what Russia did in the waters of the

¹ Foreign vessels clearly ply these waters. See AK Count I Opp. at 35 (foreign vessels in Delaware Bay); Ex. AK-457 (foreign vessels in the Port of Baltimore in Chesapeake Bay); Alabama and Mississippi Boundary Case, 470 U.S. at 103 (foreign vessels in Mississippi Sound to reach Gulf ports).

Archipelago (see infra at 11-17). Following the Treaty of Cession, the United States had no reason to follow suit because the foreign vessels navigating the inland waters of the Archipelago did so without incident and in a manner beneficial to the United States. That fact, however, does not preclude the United States from claiming the same right to deny innocent passage that Russia claimed.

But in any event, as Alaska has shown, the United States greatly overstates the extent of foreign vessel traffic in the Archipelago before statehood. The State Department, moreover, acknowledged that the United States denied innocent passage through the Archipelago. See AK Count I Opp. at 25-26. The United States can only say that this acknowledgement was “incorrect” and “inconsistent with the historic record.” US Count I Opp. at 40. For all the reasons set forth above and in its prior memoranda, Alaska submits that it is the United States’ current statements—not the State Department’s dispassionate analysis—that are incorrect and inconsistent with the historic record.

B. Historic Waters Claims Do Not Violate Normal Rules Of International Law And Alaska Bears No “Extraordinary” Burden Of Proof

The United States again mistakenly argues that Alaska bears an “extraordinary burden of proof because a historic waters claim violates the normal rules of international law to the detriment of the freedom of the seas.” US Count I Opp. at 6 (citing Juridical Regime of Historic Waters, Including Historic Bays).

As we have already explained, the Court has never imposed an “extraordinary” burden of proof on a State making a historic waters claim. See AK Count I Opp. at 5-7. These arguments of the United States directly contradict the proposition, endorsed by the Court, that a “relatively relaxed interpretation of the evidence * * * seems more consonant with the frequently amorphous character of the facts available to support these claims than a rigidly imposed requirement of certainty of proof, which must inevitably demand more than the realities of international life could ever yield.” Alabama and Mississippi Boundary Case, 470 U.S. at 114 (citation omitted; emphasis added). Notably, the Court in that case simply observed that the plaintiff States had established historic inland waters by “substantial evidence.” Id. at 111. Alaska likewise need not show “more than the realities of international life could ever yield.”

Even Juridical Regime, relied on by the United States, challenges the logic underlying the United States’ contention. It points out that the most “realistic view” is not to consider a historic inland waters claim as an exception to general rules, “but to consider the title to ‘historic waters’ independently, on its own merits.” Ex. US-I-4 at 10, ¶ 58. See also id. ¶¶ 54, 55. “[T]he problem of the elements constituting title to ‘historic waters’ and the question of proof have to be considered independently and not on the assumption that the title to ‘historic

waters’ constitutes an exception to general international law.” Id. ¶ 59 (emphasis added).

The Court should reject the United States’ attempt to raise the legal bar so high that neither Alaska nor any other historic inland waters claimant could prevail.

C. Alaska Does Not “Conflate” The Doctrines Of Straight Baselines And Historic Inland Waters

The United States contends that Alaska is trying to “conflate” the doctrines of straight baselines and historic waters. US Count I Opp. at 37. To the contrary, it is the United States that is trying to do so. Recharacterizing this case as involving Article 4 straight baselines would give the United States an insurmountable advantage, because States cannot employ such baselines over the United States’ objection. United States v. California, 381 U.S. 139, 167-168 (1965).

Alaska has not made an Article 4 straight baselines argument. That Alaska’s historic inland waters claim may be geographically similar to an Article 4 claim does not “conflate” the two doctrines, for they have quite distinct criteria. Article 4 straight baselines may only be used in areas where the coastline is deeply indented or if there is a fringe of islands in its immediate vicinity (Article 4.1); historic inland waters are not so limited. Article 4 straight baselines cannot depart appreciably from the general direction of the coast (Article 4.2); no such requirement applies to the closing lines of historic inland waters. Article 4 straight

baselines must be shown on charts “to which due publicity must be given” (Article 4.6); no such requirement applies to historic inland waters.²

A historic waters claim, on the other hand, requires a showing that a nation “(1) exercises authority over the area; (2) has done so continuously; and (3) has done so with the acquiescence of foreign nations.” AK Count I Mem. at 4. Article 4 straight baselines require no such showing. As this Court has held, the availability of Article 4 straight baselines does not preclude a historic waters claim where the United States has elected not to employ Article 4. *Id.* at 4-5.

II. THE UNITED STATES, LIKE RUSSIA BEFORE IT, CONTINUOUSLY CLAIMED AUTHORITY OVER WATERS OF THE ARCHIPELAGO

It is not surprising that the United States attempts to raise the bar to consideration of Alaska’s claim, for the evidence shows an unbroken history of the United States, like Russia before it, exercising dominion over the waters of the Archipelago. The extraordinary, and ultimately unsuccessful, lengths to which the United States must go in an attempt to explain away this mountain of evidence only underscores the validity of Alaska’s claim.

² The 10-mile closing lines claimed by Alaska under its historic inland waters claim are also significantly different from the result under Article 4 straight baselines. Compare Percy’s charts in Ex. AK-38 with Ex. AK-28; see also US Count I Opp. at 32 n.10.

A. Russia Claimed The Waters Of The Archipelago As Inland

Notwithstanding the United States' spin on the language of the 1824 and 1825 treaties and its mischaracterization of the Loriot incident, the facts demonstrate that Russia claimed the waters of the Archipelago as inland.

The 1824 and 1825 United States and British treaties with Russia gave each country a ten-year period to “frequent the interior seas, gulphs, harbours, and creeks” north of the 54° 40' latitude. The United States argues that this could not have included the waters of the Archipelago because the treaties addressed the entire “Northwest Coast of America” and not the Archipelago. US Count I Opp. at 8. The Archipelago, however, clearly was part of the referenced “Northwest Coast of America.” Moreover, the rest of the relevant treaty language—and Russia's enforcement actions—belie the United States' interpretation.

Without analysis or citation, the United States claims that the terms “interior seas” and “gulphs” could only have included waters “satisfying international rules for the delimitation of maritime boundaries.” US Count I Opp. at 9. But “interior seas” and “gulphs” clearly meant something other than the bays covered by the terms “harbors” and “creeks.” Cf. id. at 8 n.2 (“creeks” meant “small bays”). Other sources suggest that these “interior seas” and “gulphs” must have included all the waters of the Archipelago. Shalowitz, for example, says “interior waters” are the same as inland waters. 1 Shalowitz, Shore and Sea

Boundaries 295 (1962). A “gulf” is a “large area of a sea or ocean partially enclosed by land, especially a long landlocked portion of sea opening through a strait.” American Heritage Dictionary of the English Language 805 (1992) (Ex. AK-458). The most natural reading of the “interior seas” and “gulphs” referred to in the 1824 treaty encompasses the waters of the Archipelago that were not otherwise bays. Indeed, it is difficult to understand what the treaties could have meant by “interior seas” if not waters like the Archipelago.

Contrary to the United States’ argument, interpreting the treaty according to its plain language is also entirely consistent with “international rules for delimit[ing] maritime boundaries.” US Count I Opp. at 9. To the extent such rules existed at the time, they permitted claiming waters like those of the Archipelago as inland. For example, the United States claimed enclosed waters as inland at around the same time as Russia did so in the Archipelago. See Mem. in Supp. of Alaska’s Mot. for Summ. Judg. on Count I (“AK Count I Mem.”) at 32 & n.8. The United States conceded to Spain with respect to Cuba the same limit of territorial waters the United States claimed for itself, see Ex. US-I-6, App. A at 16a, and considered the inland jurisdiction of Cuba as extending to the islands along its coast with the three-mile territorial sea measured seaward from those

islands. See AK Count I Mem. at 32.³ Norway began delimiting its seaward jurisdiction from straight lines connecting islands in 1812. The Fisheries Case (U.K. v. Norway), 1951 I.C.J. 116, 134 (Dec. 18). Russia's claim to the inland waters of the Archipelago thus did not violate any maritime delimitation rules.

The United States also suggests that Alaska's reading of the "interior seas, gulphs, harbours, and creeks" language would encompass Cook Inlet, a theory that the Court rejected in the Cook Inlet case. US Count I Opp. at 9. The Court, however, did not address the "interior seas" and "gulphs" language in that case. There, the only evidence of Russia's claim consisted of four Russian settlements, a Russian fur trader firing at a British ship, and the 1821 ukase. United States v. Alaska, 422 U.S. 184, 190-191 (1975). That evidence contrasts markedly with the evidence of Russia's exercise of authority over the inland waters of the Archipelago showing not only that she claimed the right to expel foreign vessels from the waters of the Archipelago but actually did so.

But the Court need not accept Alaska's interpretation of the treaties, for Russia's enforcement actions demonstrate its claim to the waters. According to Russia, most of the foreign vessels navigating the Archipelago during the ten-year period provided by Article IV of the United States-Russia treaty did so only to sell

³ Not coincidentally, these were the inland waters to which the United States likened the inland waters of the Archipelago at the 1903 Alaska Boundary Arbitration. See id. at 12.

“spirituous liquors, fire arms, and gunpowder” to the natives, even though such trade was prohibited. Ex. AK-11 at 245. During this period, Article IV deprived Russia “of all means of controlling the vessels which should visit these latitudes.” Id. But as the United States explained to the Alaska Boundary Arbitration Tribunal in 1903, when the governor of Russian America found in 1834 “that American sea captains at the port of Sitka intended to proceed on their trading voyages through the inland waters of the colony in spite of his verbal notice to them that the term had expired,” the governor notified the captains that such privileges had ceased. Ex. AK-13 at 69 (emphasis added). Then, in 1835, “the governor took more active steps to exclude foreign traders from the Straits.” Id. (emphasis added). Russia clearly considered the waters of the Archipelago inland waters subject to its dominion.

Any doubt on this score is eliminated by the nature of the “active steps” taken by Russia to “exclude foreign traders from the Straits.” Id. In March 1835, Russia sent “the brig Chichagoff * * * to Tongas[s], near the southern boundary line at 54° 40’, for the purpose of intercepting foreign vessels entering the inland waters of the colony.” Id. at 70 (emphasis added). “[T]he single and simple measure adopted in relation to [United States] vessels, is their absolute exclusion from what are deemed Russian possessions.” Ex. AK-11 at 246 (emphasis added). The references to straits, inland waters, 54° 40’, and exclusion

from Russian possessions confirmed that Russia claimed the right to exclude foreign vessels from all the waters of the Archipelago.

Russia not only claimed that right; it exercised that right by expelling the United States vessel Loriot from the Archipelago. See AK Count I Mem. at 8; AK Count I Opp. at 9. The United States claims the Loriot was in a Russian harbor when ordered to leave Russian waters, and that an incident “plainly occurring in harbors cannot form the basis for a claim of inland water status.” US Count I Opp. at 10. The United States misreads the evidence. The Loriot was outside the Russian harbor of Tatetsky asking for permission to enter when it was “again ordered to leave the waters of His Imperial Majesty.” Ex. AK-11 at 232-233, 241 (“off the harbor of Tatetsky she was, in threatening weather, refused permission to enter, and peremptorily again commanded to quit the waters of His Imperial Majesty”). This occurred outside the harbor, not inside as claimed by the United States. More importantly, the “waters of His Imperial Majesty” that she was ordered to leave were those outside the harbor. In fact, far from Russia simply denying entrance to harbors, “the Loriot was violently seized and driven from her voyage,” AK-11 at 240, returning all the way to the Sandwich Islands (Hawaii), id. at 241. Accordingly, the “waters of His Imperial Majesty” from which the Loriot was “driven” were those of the entire Archipelago.

The facts also show that the United States eventually acquiesced to Russia's claim. The United States initially protested the expulsion of the Loriot from the Archipelago. US Count I Opp. at 10. But those protests ended in 1838 when Russia refused to renew the Article IV trading privilege or to recognize the Loriot's claim for damages; the United States "submitted" to that decision, gave notice to United States mariners not to "frequent the interior seas, gulfs, harbors, and creeks upon that coast at any point north of the latitude of 54° 40'," and thus "finally recognized the complete sovereignty of Russia over the Northwest Coast of America north of latitude 54° 40'." Ex. AK-13 at 72.

The "complete sovereignty" recognized by the United States necessarily encompassed all of the "interior seas, gulfs, harbors, and creeks" of that coast, including those of the Archipelago. The United States' suggestion that this related only to "unoccupied portions of the coast," US Count I Opp. at 10-11, ignores the fact that the expulsion of the Loriot from the "waters of His Imperial Majesty" prompted the notice to mariners not to "frequent" those waters. It had nothing to do with sovereignty over uplands.

The United States also claims that Britain's navigation of the waters of the Archipelago to implement its treaty right to navigate the Russian portion of the Stikine proves that the waters of the Archipelago were not considered inland. See, e.g., US Count I Opp. at 2, 9. The United States is wrong, for Russia also

excluded British mariners from the Archipelago, and Britain’s right to traverse the waters of the Archipelago to reach the Stikine was provided only as a contract right, not as an inherent right under international law. As former Secretary of State Foster explained, Britain was prepared to meet Russia’s demand for the lisière in the negotiations leading to the 1825 Britain-Russia treaty, but only in return for “the free use of the rivers, seas, straits, and waters which the limits assigned to Russia would comprehend”—i.e., “the right of resorting to the territory and waters conceded to Russia.” AK-299 at 431 (footnotes omitted; emphasis added). Those clearly included the waters of the Archipelago.

Britain obtained that right in Articles VI and VII of the 1825 Britain-Russia treaty, which allowed it to navigate the Russian portions of the transboundary rivers crossing the lisière and gave it the same ten-year period to “frequent” the waters of the Archipelago as Article IV of the United States-Russia treaty gave the United States. Hudson’s Bay Company chief trader Ogden recognized this fact, stating that Britain’s right to navigate the waters of the Archipelago leading to the Stikine was a treaty right: “by the treaty of convention between Great Britain and Russia we have every right to navigate these Straits.” US-I-2 at 18-19 (emphasis added). As Prof. Charney noted, Britain did not believe it had a right of innocent

passage through the territorial sea under international law; it had a right to navigate the Archipelago under the 1825 treaty. See Ex. AK-459 at 20-21.⁴

Russia, however, apparently did not share that view, for Russian Captain Sarembo told Ogden that Britain had “no right” to navigate the straits leading to the Stikine and forced Ogden’s vessel, the Dryad, to leave the Archipelago. US-I-2 at 18-19. Thereafter, Russia blockaded the British from entering the Archipelago from 1836 until 1838. Id. at 22.

The Dryad incident and the subsequent Russian blockade cast doubt on Britain’s right to navigate the waters of the Archipelago, and Britain consequently obtained “free navigation” of the Archipelago as a contract right in the Hudson’s Bay Company lease of the lisière from Russia. See Ex. AK-299 at 445-447 & n.*. This is confirmed by discussions between representatives of the United States and Canada, who agreed that the United States could deny innocent passage through the Archipelago, “thus materially curtailing or rendering nugatory the conceded right to navigate the [transboundary rivers].” Ex. AK-16 at 10.⁵

⁴ Although recently deceased, Prof. Charney (who would have been an expert witness for Alaska) was a recognized authority on historic waters whose views are instructive on the issues. He was recognized, without objection from the United States, as “an expert in international law and law of the sea, with particular expertise in those two areas as they relate to United States foreign policy and interests.” XXI Tr. at 3037, United States v. Alaska, No. 84, Orig. (May 31, 1985) (AK-460).

⁵ The United States tries to dismiss the 1888 memorandum reflecting this view as “informal conversations between two non-lawyers” that “contain[ed] no

Russia's claim to the inland waters of the Archipelago before the Treaty of Cession lays the foundation for the United States' claim to those inland waters following that treaty. The significance of Russia's claim, and the clear recognition of it by both the United States and Britain, should not be understated. In remote areas like the Archipelago, once a claim is made with reasonable notice to other countries, a nation is presumed to maintain that claim unless and until affirmatively withdrawn or renounced. See Ex. AK-459 at 16. Following the Treaty of Cession in 1867, the United States did not need to repeatedly claim the waters of the Archipelago as inland or deny innocent passage to others; its claim was established and effective unless and until it affirmatively withdrew or renounced the claim established by Russia. As next shown, the United States did not disavow that claim; to the contrary, it continued to claim the waters of the Archipelago as inland until 1971.

critique or analysis." US Count I Opp. at 12-13 & n.4. The view they expressed, however, follows directly from the facts discussed above. As the Secretary of State noted, moreover, the two "non-lawyers" were selected by their governments for these informal conversations because they possessed "knowledge of the questions in dispute." Ex. AK-16 at 1. He also stated that the memorandum and other accompanying documents "are considered of value as bearing upon a subject of great international importance" and should be made public, id., suggesting agreement with their assessment that these waters were inland.

B. The United States Claimed The Waters Of The Archipelago As Inland From The Treaty Of Cession Until 1971

1. The United States Considered The Waters Of The Archipelago As Inland From Cession To The 1903 Alaska Boundary Arbitration

The United States brushes away the various references to the “inland waters” of the Archipelago between the 1867 Treaty of Cession and the 1903 Alaska Boundary Arbitration (see AK Count I Mem. at 9-11; AK Count I Opp. at 12-13), but they are not so easily ignored. These references, including statements by sea captains of the United States who plied the waters during that era, amply reinforce the proposition that the United States succeeded to Russia’s claim to the inland waters of the Archipelago. They also reflect the national importance of the Archipelago’s waters in much the same way that the statements recited by the Court in the Alabama and Mississippi Boundary Case reflected the importance of Mississippi Sound. See 470 U.S. at 102-106. And they show a public perception that these waters belonged to the United States.

The United States argues that the 1871 treaty between the United States and Britain—which (like the 1825 Russia-Britain treaty) allowed British navigation up the Stikine—implies that the waters of the Archipelago were territorial sea. US Count I Opp. at 2, 13. But the 1871 treaty did not carry that implication any more than the 1825 treaty did. Indeed, as noted above, it was generally understood that the United States could deny passage through the Archipelago

even though that might hinder the 1871 treaty right as it related to the Stikine. See Ex. AK-16 at 10. Whether the United States actually did so is irrelevant. The important thing is that it could have, if doing so would have served its interests.

2. The United States Claimed The Waters Of The Archipelago As Inland At The 1903 Alaska Boundary Arbitration

As for 1903 Alaska Boundary Arbitration, the United States argues that its statements in that proceeding “did not, and could not, constitute a claim of historic inland waters.” US Count I Opp. at 14 (emphasis added). Alaska does not contend that the United States made a claim to historic inland waters at the Arbitration. But, as Alaska previously explained, the United States did confirm its claim to these inland waters. See AK Count I Mem. at 11-15; AK Count I Opp. at 14-18. That confirmation is part of Alaska’s showing that, when Alaska’s title vested in 1959, these were historic inland waters. Whether a body of water qualifies as historic waters is for the Court to decide based on the evidence. The implied suggestion throughout the United States’ submissions that Alaska must show that the United States specifically claimed the waters of the Archipelago as historic inland waters, rather than simply as inland waters, is baseless.

Contrary to the United States’ assertions, its claim at the 1903 Arbitration was not made simply “for the sake of argument,” US Count I Opp. at 16, but rather was central to the United States’ position. The United States explained to the arbitrators that it would be absurd to measure the United States’

10-league lisière from the political coastline—which, as the United States explained, enclosed the entire Archipelago—because in that event the lisière would encompass no mainland territory at all. See US Count I Opp. at 15. But the United States’ argument would itself have been meaningless if the United States had not, in fact, actually asserted that the political coastline enclosed the Archipelago. For if the United States did not measure the political coastline from the entrances to the Archipelago, then Britain’s argument—that the treaty coastline should be measured from a political coastline consisting of the mainland coast and closing lines drawn across mainland bays—would have made sense.

Thus, despite the United States’ current protestations that it did not claim these waters as inland at the Arbitration, it is not surprising that the Justice Department concluded in 1952 that the United States “explicitly stated that the waters inside the islands were inland” at the Arbitration. Ex. AK-29 at 1. The United States provides no reason why this reasoned conclusion should be disavowed in favor of the United States’ newly-minted litigation position.

3. The United States Continued To Claim The Waters Of The Archipelago As Inland From 1903 Until 1971

a. The Marguerite Incident

The United States argues that its regulation of Alaska fisheries has no bearing on this case, stating that Alaska “points only to a single enforcement action—the Marguerite incident—against a foreign vessel” and that it is not clear

where the Marguerite was located. US Count I Opp. at 19-20. The United States is wrong.

Attempting to recharacterize the event nearly 80 years later, the United States now asserts that the Marguerite was not, in fact, intercepted more than three miles from U.S. territory. See U.S. Count I Opp. at 19-20. But the United States' after-the-fact re-creation is immaterial, for Britain clearly stated at the time that the incident took place "approximately five and one-half (5 1/2) miles from the nearest United States territory." Ex. AK-34 at 1. Thus, even though the United States' counsel disputes it now, the location of the vessel more than three miles from land was never disputed by the two nations. In any event, a chart prepared at the time clearly shows that the Marguerite was intercepted for fishing near the entrance to Revillagigedo Channel about seven and one-half miles north of the AB line, in an area unquestionably more than three miles from any land. See Exs. AK-461, AK-462. This establishes that (1) the United States' baseline at this end of the Archipelago included ten-mile closing lines between islands; (2) the territorial sea claimed by the United States extended three miles beyond those lines; and (3) the waters behind those lines necessarily were inland. See Ex. AK-459 at 22-23.

The United States questions whether Britain acquiesced to the United States' claim to jurisdiction over this area by failing to pursue the matter beyond

asking for an investigation. US Count I Opp. at 20. The answer is that Britain knew the fishing occurred more than five and one-half miles from land, see Ex. AK-34 at 1, an area that the United States could claim as “within the jurisdiction of this Government,” Ex. AK-35 at 1, only if it claimed a three-mile territorial sea measured from an inland water closing line. Britain’s failure to pursue the matter further shows that it acquiesced in the United States’ claim. See Alabama and Mississippi Boundary Case, 470 U.S. at 110 (“When foreign governments do know or have reason to know of the effective and continual exercise of sovereignty over a maritime area, inaction or toleration on the part of the foreign governments is sufficient to permit a claim of historic title to arise.”).

b. The Dixon Entrance Negotiations With Canada

The United States (US Count I Opp. at 21) points to correspondence between the Commerce and State Departments in 1934 regarding Canadian fishing immediately north of the AB line. But this internal, confidential correspondence could not have been a disavowal of the United States’ claim to the inland waters of the Archipelago because there is no evidence that it was communicated to foreign countries. In fact, the Secretary of Commerce urged that the correspondence not be communicated to foreign nations. See Ex. US-I-14 at 2. By contrast, the United States’ contemporaneous public position, made at the 1930 Hague Codification Conference, rejected the position that waters like the Archipelago

were high seas. Waters like the Archipelago were inland under the rule for straits leading to inland seas. See Ex. AK-91 at 200-201; AK Count I Opp. at 25.

Likewise, during the AB line negotiations with Canada, the United States did not argue for strict application of the arcs-of-circles method. The United States now suggests that it did, see US Count I Opp. at 24, but no such position was expressed to Canada at the time. Boggs only illustrated the arcs-of-circles method in the vicinity of the AB line to show what the United States possessed south of it. He never suggested that this method would be strictly applied throughout the Archipelago. Indeed, he considered the waters inside the Archipelago as inland. See AK Count I Mem. at 22-26; AK Count I Opp. at 27-28.⁶

When it came to expressing a position in international discourse—which is what really matters under the historic waters inquiry—both the United States and Canada agreed that the United States possessed dominion over the waters of the Archipelago. The significance of the “draft ‘understanding’ ” as to future claims to historic inland waters (US Count I Opp. at 25-26) is that the United States and Canada agreed that each side could make such claims—i.e., they agreed that the factual predicate for such claims existed. A historic inland waters

⁶ The United States says Boggs illustrated the territorial sea extending up into Clarence Strait and Revillagigedo Channel in Ex. AK-65 at 10. See US Count I Opp. at 25. That exhibit shows no such thing. The map accompanying Ex. AK-64 does indicate that, but it also shows four-mile lines where, under the United States’ 1930 proposal, the straits leading to inland seas would begin.

claim cannot be made in the future without a factual basis in the past, and each side agreed that the other possessed the requisite factual basis.

c. Fisheries Regulations

In United States v. Alaska, 422 U.S. at 197-199, the Court found the evidence of fisheries regulation by itself was insufficient to establish historic inland waters because there was no evidence foreign vessels were treated differently from United States vessels. That is not the case here, as foreign fishing was prohibited in areas where United States nationals were allowed to fish. For example, the Alien Fishing Act prohibited foreign fishing “in any of the waters of Alaska under the jurisdiction of the United States” and was enforced up to the AB line at the south end of the Archipelago. Ex. AK-31 at 4. Much of the AB line is more than three miles from land.

As we have shown, moreover, the Department of Interior’s definition of the “waters of Alaska” in 1955 and later also shows that the United States considered the Archipelago to be part of those waters. Whether that definition also encompassed other areas in Alaska (see US Count I Opp. at 22) is not at issue. The significance of that definition is that (1) it encompassed all of the Archipelago and reflected the United States’ longstanding position, and (2) the position the United States takes here—strict application of the arcs-of-circles method producing

pockets and enclaves of high seas in the Archipelago—was not its position then nor at any time before.

d. Post-Statehood Recognition Of Inland Water Status

Alaska does not focus the inquiry on the date of statehood as “an attempt to avoid the United States’ 1971 express disclaimer.” US Count I Opp. at 5. As Alaska has repeatedly explained, the date of statehood is key because that is when Alaska’s title to submerged lands vested. See Ex. AK-459 at 14-15. The United States’ disclaimer, coming twelve years later, could not have divested Alaska of its title. See AK Count I Mem. at 4-5 (and authorities cited). That is not to say, however, that post-statehood events are entirely irrelevant. Indeed, the evidence that the United States continued to claim the waters of the Archipelago as inland after statehood, along with the evidence that it did not move to its current general delimitation position until 1971, is highly probative.

Despite the United States’ assertions (see US Count I Mem. at 31), there is absolutely no indication in Organized Village of Kake v. Egan, 174 F. Supp. 500 (D. Alaska 1959), that the court used the term “inland waters” to mean inland waters and territorial sea. No one in Alaska would have made that mistake. The court was reflecting the general understanding that all the waters of the Archipelago were inland.

Faced with its unequivocal statement in its 1964 California brief that the entrances to the Archipelago are straits leading to inland waters, the United States is reduced to saying that this statement was “mistaken[].” US Count I Opp. at 31-32. But the statement is consistent with all of the United States’ prior practice—the 1845 notice to mariners, the 1903 Alaska Boundary Arbitration, the fisheries regulations and enforcement, the AB line negotiations with Canada, and the 1952 Justice Department study. And, unlike the United States’ position here, the statement was not adopted during litigation over this very area.

Finally, the United States does not deny that the Percy charts were used for enforcement purposes. See AK Count I Mem. at 38-39. Instead, it takes the novel tack that they are irrelevant because they represented Article 4 straight baselines, not historic inland waters. US Count I Opp. at 32. The point, however, is that the use of those charts for enforcement purposes shows the United States treating the waters of the Archipelago as inland—i.e., it shows an inland waters claim. Cf. Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), 1962 I.C.J. 6, 25-28 (June 15) (officials’ actions on the basis of maps showing boundaries binds government even if officials were “minor”). Although Percy’s Article 4 straight baselines encompassed more area claimed as inland waters than Alaska claims here, they also encompassed the area enclosed by the more

conservative 10-mile lines circumscribing Alaska's historic inland waters claim.

The claim—not the basis for it—is what counts for historic waters purposes.

C. The United States' Claim To The Archipelago Was A Specific Application Of Longstanding Delimitation Principles

The United States does not dispute that, from the earliest days of the Republic, the United States claimed enclosed waters as inland. See AK Count I Mem. at 32 & n.8; Ex. AK-308 at 61. Nor does it dispute that in 1863 Secretary of State Seward made clear that this policy applied to waters enclosed by islands. Id. Seward also negotiated the purchase of Alaska. It is inconceivable that his State Department would not consider the waters enclosed by islands in the Archipelago as inland, having so soon before conceded to Spain the inland waters enclosed by the islands of Cuba.

As the United States notes, see US Count I Opp. at 30, the Court has held that the United States did not have a consistent policy before Alaska's admission. But the Court also made clear that a specific inland waters claim to an area prevails over a possibly inconsistent general policy. United States v. Alaska, 521 U.S. 1, 15 (1997). The United States' specific claim to the inland waters of the Archipelago trumps any generalized suggestion that they were treated otherwise before 1971.

III. FOREIGN NATIONS ACQUIESCED IN THE UNITED STATES' CLAIM

Foreign nations plainly acquiesced in the United States' claim, not only in the 1903 Arbitration, the Marguerite incident, and AB-line negotiations, but in various other fora, including the 1893 Fur Seal Arbitration, the 1910 North Atlantic Fisheries Arbitration, and the 1951 Fisheries Case. See AK Count I Mem. at 27-30. The United States' attempts to explain away the evidence are unavailing.

The United States now argues that Britain, at the 1893 Arbitration, did not recognize the 1824 United States-Russia treaty as granting freedom to navigate the inland waters of the Archipelago for only ten years. US Count I Opp. at 27. But that argument is contradicted by the United States' own statements to Britain at the 1903 Arbitration. See 5 Proceedings of the Alaska Boundary Tribunal, S. Doc. No. 58-162, Part I at 96-99 (1904) (Ex. AK-463). It is thus irrelevant how the United States might now characterize Britain's statements in 1893, for only ten years later the parties clearly understood that Russia's claim encompassed the Archipelago.

The United States discounts Alaska's reliance on Britain's statements at the 1910 North Atlantic Fisheries Arbitration by quoting the statement of the United States' representative that the 1903 Arbitration did not have a "direct bearing" on the limits of territorial waters. US Count I Opp. at 28-29. That statement was true to the extent that the award did not bear directly on maritime

limits. But the representative stated clearly that the United States, in the 1903 Arbitration, had “laid down the line between the islands lying off the mainland of Alaska.” Ex. AK-81 at 1094. Britain’s recognition of that fact in 1910 is thus additional evidence of its acquiescence.

The United States mischaracterizes our argument as contending that that Britain and Norway recognized a “historic waters claim” to the Archipelago in the Fisheries Case. US Count I Opp. at 29. Both Britain and Norway, however, recognized that the United States claimed the Archipelago as inland waters.

Although the nations may not have had the details of the claim correct, there can be no question that they understood the United States to have made a claim. See Alabama and Mississippi Boundary Case, 470 U.S. at 106-107. They also recognized—and did not question—the more general United States policy of claiming straits leading to inland seas. See AK Count I Mem. at 29-30.

IV. THE VITAL INTERESTS OF THE UNITED STATES DO NOT SUPPORT DENYING ALASKA THE TERRITORY IT RECEIVED AT STATEHOOD

The United States claims that its vital interests in defeating “extravagant” claims of other nations “weigh against historic inland waters status for the Archipelago.” US Count I Opp. at 40. But while the United States lists foreign claims it considers “extravagant,” id. at 41-42, it nowhere explains how recognition of Alaska’s claim here based on the voluminous historical record will

in any way compromise the United States' attempts to defeat these other claims. If this speculative argument were accepted here, it is difficult to see how any State would be able to raise a historic waters claim in the future.

Furthermore, any alleged problems the United States may perceive as a result of this case are of its own making. Even the State Department recognized that the significantly smaller quantum of evidence presented by Alaska in 1972 was "sufficiently weighty to cast doubt on the appropriateness" of the 1971 Baseline Committee charts. AK-118 at 12. The United States could have avoided any perceived problems by following the State Department's recommendation and adopting straight baselines for the Archipelago. It chose not to, however, not because of foreign relations concerns, but because of domestic concerns over litigation with the States. See AK Count I Mem. at 43-45.

Finally, the United States does not rebut Alaska's showing that the vital interests of the United States support a finding that the submerged lands underlying the waters of the Archipelago passed to Alaska as of statehood. While recognizing that those waters serve as the region's roads and are vital to Alaska's economy and society, the United States nevertheless argues that the reduced regulation entailed by a disclaimer of inland water status could never compromise those vital interests. See US Count I Opp. at 43. But regardless of whether there is now a need to regulate foreign vessel traffic more extensively, the extraordinary

importance of these waters to the people whose lives are intertwined with them plainly counsels in favor of recognizing the greatest possible level of sovereign authority over them. And while the United States downplays the defense implications of recognizing pockets of high seas in the middle of U.S. territory as of 1959—the relevant time for this historic waters claim—the fact that the high seas may then have extended to within three miles of coastal areas such as Los Angeles, *id.* at 44, says nothing about the security implications of allowing potentially unfriendly vessels unfettered access deep inside the territory of our Nation.

CONCLUSION

For the foregoing reasons, and those set forth in Alaska's motion for summary judgment and in its opposition to the United States' motion, summary judgment should be granted in favor of Alaska on Count I.

Respectfully submitted,

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