No. 84, Original

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALASKA

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE EXCEPTIONS OF THE STATE OF ALASKA

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QUESTIONS PRESENTED

The exceptions of the State of Alaska to the Report of the Special Master pose the following three questions:

1. Whether the coastline of the United States and the State of Alaska in the area of the Arctic Ocean should be determined by Alaska's proposed "ten-mile" rule.

2. Whether an offshore feature known as Dinkum Sands, which is frequently submerged by mean high water, is an island for purposes of locating the coastline.

3. Whether the United States has retained title to coastal submerged lands within the National Petroleum Reserve in Alaska.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This original action presents a dispute between the United States and the State of Alaska over the ownership of lands beneath the tidal waters along the Arctic coast of Alaska. The Special Master has prepared a comprehensive report setting out his analysis and recommended resolution of the matter. The United States has filed one exception to his recommendations. The Brief for the United States in Support of Exception (U.S. Except. Br.) summarizes the Special Master's Report and explains the basis for that exception. The State of Alaska has filed three exceptions to the recommendations of the Special Master. This brief responds to those exceptions.

I. The Special Master has properly recommended that the Court reject Alaska's contention that the State's entitlement to submerged lands along the Arctic coast should be determined on the basis of a "ten-mile" rule, which Alaska contends represented the official policy of the United States at the time of Alaska's admission to the Union. See Report 19-175.

This Court concluded in *United States* v. *California*, 381 U.S. 139 (1965) (*California II*), that the Convention on the Territorial Sea and the Contiguous Zone, done, Apr. 29, 1958, 15 U.S.T. 1606, provides the controlling legal principles for determining the limits of a State's coastal inland waters. 381 U.S. at 165. The Court specifically rejected the argument, virtually identical to Alaska's contention here, that a State's coastal inland waters should be determined on the basis of the State's historical understandings at the time of statehood. See *id.* at 150-151, 157-160, 161-165. Since that time, the Court has consistently relied on the Convention to determine the limits of coastal inland waters, and it should not depart from that practice in this case.

Under the Convention, the United States' historic delimitation policies and practices remain relevant, but in a more specific sense than Alaska urges. The Convention allows a State to claim "historic" inland waters, Art. 7(6), 15 U.S.T. 1609, but the State must show that they comprise an area "over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations." *United States* v. *Louisiana (Alabama and Mississippi Boundary Case)*, 470 U.S. 93, 101 (1985). Alaska has conceded that it cannot show that the areas in question constitute historic inland waters. See Report 44 n.13, 51. Hence, Alaska cannot claim any entitlement to the associated submerged lands. Because Alaska's assertions respecting the United States' historic

practices are not sufficient to establish a claim of historic inland waters under Article 7(6), they are also insufficient to show that the United States' adherence to the Convention's principles has impermissibly contracted Alaska's recognized territory. See *Alabama and Mississippi Boundary Case*, 470 U.S. at 111-112.

In this case, the Special Master assumed for purposes of argument that Alaska could claim a contraction of its recognized territory without showing its entitlement to that property under Article 7(6)'s historic inland waters test. See Report 52. He concluded, however, that Alaska must show that the United States had a "well-established and well-defined rule for inland water delimitation to imply such a claim." *Ibid.* The Master exhaustively evaluated the statements and positions of various United States officials over time, *id.* at 52-175, and he concluded that "[t]he evidence plainly shows that, as of Alaska's statehood, the United States had not developed a general policy of claiming as inland waters any waters behind islands that satisfied a ten-mile rule," *id.* at 127. See also *id.* at 141. Hence, even if this Court were to depart from its use of the Convention to determine the limits of coastal inland waters, Alaska has not made a satisfactory showing in this case.

II. The Special Master has also properly recommended that an offshore feature known as Dinkum Sands, which is regularly submerged by high tide, is not an island for purposes of locating the coastline. See Report 227-310.

The parties agree that the status of Dinkum Sands should be based on Article 10(1) of the Convention, which defines an island as "a naturally-formed area of land, surrounded by water, which is above water at high-tide." 15 U.S.T. 1609. After carefully examining the text and drafting history of the Convention, the Master properly concluded that Article 10(1) "requires an island to be

'above water at high tide' at least 'generally,' 'normally,' or 'usually.'" Report 309. His interpretive approach is consistent with that of the Court in *United States* v. *Louisiana (Louisiana Boundary Case)*, 394 U.S. 11, 40-47 (1969), where the Court construed Article 11's treatment of low-tide elevations. Alaska is mistaken in its argument that Dinkum Sands is analogous to "mudlumps" in the Mississippi River Delta, which Alaska asserts are islands. The Master found that there is no evidence that the mudlumps exhibit behavior analogous to Dinkum Sands, which regularly oscillates above and below mean high water. Report 291-293 & n.49. Alaska's reliance on *The Anna*, 165 Eng. Rep. 809 (1805), and other old cases is misplaced; they shed no light on the meaning of the 1958 Convention.

The Master is also correct in his factual findings respecting Dinkum Sands. Dinkum Sands is not merely "sometimes" or "occasionally" submerged. Alaska Except. Br. 45, 51. Based on the evidence, the Master concluded that Dinkum Sands is "frequently below mean high water and therefore does not meet the standard for an island." Report 309. Alaska's contrary characterization relies on a 1949-1950 survey. Subsequent observations beginning in 1955 have shown that the survey cannot be relied upon to characterize Dinkum Sands as an island. See *id.* at 240-244. Alaska makes no mention of the parties' $2.8 million joint monitoring project, which was specifically designed to provide factual data to assess Dinkum Sands' elevation with respect to mean high water. The Master correctly concluded, based on the joint monitoring study and other voluminous evidence, that Dinkum Sands "frequently slumps below the high water datum" and is therefore not an island under Article 10(1) of the Convention. *Id.* at 309.

The Special Master also properly recommended against adopting the suggestion that Dinkum Sands be deemed an

island when it is above mean high water but not when it is below. There is no clear precedent in international law for "occasional" islands. Treatment of Dinkum Sands as a temporary island, which would result in unpredictable extensions and contractions of the territorial sea on a weekly or monthly basis, would pose numerous practical problems. Furthermore, that approach is not required under domestic law. Congress has specifically provided that this Court may fix federal-state boundaries through its decrees. See 43 U.S.C. 1301(b). The treatment of Dinkum Sands as a temporary island would require a costly and timely monitoring program that would likely be subject to continuing disputes over the scientific methodology and results. This case demonstrates the undesirability of requiring permanent monitoring of a capricious coastal feature in an inclement Arctic region.

III. The Special Master correctly recommended that the United States has lawfully retained title to coastal submerged lands within the National Petroleum Reserve in Alaska through a 1923 land withdrawal that expressly included the submerged lands within its seaward boundary. Report 343-446.

Alaska's contention that it owns the submerged lands within the National Petroleum Reserve is a complete reversal of its position at the outset of the litigation. See Report 346. As the Master explained, the United States owns those lands because it expressly retained them through an Executive Order withdrawal, which Congress specifically recognized and ratified in the Alaska Statehood Act. As the Master further explained, there is a strong presumption that the United States retained the submerged lands beneath the territorial sea, where its power is "paramount" (*United States* v. *California*, 332 U.S. 19, 36 (1947) (*California I*)). See Report 394. But even if the withdrawal is construed under the "equal

footing" presumptions that this Court has applied to non-coastal inland waters, see *Utah Div. of State Lands* v. *United States*, 482 U.S. 193, 200-202 (1987), the United States clearly retained title. See Report 445.

Alaska is wrong at the outset in contending that the Pickett Act, ch. 421, 36 Stat. 847, did not authorize the President to withdraw the submerged lands. The Master rejected that argument, explaining that Alaska's construction is inconsistent with both the language and the object of the Act. See Report 404-416. It is particularly significant that the Pickett Act authorized the President to set aside lands for the purpose of creating petroleum reserves for the Navy's use. Such oil reserves exist in underground deposits that extend indiscriminately beneath uplands and submerged lands and cannot be preserved through reservation of the uplands alone. The Act's objectives would have been thwarted if it had allowed withdrawal of only the uplands. See *id.* at 410-416.

Alaska is also wrong in suggesting that there was no "public exigency" justifying the retention of submerged lands. The United States' national security needs provide an ample basis for the United States to reserve submerged lands. See Report 417-430. Alaska is additionally mistaken in its assertion that Section 11(b) of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 347, is not affirmative evidence that Congress intended to defeat Alaska's title. Section 11(b), which expressly states that the United States owns and retains exclusive jurisdiction over the National Petroleum Reserve, unambiguously expresses Congress's intention to withhold from Alaska all lands to the limit of the Reserve's seaward boundary. See Report 430-440.

There is no merit to Alaska's assertion that the Equal Footing Doctrine prohibits the United States from retaining title to submerged lands through a statehood act.

Alaska does not contest that Congress can retain submerged lands for appropriate public purposes. If that is so, then Congress can exercise that power through the legislation of its choice. Indeed, a statehood act is a particularly appropriate vehicle for Congress to manifest its intention to retain submerged lands rather than let them pass to the new State. There is also no merit to Alaska's contention that the United States is entitled to something less than fee title to the submerged lands. The decision whether to retain the full fee is a matter for Congress, which indicated its intention to retain full ownership of all of the lands within the National Petroleum Reserve. See Report 440-445.

ARGUMENT

I. ALASKA'S ENTITLEMENT TO LANDS BENEATH COASTAL INLAND WATERS SHOULD BE DETERMINED BY THE PRINCIPLES SET OUT IN THE CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE, RATHER THAN BY ALASKA'S PROPOSED "TEN-MILE" RULE

The Special Master carefully considered Alaska's entitlement to submerged lands in the vicinity of a series of barrier islands in the Arctic Ocean that lie at distances ranging from less than one mile to more than seven miles from the mainland and each other. See Report 3, Fig. 1.1 (map). He concluded that Alaska's right to submerged lands in such areas should be determined on the basis of the Submerged Lands Act of 1953 (SLA), 43 U.S.C. 1301 *et seq.*, and the mandatory provisions of the Convention on the Territorial Sea and the Contiguous Zone, done, Apr. 29, 1958, 15 U.S.T. 1606. Under those provisions, Alaska is entitled to submerged lands extending three miles seaward from the low-water line of the mainland and each of

the islands, 43 U.S.C. 1301(c); Art. 3, 15 U.S.T. 1608, and from the limits of inland waters, which are determined under the Convention's provisions governing the closing of bays, Art. 7, 15 U.S.T. 1609. See Report 19-175; U.S. Except. Br. 5-9 (summarizing the Master's findings).[1]

Alaska contends (Alaska Except. Br. 7-43) that the Special Master erred in determining the extent of the State's inland waters in the vicinity of the barrier islands. Alaska argued before the Master that all of the waters between the islands and the mainland are inland waters and that Alaska is therefore entitled to all of the underlying submerged lands. Alaska offered two separate theories in support of that claim. First, Alaska asserted that its entitlement should be determined by the optional method of "straight baselines" set forth in Article 4 of the Convention, 15 U.S.T. 1608. See Report 25-28 (Questions 2 and 12). In the alternative, Alaska asserted that its entitlement should be determined by a rule, which it characterized as the United States' historic policy, that areas enclosed by barrier islands less than ten miles apart are inland waters. See *id.* at 29-30 (Questions 3 and 13). The Master has recommended that this Court reject both theories, *id.* at 174-175, 503, and Alaska excepts only from his recommendation against adopting the "ten-mile" rule, Alaska Except. Br. 7.[2]

As we explain below, Alaska's exception should be overruled. This Court has held that the Convention provides

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[1] See also Report 24, Fig. 3.2 (map depicting the United States' position in the Leased Area); *id.* at 28, Fig. 3.4 (map depicting Alaska's position in the Leased Area).

[2] Alaska raised a third theory, one of "assimilation," which applied to only some of the submerged lands in question. Report 30-32 (Question 4). The Special Master has recommended that the Court reject that theory, see *id.* at 174-175, 503, and Alaska has not excepted from that recommendation.

the controlling principles for determining the seaward limits of inland waters for purposes of the Submerged Lands Act. See pages 9-12, *infra*. The United States' historic policies and practices are relevant under the Convention only to a claim of "historic" inland waters, and Alaska expressly disavowed such a claim here. See pages 12-17, *infra*. Moreover, as the Master comprehensively explained, even assuming *arguendo* that Alaska could claim coastal inland waters apart from the Convention's framework, there was no settled and formal position of the United States in support of the "ten-mile" rule of the sort that could justify a departure from the Convention's requirements. See pages 18-27, *infra*.[3]

A. This Court Has Ruled That A State's Entitlement To Land Beneath Coastal Inland Waters Shall Be Determined On The Basis Of The Convention

This Court held in a landmark case, *United States* v. *California*, 332 U.S. 19 (1947) (*California I*), that the United States, rather than any individual State, has paramount power over the submerged lands seaward of the coastline, in the area known as the territorial sea. *Id.* at 36. Congress later enacted the Submerged Lands Act, which granted the States title to a specified measure of the submerged land seaward of the coastline. That Act defined the "coast line" as "the line of ordinary low water

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[3] Alaska's characterization of the United States' current practice as "strictly applying the arcs-of-circles method" (Alaska Except. Br. 4-5) is inaccurate if the State means to suggest that the United States determines the limit of the State's Submerged Lands Act grant strictly from the actual low-water mark of the mainland and islands. The United States also draws the boundary from the limits of inland waters. But, unlike Alaska, the United States relies on the Convention to determine those limits.

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." SLA § 2(c), 43 U.S.C. 1301(c). But that Act did not establish principles for drawing the closing lines separating coastal inland waters (such as bays and inlets) from the territorial sea. See Report 15-16.

This Court addressed the question of inland waters in *United States* v. *California*, 381 U.S. 139 (1965) (*California II*). The Court ruled that the Convention on the Territorial Sea and the Contiguous Zone supplies the principles for determining the extent of inland waters under the Submerged Lands Act. *Id.* at 161-167. Under the Convention's principles, a coastal feature qualifies as inland waters if (a) it satisfies the requirements of a juridical bay, including a 24-mile closing rule and a "semi-circle" test; or (b) it qualifies as "historic" inland waters. Art. 7, 15 U.S.T. 1609. See *California II*, 381 U.S. at 169-175. The Convention also gives a nation the option of using "straight baselines" for determining seaward boundaries if its "coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity." Art. 4, 15 U.S.T. 1608. But the United States has elected not to use the optional straight-baselines method, and hence a State cannot rely on that methodology to extend the scope of its inland waters. *California II*, 381 U.S. at 167-169. See Report 17-18, 44-45.

The Court adopted its Convention-based approach over the objections of both California and the United States. California had argued that inland water determinations should be made on the basis of each State's understanding of its inland waters at the time of the State's admission to the Union. See *California II*, 381 U.S. at 149. The United States, by contrast, had argued that the determinations should be made on the basis of an assessment of inland water principles as of 1953, when Congress enacted the

Submerged Lands Act. See *id.* at 149, 164. The Court concluded, however, that Congress had not intended either of those results, *id.* at 150-165, but, instead, had "left the responsibility for defining inland waters to this Court," *id.* at 164. The Court accordingly announced a controlling principle:

> It is our opinion that we best fill our responsibility of giving content to the words which Congress employed by adopting the best and most workable definitions available. The Convention on the Territorial Sea and the Contiguous Zone, approved by the Senate and ratified by the President, provides such definitions. We adopt them for purposes of the Submerged Lands Act.

Id. at 165 (footnote omitted). The Court determined that fixing the meaning of inland waters in terms of the Convention for purposes of the Submerged Lands Act would "fulfill the requirements of definiteness and stability which should attend any congressional grant of property rights belonging to the United States." *Id.* at 167. See Report 17-18.

Alaska is accordingly wrong in its fundamental premise that Alaska's boundaries "were fixed by the United States' policy in 1959 of enclosing as inland waters areas between the mainland and fringing islands less than ten miles apart." Alaska Except. Br. 10. The Court's decision in *California II* categorically holds that the extent of each State's inland waters shall be determined by the rules set forth in the Convention, and not by any perceived policies at the time of an individual State's admission to the Union. Since the *California II* decision, the Court has consistently followed the Convention's principles in coastal inland water disputes, including a previous dispute between the United States and Alaska. See *United States*

v. *Maine*, 475 U.S. 89, 93-94 (1986); *United States* v. *Louisiana (Alabama and Mississippi Boundary Case)*, 470 U.S. 93, 98 (1985); *United States* v. *Maine (Rhode Island and New York Boundary Case)*, 469 U.S. 504, 513 (1985); *United States* v. *California*, 447 U.S. 1, 5, 9 (1980) (*California IV*); *United States* v. *Alaska*, 422 U.S. 184, 188-189 (1975); *United States* v. *Louisiana (Louisiana Boundary Case)*, 394 U.S. 11, 35 (1969). There is no reason to depart from that settled practice now.[4]

B. Under The Convention, The United States' Past Policies And Practices Remain Relevant To Historic Inland Waters Claims, But Alaska Has Not Made An Historic Inland Waters Claim In This Case

The Court's decision in *California II* requires a State to base its inland waters claim on the principles set forth in the Convention. As the Court recognized, the Convention takes into account historic policies and practices in a specific, but limited way. Under the Convention, a State may establish that an enclosed coastal area is inland waters by proving that it satisfies the requirements of a juridical bay: (1) the feature must be a well-marked indentation into the mainland whose area is as large as, or larger than, that of a semi-circle whose diameter is drawn across the mouth of the indentation; and (2) the closing line between the low-water marks of the natural entrance points may not exceed 24 miles. Art. 7(2) and (4), 15 U.S.T.

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[4] Experience has established the wisdom of the Court's decision in *California II*. The Convention has provided authoritative rules for resolving inland waters disputes and "many of the lesser problems related to coastlines." 381 U.S. at 165. Furthermore, as we show below, use of the Convention will limit the occasion for litigation over whether and what historic delimitation policies were in place when each of the coastal States entered the Union to those situations in which a State has a claim to "historic" inland waters under Article 7(6) of the Convention.

1609. See *California II*, 381 U.S. at 169-172; see also, *e.g.*, Report 176-226; U.S. Except. Br. 9-11. Alternatively, a State may establish that the area constitutes "historic" inland waters. Art. 7(6), 15 U.S.T. 1609. See *California II*, 381 U.S. at 172-175; see also, *e.g.*, *Alabama and Mississippi Boundary Case*, 470 U.S. at 99-101 & n.2.[5]

The Convention does not define what features constitute "historic" inland waters, but this Court stated in the *Alabama and Mississippi Boundary Case* that they comprise an area "over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations." 470 U.S. at 101. The Court additionally stated that "at least three factors are to be taken into consideration in determining whether a body of water is a historic bay: (1) the exercise of authority over the area by the claiming nation; (2) the continuity of this exercise of authority; and (3) the acquiescence of foreign nations." *Id.* at 101-102. The Court looked to a variety of evidence bearing on those factors in that case, see *id.* at 102-111, and concluded that the evidence, "considered in its entirety, is sufficient to establish that Mississippi Sound constitutes a historic bay," *id.* at 115.

Alaska cites the *Alabama and Mississippi Boundary Case* as showing that the United States had a past policy that controls the outcome in this case. Alaska Except. Br. 7. Alaska relies specifically on the Court's statement that, between 1903 and 1961 (when the United States ratified the Convention), "the United States had adopted a policy of enclosing as inland waters those areas between the mainland and off-lying islands that were so closely

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[5] As the Court noted, Article 7(6)'s provisions respecting "historic bays" apply to areas that strictly speaking are not "bays." 470 U.S. at 101 n.2. The Court left open "how unlike a juridical bay a body of water can be and still qualify as a historic bay." *Ibid.*

grouped that no entrance exceeded 10 geographical miles." 470 U.S. at 106. Alaska argues that the Court's observation "resolved" the issue here and establishes that the State is entitled to submerged lands in the Arctic Ocean fitting that description. Alaska Except. Br. 7. Alaska overlooks, however, the context in which that observation was made.

The Court discussed the United States' past policy in the specific and limited context of whether Mississippi Sound qualified as an *historic bay* under *Article 7(6)* of the Convention. See 470 U.S. at 100-101. It considered the United States' past expressions and practices as only one of numerous sources of evidence bearing on the three-factor test for historic bays. See *id.* at 102-111.[6] Indeed, the Court appeared to agree with the United States that what the Court described as a general policy would not, by itself, establish "a sufficiently specific claim to the Sound as inland waters to establish it as a historic bay." *Id.* at 107. The Court concluded, however, that the policy was relevant in "the present case" because "the general principles in fact were coupled with specific assertions of the status of the Sound as inland waters." *Ibid.*[7]

In this case, by contrast, Alaska has specifically disclaimed that Stefansson Sound and the other disputed

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[6] The Court also considered, for example, the commercial and strategic importance of the Sound (470 U.S. at 102), the depth and geographic configuration of the Sound (*id.* at 102-103), historic use of the Sound as an inland waterway (*id.* at 103), and federal navigational improvements and military defense of the Sound (*id.* at 103-105).

[7] The Court specifically pointed to its own past description of the Sound as inland waters in *Louisiana* v. *Mississippi*, 202 U.S. 1, 48 (1906), and the United States' concessions in earlier phases of the litigation, which together "represent[ed] a public acknowledgement of the official view that Mississippi Sound constitutes inland waters of the Nation." 470 U.S. at 110.

areas qualify as historic inland waters under Article 7(6) of the Convention. Report 44 n.13, 51. As the Master stated:

> Alaska points out that it is not attempting to show that the waters inside the barrier islands qualify as historic bays under Article 7(6) of the Convention. Rather, it seeks to show that these waters were inland by virtue of a general delimitation system that the United States employed at the times significant to the development of Alaska's rights.

Id. at 51. In other words, Alaska eschews the Convention's test for historic inland waters and offers a different methodology. Alaska's position is squarely inconsistent with this Court's decision in *California II*, which held that the Convention shall provide the rules for establishing inland waters. 381 U.S. at 165.

Under *California II*, if Alaska wishes to demonstrate that an area constitutes inland waters based on the United States' past practices, then it must come forward with sufficient additional proof that the area satisfies the test for "historic" inland waters under Article 7(6) of the Convention. If Alaska were correct that a State may rely on historic practices alone, divorced from the Convention's requirements, then this Court would have to discard the approach that it adopted in *California II* and has followed in all subsequent inland waters delimitation cases, which insist on adherence to the Convention's requirements. See, *e.g.*, *Maine*, 475 U.S. at 95, 105 (recognizing that, if a State can claim inland waters on the basis of "ancient title," the claim must be predicated on Article 7(6) of the Convention).

Alaska argues that there are dicta in *California II* that leave open an avenue for circumventing the Convention's requirements. As noted above, the Court observed that

the Convention allows, but does not require, a nation to use "straight baselines" to delimit inland waters if the mainland is "deeply indented" or surrounded by "a fringe of islands," Art. 4, 15 U.S.T. 1608. See *California II*, 381 U.S. at 167-168. The Court concluded that the choice whether to use straight baselines rests with the United States, but additionally observed as follows:

> The national responsibility for conducting our international relations obviously must be accommodated with the legitimate interests of the States in the territory over which they are sovereign. Thus a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable.

Id. at 168. Relying on the dicta, Alaska argues that it is entitled to demonstrate, entirely apart from Article 7(6) of the Convention, that the United States' failure to adhere to its purported historic delimitation policy has resulted in a contraction of Alaska's "recognized territory." Alaska Except. Br. 10-13.

Alaska's suggested approach is unwarranted, because this Court has fully addressed its concern over the potential "contraction of a State's recognized territory" through the framework of the Convention. Under *California II*, the Convention establishes the controlling standards for determining what coastal areas are in fact inland waters and therefore a part of a State's "recognized territory." If a State cannot establish that an area qualifies as historic inland waters under Article 7(6) of the Convention, then the State cannot justifiably claim that the area is part of its "recognized territory." But if a State does demonstrate that an area qualifies as historic inland waters, then the United States cannot divest the State

of the associated submerged lands. See *Alabama and Mississippi Boundary Case*, 470 U.S. at 111-112.[8]

In this case, Alaska has never suggested that Stefansson Sound and the other disputed areas qualify as historic inland waters under Article 7(6) of the Convention. See Report 44 n.13, 51. Cf. *United States* v. *Alaska*, 422 U.S. 184 (1975) (rejecting Alaska's claim that Cook Inlet, near Anchorage, is an historic bay). Thus, Alaska has failed to establish that the lands in question are "recognized territory," and Alaska has no basis for arguing that the United States' adherence to the normal baseline provisions of the Convention has impermissibly contracted Alaska's recognized territory.[9]

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[8] The Court specifically held in the *Alabama and Mississippi Boundary Case* that the United States' international disclaimer of territory was insufficient to divest the State of Mississippi of its claim of "historic title" that "had ripened prior to the United States' ratification of the Convention in 1961 and prior to its disclaimer of the inland water status of the Sound in 1971." 470 U.S. at 112. Accord *Louisiana Boundary Case*, 394 U.S. at 77 n.104 (United States cannot "prevent recognition of a historic title [under Article 7(6)] which may have already ripened because of *past* events"); compare *California II*, 381 U.S. at 175 (accepting a federal disclaimer where the State had failed to demonstrate historic title under the Convention).

[9] As noted above, the Court expressed its concern over a contraction of recognized territory in the specific context of the United States' decision against using the optional method of straight baselines in an area where that method would be permissible. See *California II*, 381 U.S. at 168. In this case, Alaska has pressed its argument before this Court on the basis of the "ten-mile" rule. But the same result would follow if Alaska were contending (as it did before the Special Master, Report 25-28) that the United States is obligated to draw straight baselines along the Arctic coast. As the Special Master recognized (*id.* at 45, 48 n.14), the United States has followed a consistent practice of refusing to adopt straight baselines. See *Maine*, 475 U.S. at 94; *Alabama and Mississippi Boundary Case*, 470 U.S. at 99; *United States* v. *Louisiana (Louisiana Boundary Case)*, 420 U.S. 529

C. Even If Alaska Could Base A Claim To Inland Waters On Principles Other Than Those Set Out In The Convention, It Has Not Done So Here

In this case, the Special Master generously "assume[d] arguendo that something less than the disclaimer of a historic bay might amount to an impermissible contraction of a state's territory." Report 52. He nevertheless concluded that Alaska had failed to demonstrate such a contraction in this case. *Id.* at 52-175. For the reasons stated above, the Court does not need to decide that issue: Alaska cannot claim a contraction of its "recognized territory" unless it first demonstrates under the Convention that the area in question qualifies as historic inland waters. But if the Court decides to consider the issue, it will find that the Master's decision is correct. Alaska cannot claim that the United States' adherence to the Convention resulted in a contraction of Alaska's recognized territory, because the United States did not have a sufficiently "well-established and well-defined rule for inland water delimitation to imply such a claim." *Id.* at 52.

The Master conducted a scholarly and exhaustive examination into the history of the United States' statements and practices respecting the delimitation of inland waters. His examination shows that, during the Nation's

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(1975) (accepting the Report of the Special Master); see also *Louisiana Boundary Case*, 394 U.S. at 72-73; *California II*, 381 U.S. 167-169. Alaska and the United States stipulated before trial that the United States has not drawn straight baselines in the area in question. Report 45 (citing Joint Statement 7). The United States' adherence to that practice has not contracted Alaska's "recognized territory" because, as explained above, Alaska has not proved an historic inland waters claim under Article 7(6) of the Convention. Alaska cannot avoid that result by attempting to piece together past statements or positions of various United States officials that fall short of satisfying the standards of Article 7(6).

history, various United States officials have occasionally alluded to variants of a "ten-mile" rule, as well as other methods, for delimiting coastlines, but that those episodic references did not amount to a consistent or sufficiently well-defined policy for Alaska to assert a claim to "recognized territory" for the areas at issue along the Arctic coast. See Report 56-70 (experience before 1929); *id.* at 71-83 (1929 to 1949); *id.* at 83-109 (1950 to 1952); *id.* at 109-141 (1953 to Alaska's statehood); *id.* at 141-172 (post-statehood developments).

Alaska's contrary depiction of history (Alaska Except. Br. 16-39) is not persuasive when viewed against the Master's detailed analysis, which we commend to the Court's careful review. We highlight several specific points to demonstrate the shortcomings of Alaska's arguments.

1. Alaska insists that the Court's general observations in the *Alabama and Mississippi Boundary Case* respecting the United States' past views and practices establish that the United States had a "ten-mile" policy that is binding in this case. The Master explained why that is not so. Report 52-55. The Court's observations in that case respecting United States policy were made in the specific context of an historic inland waters determination under Article 7(6) of the Convention. The question of the exact nature of the United States' past practices "was not strictly necessary to the decision" and "was not fully briefed." Report 54. Indeed, the Special Master in the *Alabama and Mississippi Boundary Case* had "quoted numerous statements of the pre-Convention policy"; there "is considerable variation among the statements"; and "he did not select any particular statement of policy as being more accurate or more authoritative than the others."

Ibid. (citing Report of Special Master Walter P. Armstrong, Jr., at 39-42, 48-53 (1984) (No. 9, Orig.)).[10]

The Special Master in this case examined the materials and arguments that were placed before the Court in the *Alabama and Mississippi Boundary Case*. He concluded:

> Given this history, I do not believe that the Court in [that case] intended to pass upon what statement of the rule most accurately reflected United States policy regarding near-shore islands.

Report 55. The Court's decision in the *Alabama and Mississippi Boundary Case* confirms the Master's conclusion. As we noted above, the Court appeared to agree with the United States that the past delimitation practices of the United States, by themselves, did not provide a "sufficiently specific" basis for claiming Mississippi Sound as inland waters. 470 U.S. at 107. The Court indicated, instead, that the United States' past practices were a relevant consideration because "the general principles in fact were coupled with specific assertions of the status of the Sound as inland waters." *Ibid.*

In the *Alabama and Mississippi Boundary Case*, the question of historic delimitation practice was merely one of many considerations in the Article 7(6) inquiry, and the Court had no need to look beyond statements of "general principles." The same cannot be said here.[11] Moreover, if

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[10] Special Master Armstrong's Report in the *Alabama and Mississippi Boundary Case* and all of the other Master's Reports respecting coastal boundaries have been collected and reproduced in Michael W. Reed, G. Thomas Koester & John Briscoe, *The Reports of the Special Masters of the United States Supreme Court in the Submerged Lands Cases 1949-1987* (1991) (*Submerged Lands Cases*).

[11] As the Master noted, "[f]or Mississippi Sound, the differences among statements apparently made no difference in result. For the northern coast of Alaska, that may not be the case." Report 55.

the Court decides to depart from its past decisions and to recognize historic inland waters claims based on considerations outside of the Convention framework, it should at least require that the State demonstrate that its claim is based on a "well-established and well-defined rule for inland water delimitation." Report 52. As the Special Master explained, "the exact nature of the United States' historic practice is a matter of some intricacy." *Id.* at 55. Hence, the Master was justified in conducting "a more detailed examination of the practice than might otherwise have seemed necessary." *Ibid.*[12]

2. The Master determined that, "before the Convention, the United States did sometimes enclose waters behind coastal islands as inland waters." Report 138. That determination is consistent with the Court's ultimate ruling in the *Alabama and Mississippi Boundary Case*, 470 U.S. at 115. But as the Master explained in his

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[12] There is no merit in Alaska's argument (Alaska Except. Br. 8) that collateral estoppel bars that inquiry. As an initial matter, Alaska acknowledged before the Master that the United States is generally not subject to non-mutual collateral estoppel. See Report 30 (noting Alaska's acknowledgment of *United States* v. *Mendoza*, 464 U.S. 154, 162-163 (1984)). As a result, "Alaska d[id] not seek to invoke collateral estoppel against the United States," and instead "introduced evidence aimed at proving the ten-mile rule independently." Report 30, 53-54. In any event, as we have explained above, the Court's characterizations in the *Alabama and Mississippi Boundary Case* were made in the specific context of an "historic" inland waters dispute. The Court's observations concerning "general principles" do not have controlling legal significance in the situation presented here, where Alaska's novel claim could succeed only upon demonstrating the existence in the past of a "well-established and well-defined rule for inland water delimitation." *Id.* at 52.

Report, the United States' underlying policy was not consistent or well defined:

> The evidence plainly shows that, as of Alaska's statehood, the United States had not developed a general policy of claiming as inland waters any waters behind islands that satisfied a ten-mile rule. At January 3, 1959, no such general rule had ever been announced as American policy, unless perhaps in the Alaska Boundary Arbitration of 1903. The rule that had been recently stated, in various forms, was a rule for straits to an inland sea. The latter was clearly not equivalent to a simple ten-mile rule for islands.

Report 127.

Contrary to Alaska's fundamental contention (Alaska Except. Br. 19), the Arbitration did not "crystallize" the United States' policy into "an explicit 10-mile rule for inland waters enclosed by islands." For example, the United States formally proposed principles to the League of Nations Conference for the Codification of International Law, held at the Hague in 1930, that did *not* include a ten-mile rule for inland waters. The United States instead proposed that individual islands would have their own three-mile belt of territorial sea and that any pockets or indentations of high sea created by that method would be assimilated to a nation's *territorial* waters, not its *inland* waters. See Report 71-75. The other materials cited by the Master further underscore that the United States never formally adopted, as an official and enduring position for the Nation, the ten-mile rule that Alaska urges.[13]

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[13] The 1903 Alaska Boundary Arbitration involved a dispute between the United States and Great Britain over the international boundary in southeastern Alaska. In the course of the arbitration, counsel for the United States had accepted the use of a ten-mile rule for closing bays. See Report 64-65. But the arbitration tribunal did not

The Master examined the consequences of that finding for Alaska's claims in this case. He stated:

> I cannot regard it as established that the United States would have treated the disputed areas as inland waters at the time of Alaska's statehood. No occasion had arisen that required the United States to take a position on their status. No actual determination had been made. The principles that would govern the determination were vague and, as I shall discuss below, perhaps discretionary.

Report 140-141. That conclusion points up the distinction between this case and the *Alabama and Mississippi Boundary Case*, where "the general principles in fact were coupled with specific assertions of the status of the Sound as inland waters." 470 U.S. at 107.

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decide the issue. See *id.* at 65. From that time until Alaska's statehood, United States officials regularly made statements that departed from or did not mention the ten-mile rule. See, *e.g.*, *id.* at 68-70 (United States international commentary in 1929 that made no mention of ten-mile rule); *id.* at 71-75 (United States international proposals in 1930 supporting delimitation methodology that was inconsistent with the ten-mile rule); *id.* at 76-80 (United States domestic and international statements in 1949 supporting the 1930 proposals); *id.* at 98-103 (State Department letter in 1951 that set forth delimitation policies but made no mention of the ten-mile rule); *id.* at 105-107 (State Department letter in 1952 that stated delimitation policies inconsistent with the ten-mile rule); *id.* at 122-125 (State Department memorandum in 1957 that discussed delimitation policies but made no mention of the ten-mile rule). Indeed Alaska's own expert witness, Professor Jonathan Charney, acknowledged that there is no evidence that the United States closed either inland waters or territorial sea behind fringing islands even from 1903 to 1930. Tr. 3083. In fact, Professor Charney conceded that "it could not be shown that there was any formal, regularized decision by the United States as a whole as to what exactly its foreign-policy position was with respect to how to fix the baselines for measuring the territorial sea." Tr. 3095.

More fundamentally, the Master's conclusion is consistent with this Court's decision in *California II*. The Court concluded in that case that, when Congress enacted the Submerged Lands Act in 1953, "there was no international accord on any definition of inland waters, and the best evidence (although strenuously contested by California) of the position of the United States was the letters of the State Department which the Special Master refused to treat as conclusive." 381 U.S. at 164. The Court adopted the Convention's approach to resolve that very uncertainty. *Id.* at 164-165. The Court observed:

> Before today's decision no one could say with assurance where lay the line of inland waters as contemplated by the Act; hence there could have been no tenable reliance on any particular line. After today that situation will have changed.

Id. at 166. The Special Master's exhaustive study of past positions and statements by various United States officials confirms the Court's observations and the soundness of its Convention-based approach to delimiting inland waters. Indeed, in the end, his analysis simply underscores that Alaska should not be able to claim an historic right to inland waters as "recognized territory" unless it can show under Article 7(6) of the Convention that they are historic inland waters.

3. Alaska contends that the United States "followed the 10-mile rule even after the Court adopted the Convention for Submerged Lands Act purposes" (Alaska Except. Br. 36-39) and "changed its position in 1971 for reasons unrelated to international relations" (*id.* at 39-40). Those contentions are without merit.

As we have explained above, in *California II*, the United States and California had argued against using the Convention to delimit inland waters, but the Court rejected

those arguments. See 381 U.S. at 161-165. Since the Court's decision in *California II*, the United States has adopted and followed the normal baseline provisions of the Convention to resolve inland water disputes. The United States has done so precisely because the Court concluded in *California II* that the Convention—and not any pre-Convention methodology—established the appropriate rules. The only exception arises from the United States' decision, shortly after *California II*, to honor a previous concession made in pending litigation.

At the time of the *California II* decision in 1965, the United States was engaged in continuing litigation with Louisiana respecting ownership of submerged lands in the Gulf of Mexico. See *United States* v. *Louisiana*, 363 U.S. 1 (1960). In 1961, the United States had proposed a closing line that, while not strictly based on a ten-mile rule, enclosed water bodies formed by fringing islands with openings of ten miles or less in the area of Chandeleur Sound. See Report 142-152. The United States had adhered to that line in 1961, notwithstanding the ratification of the Convention, as an "adherence to an earlier commitment." *Id.* at 150. In 1965, after the Court's decision in *California II*, the United States decided against withdrawing that particular concession. See *id.* at 155-157. As the Master recognized, the United States simply elected to treat the long-standing dispute over Chandeleur Sound as settled by a previous concession. Contrary to Alaska's assertions (Alaska Except. Br. 39), the United States was not following the ten-mile rule, much less committing the United States to such a rule in all circumstances in the future.[14]

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[14] The United States made clear in the formal stipulation concerning Chandeleur Sound that it made the concession "[f]or the sole purpose of expediting the ultimate resolution of this case, and without

There is also no merit to Alaska's separate contention (Alaska Except. Br. 39-40) that the United States has improperly declined to use the Convention's optional method of straight baselines. As noted above, the United States indeed has not elected to use that method. See page 10, *supra*. But as this Court has repeatedly recognized, that decision rests within the discretion of the United States. The United States has consistently followed a policy against the use of straight baselines. See note 9, *supra*. Alaska's speculation about the United States' motivations are beside the point. "This is not a situation in which the United States has created a contraction of Alaska's recognized territory in the Arctic; it is not a case in which the United States in effect used straight baselines but 'abandon[ed] that stance solely to gain advantage in a lawsuit. . . .' *Louisiana Boundary Case*, 394 U.S. at 73 n.97." Report 169.

Although Alaska complains of a contraction of its recognized territory, it is Alaska that seeks to expand its boundaries beyond what the Convention contemplates and place itself in a favored position vis-à-vis other States. Alaska urges application of a ten-mile closing rule based on the United States' purported pre-Convention policy at the time of Alaska's statehood (Alaska Except. Br. 10-13), even though similar geographic areas in other States have been held not to be inland waters. See Report 173. Furthermore, at the same time that Alaska has argued that its

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deciding whether Chandeleur or Breton Sounds are inland waters." See Report of Special Master Walter P. Armstrong, Jr., at 63 (1974) (App. A-2 Stip.), *United States* v. *Louisiana* (No. 9, Orig.) (*reproduced in Submerged Lands Cases* 249). The United States also indicated that the agreement "is not based on the belief that these are historic inland waters or described by a system of straight baselines." *Id.* at 66 (*reproduced in Submerged Lands Cases* 252).

boundaries "were fixed by the United States' policy in 1959" (Alaska Except. Br. 10), Alaska has not hesitated to argue that it is entitled to the Convention's more inclusive 24-mile closing rule for juridical bays, such as Harrison Bay. Harrison Bay and other similar coastal features would not qualify as inland waters if they were subject to a pre-Convention policy of drawing ten-mile closing lines for bays and inlets. See Report 63-65.[15]

At bottom, there is no consistency to Alaska's position save the principle of maximizing the State's submerged lands grant.

II. DINKUM SANDS IS NOT AN ISLAND

The Submerged Lands Act grants to the coastal States submerged lands within three miles of the coastline of the mainland and offshore islands. See Report 15-18. Dinkum Sands is a small gravel and ice formation located between Cross and Narwahl Islands, about four to five miles from each and about eight miles from the mainland. See *id.* at 2, Fig. 1.1. The United States and Alaska disagree over whether Dinkum Sands is an island for purposes of determining Alaska's Submerged Lands Act grant. They agree, however, that the question is governed by Article 10(1) of the Convention on the Territorial Sea and the Contiguous Zone, which defines an island as "a naturally-formed area of land, surrounded by water, which is above water at high-

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[15] The use of a pre-Convention policy of drawing ten-mile closing lines would also affect the inland waters status of numerous other bays in Alaska, not at issue in this case, that are currently closed under the Convention's 24-mile rule. An inspection of offical nautical charts would reveal that the following bays and inlets are subject to greater than ten-mile closing lines: Norton Bay; Kotzebue Sound; Nushagak Bay; Kvichak Bay; Stepovak Bay; Cold Bay; Uyak Bay; Uganik/Viekoda Bay; Chiniak Bay; Kachemak Bay; Kamishak Bay; Upper Cook Inlet; Resurrection Bay; and Prince William Sound.

tide." Art. 10(1), 15 U.S.T. 1609. See *California II*, 381 U.S. at 165; see also Report 227-230; U.S. Except. Br. 11-12.

Alaska objects (Alaska Except. Br. 43-56) to the Master's recommendation that Dinkum Sands is not an island under Article 10(1) of the Convention. See Report 230-310; *id.* at 503-504 (Question 5); U.S. Except. Br. 11-12 (summarizing the Master's findings). Alaska challenges the Master's legal conclusion that Article 10(1) "requires an island to be 'above water at high tide' at least 'generally,' 'normally,' or 'usually' " (Report 309). Alaska Except. Br. 45-51. Alaska also disputes his factual findings respecting Dinkum Sands, including his finding that it "is frequently below mean high water and therefore does not meet the standard for an island" (Report 309). Alaska Except. Br. 51-54. Finally, Alaska argues that Dinkum Sands should be treated as a temporary island in the unusual instances when it is not submerged. *Id.* at 54-56.

A. The Master Correctly Determined That Article 10(1) Of The Convention Includes As Islands Only Features That Are Normally Above Mean High Water

Article 10(1) of the Convention provides a definition of an island, but it does not explicitly address how that definition should be applied to a feature like Dinkum Sands, which Alaska concedes is at times completely submerged below mean high water. The Master therefore undertook an examination of how Article 10(1) should be applied in such a situation. He interpreted Article 10(1) in light of a detailed examination of the history of development of the Article. Further, he applied the same rules of construction that this Court has applied when interpreting the Convention.

1. The Master reviewed the origins of Article 10(1), beginning with the Conference for the Codification of International Law at the Hague in 1930. See Report 294-297. As he recounted, the committee preparing for the Conference circulated a questionnaire to solicit views on issues, including the definition of an island. Based on the responses, the committee proposed discussion of a standard that would require permanent elevation above high tide:

> BASIS OF DISCUSSION No. 14
>
> In order that an island may have its own territorial waters, it is necessary that it should be permanently above the level of high tide.

Id. at 295.[16] At the Conference, a subcommittee that was assigned the issue produced a definition incorporating a prerequisite of permanence:

> ISLANDS
>
> Every island has its own territorial sea. An island is an area of land, surrounded by water, which is permanently above high-water mark.

Id. at 296.[17] The 1930 Conference took no action on the subcommittee report, and the Conference ultimately

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[16] See *Conference for the Codification of International Law, 2 Bases of Discussion: Territorial Waters*, League of Nations Doc. C.74.M.39.1929.V (1929), *reprinted in* 2 *League of Nations Conference for the Codification of International Law [1930]* 54 (ed. Shabtai Rosenne 1975).

[17] See 3 *Acts of the Conference for the Codification of International Law, Minutes of the Second Committee: Territorial Waters*, League of Nations Doc. C.351(b).M.145(b).1930.V (1930), *reprinted in* 4 *League of Nations Conference for the Codification of International Law [1930]* 219 (ed. Shabtai Rosenne 1975).

terminated for lack of agreement on the width of the territorial sea. See *id.* at 296-297.

In 1951, the International Law Commission of the United Nations carried on the work of the 1930 Conference. See Report 297-299. Mr. J.P.A. Francois, the special rapporteur, initially proposed the definition of an island suggested by the subcommittee of the 1930 Conference: "an area of land surrounded by water, which is permanently above high-water mark." *Id.* at 297.[18] During the 1954 session, at the recommendation of Sir Hersch Lauterpacht of the United Kingdom, the Commission added the words "in normal circumstances" to allow for "exceptional cases." *Ibid.*[19] The Commission's final report included that one change:

> Every island has its own territorial sea. An island is an area of land, surrounded by water, which in normal circumstances is permanently above high-water mark.

Id. at 298.[20]

The United States Department of State prepared an internal memorandum in 1957 evaluating the work of the International Law Commission. See Report 298-299. On

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[18] See J.P.A. Francois, *Report on the Regime of the Territorial Sea*, [1952] 2 Y.B. Int'l L. Comm'n 25, 36, U.N. Doc. A/CN.4/53 (in French, translation from Alaska Exh. 84A-21, at 41); J.P.A. Francois, *Second Report on the Regime of the Territorial Sea*, [1953] 2 Y.B. Int'l L. Comm'n 57, 68, U.N. Doc. A/CN.4/61 (in French); J.P.A. Francois, *Third Report on the Regime of the Territorial Sea*, [1954] 2 Y.B. Int'l L. Comm'n 1, 5, U.N. Doc A/CN.4/77 (in French).

[19] See *Summary Records of the 260th Meeting*, [1954] 1 Y.B. Int'l L. Comm'n 90, 92, 94.

[20] *Report of the International Law Commission to the General Assembly*, 11 U.N. GAOR Supp. (No. 9) at 16, U.N. Doc. A/3159 (1956), *reprinted in* [1956] 2 Y.B. Int'l L. Comm'n 253, 270.

the subject of islands, Mr. Benjamin Read suggested that the words "permanently" and "in normal circumstances" appeared inconsistent and could be omitted:

> The Commission's definition is the same as that adopted by the Second Sub-Committee at the 1930 Hague Conference, except that the words "in normal circumstances" were added . . . in order to "cover exceptional cases." The added words seem incompatible with the succeeding word "permanently" in the definition. Both terms might well be omitted, since current international law does not purport to solve such *minor problems* . . . as how to treat land which is above sea level at neap high tides [*i.e.*, twice monthly lowest high tides] but not spring high tide [*i.e.*, twice monthly highest high tides] or only at high tides during certain seasons of the year.

Ibid. (quoting Alaska Exh. 84A-021, at 11) (emphasis added). The memorandum made three significant points: (a) the qualifier "in normal circumstances" was intended to allow for "exceptional cases"; (b) those cases were understood to mean inundation at unusually high states of high tide; and (c) those events were considered to present only "minor problems." Those minor problems are solved today by recognition of a "high water datum." See Report 234-236.[21]

Accordingly, as the Master explained, the United States recommended deletion of the words "permanently" and "in

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[21] The parties agree that, under established practice, "high tide" under Article 10 is construed to mean "mean high water," a datum developed based on 19 years of observations by the National Ocean Service. Report 234-236; see *United States* v. *California*, 382 U.S. 448, 449-450 (1966) (per curiam) (*California III*).

normal circumstances," at the 1958 United Nations Conference on the Law of the Sea:

> The requirements in the International Law Commission's definition of an island that it shall be above the high-water mark "in normal circumstances" and "permanently" are conflicting, and since there is no established state practice regarding the effect of subnormal or abnormal or seasonal tidal action on the status of islands, these terms should be omitted.

Report 299-300.[22] The 1958 Conference accepted the United States' proposed changes. *Id.* at 300.[23] The final Convention text is reflected in Article 10(1), which defines an island as "a naturally-formed area of land, surrounded by water, which is above water at high-tide." *Ibid.*

The Master reasoned from the history of the Convention that the "1958 deletion of 'permanently' must be read together with the deletion of 'in normal circumstances.'" Report 301. He determined that the drafters intended to allow for only "temporary inundation," stating:

> The two phrases were viewed as conflicting, but in fact any conflict seems to be limited to the case where abnormal circumstances lead to the temporary inundation of a feature that would otherwise qualify as an island.

Ibid. His reconciliation of the two phrases, and his explanation of their deletion, are consistent with the observations of two of the most influential members of the

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[22] U.N. Conference on the Law of the Sea, 1st Comm., *Summary records of meetings*, 3 Official Records 242, U.N. Doc. A/CONF.13/C.1/L.112 (1958).

[23] U.N. Conference on the Law of the Sea, 1st Comm., 52d mtg., 3 Official Records 160, 161-163 (1958); *id.*, 19th plen. mtg., 2 Official Records 61, 64.

International Law Commission. In 1954, Mr. Spiropoulos and Mr. Francois, the Rapporteur, commented that Mr. Lauterpacht's addition of the phrase "in normal circumstances" was unnecessary because it was implied in the original draft. See Clive Symmons, *The Maritime Zones of Islands in International Law* 42 (1979).[24]

Thus, the Master construed Article 10(1) to define an island as a feature "generally", "normally," or "usually" above mean high water. Report 302. Contrary to Alaska's argument, the Master did not fashion a new standard (Alaska Except. Br. 6, 44); he interpreted Article 10(1) in light of the drafters' deletions with the express intention of avoiding any new standard:

> I do not believe the drafters intended, in eliminating supposedly conflicting standards, to adopt yet another standard less demanding than either of the first two. That the drafters declined to say an island must be "permanently above water at high tide" or "normally above water at high tide" does not mean they intended to insert some weaker qualifier such as "sometimes" or "occasionally."

Report 301.[25]

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[24] Sir Gerald Fitzmaurice, the primary British delegate to the 1958 Conference, and later a Judge on the International Court of Justice, commented on the definition immediately after the Conference, stating:

> [I]n the absence of any special agreement to the contrary, any natural formation (even a mere rock), permanently (even if only just) visible at all states of the tide, generates a territorial sea.

Gerald Fitzmaurice, *Some Results of the Geneva Conference on the Law of the Sea*, 8 Int'l & Comp. L.Q. 73, 85 (1959).

[25] The Master noted that "an arguably relevant international case supports a rather demanding standard" of vertical permanence. Report 301. Following the ratification of the Convention, England and

Indeed, Alaska once agreed with that interpretation, for the Master observed when he issued his Report: "Even Alaska contends only that Article 10 permits a feature 'to slump on occasion' below the tidal datum and still to qualify as an island. AB [Alaksa Brief] 64." Report 301. Thus, it is Alaska that now seeks to graft a new standard on the Convention definition. By rejecting "normally," Alaska apparently demands a weaker, more forgiving criterion that ignores both "permanently" and "in normal circumstances." Under Alaska's view, a feature need appear only episodically above mean high tide.

2. The Master's reliance on the history of the development of Article 10(1) is consistent with this Court's method of interpreting the Convention. In the *Louisiana Boundary Case*, the Court examined the International Law Commission's addition to Article 11, which governs the treatment of low-tide elevations for purposes of determining the baseline of the territorial sea. 394 U.S. at 40-47.[26] The United States argued that the addition was not intended merely for clarification, but instead to effect a change in Article 11's meaning.[27] The Court disagreed,

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France disputed whether Eddystone Rock off the coast of Cornwall was an island. See *ibid.* (citing *Delimitation of the Continental Shelf (U.K. v. Fr.)*, 18 R. Int'l Arb. Awards 3, 65-74 (1977)). The Rock was covered only at "high water equinoctial springs." Report 301 (quoting 18 R. Int'l Arb. Awards at 66). Although the case was resolved on the ground that France had already accepted the Rock as a basepoint, the Master observed that "the parties did argue the case as if a formation, to be an island, must be almost never below water." Report 302.

[26] The addition specified that low-tide elevations could be used only once to extend a baseline, so that a country could not unduly extend its baselines seaward by leapfrogging from one low-tide elevation to the next. 394 U.S. at 45.

[27] The United States argued that the change was intended to preclude extensions of the territorial sea that might otherwise be at-

stating that "any change in the basic meaning of the Article" would have to be apparent in the history of its development. *Id.* at 46. The Court explained:

> Precisely the opposite conclusion, however, flows from an inspection of the history of the Convention. The amendment was advanced by the United States; yet its explanation for the proposal contained not the slightest indication that any change in the basic meaning of the Article was intended. *Surely there would have been some discussion* of the reference to the territorial sea as a measure of distance rather than as a situs *had it been the purpose of the United States or the Conference to alter so significantly the meaning of prior drafts and the existing international consensus.*

Ibid. (emphasis added, footnote omitted).[28] The Master applied similar reasoning here. He examined the two deletions in Article 10(1) and looked for any sign of departure from the basic meaning of prior drafts. He found no such sign. Compare *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155, 186-187 (1993).

3. Alaska cites numerous sources (Alaska Except. Br. 45-51) to support its contention that Article 10(1)'s definition of an island encompasses "ephemeral" features. Those sources are of little value because they are either

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tempted by extending baselines from bay and river closings seaward to low-tide elevations. 394 U.S. at 41-43.

[28] Sometimes no significance at all should be attributed to the choices of drafters, because they may have been simply searching for the best way to describe a concept. See, *e.g.*, 394 U.S. at 45 n.58; see also 2A Norman Singer, *Sutherland's Statutory Construction* § 48.18, at 369 (5th ed. 1992) ("An amendment may have been adopted, only because it better expressed a provision already embodied in the original bill or because the provision in the original bill was unnecessary as unwritten law would produce the same result without it.").

inconclusive or they predate the Convention and suffer from the weight of countervailing authorities. Alaska places particular reliance on its claim that Dinkum Sands is "far more stable" than mudlumps at the mouth of the Mississippi River, which Alaska contends are islands. Alaska Except. Br. 45-46, 51. The Master appropriately discounted the mudlumps as a precedent for Dinkum Sands because of the absence of evidence concerning their behavior. See Report 291-293 & n.49. Alaska put forward no evidence that the mudlumps behave like Dinkum Sands, which lacks vertical permanence and can rise above and fall below mean high water over the span of days, weeks, or months. As the Master stated, "[t]he record contains no evidence * * * of the behavior of these features in general." *Id.* at 293 n.49.

Alaska contends that the mudlumps are "temporary" features based on *The Anna*, 165 Eng. Rep. 809 (1805). The English court in that case found that a British privateer had illegally captured an American cargo ship inside United States territory because of the proximity of the capture to the mudlumps. The parties disagreed on the consistency of the mudlumps for purposes of defining United States territory. The captive described them as "small islands, which are always dry," while the captor described them as "temporary deposits of *logs* and drift." *Id.* at 810, 811. As the Master pointed out, the English court did not address "whether the islands were permanent." Report 291.[29]

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[29] Furthermore, the English court's 1805 decision in *The Anna* is of no value in interpreting Article 10(1) of the 1958 Convention. Indeed, that case did not discuss the legal definition of an island. Instead, the court described the mudlumps as forming "a kind of portico to the mainland," identified the issue as whether they are "to be deemed the shore," and ruled that "they are the natural appendages of the coast on which they border, and from which indeed they are formed." 165 Eng.

Alaska cites other 19th century sources for the propositions that features should be deemed islands even if inundated for 40 years and that the period of submergence is irrelevant as long as it is not permanent. Alaska Except. Br. 48-49. Those references are not helpful in construing Article 10(1). Indeed, the State appears to be attempting to turn upside down the notion of permanence above high water from which Article 10(1) was developed.[30] Alaska similarly cites a series of mostly early cases relying on the same sources and state laws to address questions of shore erosion and submerged islands in river channels and along beaches. *Id.* at 49. Application of those authorities, relying on common law principles based on

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Rep. at 815. See Report 291-292. This Court discussed *The Anna* in the *Louisiana Boundary Case* when it considered the question whether islands can be headlands for the purpose of closing bays under Article 7(4). It expressed no view, however, on whether the mudlumps were islands for purposes of Article 10(1). See 394 U.S. at 60 n.80, 64 n.84. Special Master Armstrong later noted the existence of mudlumps in determining the Louisiana coastline and the closing lines for particular bays, but he likewise did not determine whether they were in fact islands within the meaning of Article 10(1). See Report of Special Master Walter P. Armstrong, Jr., at 38-40, 42, 43-44 (1974), *United States* v. *Louisiana* (No. 9, Orig.) (*reproduced in Submerged Lands Cases* 224-226, 228, 229-230); *United States* v. *Louisiana (Louisiana Boundary Case)*, 420 U.S. 529 (1975) (accepting Report).

[30] The references are at odds with early countervailing authorities emphasizing a need for permanence above high tide. See U.S. Exh. 84A-602, at 12 (1923 Report of the Territorial Waters at the Imperial Conference, defining islands as "all portions of territory permanently above high water in normal circumstances and capable of use and habitation"); *id.* at 20 (translated excerpt from 3 Gilbert Gidel, *Le Droit International de la Mer* 684 (1934), describing an island as "a natural elevation of the waterbottom which, is surrounded by water, is, in a permanent way, above high tide and the natural conditions of which permit the stable residence of organized human groups"). See also Tr. 1106, 1108, 1161.

accretion and avulsion, sheds no light on the meaning of Article 10(1) of the Convention.

In short, Alaska's objection to the Master's construction of Article 10(1) should be rejected. The Master's interpretation is rooted in his examination of the language of Article 10(1) and the history of its development. His method of examination is the same as that the Court employed in interpreting Article 11 of the Convention, and his conclusion is reasonable.

B. The Master Correctly Found That The Evidence Showed Dinkum Sands To Be Frequently Below Mean High Water

Alaska concedes that Dinkum Sands is "sometimes submerged," but nevertheless argues that it has the appearance of an island. Alaska Except. Br. 51. That argument is founded on a 1949-1950 United States survey, which measured Dinkum Sands as above mean high tide. The other sources to which Alaska points (charts, Baseline Committee designations, and leasing maps) all rely on the 1949-1950 survey rather than independent observations.

The countervailing evidence before and after that survey is extensive. Early cartography, including the work of respected explorer and geologist Ernest de K. Leffingwell, repeatedly shows only a low-tide elevation in the area of Dinkum Sands. Observers saw no island at that location during a 1947 photographic survey. Searches for Dinkum Sands by ship in 1955 and by helicopter in 1976 concluded that it was "not there." Later visits likewise usually found it under water. Furthermore, Alaska ignores the parties' 1981 joint monitoring project, during which the feature was surveyed in March, June, and August and found to be below mean high water. In short, the totality of the evidence shows that Dinkum Sands is usually below water, and in any event it fails to establish

that Dinkum Sands is normally *above* mean high tide, as Article 10(1) requires. It therefore is not an island under Article 10(1).

1. The Special Master reviewed voluminous cartographic evidence put forward by the parties. See Report 240-242. Maps from the 19th century, if they marked any feature at all, showed only a shoal in the area of Dinkum Sands. *Id.* at 240. In the early 20th century, Ernest de K. Leffingwell, a geologist and explorer, conducted the first detailed mapping of the Alaska north coast, making ten trips by ship and 31 trips by small boat and sled. Ernest de K. Leffingwell, *The Canning River Region, Northern Alaska* (U.S. Geological Paper 109) (1919) (U.S. Exh. 84A-135). Historical geographer Dr. De Vorsey testified that Leffingwell had an incentive to locate a feature between Cross and Narwhal Islands to facilitate his surveying. Report 241. However, Leffingwell's map of the Dinkum Sands area shows only a shoal submerged beneath a minimum depth of 2.25 fathoms (13.5 feet). *Ibid.* Leffingwell's report served as a basis for United States Coast and Geodetic Survey charts, which, through 1950, marked Dinkum Sands at that depth. *Id.* at 241-242.

In 1947, the Coast and Geodetic Survey began preparations for the 1949-1950 hydrographic survey. The preparations included flights to photograph "the beach and all * * * islands." U.S. Exh. 84A-227, at 2-3. A participant in that survey, Harley Nygren (who was an ensign at the time of the survey and a retired admiral at the time of this trial), acknowledged that the photographs showed no evidence of Dinkum Sands. Tr. 1336, 1356-1357; see also Hydrographic Descriptive Report H-7761, U.S. Exh. 84A-225. In view of the cartography and photography, it is no wonder that the members of the survey group, including local natives, were surprised when they discovered "a new gravel bar baring about three feet." Report 231 (quoting

U.S. Exh. 84A-225, at 3). See Tr. 1361, 1378. As Nygren later testified, "[w]e had no indication whatsoever that there was any such body in the area." Tr. 1325-1326. The group erected a survey target and photographed the feature. Based on the survey of 1949-1950, the Coast and Geodetic Survey charts showed Dinkum Sands as an island until 1955. Report 231-232, 242.

2. In 1955, the Navy vessel U.S.S. *Merrick* conducted an Arctic resupply operation. Report 232, 242-243. As part of its mission, the *Merrick* was inspecting aids to navigation, both artificial and natural. Tr. 517. After attempting to find Dinkum Sands, the commanding officer reported "Survey Target and island not there." U.S. Exh. 84A-241, at 9. Alaska dismisses the report as "cryptic," Alaska Except. Br. 52, but that label ignores the full import of the observation. The *Merrick* report explained that comments were made about aids "only when the aid was definitely sighted or definitely absent. When visibility or the distance of the ship from shore prevented certain knowledge of the conditions of the aid, no comment was made." Report 242-243. While in the area, the *Merrick* also dispatched two small boats to assist the grounded U.S.S. *Archer T. Gammon*. The boats came within two miles of the location of Dinkum Sands when visibility was reported as seven miles with no waves. *Id.* at 243; Tr. 1699-1700.

Based on the 1955 *Merrick* report, the Coast and Geodetic Survey resumed charting Dinkum Sands as a low-tide elevation beginning with its 1956 edition. Report 232, 243. That designation reflected a standard practice that was intended to warn mariners of possible navigation hazards. *Ibid.*; Tr. 637, 641. In 1976, the Coast Guard and the National Ocean Survey (NOS), successor to the Coast and Geodetic Survey, conducted a project to " 'investigate all charted landmarks' along the Alaskan Arctic coast." Report 243 (quoting U.S. Exh. 84A-246, at 4). The agen-

cies conducted the survey by helicopter at 300 feet, and NOS commander Ned Austin reported on Dinkum Sands: "Couldn't find island," "Island Not There—Survey Target Destroyed." *Ibid.*; see U.S. Exh. 84A-246, at 19. Based on the 1955 *Merrick* report and Commander Austin's 1976 report, NOS continued to chart Dinkum Sands, for purposes of navigation safety, as a low-tide elevation. Report 243.

Alaska makes much of 1971 baseline charts and a 1979 leasing map that treated Dinkum Sands as an island, even though it was treated by the charting agency as a low-tide elevation. Alaska Except. Br. 43-44, 53. The Master appropriately considered neither of them to be of significance, because they both stemmed from the 1949-1950 survey alone and were contrary to later observations. Report 232-233, 244. Indeed, the discrepancy is easily explained. As noted above, Harley Nygren was an ensign in the survey group that had personally observed Dinkum Sands during the 1949-1950 survey. Twenty years later, in 1970, Nygren was an admiral and a member of the interagency Baseline Committee, which was charged with delimiting the United States' coastline and territorial sea. Based on his personal experience, Nygren persuaded the Committee that Dinkum Sands was an island, even though the current charts showed it to be a low-tide elevation. See Tr. 1639-1672. In the proceedings before the Master, Nygren acknowledged that he did not examine, either before or after the Committee meeting, the reason why the official charting agency had changed Dinkum Sands to a low-tide elevation. Tr. 1373-1374. The 1979 leasing map was merely another generation of the Nygren-influenced Baseline Committee charts. Report 232-233, 244.

3. Alaska's brief makes no mention of the joint monitoring project that the parties developed in the course of the litigation to measure the elevation of Dinkum Sands

in relation to mean high water. That jointly funded, $2.8 million project was conducted under a consensual protocol worked out in advance of the actual measurements. Report 233, 248; U.S. Exhs. 84A-302, 84A-400. Under the project, the feature was measured in March, June, and August 1981, and each time it was found to be below mean high water. Report 248. Alaska challenged those results, but the Master rejected Alaska's objections.

The joint project was conducted in two parts. First, the parties contracted with NOS to compute a mean high water datum for Dinkum Sands. As agreed, NOS trained an independent contractor to collect the data, monitored the collection process for accuracy, and then computed the datum using standard NOS procedures. U.S. Exh. 84A-400, at 1; Tr. 758, 788, 839. NOS made the computation based on a year of tidal data from nearby Cross Island and three months from Dinkum Sands. Ordinarily, 19 years of continuous readings would be used, but readings of that duration are not available in desolate Arctic regions. Therefore, as agreed, NOS calculated an error band. U.S. Exh. 84A-403. It showed that there was a 95% chance that the tidal datum was accurate within plus or minus .206 feet (2.47 inches) of the value that would have been calculated using 19 years of readings. Report 249-252.

Second, the parties contracted with an engineering firm to measure, under the parties' oversight, the height of Dinkum Sands. U.S. Exh. 84A-302. Elevations of the high points of the formation were measured three times in 1981. In March, the top of the formation was determined by augering through the ice cover until gravel was encountered. In June, when the ice pack had begun to break up, the top was determined by selecting the high points of gravel that appeared above the ice. In August, during open water, the surveyors measured the apparent

high point of the feature, which was submerged. Report 253-255.

After the measurements were made, Alaska prepared the final report tying the two parts together. U.S. Exh. 84A-302. As had been agreed, the final report superimposes the separately determined mean high water datum over the elevation measurements. Not until that time did the parties know the results of the joint project. The results showed Dinkum Sands to have been .28 feet below mean high water in March; .02, .04 and .28 feet below mean high water from the three highest points in June; and 2.27 feet below mean high water in August. The March measurement is the only ice-locked, winter measurement ever made of Dinkum Sands. While the two highest points in the June survey were within the error band, the Master found them to be of "little or no weight" because, as the testimony showed, the gravel high points likely were piles left from the augering during the March survey. Report 253-255.

The Master found Alaska's objections to the joint project to be unpersuasive. Report 255-269. Alaska argued that the mean high water datum should be lowered by a total of .26 feet by making two adjustments. As the Master observed, the adjustments would still place all measured elevations, exclusive of the two dubious June measurements, below mean high water. *Id.* at 257. However, because the March and other June measurements would be in the error band, he examined the two adjustments. *Ibid.*

The Master rejected Alaska's argument to lower the datum by .20 feet to account for alleged long-term tidal trends, relying primarily on "the evidence that the trend may vary locally not only in magnitude but in direction, and in view of the lack of evidence of trend specific to Dinkum Sands." Report 262. He found it unnecessary to rule on Alaska's second downward adjustment of .06 feet to

account for barometric pressure effects on sea level, because it would not place Dinkum Sands above mean high water at any of the times it was surveyed. *Id.* at 264. He also noted his doubts about the reliability of the barometric pressure data and the appropriateness of singling out only one of several sea-level influences. *Ibid.*[31]

The Master also dismissed Alaska's argument for a wider error band. He found that the State's argument had "not been fully spelled out" and that, in any event, it was not necessary to resolve because "[t]he controlling point is the estimate of mean high water," whatever the width of the error band. Report 268-269. Furthermore, while Alaska questioned the degree of possible variance from a datum based on 19 years of tidal data, the figure computed from one year of data is "the best estimate now available." *Id.* at 269. By agreeing to the one-year joint project, the parties "consciously gave up some precision of result for the sake of reasonable time and expense." *Id.* at 269 n.34.[32]

4. The Master also considered numerous observations of Dinkum Sands in years before and after the 1981 joint monitoring project. From 1970 to 1978, Dr. Reimnitz, the United States' expert geologist, observed Dinkum Sands below water on all of several visits except one. Report 245-246. In 1979, he observed Dinkum Sands both above and

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[31] It is also significant that NOS computed the mean high water datum according to standard NOS procedures, as the parties had agreed before embarking on the joint project, and that Alaska has subsequently relied on it for mapping. Tr. 758, 788, 839, 1758.

[32] In fact, the error band is very close to the estimate provided to the parties before the joint project, and the official responsible for calculating the error band did not know the estimate before completing his work. Tr. 876-877. Although Alaska argued for those adjustments, its primary source of evidence—the 1949-1950 survey—did not have the benefit of an error band, nor were there trend and weather adjustments. Tr. 1367.

below water. On July 25, 1979, Dr. Reimnitz photographed Dinkum Sands as it usually appears during the open water season—submerged. See Fig. 1, *infra*, U.S. Exh. 84A-507a. Based on the closest data source, a tide gauge approximately 15 miles away, he calculated the feature to be .33 to .66 feet below mean high water. Report 247. In 1980, sightings ranged from one foot above water to a meter below. *Id.* at 248. On July 31 and August 1, 1981, the Master, counsel, Dr. Reimnitz, and others visited the feature and found it submerged. *Id.* at 228, 247-248.[33]

After the joint survey, the feature was again observed above and below water. On July 7, 1982, an Alaska witness visited Dinkum Sands. By using Cross Island tidal data and a 1981 joint project benchmark, apparently without releveling it, he calculated the feature to be above mean high water. Report 278. On September 19 and 29, 1982, Dr. Reimnitz observed the feature below water. The Master estimated that on those visits it was below mean high water, using Alaska's evidence on seasonal sea levels and other assumptions favoring Alaska. *Id.* at 280-282.

During five visits by state witnesses from May through July in 1983, Dinkum Sands was measured above mean high water. See Report 278-280. The Special Master gave special weight to the June 22 visit, because NOS had assisted the State witnesses by recommending releveling of the Cross Island benchmarks and collecting tidal data at both Dinkum Sands and Cross Island. *Id.* at 278-279. Alaska's witness also made observations in late 1983. He

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[33] Alaska derisively refers to Dr. Reimnitz as "an Interior Department staffer" who "erroneously claimed that the 1949 survey was off by three feet." Alaska Except. Br. 53. Reimnitz was not a mere "staffer," but was a preeminent expert on the Arctic coastal region who had extensively studied Dinkum Sands during field work between 1970 and 1980. Tr. 909-919. The Master found his work highly credible and properly relied on his observations. See Report 244-248.

estimated that Dinkum Sands was above mean high water on August 26 and below mean high water on September 11. Dinkum Sands was submerged on October 12, but ice movement had destroyed the tidal measuring rod and prevented a tidal observation. *Id.* at 282-283.

The Master summarized the evidence on Dinkum Sands and placed primary emphasis on actual observations from 1981 through 1983. Report 307-310. He concluded:

> The preponderance of the evidence is that, in one year of the three (1981), Dinkum Sands was consistently below mean high water and, in two years of the three (1981 and 1982), it was below mean high water by the end of the open-water season.

Id. at 308-309. He also explained that the evidence showed Dinkum Sands to exhibit a regular pattern of slumping as the summer progresses, and thus that it may have been below mean high water in 1979 and 1980 as well. *Id.* at 309 n.66. Indeed, the evidence suggests the same for late 1983. *Id.* at 282-283, 288.[34] On the basis of all the evidence, the Master found "that Dinkum Sands is frequently below mean high water and therefore does not meet the standard for an island." *Id.* at 309. That recommendation is sound and should be accepted by this Court.

C. The Master Properly Determined That Dinkum Sands Should Not Be Treated As Alternating Between An Island And A Non-Island Formation

Alaska has watched its position on the status of Dinkum Sands erode over the course of the proceedings. See Report 307 (noting that Alaska originally argued that

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[34] The explanation for slumping is that ice in the upper part of Dinkum Sands melts during the summer, causing "ice collapse" and reducing the feature's elevation by approximately 50 centimeters (1.6 feet). Report 270, 281-282.

Dinkum Sands is "always above high water"). In response, Alaska now favors a compromise resolution under which Dinkum Sands would be deemed an island when above mean high water but not when it is below mean high water. The parties identified the alternative in the Joint Statement and closing arguments, but did not brief the question. *Id.* at 305. The Master has appropriately recommended against that approach. *Id.* at 305-307.

As the Master explained, neither party has identified a precedent for treating as an island a feature that oscillates above and below mean high tide. United States expert Clive Symmons explained that "occasional islands" are not legally recognized, stating that

> in international law, there is no such phenomenon as a "seasonal" or "occasional" island merely on the basis of periodic appearances above mean high-tide.

U.S. Exh. 84A-602, at 67. Moreover, a notion of temporary islands would pose the problem of sovereign enclaves, with their own territorial seas, constantly appearing and disappearing at the whim of nature. That unpredictability would frustrate the policy of freedom of the seas and place mariners at risk of inadvertent breaches of sovereignty. *Id.* at 59; see also Report 304.

Furthermore, there is no compulsion under United States law to accept a theory of temporary islands. As the Master explained, "Article 10 does not demand an interpretation under which islands may frequently come and go." Report 305. Alaska suggests (Alaska Except. Br. 55-56) that this Court has found itself bound by the Submerged Lands Act to recognize ambulatory boundaries. See *Louisiana Boundary Case*, 394 U.S. at 32-34. But since that time, Congress has recognized the value of fixing the federal-state coastal boundary to provide greater certainty respecting ownership rights, and it has

expressly granted the Court the power to take that step. See Outer Continental Shelf Lands Act Amendments of 1985, Pub. L. No. 99-272, Tit. VIII, § 8005, 100 Stat. 151 (1986) (amending the Submerged Lands Act, 43 U.S.C. 1301(b), to provide that a boundary between the United States and a State may be fixed by a Supreme Court Decree). See Report 306 n.64.

Moreover, what Alaska proposes is not the typical "ambulatory" boundary that moves in a particular direction through a gradual process of accretion or erosion, but rather a boundary that would oscillate suddenly and unpredictably between two distinct locations, depending on whether Dinkum Sands happened to be above or below water. That is a novel and unhelpful concept of a "boundary," and not one that this Court should establish to govern future relations between sovereigns.

Finally, as the Master pointed out, a theory of temporary islands would likely lead to costly and time-consuming monitoring efforts and continuing disputes over the scientific methodology and results. Report 305. This case provides a lesson in the difficulty and expense of monitoring a capricious coastal feature in an inclement Arctic region. Even after the parties agreed to a joint monitoring protocol and spent $ 2.8 million for one year of data, they continued to dispute the accuracy and significance of the results. See *id.* at 248-269. Furthermore, it is not possible to collect evidence now on the vagaries of Dinkum Sands for lease revenues received many years ago.

In sum, the Master properly concluded that "Dinkum Sands should be treated as a single, continuing feature, whose legal status will change only on the basis of a sustained change in its characteristics." Report 307. He properly interpreted the definition of an island under Article 10(1), including the history of the drafters' dele-

tion of the terms "permanently" and "in normal circumstances," to mean a naturally formed area of land "generally," "normally" or "usually" surrounded by water at mean high water. *Id.* at 309. He likewise correctly found from the vast array of cartographic, monitoring, visual, and other evidence that "Dinkum Sands is not an island constituting part of Alaska's coastline for purposes of delimiting Alaska's offshore submerged lands." *Id.* at 310. The Court should accept that recommendation.

III. THE UNITED STATES HAS RETAINED TITLE TO SUBMERGED LANDS WITHIN THE NATIONAL PETROLEUM RESERVE IN ALASKA

Alaska excepts to the Special Master's determination that, when Alaska was admitted to the Union, the United States retained the coastal submerged lands within the National Petroleum Reserve in Alaska. See Report 343-446; U.S. Except. Br. 14-21 (summarizing Report). Alaska contends, first, that Congress did not clearly intend to retain ownership of those lands (Alaska Except. Br. 58-62), and second, that retention of those lands through the Alaska Statehood Act would violate the Equal Footing Doctrine (*id.* at 66-71).

Alaska's exception reflects a complete reversal of the position that Alaska took in the initial stages of this litigation. In the original Joint Statement of Questions Presented, the parties had agreed as follows:

> The only question before this Court is the location of the seaward boundary of the Reserve, which concededly includes some submerged lands. It is agreed that whatever submerged lands are within the Reservation do not belong to Alaska, having been effectively withheld from the grant to the State at the time of its

admission to the Union under both the *Pollard* doctrine and the Submerged Lands Act.

Report 346 (quoting Joint Statement 17). The Master relieved Alaska of its concession, but he rejected Alaska's arguments on the merits. Report 381-445.[35]

A. The United States Owns Submerged Lands Within The Boundaries Of The National Petroleum Reserve Because It "Expressly Retained" Those Lands

The Special Master's Report and our opening brief set out the basic legal principles that govern the ownership of coastal submerged lands. Report 15-18, 381-404, 455-457; U.S. Except. Br. 5-7, 31-37. Alaska appears to dispute those principles. In particular, Alaska does not acknowledge this Court's decisions in past submerged lands cases, which draw a fundamental distinction between land beneath territorial sea and land beneath inland waters. We accordingly review those rulings, which provide the foundation for the Master's recommendations in this case.[36]

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[35] Alaska does not except to the Master's recommendations concerning the location of the boundary of the National Petroleum Reserve, which was the only question originally at issue. Report 380-381; see *id.* at 349-380 (discussion); *id.* at 348, Figs. 8.1-8.3 (maps).

[36] The Master correctly concluded that the principles that we articulate here apply equally to the United States' claim to submerged lands within the Arctic National Wildlife Refuge. See Report 456-457. The Master rejected our claim to those lands, however, based on an additional consideration. He concluded that the United States had not expressly retained those lands under Section 6(e) of the Alaska Statehood Act, even though the United States had "set apart" those lands for a wildlife refuge, because the United States had not completed the formal process for establishing the refuge at the time of Alaska's admission to the Union. We have excepted from that recommendation. See U.S. Except. Br. 31-53.

1. This Court has consistently recognized that the United States holds title under the Property Clause, U.S. Const. Art. IV, § 3, Cl. 2, to submerged lands in pre-statehood territories. The United States has complete and paramount constitutional power over all lands seaward of the coastline (the line of ordinary low tide), which includes the area known as the territorial sea. See, *e.g.*, *United States* v. *California*, 332 U.S. 19 (1947) (*California I*). However, in a territory, the United States holds title to inland navigable waters, including tidelands (*viz.*, the area between ordinary low and high tides), in trust for future States. See, *e.g.*, *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212 (1845).

The constitutional distinction between the territorial sea and inland waters arises from both history and principles of federalism. The Court recognized that the original thirteen States possessed title to lands beneath inland navigable waters, see *Martin* v. *Waddell's Lessee*, 41 U.S. (16 Pet.) 367 (1842), and it concluded that new States, which are admitted on an "equal footing" with the original States, are likewise entitled to those lands. *Pollard's Lessee*, 44 U.S. (3 How.) at 228-229. But the original thirteen States had no rightful claim to lands beneath the territorial sea, and accordingly newly admitted States had no "equal footing" claim to those lands. *California I*, 332 U.S. at 30-33. Moreover, the Court was "not persuaded to transplant the *Pollard* rule of ownership as an incident of state sovereignty in relation to inland waters out into the soil beneath the ocean, so much more a matter of national concern." *Id.* at 36. The Court emphasized that the "rationale of the *Pollard* case" actually supports "the conclusion that national interests, responsibilities, and therefore national rights are paramount in waters lying to the seaward in the three-mile belt." *Ibid.* See U.S. Except. Br. 31-33.

2. Congress has applied those constitutional principles in the Submerged Lands Act, which "embraced" the Court's holding that "paramount rights to the offshore seabed inhere in the Federal Government as an incident of national sovereignty." *United States* v. *Maine*, 420 U.S. 515, 524 (1975). As a general matter, Section 3(a) of the Act confirms the States' rights under the Equal Footing Doctrine to submerged lands beneath inland waters. It also grants the States title to submerged lands beneath a three-mile belt of the territorial sea. 43 U.S.C. 1311(a). The Act, however, includes important exceptions. Of particular relevance here, Section 5(a) of the Submerged Lands Act withholds from the States "all lands expressly retained by or ceded to the United States when the State entered the Union." 43 U.S.C. 1313(a). See U.S. Except. Br. 34-36.

The Submerged Lands Act expresses Congress's understanding that the United States may retain submerged lands and thereby prevent them from passing to a new State upon its admission to the Union. That understanding is consistent with this Court's decisions, which hold that the United States has paramount power over lands beneath the territorial sea, *California I*, *supra*, and which suggest (without deciding) that the United States may reserve for appropriate public purposes lands beneath inland waters, see *Utah Div. of State Lands* v. *United States*, 482 U.S. 193, 200-202 (1987). In either instance, the basic statutory question is the same: Has the United States "expressly retained" the lands at issue? But as the Special Master recognized, the courts apply different rules of construction in determining the effect of a federal withdrawal, depending on whether the lands are located beneath territorial sea or inland waters. See Report 390-394.

This Court's decision in *California I* squarely holds that the United States has paramount constitutional

power over lands beneath the territorial sea and that the States have no rights under the Equal Footing Doctrine to those lands. See 332 U.S. at 30-36; accord *Maine*, 420 U.S. at 520-522; *United States* v. *Texas*, 339 U.S. 707, 719 (1950); *United States* v. *Louisiana*, 339 U.S. 699, 704 (1950). The United States therefore has plenary power and authority to retain or divest those lands as it sees fit. Its determinations whether to retain or divest those lands are judged according to the Court's established rule of decision that the "federal grants are to be construed strictly in favor of the United States." *E.g.*, *California ex rel. State Lands Comm'n* v. *United States*, 457 U.S. 273, 287 (1982). The Submerged Lands Act's grant of lands beneath the territorial sea is an "exercise of Congress's power to dispose of federal property," *id.* at 285, and, accordingly, if there are doubts whether the United States has retained submerged lands beneath the territorial sea, "they are resolved for the Government, not against it." *E.g.*, *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 59 (1983). See Report 393-394; U.S. Except. Br. 33-34, 36, 47-48.

The Court has not definitively declared that the United States may retain submerged lands beneath inland waters, but its decisions strongly suggest—and Alaska does not contest (see Alaska Except. Br. 56-58)—that the United States may do so for an appropriate public purpose. See *Utah*, 482 U.S. at 200-202. The Court has recognized that Congress had the power to make pre-statehood conveyances of submerged lands, *Shively* v. *Bowlby*, 152 U.S. 1, 48 (1894), and it stated in *Utah* that "arguably there is nothing in the Constitution to prevent the Federal Government from defeating a State's title to land under navigable waters by its own reservation for a particular use," *Utah*, 482 U.S. at 201. Indeed, as Justice White noted, one should "more readily find a reservation constitutionally permissible than a conveyance," because reserved sub-

merged lands "retain their sovereign status," and "if Congress later determines that the lands are no longer needed by the Federal Government for a public purpose, it can at that time transfer title to the State." *Id.* at 210 (White, J., dissenting on other grounds).[37]

The Property Clause of the Constitution provides that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Art. IV, § 3, Cl. 2. As this Court pointed out in *Utah*, "[t]he Property Clause grants Congress plenary power to regulate and dispose of land within the Territories." 482 U.S. at 201; see also *Alabama* v. *Texas*, 347 U.S. 272, 273 (1954) ("The power of Congress to dispose of any kind of property belonging to the United States 'is vested in Congress without limitation.' ") (quoting *United States* v. *Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840)). And as the Court further pointed out in *Utah*, "assuredly Congress also has the power to acquire land in aid of other powers conferred on it by the Constitution." 482 U.S. at 201; *Kohl* v. *United States*, 91 U.S. 367 (1876); U.S. Const. Art. I, § 8, Cl. 18 (Necessary and Proper Clause). Congress accordingly can acquire oil-bearing lands for purposes of securing an oil supply in aid of its power "[t]o provide and maintain a Navy," Art. I, § 8, Cl. 13, and its other powers to "provide for the common Defence," U.S. Const. Preamble; Art. I, § 8, Cls. 1, 11-17. It necessarily follows that Congress may provide for the "disposition" of property belonging to the United States in a Territory—including submerged lands

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[37] The Court did not resolve that question in *Utah* because it concluded that the United States had failed in any event to demonstrate adequately an intent to retain the submerged lands and defeat the State's title. See 482 U.S. at 209. Four Justices concluded, however, that the United States could retain submerged lands, see *id.* at 209-210 (White, J., dissenting), and had done so in that case, *id* at 210-219.

that would otherwise be held in trust for a future State—through the reservation of the property for use by the United States Government.[38]

The Master carefully analyzed the rulings of this Court and other courts bearing on the question, Report 395-404, and he concluded that "a federal reservation or withdrawal of lands beneath inland waters is constitutionally permissible under the equal footing doctrine to the same extent as is a federal conveyance," *id.* at 404. But the Master also recognized that, under the rules that the Court established in *Utah* for construing federal reservations and withdrawals, it is not enough for the United States merely to show that the reservation or withdrawal includes lands beneath inland waters. In light of Congress's established policy to retain those lands for future States, the United States must additionally establish an intent "to defeat the future State's title to such land." 482 U.S. at 202.

Against this background, the Master accordingly concluded that the Court's decisions in *California I* and *Utah* mandate the use of different rules of construction, depending on whether the land lies beneath territorial sea or inland waters, in determining whether the United States has "expressly retained" coastal submerged lands for purposes of the Submerged Lands Act. Report 394. Much of the submerged land at issue in the National Petroleum Reserve lies beneath the territorial sea. The Master nevertheless conducted his analysis under the more stringent "inland waters principles," concluding

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[38] Even after a State is admitted to the Union, the United States may acquire property of the State, either by purchase or by the exercise of the power of eminent domain. See *Block* v. *North Dakota*, 461 U.S. 273, 291 (1983); see also *United States* v. *50 Acres of Land*, 469 U.S. 24, 31 & n.15 (1984).

that, if the United States established its rights under those principles, it would "certainly meet the less demanding standard" for lands beneath the territorial sea. *Ibid.*

3. As we explain below, the Master correctly concluded that the United States has satisfied the more stringent "inland waters principles" for all submerged lands within the National Petroleum Reserve, and he therefore did not need to conduct a separate evaluation for lands beneath the territorial sea. See Report 394, 445. The relevance of the "less demanding standard" for lands beneath the territorial sea should be kept in mind, however, when analyzing Alaska's exception. Alaska objects to the Master's recommendation based on its understanding of the Equal Footing Doctrine. But as this Court's decision in *California I* holds, that doctrine applies only to land beneath inland navigable waters. 332 U.S. at 31-36.[39]

Alaska's exception accordingly is inapposite to the lands beneath the territorial sea, where the United States' rights are paramount. The United States unambiguously reserved those submerged lands—and thereby "expressly retained" them for purposes of Section 5(a) of the Submerged Lands Act—by including them within the seaward boundary of the National Petroleum Reserve. There is no need to look further than the specification of that boundary to resolve the ownership of the disputed lands beneath the territorial sea. See Report 344-346; *id.* at 348, Figs. 8.1-8.3. The only lands that are truly at issue under

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[39] Alaska suggests that the Submerged Lands Act requires this Court to apply the Equal Footing Doctrine to the territorial sea. Alaska Except. Br. 57 n.34. As the Master noted, this Court has rejected that argument. Report 392-394 (quoting, *e.g.*, *Maine*, 420 U.S. at 524); see, *e.g.*, *California ex rel. State Lands Comm'n*, 457 U.S. at 285-287; *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370-374 & n.4 (1977).

Alaska's exception are tidelands and other lands beneath coastal inland waters, which comprise only a portion of the coastal submerged lands that Alaska has claimed in the National Petroleum Reserve. See *id.* at 394. With that understanding, we turn to Alaska's specific objections.

B. Contrary To Alaska's Assertions, Congress Intended To Reserve The Submerged Lands And Defeat Alaska's Claim To Title

Alaska raises three objections to the Master's determination that the United States retained title to the submerged lands within the National Petroleum Reserve. Alaska contends that: (1) the Pickett Act did not authorize the federal reservation of submerged lands (Alaska Except. Br. 58-60); (2) there was no "public exigency" justifying inclusion of submerged lands (*id.* at 61-62); and (3) there is no "affirmative evidence" that Congress intended to defeat Alaska's title (*id.* at 62-66). Those objections are without merit.

1. The United States created the National Petroleum Reserve in Alaska through Executive Order No. 3797-A (1923). See Report 343-345 & n.1. That order described the boundary line of the Reserve (which was then known as Naval Petroleum Reserve No. 4) as following the Arctic Ocean's coastline along "the ocean side of the sandspits and islands forming the barrier reefs and extending across small lagoons from point to point, where such barrier reefs are not over three miles off shore." *Id.* at 345. Accordingly, as Alaska had originally conceded, that order explicitly withdrew and reserved lands beneath offshore navigable waters within the specified boundaries. See *id.* at 345-346. Alaska now argues, however, that the President lacked authority to include submerged lands within the Reserve. As the Special Master correctly concluded, the Act of June 25, 1910, ch. 421, 36 Stat. 847, which is known

as the Pickett Act, authorized that withdrawal. See Report 404-416.[40]

Alaska is mistaken at the outset in its assertion that the Alaska Right-of-Way Act of May 14, 1898, ch. 299, 30 Stat. 409, precluded the President from withdrawing submerged lands. That Act, which is set out in the Master's Report at page 411, authorized railroads to construct facilities "for connection with water transportation," but provided that "nothing in this Act" shall impair a future State's title to tidelands and beds of navigable rivers, which "shall continue to be held by the United States in trust" for the people of any State or States that might thereafter be erected in the District of Alaska. § 2, 30 Stat. 409. The Right-of-Way Act does not have the force that Alaska ascribes to it. As the Master noted, the Alaska Right-of-Way Act could not limit the scope of the Pickett Act, because "an earlier Congress cannot bind a later one." Report 411. Furthermore, there is no conflict between the Pickett Act and the Right-of-Way Act.[41]

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[40] The Pickett Act, which has since been repealed, stated in relevant part:

> That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

§ 1, 36 Stat. 847, repealed by the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2792.

[41] The Alaska Right-of-Way Act recognized the existence of the Equal Footing Doctrine and prevented that Act from conveying land beneath inland waters to the railroads. But as noted above, the Equal Footing Doctrine embraces the principle that the United States may convey or reserve submerged lands for appropriate public purposes.

Alaska also argues (Alaska Except. Br. 59) that the Pickett Act did not grant the President authority to withdraw lands beneath navigable waters because it allowed him to withdraw "public lands," which—according to Alaska—necessarily excludes submerged lands. The Master carefully considered and rejected that argument. See Report 407-414. As he pointed out, this Court, in the specific context of Alaska, has "reject[ed] the assertion that the phrase 'public lands,' in and of itself, has a precise meaning, without reference to a definitional section or its context in a statute." *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531, 548 n.15 (1987) (citing *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 115-116 (1949)). See Report 409.[42]

Hence, Congress's mere recognition of the Equal Footing Doctrine in the Right-of-Way Act did not conflict with the Pickett Act's grant of authority to reserve those lands. Furthermore, there is nothing inconsistent in Congress's decision to withhold submerged lands from private railroad companies, but later to allow the *federal government* to withdraw such lands for appropriate *public* purposes. See also Report 414-416 (reconciling the Pickett Act with the Alaska Right-of-Way Act); cf. *Wisconsin* v. *Baker*, 698 F.2d 1323, 1334 (7th Cir.) (recognizing that "the people * * * have a compelling interest in seeing that powers reposed in their government are not surrendered to private, non-representative groups"), cert. denied, 463 U.S. 1207 (1983).

[42] Alaska derives its definition of "public lands" (Alaska Except. Br. 59 & n.36) from statements, taken out of context, in two cases involving private land disputes. See *Borax Consolidated, Ltd.* v. *City of Los Angeles*, 296 U.S. 10, 17 (1935); *Mann* v. *Tacoma Land Co.*, 153 U.S. 273, 284 (1894). Those cases recognize the familiar rule that, when Congress enacts general land laws opening up "public lands" to private entry and settlement, it generally does not allow private parties to lay claims to submerged lands. See *Shively*, 152 U.S. at 48 (Congress may convey submerged lands, but has "never undertaken by general laws to dispose of such lands."); *Utah*, 482 U.S. at 203-204. Those cases shed no light on the meaning of the term "public lands" in the context presented here, where Congress has authorized the President to withdraw

The Pickett Act does not define the term "public lands." The Master therefore examined the context provided by the Act, and he concluded that Congress intended the term to include submerged lands. He noted at the outset that it is unlikely that Congress employed the term "public lands" in the limited sense that Alaska urges. The Pickett Act categorically reached "any of the public lands of the United States including the District of Alaska," which indicated that the President's power extended to all government-owned lands within the District. § 1, 36 Stat. 847. As the Master noted, the concept of "public lands" in Alaska has never been limited to uplands. Report 408-409. See, *e.g.*, *United States* v. *Alaska*, 423 F.2d 764, 766 (9th Cir.) ("In construing the pertinent Alaskan statutes, the courts have consistently held that the words 'public domain', 'public lands' and 'land', include land under water."), cert. denied, 400 U.S. 967 (1970).[43] Indeed, at the time that Congress enacted the Pickett Act, it had already begun to open submerged lands to entry under the mining laws.

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and reserve specific tracts of land for public purposes. Indeed, in that context, this Court itself has described lands beneath inland navigable waters as "public lands." *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 633 (1970) ("the United States can dispose of lands underlying navigable waters just as it can dispose of *other public lands*" (emphasis added)). See *Utah*, 482 U.S. at 212 n.4 (White, J., dissenting).

[43] As the Master explained, this Court expressly recognized that point in *Hynes*, *supra*. See Report 409 n.51. In that case, Congress authorized the Secretary of the Interior to create an Indian reservation from "public lands which are actually occupied by Indians or Eskimos." Act of May 1, 1936, ch. 254, § 2, 49 Stat. 1250. The Court upheld the Secretary's designation of an upland area "and the waters adjacent thereto extending 3,000 feet from the shore line at mean low tide," Public Land Order 128, 8 Fed. Reg. 8557 (1943). See *Hynes*, 337 U.S. at 116; see also *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918) (discussed at Report 399-400); cf. *Amoco Production Co.*, 480 U.S. at 546-548.

Report 408 & n.49. The Master correctly recognized that it is unlikely that Congress meant to limit the reach of the Pickett Act to uplands within the District of Alaska, and thereby prevent federal withdrawals of submerged lands for *public* purposes, when at the same time Congress was opening those lands to *private* appropriation. See *ibid.*[44]

Furthermore, Congress's objectives in enacting the Pickett Act demonstrate that Congress intended to allow the President to reserve submerged lands. See Report 410-414. Congress adopted the Pickett Act to protect public interests that extended beyond uplands and that could not be readily protected by anything short of fee ownership. As the Master explained, Congress developed the legislation specifically out of concern that the President needed authority in the interest of national security to withdraw land containing oil deposits. *Id.* at 411-

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[44] Contrary to Alaska's suggestion (Alaska Except. Br. 59), the situation presented here is starkly different from that in *Utah*. In that case, the Court concluded that a provision of the Sundry Appropriations Act of 1888, ch. 1069, 25 Stat. 526-527 (which appropriated funds for surveying arid lands, and reserved from sale, entry, settlement or occupation "lands which may hereafter be designated or selected by such United States surveys" for reservoir sites), "did not necessarily refer to lands under navigable waters," because those lands "were *already* exempt from sale, entry, settlement or occupation under the general land laws." *Utah*, 482 U.S. at 198-199, 203. As noted above, that was not true here. Furthermore, Alaska's observation (Alaska Except. Br. 60) that the Pickett Act continued to allow mining entry misses the Master's point: Federal reservations are less intrusive on State equal footing interests than federal conveyances, and therefore it would have been anomalous for Congress to forbid the President from reserving submerged lands, revocably and for public purposes, when it was, at the same time, authorizing private parties to appropriate those lands permanently for private use.

414.[45] The Pickett Act's objective of preserving federal ownership of petroleum resources, which exist in subsurface formations that extend indiscriminately beneath uplands and submerged lands, would have been severely hampered if the United States could reserve only the upland portions of oil-bearing lands. That problem would have been particularly acute in regions like the National Petroleum Reserve, which contain extensive areas of inland waters. See *id.* at 348, Figs. 8.1-8.3. In those regions, reservation of only the uplands would deny the federal government an incalculable amount of the very oil deposits it sought to reserve, and would generate extraordinarily complex disputes concerning ownership, division, and drainage of the subsurface oil deposits. See *id.* at 427

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[45] The Pickett Act originated out of a continuing controversy over whether the President could withdraw lands to create petroleum reserves for the Navy. See *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 466-469 (1915) (describing the controversy). As a result of that controversy, the President sought express authority from Congress to make withdrawals for petroleum reserves and other purposes. 45 Cong. Rec. 621, 622 (1910) (Letter from President Taft). Congress held hearings in which it received testimony on the President's need to set aside oil-bearing lands while protecting existing private claims. *Oil-land Withdrawals and the Protection of Locators of Oil Lands: Hearings on H.R. 24070 Before the House Comm. on the Public Lands*, 61st Cong., 2d. Sess. (1910). Congress ultimately enacted the Pickett Act, which provided that withdrawn lands shall not be open to "exploration, discovery, occupation and purchase" for purposes of locating oil. § 2, 36 Stat. 847. See generally Robert W. Swenson, *Legal Aspects of Mineral Resources Exploitation*, in Paul W. Gates, *History of Public Land Law Development* 731-745 (1968); S. Doc. No. 187, 78th Cong., 2d Sess. (1944) (History of the Naval Petroleum Reserves); Max W. Ball, *Petroleum Withdrawals and Restorations Affecting the Public Domain* (U.S. Geological Survey Bull. 623) (1916).

& n.68; see generally *Railroad Comm'n* v. *Rowan & Nichols Oil Co.*, 310 U.S. 573, 579-580 (1940).[46]

The Master thoroughly examined the matter, and he correctly concluded that the term "public lands," as used in the Pickett Act, includes submerged lands. The Master's conclusion is buttressed by the fact that the President, who was charged with administering the statute through the withdrawal of specific tracts, contemporaneously construed the term to include submerged lands. Moreover, as we explain below (see pages 66-72, *infra*),

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[46] In this respect as well, the situation presented here is distinguishable from that in *Utah*, where Congress had enacted legislation reserving reservoir sites out of concerns, unrelated to submerged lands, that those sites would become unavailable on account of settlement, land speculation, and monopolization. See 482 U.S. at 203. In that situation, Congress did not need to reserve associated submerged lands, because the government's interests in those lands could be accommodated through its navigational servitude, see *United States* v. *Cherokee Nation*, 480 U.S. 700, 706-707 (1987), or through specific conditions on the construction of federal projects, see *Silas Mason Co.* v. *Tax Comm'n*, 302 U.S. 186, 199-203 (1937). No similar avenues were available here to protect the government's interest in oil reserves in the submerged lands themselves.

Furthermore, the Pickett Act is unlike the legislation involved in *Utah*, because it did not result in a broad and general reservation of all lands of a particular character and their subsequent availability for settlement under the homestead laws, 482 U.S. at 199, 203-204, "but rather for withdrawals or reservations in particular cases" for public purposes. Report 413-414. Hence, this case does not present the "inconceivable" situation, posed in *Utah*, that, if Congress included submerged lands within the statute's coverage, it had effected a wholesale abandonment of the policy against permitting the sale or settlement of land underlying navigable waters under the general land laws and instead preserving submerged lands for future States. 482 U.S. at 204. The Pickett Act gave the President discretion to determine "[w]hether there is need in any particular case to include lands under navigable waters," and those judgments would then be subject to congressional review. See Report 414.

Congress subsequently ratified the President's construction in the Alaska Statehood Act, which recognized that the United States owns the lands within the boundaries of the National Petroleum Reserve.

2. Alaska asserts (Alaska Except. Br. 61-62) that there was no "public exigency" requiring the President to include submerged lands within the National Petroleum Reserve. As this Court explained in *Utah*, however, the term "public exigency" describes the "congressional policy" that the Court has "inferred"—"not a constitutional obligation"—with respect to the "grant[ing] away" of land under navigable waters. 482 U.S. at 197. The Court has repeatedly recognized that the United States possesses power under the Constitution to dispose of submerged lands in pre-statehood territories

> in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.

Id. at 196-197 (quoting *Shively*, 152 U.S. at 48); *Montana* v. *United States*, 450 U.S. 544, 551 (1981) (accord). In order to satisfy the Constitution, then, the United States need show no more than that the reservation or other disposition of the submerged lands fulfulls a "public purpose[] appropriate to the objects for which the United States hold the Territory." Cf. *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77, 85-86 (1922) (leaving open whether the United States must satisfy even that test).

The term "public exigency" is, at most, only a guide to assist a court in determining whether submerged land has been granted away in a particular instance. Where, as here, the circumstances make clear that submerged lands

are included within a Reserve and were withheld from the State, the "public exigency" formulation is not an independent, judicially enforceable barrier to accomplishing that end.

In any event, Alaska is mistaken in suggesting the extreme view (Alaska Except. Br. 61-62) that this Court's use of the term "public exigency" in *Utah*, 482 U.S. at 197-198, denotes a dire national emergency. The Master correctly concluded that a "public exigency" exists if there is an important public need justifying the conveyance or reservation. See Report 417-419.[47]

The Master was also correct in his conclusion that the Nation's need for the National Petroleum Reserve manifestly qualifies as a "public exigency." See Report 423-430. As he explained, the National Petroleum Reserve was explicitly created at the close of World War I to provide a "future supply of oil for the Navy," which "is at all times a matter of national concern." See *id.* at 424 (quoting Executive Order No. 3797-A). Congress itself expressly approved of the creation of such Reserves, noting the Nation's need "to maintain in the ground a great reserve supply of oil adequate to the needs of the Navy in any emergency threatening the national security." See *id.* at 425 (quoting S. J. Res. 54, 68th Cong., 1st Sess., 43 Stat. 5, 6 (1924)). See also Report 426-427 (noting the Reserve's additional purpose to "promote development" in Alaska).

Alaska is mistaken in its contention (Alaska Except. Br. 62) that there was no need to reserve submerged lands for that purpose. The United States was aware that there

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[47] See, *e.g.*, *Montana*, 450 U.S. at 556 (suggesting that the United States might retain submerged lands for an Indian Tribe if fishing were "important to [the Tribe's] diet or way of life"); accord *Hynes*, 337 U.S. at 116; *Alaska Pacific Fisheries*, 248 U.S. at 87.

were "large seepages of petroleum along the Arctic Coast of Alaska and conditions favorable to the occurrence of valuable petroleum fields on the Arctic Coast," Report 424 (quoting Executive Order No. 3797-A), but the exact locations of those fields were unknown. The United States needed to control both the uplands and the submerged lands within the National Petroleum Reserve's boundaries to avoid conflicting claims to, and drainage of, the anticipated, but then unidentified, underground deposits. *Id.* at 427-428. The United States clearly intended to include, and did include, all of the oil bearing lands within the boundaries of the Reserve. *Id.* at 428-429.

3. Alaska also argues that "the Alaska Statehood Act is not 'affirmative' evidence that Congress intended to defeat Alaska's title." Alaska Except. Br. 62-66. That contention misconceives the Court's *Utah* decision and the relevant provisions of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958). The Master properly applied *Utah* to the circumstances presented here and concluded that Congress unambiguously expressed its intention, through Section 11(b) of the Alaska Statehood Act, to defeat the State's title to the submerged lands. Report 430-440.

In *Utah*, the Court assumed *arguendo* that Congress could reserve submerged lands beneath inland waters for an appropriate federal purpose, but it concluded that the mere fact that Congress had included such lands within the boundaries of a federal reservation did not, by itself, manifest an intention to retain those lands. 482 U.S. at 202. It reasoned that, when Congress conveys submerged land to a private party, "of necessity it must also intend to defeat the future State's claim to the land," but when submerged lands are included within a reservation, that action is not necessarily meant to deprive a future State of title to the lands. *Ibid.* Therefore, a court must determine

whether there was an intent "to defeat the future State's title to such land." *Ibid.* That is what the Master did in this case.

When Congress drafted the Alaska Statehood Act, it gave specific attention to the President's establishment of the National Petroleum Reserve. The President, the "constitutional officer" in whom Congress vested the authority to make withdrawals and reservations to serve paramount public purposes, compare *Franklin* v. *Massachusetts*, 505 U.S. 788, 799-800 (1992), had deliberately drawn the boundaries of the National Petroleum Reserve to include submerged lands along the Arctic Coast. See Report 421. The location of the boundary was not mere happenstance. It was based on the President's specific determination that "there are large seepages of petroleum along the Arctic Coast of Alaska and conditions favorable to the occurrence of valuable petroleum fields on the Arctic Coast" that should be retained for the Navy's use. *Id.* at 424 (quoting Executive Order No. 3797-A). The Executive Order's designation of the boundary to include coastal submerged lands clearly manifested the federal government's intention to defeat a future State's title to those lands. The transfer of those lands to the State—and the consequent loss of ownership rights to the oil deposits therein—would have thwarted the very purpose of including those lands within the Reserve. As the Master succinctly put it, "[i]f the drafters had not intended to reserve the resources in submerged lands, there would have been no point in their drawing the boundary to include them." *Id.* at 422.

Congress was placed on notice by the terms of the Executive Order that the President had determined the need to include the submerged lands as part of the National Petroleum Reserve. See Pickett Act, § 3, 36 Stat. 848 (requiring the Secretary of the Interior to notify

Congress of withdrawals).[48] Congress had the power to revise that determination, see § 1, 36 Stat. 847, but did not do so. To the contrary, Congress ratified the President's establishment of the Reserve through the Alaska Statehood Act, which, in Section 5(a), retains federal ownership of the Reserve, including the submerged lands therein. See U.S. Except. Br. 37-38.[49]

As the Master explained, Congress acknowledged and ratified the President's retention of the National Petroleum Reserve in Section 11(b) of the Alaska Statehood Act, which states:

> Notwithstanding the admission of the State of Alaska into the Union, authority is reserved in the United States, subject to the proviso hereinafter set forth, for the exercise by the Congress of the United States of the power of exclusive legislation, as provided by article I, section 8, clause 17, of the Constitution of the United States, in all cases whatsoever *over such tracts or parcels of land as, immediately prior to the admission of said State, are owned by the United States* and held for military, naval, Air Force, or Coast Guard purposes, *including naval petroleum reserve numbered 4* [the National Petroleum Reserve], whether such lands were ac-

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[48] As the Master explained, there is a rich legislative history confirming Congress's awareness that the Executive Order retained not only the offshore lagoons, but also the lakes and rivers, within the Reserve. See Report 434-440.

[49] As we explain in our opening brief, the Alaska Statehood Act accomplishes that result through Sections 5 and 6(m), 72 Stat. 340, 343. Section 5 provides that the United States "shall retain title to all property, real and personal, to which it has title," except as provided in Section 6; and Section 6(m) incorporates the Submerged Lands Act, including its reservation of submerged lands "expressly retained" by the United States, 43 U.S.C. 1313(a). See U.S. Except. Br. 37-38.

> quired by cession and transfer to the United States by Russia and set aside by Act of Congress or by Executive order.

72 Stat. 347 (emphasis added). As the plain text of Section 11(b) provides, Congress by law affirmed that the United States had "acquired," and therefore "owned," the "parcel[] of land" that is now known as the National Petroleum Reserve. *Ibid.* But Congress not only recognized that the United States retained title to those lands, it further stated that, "[n]otwithstanding the admission of the State of Alaska into the Union," it would reserve the power of "exclusive legislation" over them. *Ibid.*[50]

Alaska objects that Section 11(b) "does not address *title* at all," but is concerned merely with Congress's retention of exclusive legislative jurisdiction under the Enclave Clause, U.S. Const. Art. I, § 8, Cl. 17. See Alaska Except. Br. 63-64. Alaska misapprehends the significance of Congress's reservation of that power. When the United States specifically exercises its power of "exclusive legislation" under the Enclave Clause, it necessarily acquires title to the property. See, *e.g.*, *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518, 527 (1938); *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 141-142 (1937).[51] Hence,

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[50] Section 11(b) also contains two provisos that qualify the reservation of exclusive jurisdiction. See § 11(b)(ii) and (iii), 72 Stat. 347. Alaska no longer argues that those provisos are relevant to the question presented here. See Alaska Except. Br. 62-66; compare Report 433.

[51] The Enclave Clause authorizes the exercise of "exclusive legislation" over "all Places .purchased by the Consent of the Legislature of the State in which the Same shall be." U.S. Const. Art. I, § 8, Cl. 17. This Court has recognized, however, that the United States may acquire land by means other than purchase. See *Collins*, 304 U.S. at 527 ("other lands composing the Park had been in the proprietorship of the national government since cession by Mexico").

Congress's explicit assertion, pursuant to the Enclave Clause, of the power of "exclusive legislation" over the National Petroleum Reserve clearly demonstrates Congress's affirmative intention that the United States—rather than Alaska—owned and retained all of the lands therein. See *Silas Mason Co.* v. *Tax Comm'n*, 302 U.S. 186, 208 (1937) ("federal intent * * * is shown not merely by the action of administrative officials, but by the deliberate and ratifying action of Congress").[52]

Congress's reservation of its power of "exclusive legislation" over those oil-bearing lands leaves no doubt that

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[52] Alaska cites as contrary authority a district court's recent interlocutory order involving Public Land Order (PLO) 82, 8 Fed. Reg. 1599 (1943), which set aside lands in northern Alaska to preserve minerals for military use. Alaska Except. Br. 64-65. See *Alaska* v. *United States*, No. A87-0450-CV (HRH) (D. Alaska Mar. 29, 1996) (*reproduced in* Alaska Except. Br. App. B). The issue in that litigation is whether PLO 82 expressly retained the beds of rivers and other inland waters therein. The district court held that the Secretary of the Interior intended PLO 82 to retain those submerged lands in federal ownership. Alaska Except. Br. App. B at 42. The court concluded, however, that Section 11(b) of the Alaska Statehood Act did not manifest Congress's intention to defeat the State's title, because Section 11(b) "make[s] no reference to lands beneath navigable waters in PLO 82." *Id.* at 54. That court, which did not have the benefit of the Master's ruling in this case, misunderstood the significance of Section 11(b). As we have explained above, if Congress elects to exercise exclusive legislation pursuant to the Enclave Clause over a federal reservation, then Congress has clearly manifested its intention to retain ownership of the lands in the reservation. That conclusion takes on particular force in the case of the National Petroleum Reserve because, as we explain in the text, *infra*, Congress not only manifested its intention to retain ownership of the Reserve, but it did so with the understanding that it would own the submerged lands within its boundaries. The United States has made a similar submission, but on a different factual basis, in the PLO 82 litigation. The district court's erroneous understanding of Section 11(b), however, prevented it from reaching that issue.

Congress intended to defeat the State's title to all lands within the boundaries of the National Petroleum Reserve, including the submerged lands. As the Master pointed out, "[n]othing in section 11(b) suggests that different jurisdictional patterns were to apply within the Reserve, depending on whether the lands were upland or submerged." Report 434. Congress understood from the Executive Order that the United States had an extraordinary interest in the Reserve because it contained oil deposits set aside for national security purposes. The President described in his Executive Order the potential oil fields along the Arctic coast, and he drew the boundaries of the Reserve accordingly. It would have made no sense for Congress, which expressly acknowledged the "Executive order" in the text of Section 11(b) of the Alaska Statehood Act, to ratify the President's withdrawal and extend its power of exclusive legislation over the Reserve, but not to retain ownership of the valuable submerged lands that the Executive Order explicitly included within it.[53]

As this Court's *Utah* decision recognizes, the issue whether Congress has retained submerged lands is ultimately one of congressional intent. See 482 U.S. at 202. The Master correctly concluded that Congress unambiguously stated its intentions through the Alaska Statehood Act. This is not a case in which Congress created a pre-statehood federal reservation, but did not

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[53] That conclusion is bolstered by Congress's contemporaneous enactment of other legislation governing oil and gas leasing of Alaska submerged lands, which was fashioned to exclude leasing within the National Petroleum Reserve. See Report 434-438 (discussing Act of July 3, 1958, Pub. L. No. 85-505, 72 Stat. 322, and Act of Sept. 7, 1957, Pub. L. No. 85-303, 71 Stat. 623). As the Master explained, those Acts were premised on the assumption that "submerged lands in the Reserve would remain the property of the United States." Report 436; see *id.* at 438.

need title to submerged lands, and therefore presumptively intended that the State would receive title to those lands upon admission to the Union. See *ibid.* Rather, the President and Congress recognized an overriding need to retain oil-bearing lands within the National Petroleum Reserve—including its submerged lands—in federal ownership for purposes of national security. The Master correctly concluded that Congress affirmatively intended "to defeat Alaska's title to those lands." Report 440.

C. The United States' Retention Of Submerged Lands Through A Statehood Act Does Not Violate The Equal Footing Doctrine

Alaska asserts that the Equal Footing Doctrine prohibits the United States' retention of submerged lands in a statehood act (Alaska Except. Br. 66-70) and, alternatively, that any federal retention of submerged lands should be limited to those rights "absolutely necessary rather than fee title" (*id.* at 70-71). Those arguments do not require extended discussion.

1. Alaska's assertion that Congress cannot retain submerged lands through a statehood act is both counterintuitive and wrong. Alaska does not contest the principle that the United States may retain submerged lands beneath navigable waters for appropriate public purposes. See pages 53-54 & note 37, *supra*. If Congress has the power under the Equal Footing Doctrine to retain those lands, then it can exercise that power through legislation of its choice. A statehood act, which specifies the boundaries and landholdings of a new State, see Alaska Statehood Act, *supra*, is a logical place for Congress to set forth whether and to what extent submerged lands are reserved for public purposes. The retention of such lands is not an unlawful condition upon the State's admission to the Union, because the State has no right to submerged lands

that Congress has deemed it necessary to retain for an appropriate public purpose. Compare *Coyle* v. *Smith*, 221 U.S. 559, 565, 574 (1911) (Congress cannot dictate the location of a State's capital in a statehood act, because it has "no power" to make that choice, which rests entirely with the State).

2. Alaska's asks this Court to second guess Congress's judgment as to whether the national interest requires the United States to retain full fee title to the submerged lands within the National Petroleum Reserve. The question whether the United States should retain full title, or some lesser aliquot, is a matter committed to Congress's discretion under the Property Clause. As this Court has repeatedly emphasized, "determinations under the Property Clause are entrusted primarily to the judgment of Congress." *Kleppe* v. *New Mexico*, 426 U.S. 529, 536 (1976). In this case, Congress expressed the intention to retain all of the lands within the National Petroleum Reserve. See Report 440-445. Congress can change its ownership interest if it finds a need to do so. As the enactment of the Submerged Lands Act demonstrates, Congress has been attentive to state interests in coastal resources, and there is no reason to expect that Congress "will execute its powers in such way as to bring about injustices to states, their subdivisions, or persons acting pursuant to their permission." *California I*, 332 U.S. at 40.

CONCLUSION

The exceptions of the State of Alaska should be overruled.

Respectfully submitted.

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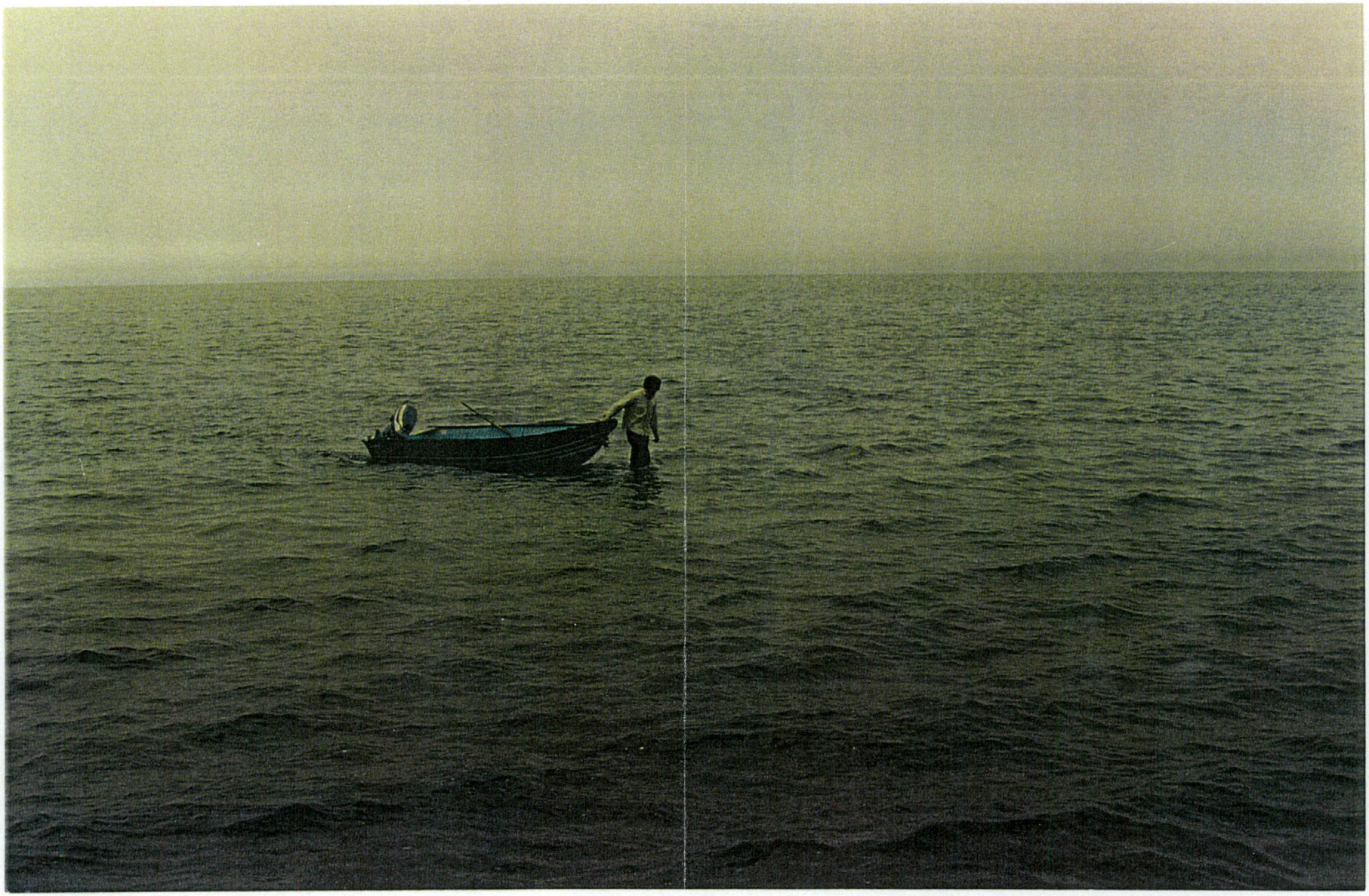

Figure 1. Photograph of Dinkum Sands, July 25, 1979
(U.S. Exh. 84A-507a). See Report 247.