No. 5, Original

In the Supreme Court of the United States

OCTOBER TERM, 1964

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES IN ANSWER TO THE BRIEF OF *AMICUS CURIAE* STATE OF ALASKA

ARCHIBALD COX,
Solicitor General,

GEORGE S. SWARTH,
MARTIN GREEN,
Attorneys,
Department of Justice, Washington, D. C., 20530.

INDEX

CITATIONS

Cases:

Cases—Continued Page

Treaty and Statute:

Miscellaneous:

Miscellaneous—Continued Page

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 5, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES IN ANSWER TO THE BRIEF OF *AMICUS CURIAE* STATE OF ALASKA

INTRODUCTION

One of the problems presented by this case is the proper identification of the "seaward limit of inland waters" from which is to be measured, in part, the three-mile belt of submerged land given to California by the Submerged Lands Act. One of the specific questions presented in that connection is whether, in nonhistoric bays, the "inland waters" referred to by the Act are limited to those within an entrance no more than 10 geographical miles wide, as the United States contends, or can include those within an entrance up to 24 geographical miles wide, as California contends. In California, this particular question ap-

pears to be material only with respect to Monterey Bay, as no other coastal indentation more than 10 miles wide is sufficiently enclosed to satisfy other criteria of inland waters. However, the same question will arise in other coastal States, and is now in litigation between the United States and Alaska, with respect to Yakutat Bay. *United States* v. *State of Alaska*, Civ. No. A-51-63, U.S. Dist. Ct., D. Alaska, decided in favor of the United States on June 24, 1964,[1] and now on appeal to the Court of Appeals for the Ninth Circuit. Since this Court's decision in the present case may control the outcome of the *Alaska* case, and since Alaska's arguments in support of a 24-mile limit differ from California's, Alaska has filed its *amicus curiae* brief to bring before the Court its own arguments on this single point. The present brief is confined to answering those arguments.

QUESTIONS PRESENTED

1. Whether the Submerged Lands Act, in giving to California the submerged lands within three miles of the seaward limit of "inland waters," referred to—

(a) the waters that American courts would recognize as inland waters under ordinary legal principles; or

(b) all waters that international law would permit a nation to claim as inland waters.

---

[1] The district court's memorandum of decision, findings of fact, conclusions of law, and judgment are set out in full in the Appendix, *infra*, pp. 22-39. They are not yet reported.

2. Whether the applicable definition of "inland waters" should be that prevailing on May 22, 1953, the date of the grant, or that prevailing now or at any future time.

3. Whether the applicable definition limits "inland waters" in nonhistoric bays to waters where the width of the entrance does not exceed 10 geographical miles, or includes waters where the width of the entrance may be as much as 24 geographical miles.

STATEMENT

The particular facts relevant to Alaska's arguments are these:

Article XII of the California Constitution of 1849, under which the State was admitted to the Union, described the boundary of the State as—

> running west and along said [Mexican] boundary line, to the Pacific Ocean, and extending therein three English miles; thence, running in a northwesterly direction and following the direction of the Pacific Coast, to the 42d degree of north latitude; thence, on the line of said 42d degree of north latitude to the place of beginning. Also all the islands, harbors, and bays, along and adjacent to the Pacific coast.

On November 13, 1951, Acting Secretary of State James E. Webb, answering an inquiry by the Attorney General as to the principles or criteria which govern the delimitation of the territorial waters of the United States, wrote in part as follows:

(c) The determination of the base line in the case of a coast presenting deep indentations such as bays, gulfs, or estuaries has frequently given rise to controversies. The practice of states, nevertheless, indicates substantial agreement with respect to bays, gulfs or estuaries no more than 10 miles wide: the base line of territorial waters is a straight line drawn across the opening of such indentations, or where such opening exceeds 10 miles in width, at the first point therein where their width does not exceed 10 miles. * * *

* * * *

The principles outlined above represent the position of the United States with respect to the criteria properly applicable to the determination of the base line of territorial waters and to the demarcation between territorial waters and inland waters.

On December 18, 1951, in the *Fisheries Case* (*United Kingdom* v. *Norway*), I.C.J. Reports 1951, p. 116, 131, the court rejected Great Britain's assertion that, apart from historic considerations that were admittedly controlling in that case, bays could comprise inland waters only where the closing line does not exceed 10 geographical miles in length. The court said that "the ten-mile rule has not acquired the authority of a general rule of international law."

On February 12, 1952, in reply to an inquiry as to whether that ruling had caused any modification in the position of the United States, Secretary of State Dean Acheson again wrote to the Attorney General, saying in part:

> In the view of the Department, the decision of the International Court of Justice in the Fisheries Case does not require the United States to change its previous position with respect to the delimitation of its territorial waters. It is true that some of the principles on which this United States position has been traditionally predicated have been deemed by the Court not to have acquired the authority of a general rule of international law. Among these are the principle that * * * in the case of bays no more than 10 miles wide, the base line is a straight line across their opening. These principles, however, are not in conflict with the criteria set forth in the decision of the International Court of Justice. The decision, moreover, leaves the choice of the method of delimitation applicable under such criteria to the national state. The Department, accordingly, adheres to its statement of the position of the United States with respect to delimitation of its territorial waters in date of November 13, 1951.[2]

On May 22, 1953, the United States granted to California the submerged lands within its boundaries, but limited to an extent of three geographical miles from the line of ordinary low water on the open coast and from the line marking the seaward limit of inland waters. Submerged Lands Act, secs. 2 and 3, 67 Stat. 29-30, 43 U.S.C. 1301, 1311.

The Convention on the Territorial Sea and the Contiguous Zone, executed at the United Nations Conference on the Law of the Sea at Geneva on April

---

[2] Both letters are reprinted in full in the appendix to the Brief for the United States in Answer to California's Exceptions, pp. 6a-13a.

29, 1958, was approved by the Senate on May 26, 1960 (106 Cong. Rec. 11174-11196), and was ratified by the President on March 24, 1961 (44 State Dept. Bull. 609). Article 7 of that Convention provides, in part:

> 4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.
>
> 5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

On January 15, 1963, Secretary of State Dean Rusk, writing to the Attorney General, said (2 *International Legal Materials* 527, 528):

> Although the Convention is not yet in force according to its terms because twenty-two States have not yet ratified or acceded to it, nevertheless, it must be regarded in view of its adoption by a large majority of the States of the world as the best evidence of international law on the subject at the present time. This is particularly so in view of the rejection by the International Court of Justice in the *Anglo-Norwegian Fisheries* case of the so-called ten-mile rule previously considered as international law by the United States and other countries. Furthermore, in view

> of the ratification of the Convention by the President with the advice and consent of the Senate, it must be regarded as having the approval of this Government and as expressive of its present policy. * * *

The Convention on the Territorial Sea and the Contiguous Zone entered into force on September 10, 1964, as proclaimed by the President on September 8, 1964. 51 State Dept. Bull., No. 1318, p. 452, Sep. 28, 1964.

ARGUMENT

I

DOMESTIC POLICY RATHER THAN INTERNATIONAL LAW DEFINES THE "INLAND WATERS" FROM WHICH IS MEASURED THE GRANT MADE BY THE SUBMERGED LANDS ACT

A. CONGRESS INTENDED TO REFER TO "INLAND WATERS" AS DEFINED BY DOMESTIC COURTS

Preparatory to expounding its principal contention that international law "prescribes" the boundaries of California and all the other littoral States of the Union, Alaska attempts to demonstrate that Executive policy does not govern and define the limits of the boundaries of the coastal States. Alaska suggests that the deletion of certain language from Sec. 2(b) of S.J. Res. 13, 83d Cong., 1st Sess., which section, as modified by the deletion, is now Sec. 2(c) of the Submerged Lands Act, and the reasons given by the Senate Committee on Interior and Insular Affairs for that deletion, constitute a specific rejection by the Congress of Executive policy as a means for ascertaining the seaward limits of the inland waters of the

States of the Union (Brief, pp. 11-13). A similar contention by California based on the same item of legislative history is considered on pages 96 through 98 of the Brief for the United States in Answer to California's Exceptions, and the United States there concludes that "the committee was doing nothing more than disclaiming any intent to pass on what the policy of the United States on this subject was or should be" (p. 98). Indeed, the most Alaska itself can conclude from the legislative history it relies upon is that "the inland water question was to be left 'where Congress finds it' " (Brief, p. 12).

And the inland water question, where Congress found it, was resolved, whenever it arose, on a case-by-case basis by the courts of this nation. Even as he struck from S.J. Res. 13 the language referred to in Alaska's brief, Senator Cordon, the Acting Chairman of the Senate Committee on Interior and Insular Affairs stated—

> The matter of inland waters is one that has been defined time and time again by the courts, not, I believe, in any one all-inclusive definition, but it was felt that the use of these words were an attempted legislative definition of the term "inland waters," and it was inadvisable for us in this bill, which is a transfer of title, to attempt to make law in the other field of what is or is not inland water.
>
> The use of the language, it was felt, would probably raise questions that have not been raised, whereas the present definitions are in the decisions and available to the court. [Hearings,

S. Committee on Interior and Insular Affairs, S.J. Res. 13, 83d Cong., 1st Sess. (1953), Pt. 2, pp. 1304-1305.][3]

B. DOMESTIC COURTS FOLLOW THE PRINCIPLES ESTABLISHED BY THE EXCUTIVE BRANCH IN DEFINING INLAND WATERS

The proposition that domestic courts, in defining the extent of the inland waters of the United States and of the several States, follow the principles and policy established by the Executive Branch, is set forth in detail on pages 39 through 48 of the Brief for the United States in Answer to California's Exceptions. There is no merit to Alaska's suggestion (Brief, pp. 8, 9) that this Court's opinion in *United States* v. *Louisiana*, 363 U.S. 1, 35-36 (1960) holds that Executive policy in foreign relations is irrelevant for all purposes under the Submerged Lands Act. The Court there held only that where Congress, in domestic legislation, had fixed for a State a seaward

---

[3] It appears also that the language referred to in Alaska's brief was stricken for the purpose of accommodating, rather than repudiating, Executive policy. In a letter dated March 4, 1953, the Assistant Secretary of State wrote to the Chairman of the Senate Committee on Interior and Insular Affairs that "the United States has traditionally taken the position that the waters of estuaries and bays are inland waters only if their opening is no more than 10 miles wide, or, where such opening exceeds 10 miles, at the first point where it does not exceed 10 miles," and that the "broad definition of inland waters now present in the proposed legislation" was objectionable because it seemed to sanction a larger claim to inland waters. Hearings, S. Committee on Interior and Insular Affairs, S.J. Res. 13, 83d Cong., 1st Sess. (1953) p. 28. In striking the broad definition, Senator Cordon noted that the State Department had objected to it. *Id.*, p. 1304.

boundary different from our international claim, the Submerged Lands Act, in view of its purely domestic purpose, should be understood to refer to the domestic rather than the international boundary. That reasoning can have no application to the identification of "inland waters," which by definition are simply those waters where a nation asserts exclusive sovereignty as against other nations. The term has no separate domestic meaning; it is a concept inherently bound up with international relations, and its scope must be determined accordingly. There is no reason for the Court to refrain from consulting in this case the same source of information on this aspect of foreign policy which in all other cases involving such matters has been deemed to be conclusive. *Cf. United States* v. *Benner*, 24 Fed.Cas. No. 14,568 (C.C. E.D. Pa.), where the question of who was a foreign diplomat, within the meaning of a domestic statute making it a domestic crime to arrest a foreign diplomat, was held to be concluded by a certificate of diplomatic status furnished by the Secretary of State.

C. INTERNATIONAL LAW DOES NOT CONTROL THE DECISION OF DOMESTIC CONTROVERSIES

Alaska argues that international law controls the disposition of this suit because international law has been incorporated into the law of the United States. In support of this proposition is cited *The Paquete Habana*, 175 U.S. 677, 700 (1900):

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as

> questions of rights depending upon it are duly presented for their determination.

But a close reading of this sentence reveals it true meaning: that international law must be ascertained and administered when questions of rights *depending upon international law* are presented. The Court was there sitting as a prize court. 175 U.S. at 714. Prize courts are established for the purpose of determining the validity, under international law, of captures at sea. Although established by domestic authority, they purport to administer international law rather than domestic law. *The Peterhoff*, 5 Wall. 28, 57; *Cushing* v. *Laird*, 107 U.S. 69, 76-77. See Colombos, *Law of Prize* (2d ed. 1940), pp. 20, 31. Their independent approach to international law has no applicability in ordinary domestic litigation. As Alaska points out (Brief, p. 10), the Submerged Lands Act "involves a purely domestic division of off-shore resources between the Federal Government and the states." International law is not controlling in such a matter. *Skiriotes* v. *Florida*, 313 U.S. 69, 73.

Most of the other cases cited by Alaska in support of its claim for the relevancy here of international law involve either the application (or misapplication) of the statement contained in *The Paquete Habana*, or a treaty (which is domestic law), or boundary disputes between States, where this Court, having original jurisdiction, has settled the disputes by applying to the States the same principles which would be the basis for the peaceful settlement of disputes between nations. None of these cases stands for the proposi-

tion that international law governs the interpretation of a domestic statute in a dispute involving the right of a State as against the United States.

The only case cited by Alaska requiring extended comment is *Manchester* v. *Massachusetts*, 139 U.S. 240. The State contends (Brief, p. 16) that since, in the *Manchester* case, this court specifically referred to international law, and not to Executive policy, in arriving at the conclusion that bays not exceeding two marine leagues (*i.e.*, six geographical miles) in width at their mouth were within the territorial jurisdiction of the State of Massachusetts, it appears that international law, and not Executive policy, is the standard by which such determinations are to be made. The State avers that at the time the *Manchester* case was decided, the Executive branch had a clearly defined policy dating from 1888 that inland waters within bays were defined by a 10-mile closing line, and implies that if Executive policy had anything to do with the determination of the limits of the internal waters of States, some reference would have been made by this Court to a 10-mile, rather than a 6-mile, closing line.

But this argument cannot be sustained. In the first place, it is by no means clear that in 1891, when *Manchester* was decided, the United States defined internal waters in bays with reference to a 10-mile closing line. See Brief for the United States in Answer to California's Exceptions, pp. 75-85. In the second place, the *Manchester* case involved a bay, the headlands of which were "*less* than two marine leagues" apart. 139 U.S. 240, 256; emphasis supplied.

Since such bays, at least, were claimed as inland waters by the United States and were recognized as such by international law, it was not necessary for the Court to consider what would have been the result if the domestic law had differed from the international law.

Although neither California nor Alaska has done so, it might also be argued that *Manchester* v. *Massachusetts* stands for the proposition that a littoral State may unilaterally extend its boundary as far as international law permits. At 139 U.S. 264 appears the statement:

> Within what are generally recognized as the territorial limits of States by the law of nations, a State can define its boundaries on the sea and the boundaries of its counties; and by this test the Commonwealth of Massachusetts can include Buzzard's Bay within the limits of its counties.

From this sentence, it might be concluded that since the Convention on the Territorial Sea and Contiguous Zone, which has been ratified by the United States, now defines inland waters in bays by a 24-mile closing line, littoral States may themselves extend their boundaries out to a 24-mile closing line. However, the argument is refuted by more recent decisions of this Court. Where Congress has fixed a State's maritime boundary as a domestic matter, "[s]uch a boundary, fully effective as between Nation and State, undoubtedly circumscribes the extent of navigable *inland* waters and underlying lands owned by the State under the *Pollard* rule." *United States* v. *Louisiana*, 363 U.S. 1, 35; emphasis by the Court.

Moreover, *Manchester* was decided on the stated premises that Massachusetts was originally an independent sovereign and as such had always had jurisdiction over a three-mile belt. 139 U.S. at 257. Both of those assumptions have now been rejected by the Court, *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 316-317; *United States* v. *California*, 332 U.S. 19, 32-33, and any conclusion drawn from them must be deemed discredited.

II

THE GRANT MADE BY THE SUBMERGED LANDS ACT WAS MEASURED FROM THOSE WATERS THAT HAD THE STATUS OF INLAND WATERS ON THE DATE OF THE ACT, MAY 22, 1953

The Submerged Lands Act made a grant *in praesenti*, and the "inland waters" referred to in the Act must be understood as those having the status of inland waters on May 22, 1953, when the Act took effect. Amended exceptions of the United States, pp. 25-26. Since the 24-mile rule for bays, on which Alaska relies, had not made its appearance either internationally or domestically in 1953 (*infra*, pp. 16, 20), Alaska seeks to secure its benefits by giving its eventual adoption a retroactive effect. Alaska argues (Brief, pp. 17-33) that international law is a sort of natural law that endures unchanged and unchanging forever; that new developments in international law do not represent changes in the law, but rather reflect merely new discoveries of what the law has always been; consequently, that present international acceptance of 24-mile entrances for the inland waters of bays means that such waters have been in-

land waters since the dawn of history, although that fact has been discovered only recently. Further, Alaska argues that even if the inland waters referred to by the Submerged Lands Act are determined by national policy rather than by international law, it has always been the national policy of the United States to conform to international law, whether known or unknown; and that consequently the recent revelation that 24-mile bays have always been inland waters under international law has *pari passu* revealed that such bays have always been claimed by the United States. Thus, Alaska concludes that the *in praesenti* character of the grant made by the Submerged Lands Act imposes no impediment to a claim that the grant is, and always was, measured from waters that have only subsequently been recognized as inland waters.

We reject this metaphysical concept of international law as a set of abstract principles having eternal universality before as well as after its discovery by mankind. This Court has always taken the realistic view that international law is simply "the usage of all civilized nations," *United States* v. *Arredondo*, 6 Pet. 691, 712, and that when the general usage of nations changes, the international law is changed. As was said by Mr. Justice Strong, speaking for a unanimous Court in *The Scotia*, 14 Wall. 170, 188:

> And it is evident that unless general assent is efficacious to give sanction to international law, there never can be that growth and development of maritime rules which the constant changes in the instruments and necessities of navigation re-

> quire. Changes in nautical rules have taken place. How have they been accomplished, if not by the concurrent assent, express or understood, of maritime nations?

The same view of international law as a changing body of principles was expressed by Mr. Arthur Dean, testifying for the Department of State (Hearing, S. Committee on Foreign Relations, Executives J, K, L, M, N, 86th Cong., 2d Sess., p. 1), regarding the Convention on the Territorial Sea and the Contiguous Zone and the other conventions on the law of the sea, when he said that "international law is supposed to be that which a majority of the countries say that it is *as of any particular time* * * *" (*id.*, p. 9; emphasis added).

Specifically, the provision of Article 7 of the Convention on the Territorial Sea and the Contiguous Zone, fixing 24 miles as the maximum permissible entrance width for inland waters of a nonhistoric bay, has been recognized as an innovation. The State Department's commentary on the Convention, transmitted to the Senate by the President with his message of September 9, 1959, submitting the Convention for Senate approval, said of Article 7, "Its most significant change of existing international law is the provision for a 24-mile closing line for bays." S. Executives J to N, Inclusive, 86th Cong., 1st Sess., p. 6.

Equally unsound is Alaska's suggestion that it has been the policy of the United States not to define its inland water claims specifically, but rather to make an undefined claim as inland waters to all areas that

international law currently recognized or should someday recognize as such. On the contrary, the State Department has declared the extent of the United States' claims with great precision. This was done, for example, in the Acting Secretary's letter of November 13, 1951, to the Attorney General, which specifically stated this country's adherence to the 10-mile rule for bays. Brief for the United States in Answer to California's Exceptions, pp. 65-69, 6a-11a. Alaska points to the statement in that letter that in formulating its policy on the subject "the Department of State has been and is guided by generally-accepted principles of international law and by the practice of other states in the matter." Brief, p. 37. However, Alaska is entirely mistaken in construing that explanatory statement as a blanket present assertion of jurisdiction to the uttermost extent then or thereafter permitted by international law, whatever that extent might eventually prove to be. It meant only that the State Department, in formulating the claims of the United States, had taken care not to exceed the limits recognized by international law. This was made perfectly clear by Secretary Acheson's further letter of February 12, 1952, in response to the Attorney General's inquiry whether the position of the United States was modified in view of the decision in the *Fisheries Case*, I.C.J. Reports 1951, p. 116, on December 18, 1951. The Secretary of State, noting that some of the American principles, including the 10-mile rule for bays, had there been held not to be general rules of international law, said (*supra*, p. 5):

> These principles, however, are *not in conflict* with the criteria set forth in the decision of the International Court of Justice. The decision, moreover, leaves the choice of the method of delimitation applicable under such criteria to the national state. The Department, accordingly, adheres to its statement of the position of the United States with respect to delimitation of its territorial waters in date of November 13, 1951. [Emphasis added.]

Here we see specific statement that the State Department only intended to observe the limitations of international law, and did not intend a carte blanche adoption of all that international law allowed.[4] The *Fisheries Case* itself recognized that this was necessarily the correct approach to the subject, saying (I.C.J. Reports 1951, at p. 132):

> Although it is true that the act of delimitation [of sea areas] is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.

Thus, even if international law had the sempiternal character attributed to it by Alaska, there is no basis for attributing the same quality to American policies regarding inland waters.

The impracticality of Alaska's concept is particularly apparent with respect to the Submerged Lands

---

[4] On the contrary, the United States has always been a leading advocate of moderation in maritime claims. Brief for the United States in Answer to California's Exceptions, pp. 49-51.

Act, which was designed to make a final settlement of the respective rights of the United States and the States in the offshore submerged lands. If the scope of the grant were to be deemed retroactively changed by every subsequent change in the nation's inland water claims, that purpose would be materially frustrated. Arthur Dean, in testifying before the Senate Foreign Relations Committee regarding the Convention on the Territorial Sea and the Contiguous Zone, and other conventions on the law of the sea, clearly expressed the view that they would not affect rights as between the States and the United States. Brief for the United States in Answer to California's Exceptions, fn. 110, pp. 147-148. The committee report on the conventions pointed this out, saying:

> * * * Mr. Dean made clear that the conventions do not affect the relative rights as between the several states of the United States and the Federal Government. The conventions only affect the rights of the United States as a sovereign state with respect to the rights of other sovereign states. [S. Exec. Rept. No. 5, 86th Cong., 2d Sess., p. 10.]

There is no justification for Alaska's view that subsequent changes in international law or domestic policy operated retroactively to give the status of inland waters as of 1953 to areas that were not inland waters in 1953, and so to bring them within the scope of the Submerged Lands Act.

III

ON MAY 22, 1953, TEN GEOGRAPHICAL MILES WAS THE MAXIMUM ENTRANCE WIDTH OF INLAND WATERS IN NONHISTORIC BAYS OF THE UNITED STATES

The thing that gives inland waters their status as such is the coastal nation's assertion of complete and exclusive sovereignty over them, as against other nations. They are distinguished in this respect from the marginal sea, where merchant vessels of other nations have a right of innocent passage under international law. Since this sole criterion is inherently international in its nature,[5] we must look to the State Department, which conducts our international relations, to learn what waters have been so claimed by the United States as against other nations. As we have seen, in 1953 the United States claimed inland waters in bays only where the width of the entrance did not exceed ten geographical miles. Brief for the United States in Answer to California's Exceptions, pp. 65-118. That policy was not replaced by the 24-mile rule until the President ratified the Convention on the Territorial Sea and the Contiguous Zone on March 24, 1961. See letter of January 15, 1963, from the Secretary of State to the Attorney General, *supra*, p. 6. As we have just shown, the new rule was

[5] The international status of inland waters has been given some domestic consequences, such as State ownership of the submerged lands. However, a consequence flowing from the status of inland waters cannot become a basis for establishing that status; the attempt would be completely circular. There is no domestic basis for defining inland waters, other than the international basis.

not retroactive and did not enlarge the areas referred to by the Submerged Lands Act in 1953.

CONCLUSION

For the foregoing reasons, the Court should hold that in nonhistoric bays the inland waters referred to by the Submerged Lands Act are limited to those waters where the width of the entrance does not exceed ten geographical miles.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

GEORGE S. SWARTH,
MARTIN GREEN,
Attorneys.

NOVEMBER 1964.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA AT ANCHORAGE

No. A-51-63 Civil

UNITED STATES OF AMERICA, PLAINTIFF

vs.

STATE OF ALASKA, DEFENDANT

MEMORANDUM OF DECISION

This is an action to quiet title to submerged lands, some of which underlie a portion of Yakutat Bay, and the rest of which constitute a part of the continental shelf immediately seaward of the Bay. Yakutat Bay is near the northern end of the Alaska panhandle, and is approximately seventeen geographical miles wide at its entrance. Point Manby and Ocean Cape form the natural entrance points to the Bay; from a line connecting these points, the Bay extends inland approximately thirty geographical miles.

The State of Alaska claims title to all of the lands underlying the waters of Yakutat Bay, from the line of mean high tide of the shores of the Bay out to the line—which for convenience may be called the seventeen mile closing line of the Bay—stretching between Point Manby and Ocean Cape. In addition, the State claims title to the submerged lands underlying a belt of waters extending three geographical miles seaward of the seventeen mile closing line.

The State's claim to these lands is premised on its contention that when Alaska was admitted into the

Union of States that the limits of the internal or inland waters in bays, the coasts of which belonged to a single state, were determined by the use of a base line or closing line of twenty-four miles instead of a base line or closing line of ten miles.

The United States does not dispute the title of the State of Alaska to that portion of the bed of Yakutat Bay lying between the opposing shores of the Bay out to where those shores, from low water line to low water line, are not more than ten geographical miles apart; that is, the United States acknowledges the State's title to the bed of Yakutat Bay out to a ten mile closing line.

Also, the United States does not dispute the title of the State of Alaska to the lands underlying a belt of territorial waters extending three geographical miles seaward of the shores and ten mile closing line of Yakutat Bay. But the United States does deny that the State of Alaska has any rights, title, or interest in any of the submerged lands beyond the three mile belt adjacent to the ten mile closing line of Yakutat Bay, and to the contrary asserts that the United States is the owner of, or is possessed of paramount rights in and powers over, all of the submerged lands of the continental shelf lying more than three geographical miles seaward of the line of mean low water of the shores and ten mile closing line of Yakutat Bay.

On July 12, 1963, the State of Alaska, through its Department of Natural Resources, published notice of its intention to accept sealed bids for competitive oil and gas leases covering 193,645 acres of land underlying the waters of Yakutat Bay. Some of the lands offered for lease are claimed by the United States. On July 23, 1963, the United States filed in this court an action to quiet title to, and to enjoin trespasses on, the lands it claims. On the same day, a motion for a

preliminary injunction to restrain the State from leasing or attempting to lease the submerged lands claimed by the United States was filed, and, being unopposed, was granted. On July 26, 1963, the State of Alaska filed its answer to the Government's complaint. On October 9, 1963, the United States moved for summary judgment. On December 19, 1963, the State moved for summary judgment.

By a stipulation filed in this action on September 3, 1963, the United States and the State of Alaska have agreed that the line described by metes and bounds in the Government's complaint is the ten mile closing line of Yakutat Bay.

By the stipulation filed on September 3, 1963, the United States and the State of Alaska have agreed that the line between Point Manby and Ocean Cape referred to in the State's answer is the line between the natural entrance points of Yakutat Bay, and is approximately seventeen geographical miles in length.

The submerged lands put in issue by the pleadings thus extend from a line three geographical miles seaward of the shores and ten mile closing line of Yakutat Bay to a line three geographical miles seaward of the seventeen mile closing line of the Bay. This is an area of approximately 96,000 acres.

The crucial issue to be determined in this case is the extent of inland waters of the State of Alaska as defined by section 2 of the Statehood Act.

The court, upon the reasoning and authorities cited in plaintiff's memorandum in support of plaintiff's motion for summary judgment filed October 9, 1963, and plaintiff's memorandum in opposition to defendant's motion for summary judgment filed February 3, 1964, finds as follows:

1. At the time of the admission of Alaska into the Union on January 3, 1959, and until March 24, 1961,

the United States maintained its traditional position that, with exception of historic bays, the waters within a bay, the coasts of which belonged to a single state, were considered internal waters if the distance between the low-water marks of the natural entrance points of the bay did not exceed ten geographical miles.

2. On March 24, 1961, the President of the United States, with the approval of the Senate, ratified the Convention on the Territorial Sea and Contiguous Zone adopted at the First Law of the Sea Conference at Geneva in 1958, which Convention had the approval of the government of the United States and since its ratification is expressive of its present foreign policy.

3. At all times herein material, plaintiff was and now is the owner in fee simple of, or possessed of paramount rights in and powers over, the lands, minerals, and other natural resources underlying the coastal waters of Alaska at Yakutat Bay, between Point Manby and Ocean Cape, lying more than three geographical miles seaward from the line of mean low water of the mainland or any island and from lines connecting the following points at mean low-water line:

From the northernmost extremity of Point Carrew to the westernmost extremity of Point Munoz;

From the northernmost extremity of Khantaak Island to the westernmost extremity of Knight Island; and

From the westernmost extremity of Knight Island, extending ten geographical miles in a northwesterly direction to the northwestern shore of Yakutat Bay;

and extending seaward to the edge of the continental shelf.

4. Plaintiff is entitled to summary judgment granting the relief requested in the prayer of the complaint filed on July 27, 1963.

5. Defendant's motion for summary judgment should be denied.

Pursuant to Court Rule 14 of the Rules of the United States District Court for the District of Alaska counsel for plaintiff is directed to prepare and submit appropriate findings of fact and conclusions of law and a proposed form of judgment within twenty (20) days from the date of this decision.

The Clerk will not enter judgment until the form thereof has been approved by the court.

DATED this 24th day of June, 1964.

/s/ Raymond E. Plummer
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
AT ANCHORAGE

No. A-51-63 Civil

UNITED STATES OF AMERICA, PLAINTIFF

vs.

STATE OF ALASKA, DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered in the above-entitled case the pleadings, stipulation, motions for summary judgment and briefs filed by both parties, as well as matters of which the Court may take judicial notice, and the oral arguments made on March 13, 1964, by both the plaintiff and the defendant with respect to the motions for summary judgment, and being fully advised in the premises, the Court hereby makes findings of facts and states conclusions of law as follows:

FINDINGS OF FACT

1. On July 27, 1963, the United States filed a complaint to quiet title to certain submerged lands lying off the coast of Alaska, and to enjoin the State of Alaska from leasing, or offering to lease, the mineral resources contained within the submerged lands. The jurisdiction of this Court is invoked under 28 U.S.C. 1345.

2. The United States moved for summary judgment on October 9, 1963; the State of Alaska moved for summary judgment on December 19, 1963.

3. Yakutat Bay, an indentation in the coast of Alaska near the northern end of the Alaska "pan-

handle," is, between Point Manby and Ocean Cape, which form its natural entrance points, approximately seventeen geographical miles in width. The configuration of the Bay is shown on Coast and Geodetic Survey Chart Number 8455.

4. A line drawn between the low water lines of the opposing shores of Yakutat Bay at the point where the Bay is ten geographical miles in width would extend from a point approximately two thousand five hundred yards southwest of Blizhni Point on the northwestern shore of Yakutat Bay in a southeasterly direction to the westernmost extremity of Knight Island, at which point it would close upon a line drawn from the northernmost extremity of Khantaak Island to the westernmost extremity of Knight Island, which line, together with a line drawn from the westernmost extremity of Point Munoz to the northernmost extremity of Point Carrew, would complete the ten mile closing line of the Bay.

5. The Court judicially knows the matters set forth in the affidavit submitted in the present action by Raymond T. Yingling, Assistant Legal Adviser, Office of the Legal Adviser, United States Department of State, the pertinent portions of which are here set forth in full:

> 2. At the time of the admission of Alaska into the Union on January 3, 1959, and until March 24, 1961, the United States maintained its traditional position that, with the exception of historic bays, the waters within a bay, the coasts of which belong to a single State, shall be considered internal waters if the distance between the low-water marks of the natural entrance points of the bay do not exceed ten geographical miles.

3. On March 24, 1961, the President of the United States, with the approval of the Senate, ratified the Convention on the Territorial Sea and Contiguous Zone adopted at the First Law of the Sea Conference at Geneva in 1958, which Convention has the approval of this Government and is expressive of its present foreign policy. Paragraphs 4, 5 and 6 of Article 7 of the Convention read in part as follows:

> 4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.
>
> 5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.
>
> 6. The foregoing provisions shall not apply to so-called "historic bays" . . . .

4. Yakutat Bay is not an historic bay, and at the date of the admission of Alaska into the Union, the only waters of Yakutat Bay claimed by the United States as internal waters were those waters landward of a line drawn between the low-water lines of the opposing shores of Yakutat Bay at a point where the Bay was ten geographical miles in width, and the water of Yakutat Bay claimed by the United States as internal waters since March 24, 1961, are the waters

landward of a line drawn between the low-water lines of the natural entrance points of Yakutat Bay.

6. The affidavit of Raymond T. Yingling, Assistant Legal Adviser, Office of the Legal Adviser, United States Department of State, is an official statement of the past and present policies of the Executive Branch of the government with respect to the determination of the internal waters of the United States in bays.

7. The Court further finds that in

(a) the unratified treaty of February 15, 1888, S. Misc. Doc. No. 109, 50th Cong., 1st sess. (1888)

the Executive Branch of the Government recognized and expressed a willingness to comply with the then developing practice of nations to delimit their internal waters in nonhistoric bays not exceeding ten geographical miles in width by drawing a straight line across the opening of the bay, and, where the opening of the bay exceeded ten geographical miles in width, by drawing a straight line across the opening at the most seaward point where its width did not exceed ten geographical miles,

and that in

(b) the proceedings before the Alaska Boundary Tribunal, 7 Alaska Boundary Arbitration, S. Doc. No. 162, 58th Cong., 2d sess. (1904), p. 844

the United States position was that a ten mile closing line drawn in the manner above described delimited the greatest area of a nonhistoric bay which under then existing international law might be assimilated into the internal waters of a nation,

and that in the following acts and documents, the use of the ten mile rule for delimiting the internal waters of a nation was stated to be the official practice of the United States:

(c) the Hague Conference of 1930, Acts of Conference for the Codification of International Law, The Hague (1930), pp. 197-199;

(d) the letter of November 13, 1951, from the Acting Secretary of State to the Attorney General, Hearings, S. Committee on Interior and Insular Affairs, S. J. Res. 13, 83rd Cong., 1st sess. (1953), p. 460;

(e) the letter of February 12, 1952, from the Secretary of State to the Attorney General, Hearings, S. Committee on Interior and Insular Affairs, S. J. Res. 13, 83rd Cong., 1st sess. (1953), p. 462;

(f) the testimony on March 3, 1953, of the Deputy Legal Adviser of the Department of State before the Senate Committee on Interior and Insular Affairs, Hearings, S. Committee on Interior and Insular Affairs, S. J. Res. 13, 83rd Cong., 1st sess. (1953), p. 1052;

(g) the letter of March 4, 1953, from the Assistant Secretary of State to the Chairman of the Senate Committee on Interior and Insular Affairs, Hearings, S. Committee on Interior and Insular Affairs, S. J. Res. 13, 83rd Cong., 1st sess. (1953), p. 27;

(h) the note verbale of March 12, 1956, of the United States to the United Nations, 2 *Yearbook of the International Law Commis-*

sion, 1956, A/CN.4/SER.A/1956/Add. 1, p. 94; and

(i) the statement on April 15, 1958, of a member of the United States delegation to the Geneva Conference on the Law of the Sea before the Committee on the Territorial Sea and Contiguous Zone, 3 *Official Records*, United Nations Conference on the Law of the Sea, A/CONF. 13/39, pp. 144, 242.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this action under 28 U.S.C. 1345.

2. Section 2 of the Alaska Statehood Act of July 7, 1958, 72 Stat. 339, provides that

> The State of Alaska shall consist of all the territory, together with the territorial waters appurtenant thereto, now included in the Territory of Alaska.

3. Section 8(b) of the Alaska Statehood Act of July 7, 1958, 72 Stat. 343-344, provides that:

> At an election designated by proclamation of the Governor of Alaska, which may be the general election held pursuant to subsection (a) of this section, or a Territorial general election, or a special election, there shall be submitted to the electors qualified to vote in said election, for adoption or rejection, by separate ballot on each, the following propositions:
>
> "(1) Shall Alaska immediately be admitted into the Union as a State?
>
> "(2) The boundaries of the State of Alaska shall be as prescribed in the Act of Congress approved (date of approval

> of this Act) [i.e., July 7, 1958] and all claims of this State to any areas of land or sea outside the boundaries so prescribed are hereby irrevocably relinquished to the United States.
>
> "(3) * * *"
>
> In the event any one of the foregoing propositions is not adopted at said election by the majority of the legal votes cast on said submission, the provisions of this Act shall thereupon cease to be effective.

4. Section 6(m) of the Alaska Statehood Act of July 7, 1958, 72 Stat. 343, provides that:

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

5. Section 4 of the Submerged Lands Act of 1953, 43 U.S.C. 1312, provides in part that:

> The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line * * *.

6. Section 2(c) of the Submerged Lands Act of 1953, 43 U.S.C. 1301(c) provides that

> The term "coast line" means the line of ordinary low water along that portion of the coast

which is in direct contact with the open sea and the line marking the seaward limit of inland waters.

7. Section 3 of the Submerged Lands Act of 1953, 43 U.S.C. 1311, provides in part that

> (a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters * * * be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States * * *.

8. Section 9 of the Submerged Lands Act of 1953, 43 U.S.C. 1302, provides that

> Nothing in this chapter shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 1301 of this title, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is confirmed.

9. Section 3 of the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. 1332, provides in part that

> (a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter.

10. Alaska was admitted into the Union on January 3, 1959, 73 Stat. C-161.

11. Sections 4, 5 and 6 of Article 7 of the Convention on the Territorial Sea and Contiguous Zone adopted by the United Nations Conference on the Law of the Sea at Geneva on April 29, 1958, signed by the United States delegate to the Convention on September 15, 1958, and ratified by the President of the United States on March 24, 1961, 2 *International Legal Materials*, p. 527 (May 1963), provide that:

> 4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.
>
> 5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.
>
> 6. The foregoing provisions shall not apply to so-called "historic bays" . . . .

12. In the absence of specific Congressional action to the contrary, the internal waters of the State of Alaska are those waters which on the date of the admission of the State of Alaska into the Union were recognized by the Executive Branch of the government in its dealings with foreign nations to be the internal waters of the United States and the Territory of Alaska.

13. A statement by a duly authorized official of the State Department as to the policy of the Executive

Branch of the Government, either at the present time or in the past, in claiming internal waters for the United States as against other countries in its international dealings, is subject to judicial notice, and is binding upon this Court.

14. The affidavit submitted in this case by the Assistant Legal Adviser of the State Department establishes that at the time of the admission of Alaska into the Union on January 3, 1959, and until March 24, 1961, the United States maintained its traditional position that, with the exception of historic bays, the waters within a bay, the coasts of which belong to a single State, were considered internal waters if the distance between the low-water marks of the natural entrance points of the bay did not exceed ten geographical miles.

15. However, even were the policy statement of the Assistant Legal Adviser of the State Department not binding on the Court, and independently of it, the Court concludes, on the basis of the matters set forth in paragraph 7 of the findings of fact, that at the time of the admission of Alaska into the Union on January 3, 1959, and until March 24, 1961, when the President ratified the Convention on the Territorial Sea and Contiguous Zone, the Executive Branch of the Government, in its dealings with foreign countries, maintained its traditional position that, with the exception of historic bays, the waters within a bay, the coasts of which belonged to a single nation, were the internal waters of a nation out to the most seaward point where the distance between the low water marks of the opposing shores did not exceed ten geographical miles.

16. Congress has not, since the date of Statehood, extended the limits of the internal waters of Alaska, and, in the absence of such Congressional change, the

internal waters of the State of Alaska remain what they were upon the passage by the Congress of the Alaska Statehood Act of July 7, 1958.

17. Consequently, the limits of the internal waters of the State of Alaska in Yakutat Bay extend only to a line drawn across the Bay at the most seaward point where the distance between the low water marks of the opposing shores of the Bay does not exceed ten geographical miles.

18. The State of Alaska has title to all of the submerged lands landward of the ten mile closing line of Yakutat Bay, and to all the lands and natural resources underlying a belt of territorial sea three geographical miles in width immediately adjacent to and seaward of the ten mile closing line of Yakutat Bay.

19. The submerged lands of the continental shelf lying more than three geographical miles seaward of the ten mile closing line of Yakutat Bay appertain to the United States and are subject to its exclusive jurisdiction and control.

20. The United States is entitled to summary judgment granting the relief requested in the prayer of the complaint filed on July 27, 1963.

21. Defendant's motion for summary judgment should be denied.

Let judgment be entered accordingly.

Dated this 19th day of August, 1964.

/s/ Raymond E. Plummer
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
AT ANCHORAGE

No. A-51-63 Civil

UNITED STATES OF AMERICA, PLAINTIFF

vs.

STATE OF ALASKA, DEFENDANT

JUDGMENT

The Court having concurrently herewith made its findings of fact and conclusions of law in this case and having directed the entry of judgment in favor of the United States granting the relief requested in the prayer of the complaint filed on July 27, 1963,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The United States of America is now, and has been at all times pertinent hereto, the owner in fee simple of, or possessed of paramount rights in, and full dominion and power over, the lands, minerals and other natural resources underlying the coastal waters of Alaska at Yakutat Bay, between Point Manby and Ocean Cape, lying more than three geographical miles seaward from the line of mean low water of the mainland or any island and from lines connecting the following points at mean low-water line:

From the northernmost extremity of Point Carrew to the westernmost extremity of Point Munoz;

From the northernmost extremity of Khantaak Island to the westernmost extremity of Knight Island; and

From the westernmost extremity of Knight Island, extending ten geographical miles in a northwesterly direction to the northwestern shore of Yakutat Bay;

and extending seaward to the edge of the continental shelf. The State of Alaska has no title thereto or property interest therein.

2. The State of Alaska is hereby enjoined from issuing leases purporting to confer upon individuals, corporations, and any other entities, the right to trespass upon and to remove the minerals and other natural resources from the lands here decreed to appertain to and be under the exclusive control of the United States, or from exercising or purporting to exercise [*sic*] any other manner whatsoever of right or dominion over these submerged lands and the resources they contain.

Dated this 19 day of Aug., 1964.

/s/ J. M. Kroninger
J. M. KRONINGER

Approved as to form and substance this 19th day of August, 1964.

/s/ Raymond E. Plummer
United States District Judge

☆ U. S. GOVERNMENT PRINTING OFFICE; 1964 755255 397