No. 128, Original

In the Supreme Court of the United States

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

MOTION FOR LEAVE TO INTERVENE AND FILE ANSWER

DARRON C. KNUTSON
Counsel of Record
PHILIP R. MAHOWALD
JULIE ANN FISHEL
WINTHROP & WEINSTINE, P.A.
3200 Minnesota World Trade Center
30 East Seventh Street
St. Paul, Minnesota 55101
(651) 290-8400
FAX: (651) 292-9347

RICHARD L. YOUNG
211 12th Street Northwest
Albuquerque, New Mexico 87102
(505) 842-6123
FAX: (505) 842-6124

Counsel for Proposed Intervenor Defendants Franklin H. James, Shakan Kwaan Thling-Git Nation, Joseph K. Samuel, and Taanta Kwaan Thling-Git Nation

TABLE OF CONTENTS

In the Supreme Court of the United States

No. 128, Original

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

MOTION FOR LEAVE TO INTERVENE AND FILE ANSWER

The proposed Intervenor Defendants Franklin H. James, Shakan Kwaan Thling-Git Nation, Joseph K. Samuel and Taanta Kwaan Thling-Git Nation (collectively, the "Proposed Intervenors") by their attorneys ask leave of this Court to intervene as party Defendants in the above-captioned matter and to file the Proposed Answer of Intervention attached hereto as Appendix A. As is more fully set forth in the accompanying Brief in Support of Motion for Leave to Intervene and File Answer attached as Appendix B, the Proposed Intervenors state as follows:

1. The Proposed Intervenors have a direct and substantial interest in the question of ownership of the submerged lands within the boundaries of the Tongass National Forest.

2. Disposition of this action without the Proposed Intervenors will, as a practical matter, impair or impede the ability of the Proposed Intervenors to protect their interests which are not adequately represented by the other parties to this litigation.

3. The Proposed Intervenors' defense that there is federal ownership of the submerged lands in the Tongass National Forest area has questions of fact and law in common with those raised in this litigation. Intervention will not delay or prejudice the adjudication of the rights of the original parties.

4. For the foregoing reasons, the motion for leave to intervene as party Defendants in this matter should be granted.

Dated: February 20, 2001

Respectfully submitted,

DARRON C. KNUTSON
Counsel of Record
PHILIP R. MAHOWALD
JULIE ANN FISHEL
WINTHROP & WEINSTINE, P.A.
3200 Minnesota World Trade Center
30 East Seventh Street
St. Paul, Minnesota 55101
(651) 290-8400
FAX: (651) 292-9347

RICHARD L. YOUNG
211 12th Street Northwest
Albuquerque, New Mexico 87102
(505) 842-6123
FAX: (505) 842-6124

Appendix A

In the Supreme Court of the United States

No. 128, Original

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

AND

FRANKLIN H. JAMES, SHAKAN KWAAN THLING-GIT NATION, JOSEPH K. SAMUEL, AND TAANTA KWAAN THLING-GIT NATION, INTERVENOR DEFENDANTS

PROPOSED ANSWER OF INTERVENTION

Intervenors, for their Answer to Plaintiff State of Alaska's Amended Complaint to Quiet Title, admit, deny and allege as follows:

Count I – Historic Waters of the Alexander Archipelago

1. The allegations of paragraph 1 of the Amended Complaint are admitted.

2. The allegations of paragraph 2 of the Amended Complaint are admitted.

3. Intervenors are without sufficient information to admit or deny the allegations contained in paragraph 3 of the Amended Complaint.

Count II – The Juridical Bay Status of the Waters of the Alexander Archipelago

4. Paragraph 4 of the Amended Complaint is a conclusion of law for which no response is required.

5. The allegations of paragraph 5 of the Amended Complaint are admitted.

6. Paragraph 6 of the Amended Complaint is a conclusion of law for which no response is required.

7. Intervenors are without sufficient information to admit or deny the allegations of paragraph 7 of the Amended Complaint.

8. The allegations of paragraph 9 of the Amended Complaint are denied.

9. The allegations of paragraph 10 of the Amended Complaint are denied.

10. Paragraph 11 of the Amended Complaint is a conclusion of law for which no response is required.

11. Section 6(m) of the Alaska Statehood Act speaks for itself and no other response to the allegations contained in paragraph 12 of the Amended Complaint is required.

12. Paragraph 13 of the Amended Complaint is a conclusion of law for which no response is required.

13. Intervenors are without sufficient information upon which to admit or deny the allegations contained in paragraph 14 of the Amended Complaint.

14. The allegations of paragraph 15 of the Amended Complaint are denied.

15. The allegations of paragraph 16 of the Amended Complaint are admitted.

16. The allegations of paragraph 17 of the Amended Complaint are admitted.

17. The allegations of paragraph 18 of the Amended Complaint are admitted.

18. Intervenors make no Answer to the allegations contained in paragraph 19 of the Amended Complaint because they do not address subject matter in which Intervenors have an interest.

19. The allegations of paragraph 20 of the Amended Complaint are denied.

20. The allegations of paragraph 21 of the Amended Complaint are denied.

21. The allegations of paragraph 22 of the Amended Complaint are denied.

22. Intervenors make no answer to the allegations contained in paragraphs 23 through 41 of the Amended Complaint because they do not address subject matter in which Intervenors have an interest.

Count III – The Tongass National Forest

23. The allegations of paragraphs 1-6, 11-13 and 16-19 of the Amended Complaint are responded to as set forth above.

24. The allegations of paragraph 43 of the Amended Complaint are denied.

25. The allegations of paragraph 44 of the Amended Complaint are denied.

26. The allegations of paragraph 45 of the Amended Complaint are denied.

27. Intervenors deny that the State of Alaska holds title to these lands. For the remainder of the allegations, Intervenors are without sufficient information to admit or deny the allegations contained in the remainder of paragraph 46 of the Amended Complaint.

28. The allegations of paragraph 47 of the Amended Complaint are denied.

Count IV – Glacier Bay National Monument

29. Intervenors make no Answer to the allegations contained in paragraphs 48 through 63 of the Amended Complaint because they do not address subject matter in which Intervenors have an interest.

PRAYER FOR RELIEF

WHEREFORE, the Proposed Intervenors pray for the following relief:

A. That the Court enter a judgment quieting title of the United States in and to the subject land of the Tongass National Forest and declaring that the State of Alaska has no right, title or interest in or to said lands and that the State of Alaska be forever barred from asserting any claim whatsoever in the subject lands.

B. That said judgment enjoin the State of Alaska, its privies, assigns, lessees, and other persons claiming under it from interfering with the rights of the United States in said lands.

C. For such other and further relief as this Court may deem just and proper.

Respectfully submitted,

DARRON C. KNUTSON
Counsel of Record
PHILIP R. MAHOWALD
JULIE ANN FISHEL
WINTHROP & WEINSTINE, P.A.
3200 Minnesota World Trade Center
30 East Seventh Street
St. Paul, Minnesota 55101
(651) 290-8400
FAX: (651) 292-9347

RICHARD L. YOUNG
211 12th Street Northwest
Albuquerque, New Mexico 87102
(505) 842-6123
FAX: (505) 842-6124

Appendix B

In the Supreme Court of the United States

No. 128, Original

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AND FILE ANSWER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Statutes:

Franklin H. James, Shakan Kwaan Thling-Git Nation ("Shakan Kwaan"), Joseph K. Samuel and Taanta Kwaan Thling-Git Nation ("Taanta Kwaan") (collectively "Proposed Intervenors") hereby move the Court for an order permitting them to intervene as party Defendants in this matter, and permitting their proposed Answer of Intervention to be filed as the Answer of Intervention. The grounds of this motion are set forth below.

BACKGROUND

The Proposed Intervenor Defendant Franklin H. James is the First Chairholder and Tribal Spokesman for Shakan Kwaan. Shakan Kwaan is a band of Thling-Git natives whose ancestral homeland is in southeast Alaska, and more particularly in and around the northwest part of Prince of Wales Island. The membership of the Shakan Kwaan is determined by Thling-Git blood and marriage relationships; and thus the Proposed Intervenor Shakan Kwaan is both a community and an extended family as those terms are defined and/or used in the United States' subsistence regulations set forth in 50 C.F.R. Part 100. Insofar as the subject matter of this lawsuit is concerned, all members of the Shakan Kwaan who are involved in the subject matter of this lawsuit and who have authorized Proposed Intervenor James to represent them in this matter are rural Alaskan residents, as well as being citizens of the United States and federally recognized Alaskan natives.

Proposed Intervenor Defendant Joseph K. Samuel is the First Chairholder and Tribal Spokesman for the Taanta Kwaan. Taanta Kwaan is a band of Thling-Git natives whose ancestral homeland in southeast Alaska and more particularly in and around Prince of Wales Island, neighboring the homeland of Intervenor Shakan Kwaan. The membership of the Taanta Kwaan is determined by Thling-Git blood and marriage relationships; and thus the Proposed Intervenor Taanta Kwaan is both a "community"

and an extended "family" as those terms are defined and/or used in the federal subsistence regulations set forth in 50 C.F.R. Part 100. Insofar as the subject matter of this lawsuit is concerned, all members of the Taanta Kwaan who are involved and who have authorized Proposed Intervenor Samuel to represent them in this matter are rural Alaskan residents as well as being citizens of the United States and federally recognized Alaskan natives.

Since time immemorial, the Proposed Intervenors and their ancestors have made customary and traditional use of herring roe on kelp in the marine waters of the Tongass National Forest, within the meaning of the Alaskan National Interest Lands Conservation Act ("ANILCA") and 50 C.F.R. § 100.4. In or about 1991, based on the United States' failure to act lawfully and with reasonable timeliness on the Proposed Intervenors' application to issue permits for the harvesting and selling of herring row on kelp, as lawful "customary trade" under the terms of ANILCA, the Proposed Intervenors filed a civil action in the United States District Court for the District of Alaska seeking declaratory and injunctive relief against several federal agencies. *See Lincoln Peratrovich v. United States of* America, No. A92-0734-CV (D. Alaska). In particular, the lawsuit addressed the United States' disclaimer of federal regulatory jurisdiction over the marine waters of the Tongass National Forest.

In the approximately nine (9) years after filing the Complaint, the Proposed Intervenors repeatedly argued that the United States, not the State of Alaska, holds title to all fast and submerged lands within the boundaries of the Tongass National Forest; and that because such federally owned lands are "federal public lands," ANILCA subsistence fishing rights clearly apply to them. Conversely, the United States argued during the proceedings that title had not been shown to have been reserved by the United States to

the submerged lands within the exterior boundaries of the Tongass National Forest. *See Peratrovich,* Response to Motion for Preliminary Injunction, 20-23, No. A92-0734-CV (D. Alaska), filed on or about December 23, 1992, relevant pages attached hereto as Exhibit A.

In this original jurisdiction case, the State of Alaska seeks to establish title to submerged lands within its borders, including, the same submerged lands within the boundaries of the Tongass National Forest at issue in the Proposed Intervenors' federal district court case. On August 17, 2000, after this Court granted Alaska's motion for leave to file its complaint in this matter, the District Court stayed the Proposed Intervenors' case because "it would not be good use of resources for this Court to undertake to resolve an issue which will be resolved by the United States Supreme Court in a fashion which will be controlling for purposes of this and other cases." *See Peratrovich,* Order Status Conference, No. A92-074-CV (D. Alaska) filed on or about August 18, 2000, attached hereto as Exhibit B. The district court's stay effectively bars the Proposed Intervenor's ability to participate meaningfully in the adjudication of land title issues that will have a direct and permanent impact on their subsistence rights. If the State of Alaska is successful in this case, the Proposed Intervenors' litigation in the District of Alaska will fail and they will effectively lose federal subsistence rights in this area.

Given their interest, the threat to that interest and the inability of the Respondent United States to represent or defend that interest, the Proposed Intervenors respectfully request that they be permitted to intervene in the proceedings as a full party.

ARGUMENT

Whether a third person may intervene in an original action in the U.S. Supreme Court is guided by the Federal

Rules of Civil Procedure. *See Arizona v. California*, 460 U.S. 605 (1983). Rule 24 Fed. R. Civ. P., authorizes intervention in certain cases as a matter of right and in other cases as a permissive matter. Intervention should be granted in this case as a matter of right because the Proposed Intervenors would be bound by the judgment to be entered in this matter and the representation of the Proposed Intervenors' interests by the existing parties may be inadequate. Further, the claims and defenses of the Proposed Intervenors and those of the United States, a party to the main proceedings herein, have questions of law and fact in common and no party would be prejudiced by the intervention.

I. THE PROPOSED INTERVENORS ARE ENTITLED TO INTERVENTION AS A MATTER OF RIGHT.

Intervention as a matter of right is appropriate in this case. The rule guiding intervention as a matter of right provides that upon timely application, anyone shall be permitted to intervene "when the applicant claims an interest relating to the property...which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a).

The Proposed Intervenors' motion for leave to intervene is sufficiently timely with respect to this case of original jurisdiction given that the only briefing that has taken place thus far is the motion for leave to file the bill of complaint. Intervention will not interfere with the schedule for the proceedings previously established in this matter.

The lack of "adequate representation" condition is satisfied if the Proposed Intervenors can show that the representation of their interests by the current party "may be"

inadequate. *See Sierra Club, et al. v. Robinson, et al.*, 960 F.2d 83, 86 (8th Cir. 1992). The burden for making this showing is generally a minimal one. *See id.* The Proposed Intervenors believe it necessary to be involved in all hearings on the merits in this matter in order to adequately ensure that federal ownership of the Tongass National Forest area is strongly asserted. While it may be presumed that the United States has the same interest in asserting ownership of these lands, the United States has previously not taken a strong position in regard to this issue as reflected by the position taken by the United States in the Proposed Intervenors' litigation in the District of Alaska, where it actually disclaimed regulatory jurisdiction over submerged lands in the Tongass National Forest. Further, the Proposed Intervenors' interests include the obligations they have with regard to the economic and social well-being of their members. The federal government, although in a trust relationship with Alaskan natives, cannot ensure adequate representation sufficient to guarantee the Proposed Intervenors the level of advocacy their members demand.

Finally, there can be no doubt that the Proposed Intervenors have a recognized interest in the subject matter of the litigation. The submerged lands to which the Proposed Intervenors are seeking declaration of their subsistence rights in the federal district court are directly at issue in the present matter. The Proposed Intervenors' interests in the submerged lands of southeastern Alaska have been and will continue to be determined in this litigation since the United States' action as a representative will bind the Alaskan natives to any judgment. *See Heckman v. U.S.*, 224 U.S. 413, 444-45 (1912). Moreover, the Proposed Intervenors are entitled "'to take their place as independent qualified members of the modern body politic.'" *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 369 (1968) (quoting *Board of County Comm'rs v. Seeber*, 318 U.S. 705, 715 (1943)); *Arizona v. California*, 460 U.S. 605. Accordingly, similar to

the Indian tribes in *Arizona v. California*, the Proposed Intervenors' participation in the current litigation which concerns matters critical to their welfare, should not be denied. Any argument by the State of Alaska or the U.S. to the contrary is misplaced. *Id.* The Proposed Intervenors' claims in the federal district court have been stayed on account of this very matter. If they cannot litigate their interests here, they will be unable to assert their rights in any court.

For these reasons, the Proposed Intervenors should be allowed to intervene as of right.

II. AT A MINIMUM, THE PROPOSED INTERVENORS SHOULD BE GRANTED PERMISSIVE INTERVENTION UNDER RULE 24(b)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The Proposed Intervenors, at a minimum, satisfy the standards for permissive intervention set forth in the federal rules. In the event intervention is not available as a matter of right under Federal Rule of Civil Procedure 24(a), the Court may, in the exercise of its discretion, allow intervention under Rule 24(b). In order to satisfy the requirements of permissive intervention under Rule 24(b)(2), the motion: (1) must be timely; (2) the "claim or defense in the main action must have a question of law or fact in common"; and (3) intervention must not "unduly delay or prejudice the adjudication of the rights of the original parties." *See Arrow v. Gambler Supply Inc.*, 55 F.3d 407, 410 (8th Cir. 1995).

For the reasons previously stated, the Proposed Intervenors' motion is timely. The litigation has not progressed beyond the preliminary stages and, as such, it is difficult to envision that intervention would unduly delay or prejudice the parties. The issue in this litigation is ownership of submerged lands and that question directly controls the

Proposed Intervenors' subsistence rights under federal law, so the common questions of law or fact the Proposed Intervenor wish to present in defense of federal ownership justifies permissive intervention.

Neither the State of Alaska nor the United States can present any precise reason why their interests would be prejudiced or this litigation unduly delayed by the Proposed Intervenors' presence. Here, the Proposed Intervenors do not seek to bring new claims or issues against the state or the federal government, but only ask leave to participate in the question of ownership of specific submerged lands which affect their subsistence rights in a case of original jurisdiction commenced by the State of Alaska. Hence, the Supreme Court's judicial power over the controversy is not enlarged by granting leave to intervene, and the state's sovereign immunity protected by the Eleventh Amendment is not compromised. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981); *Poafpybitty*, 390 U.S. 365. Having satisfied the requirements for permissive intervention, at a minimum, the Proposed Intervenors' Motion for Leave to Intervene should be granted.

CONCLUSION

Rule 24 intervention is intended to ensure that litigation proceeds with all parties who have a legally recognizable stake in the outcome. For all the reasons set forth in this brief, the Proposed Intervenors respectfully request that they be granted leave to intervene in this case.

idmsstp:606849_1

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

LINCOLN PERATROVICH, et al.,	)	
	)	
Plaintiffs,	)	No. A92-
vs.	)	734 Civil (HRH)
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

Status Conference

A status conference was held in this case on August 17, 2000.

The court discussed with all counsel the status of this case in light of the fact that the United States Supreme Court has taken jurisdiction of a case known as Alaska v. United States, No. 128 Orig., 2000 WL 743716 (U.S. June 12, 2000). It is the perception of the court, and counsel do not disagree, that Original No. 128 raises what is probably the fundamental issue raised in this case. It is the court's view and counsel do not disagree, that it would not be a good use of resources for this court to undertake to resolve an issue which will be resolved by the United States Supreme Court in a fashion which will be controlling for purposes of this and other cases.

In light of the foregoing, this case shall remain stayed pending a decision by the United States Supreme Court in Original

No. 128 or until a party shall convince the court that there is a good cause to proceed with this matter, whichever shall occur earlier.

DATED at Anchorage, Alaska, this 17 day of August, 2000.

/s/ H. Russel Holland
H. Russel Holland, Judge
District of Alaska

EXHIBIT B

DEAN K. DUNSMORE
BRUCE M. LANDON
Department of Justice
Environment & Natural Resources Division
Room 217
222 West Seventh Avenue #69
Anchorage, Alaska 99513-7553
(907) 271-5452

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

LINCOLN PERATROVICH, rural Alaska resident & spokesman for Shakan Kwaan; et. al.,	)	No. A92-734 Civil
Plaintiffs,	)	
v.	)	
UNITED STATES OF AMERICA, FEDERAL SUBSISTENCE BOARD, et. al.,	)	
Defendants.	)	

RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION

* * *

C. Title Has Not Been Shown To Have Been Reserved By The United States. Plaintiffs contend that the creation of the Tongass National Forest constituted a reservation of title by the United States to any submerged lands within the exterior boundaries of that reservation. Pltfs' Memo at 5-10. The Supreme Court in Utah Division of State Lands v. United States, 482 U.S. 193 (1987), has addressed the standard to be applied in determining whether a reservation of title has been effected. Plaintiffs have

clearly failed to carry their burden of showing that title to the submerged lands at issue was reserved at the time of statehood. Plaintiffs have thus failed to show a likelihood of prevailing on the merits of this claim. This is especially so when the Department of Agriculture has previously been affirmed in its contention that tidelands within the Tongass National Forest were not public lands for purposes of Section 810 of ANICLA. City of Angoon v. Hodel, 803 F.2d 1016, 1027 n.6 (9th Cir. 1986), aff'g, City of Angoon v. Hodel, No. A83-234 Civil (D. Alaska, Memorandum and Order on Subsistence and Trust Responsibility Issues filed Oct. 17, 1985) at 14-16.[5]

As indicated in Utah Division of State Lands, title to the lands under navigable waters is generally held in trust for the respective future states. Id. at 196-97. The United States may, however, prior to statehood convey that title to a third party or reserve it to itself. Id. at 197, 200-02.[6] The issue is one of intent which is not to be lightly inferred. Id. at 197, 201-02. As stated by the Court:

> Congress, therefore, will defeat a future State's entitlement to land under navigable waters only in "exceptional circumstances," and in light of this policy, whether faced with a reservation or a conveyance, we simply cannot infer that Congress intended to defeat a future State's title to land under navigable waters "unless the intention was definitely

---

[5] A copy of this court's unreported decision is attached as Exhibit No. 2 hereto.

[6] Technically, the court only assumed without finally deciding that the United States could reserve title to itself. 482 U.S. at 201.

> declared or otherwise made very plain." (Emphasis added).

Id. The necessary intent to defeat a state's entitlement will not be inferred from the "mere act of reservation itself." Id. at 202. In order for title to be found to have remained in the United States:

> [T]he United States would not merely be required to establish that Congress clearly intended to include land under navigable waters within the federal reservation; the United States would additionally have to establish that Congress affirmatively intended to defeat the future State's title to such land. (Emphasis added).

Id.

Plaintiffs have shown nothing more than the acts of creating the Tongass National Forest. The authorization set forth in Section 24 of the Act of March 21, 1891, ch. 561, 26 Stat. 1095, 1103, quoted in Pltfs' Memo at 6, only authorizes the President to "declare the establishment of such reservations and the limits thereof." There is no indication in the legislative language of the necessary affirmative intent by Congress that any action by the President under that statute was "affirmatively intended to defeat" any future state's title to submerged lands. Nor is that intent shown in the proclamations of President Roosevelt referenced in Pltfs' Memo at 7-9. While the President clearly intended to create the forest reserve, there is no showing in those proclamations that these reserves were intended to defeat the title of the future State of Alaska to submerged lands at issue.

Plaintiffs' reliance on Section 4 (Plfs' Memo at 6) of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339, note prec. 48 U.S.C. § 21, is also misplaced. In Section 4, the State of Alaska only agrees not to claim title to lands "not granted or confirmed to the State or its political subdivisions by or under the authority of this act. . . " Section 6(m) of the Statehood Act provides, however, that "[t]he Submerged Lands Act of 1953. . . shall be applicable to the State of Alaska and the said State shall have the same rights as do the existing States thereunder." 72 Stat. At 343. Under the Submerged Lands Act, 43 U.S.C. § 1311(a), "title to and ownership of the lands beneath navigable waters. . . are hereby vested in and assigned to the respective States. . . " Therefore, Section 4 of the Statehood Act does not operate as a disclaimer by the State of title to submerged lands.

For the foregoing reasons, plaintiffs have failed to show likelihood of success on the merits of their claim that title to the submerged lands within the Tongass National Forest was reserved to the United States at the time of statehood.

* * *