No. 84, Original

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1996

UNITED STATES OF AMERICA,
Plaintiff
v.
STATE OF ALASKA

ON THE REPORT OF THE SPECIAL MASTER

SURREPLY BRIEF FOR THE STATE OF ALASKA IN SUPPORT OF ITS EXCEPTIONS

Bruce M. Botelho
Attorney General
Counsel of Record
Joanne M. Grace
Assistant Attorney General
P.O. Box 110300
Juneau, Alaska 99811-0300
907-465-3600

G. Thomas Koester
2250 Fritz Cove Road
Juneau, Alaska 99801
907-789-6818

John Briscoe
Washburn, Briscoe & McCarthy
55 Francisco Street, Suite 600
San Francisco, California 94133
415-421-3200

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This surreply responds to the Brief of the United States in Opposition to the Exceptions of the State of Alaska ("U.S. Opp."), and addresses the United States' arguments in order.

I. Alaska's submerged lands entitlement should be determined on the basis of the 10-mile rule.

The question here is whether Alaska's submerged lands entitlement in Stefansson Sound and other areas enclosed by near-shore fringing islands less than ten miles apart is to be determined under the 10-mile rule, as Alaska contends, or the arcs-of-circles method as claimed by the United States.[1]

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[1] Alaska outlined its and the United States' claims and positions in the vicinity of Stefansson Sound in its opening brief. Exceptions of the State of Alaska and Supporting Brief ("Alaska's Brief") at 2-5. To summarize, Alaska is entitled to lands underlying inland navigable waters under the equal footing doctrine of *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 229-30 (1844), and

The Court seemed to resolve this question in 1985 when it found that the United States had claimed areas enclosed by islands less than ten miles apart as inland waters from at least 1903 to 1961. *United States v. Louisiana (Alabama and Mississippi Boundary Case)*, 470 U.S. 93, 106-07 (1985). As set out in Alaska's opening brief, the evidence shows (1) the Court correctly found that this 10-mile rule was the United States' official policy both before and after Alaska entered the Union in 1959, (2) the United States rejected the arcs-of-circles method for areas subject to the rule both in international relations and for Submerged Lands Act purposes, and (3) it only began using the arcs-of-circles method in such areas in 1971 for reasons unrelated to international relations. Alaska's Brief at 19-40.

In response, the United States first urges the Court to ignore this evidence, mistakenly claiming that it is relevant only to an historic inland waters claim under the Convention on the Territorial Sea and Contiguous Zone ("the Convention"), Apr. 29, 1958, 15 U.S.T. (pt. 2) 1607, T.I.A.S. No. 5639, which the Court adopted for Submerged Lands Act purposes in *United States v. California* ("*California II*"), 381 U.S. 139 (1965). U.S. Opp. at 12-17. The United States is wrong. In *United States v. Louisiana (Louisiana Boundary*

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offshore submerged lands within its boundaries under the Submerged Lands Act, ch. 65, 67 Stat. 29 (1953) (codified as amended at 43 U.S.C. §§ 1301-1315 (1988)), made applicable to Alaska in section 6(m) of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339, 343 (1958) (reprinted as amended in 48 U.S.C. note preceding § 21 (1987)). Under the Outer Continental Shelf Lands Act, ch. 345, 67 Stat. 462 (1953) (codified as amended at 43 U.S.C. §§ 1331-1356 (1988 and Supp. V 1993)), the United States is entitled to the offshore submerged lands that are "seaward and outside of" those granted to the States under the Submerged Lands Act. Alaska's 10-mile rule contention in the area of Stefansson Sound is shown on the Master's Figure 3.4, Report facing 28; the United States' arcs-of-circles claim is shown on the Master's Figure 3.2, Report facing 24. Both figures are reproduced opposite at reduced scale. Stefansson Sound is the only area in dispute where using the arcs-of-circles method produces "pockets" or "enclaves" of submerged lands surrounded by lands concededly owned by Alaska. *See* Report at 24 n.6 and 138-39.

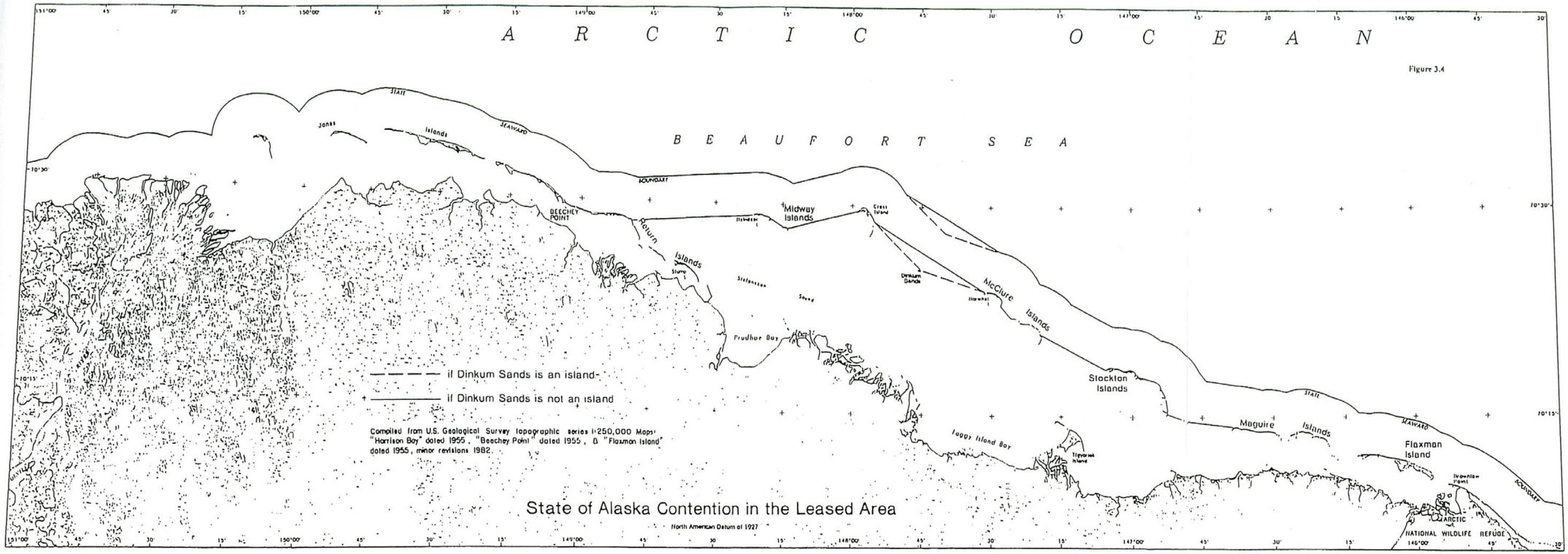

Figure 3.4

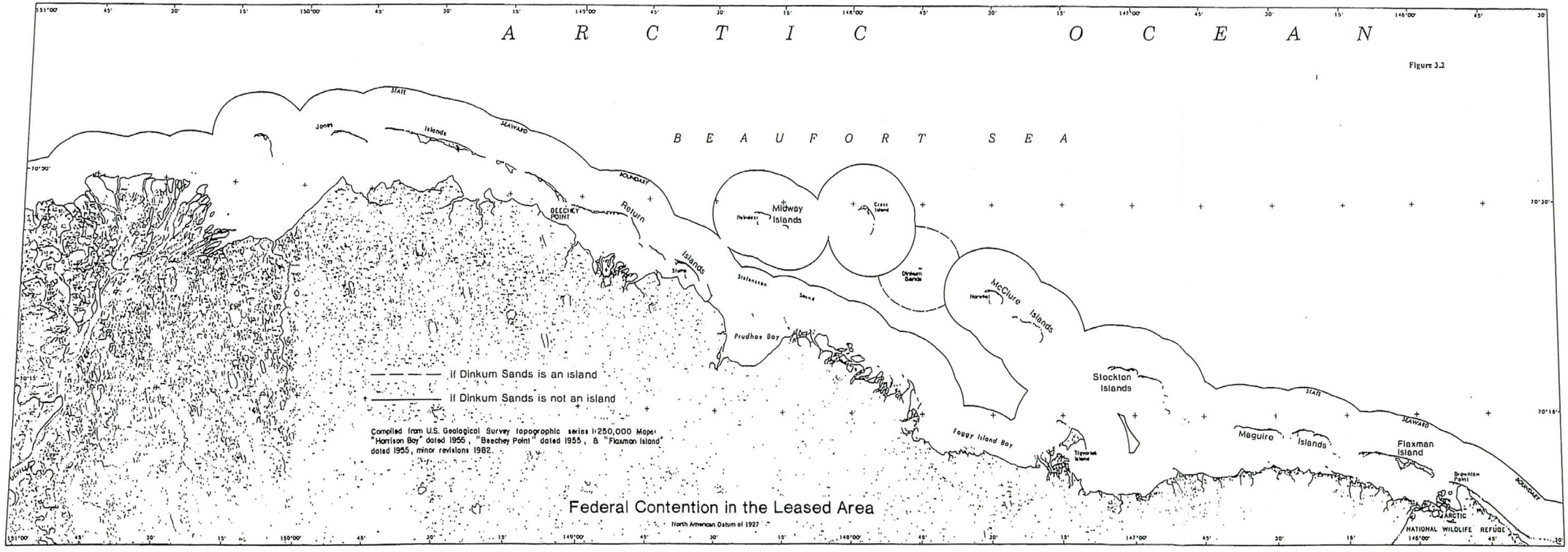

Figure 3.2

Case), 394 U.S. 11, 73-74 n.97 (1969), the Court explained that a State could present evidence of the United States' historic inland waters delimitation policy to show that the United States had previously drawn its boundaries in accordance with the straight baseline principles now codified in Article 4 of the Convention. Upon such a showing, the State may use such baselines to delimit its inland waters to prevent an impermissible contraction of its recognized territory. *Id.*

The United States also claims that the Court erred in finding in the *Alabama and Mississippi Boundary Case* that the 10-mile rule was the United States' policy from at least 1903 to 1961. U.S. Opp. at 18-27. In discussing the evidence of its past practices, however, the United States overlooks the same principles governing consideration of the evidence that the Master overlooked. *See* Alaska's Brief at 13-16. Under those principles, which the United States does not dispute, the evidence establishes that the 10-mile rule was the United States' policy from at least 1903 until 1971.

A. The United States' historic maritime delimitation practice controls resolution of this issue.

The United States erroneously claims that evidence of its historic maritime delimitation policy is relevant only to historic inland waters claims under Article 7(6) of the Convention. U.S. Opp. at 12-17. The Court made clear in the *Louisiana Boundary Case* that a State may show that the United States historically employed an inland waters delimitation system like that now authorized in Article 4 of the Convention and, if proved, may use that system to delimit its inland waters to prevent an impermissible contraction of its recognized territory:

> If that had been the consistent official international stance of the Government, it arguably could not abandon that stance solely to gain advantage in a lawsuit to the

> detriment of [a State]. Cf. *United States v. California*, 381 U.S. 139, 168: "[A] contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable." We do not intend to preclude [a State] from arguing . . . that . . . the United States had actually drawn its international boundaries in accordance with the principles and methods embodied in Article 4 of the Convention . . . .

394 U.S. at 74 n.97.

In the *Alabama and Mississippi Boundary Case*, moreover, the Court noted that consistent and prolonged application of a delimitation system gives rise to a "*right* to apply the *system*." 470 U.S. at 107 n.10 (emphasis added). Contrary to the United States' claim, U.S. Opp. at 17 and 20, the Court thus anticipated the very argument Alaska makes here: That, by virtue of the United States' past practice, Alaska is entitled to use the 10-mile rule to delimit inland waters independent of a historic waters claim.

Alaska's argument, accordingly, is fully consistent with the Court's adoption of the Convention in *California II*, the impermissible contraction concept described in the *Louisiana Boundary Case*, and the recognition in the *Alabama and Mississippi Boundary Case* that a State has a right to use the 10-mile rule system of delimiting inland waters if the United States consistently employed that system.[2] And that is what

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[2] The United States asserts that Alaska advanced the 10-mile rule, Article 4 straight baselines, and assimilation and simplification as entirely "separate theories" before the Special Master, and has excepted only from his recommendation against use of the 10-mile rule. U.S. Opp. at 8. Alaska argued before the Master, however, that the 10-mile rule is simply a conservative application of the principles now codified in Article 4 of the Convention. *See* Alaska's Reply Brief on Questions 2, 3, 4, 12, 13 and 15 before the Special Master at 46-52; Volume XXV of the Transcript at 3525, 3533, and 3581-82. The Master recognized that "it is not practical to treat each delimitation method as a separate topic" for "[t]hey are interrelated in too many ways." Report at 32. Alaska's exception on this issue accordingly encompasses both of the Master's subsidiary recommendations against the 10-mile rule and

the evidence shows.

B. The evidence shows that the 10-mile rule remained the United States' policy until 1971.

Alaska showed in its opening brief that the 10-mile rule was the United States' policy not just from the 1903 Alaska Boundary Arbitration until 1961, as the Court found in the *Alabama and Mississippi Boundary Case*, 470 U.S. at 106-07, but remained its policy until renounced in 1971 for reasons unrelated to international relations.

In disputing that evidence, the United States relies heavily on the Master's analysis, U.S. Opp. at 18-27, a reliance that is misplaced. The United States does not dispute, and thus apparently concedes, that the Master overlooked the principle that minor uncertainties and even occasional contradictions in a nation's maritime delimitation practice are not legally significant. *Fisheries Case (U.K. v. Norway)*, 1951 I.C.J. 116, 138; *see also* Alaska's Brief at 14-15. Also, "convincing evidence to the contrary" is required to show a change in prior policy. *Fisheries Case* at 138; *see also* Alaska's Brief at 15. Nothing in the record provides "convincing evidence to the contrary" showing a change in the United States' position from the 10-mile rule until the United States formally renounced that position with the publication of the Baseline Committee charts in 1971.[3] *See* Alaska's Brief at 16-36.

Article 4 straight baselines with a ten mile limitation. *See New Mexico v. Texas*, 275 U.S. 279, 286, *modified as to other issues*, 275 U.S. 557 (1928) (a Master's subsidiary determinations need not "be dealt with separately, as they are merged in the ultimate question"). As to the Master's recommendation regarding assimilation, U.S. Opp. at 8 n.2, the undisputed evidence shows that the United States never applied that delimitation method to its own waters. *See* Ak. Brief at 25 and 29 n.14; *see also* Alaska Exhibit ("Ak. Ex.") 85-062 at 10.

[3] As to the specific items referred to by the United States, U.S. Opp. at 22-23 n.13, most of them were addressed in detail in Alaska's Brief at 22-24 (United States' international commentary in 1929 was consistent with 10-mile rule); 24-25 (United States' international proposals in 1930 preserved the 10-mile rule as a rule for straits leading to inland seas); 29 (State Department letter

In its selective discussion of the pre-Alaska statehood evidence, moreover, the United States ignores the most significant events. In its 1930 international proposals, the United States explicitly rejected the arcs-of-circles method for islands less than ten miles apart. *Id.* at 24-25. The United States used the 10-mile rule in drawing the Chapman line to delimit the coast line of Louisiana in 1950. *Alabama and Mississippi Boundary Case*, 470 U.S. at 106-07 n.9. Both the United Kingdom and Norway cited the United States' 10-mile rule policy in the 1951 *Fisheries Case*. *Id.* at 107. In the 1953 Submerged Lands Act, Congress rejected the arcs-of-circles method for near-shore fringing islands. *See* Alaska's Brief at 30-32. Federal officials implemented the Submerged Lands Act, the Outer Continental Shelf Lands Act, and other federal jurisdictional statutes by treating areas enclosed by near-shore fringing islands as inland waters both administratively and in proceedings in this Court. *Id.* at 32-36. As late as 1964, the United States told this court that straits formed by islands less than 10 miles apart were inland waters if they led to inland waters.[4] *Id.* at 16-18.

The United States does not respond in any meaningful

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in 1951 restated 10-mile rule for straits leading to inland seas); and 28 n.13 (State Department letter in 1952 did *not* state policies inconsistent with 10-mile rule). The United States adds to this list statements in 1949 supporting the 1930 proposals. As the 1930 proposals included the 10-mile rule as a rule for straits leading to inland seas, however, the 1949 statements also supported the 10-mile rule. The United States also cites a 1957 memorandum that did not mention a 10-mile rule. The 1957 memorandum cited the first draft of the Restatement of Foreign Relations Law of the United States, however, which recited that the United States claimed as inland waters straits formed by islands that formed a "channel of communication" to inland waters. Report at 125. Like the other evidence, nothing in either the 1949 statements or the 1957 memorandum constituted "convincing evidence to the contrary" reflecting a change in the United States' 10-mile rule policy.

[4] The only exception was for straits connecting two areas of high seas, where the United States insisted on the right of innocent passage. Alaska's Brief at 16-18. There are no such "international straits" along Alaska's north coast.

way to the evidence of its initial implementation of the Convention following its ratification in 1961. It simply ignores Solicitor General Cox's and Shalowitz's synthesis of the United States' pre-Convention practice and Article 4 of the Convention in which they agreed that the 10-mile rule reflected both the United States' pre-Convention position and the proper application of the Convention for the future. *Id.* at 34-35. It dismisses its continued treatment of Chandeleur Sound as inland waters in the *Louisiana* litigation following the Court's adoption of the Convention in *California II* as merely "adherence to an earlier commitment." U.S. Opp. at 25. It does not explain, however, why it told the Court that adoption of the Convention for Submerged Lands Act purposes required a change in its position in the *Louisiana* case as to artificial jetties, islands and low-tide elevations, and bay closing lines, but *not* in its position that Chandeleur Sound was inland waters. *See* Alaska's Brief at 36-37. This silence is "evidence of the most convincing character" that the 10-mile rule remained the United States' policy following ratification of the Convention. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939).

The United States also failed to produce a joint study of the application of the Convention to the Louisiana coast line. *See* Alaska's Brief at 38. This study may be the strongest evidence of the United States' position under the Convention with respect to areas enclosed by near-shore fringing islands less than ten miles apart at that time. The failure to produce it "can lead only to the conclusion" that it would be adverse to the United States' current claim that continuing to close Chandeleur Sound as inland waters was simply adherence to a prior commitment. *See Interstate Circuit*, 306 U.S. at 226.

The evidence thus establishes that "the United States had actually drawn its international boundaries in accordance with the principles and methods embodied in Article 4 of the Convention," *Louisiana Boundary Case*, 394 U.S. at 74 n.97, both *before* and *after* the Court adopted the Convention for Submerged Lands Act purposes.

The United States did not renounce this policy until it published the Baseline Committee charts in 1971. On those charts, the United States for the first time strictly applied the arcs-of-circles method to Stefansson Sound, Chandeleur Sound, Mississippi Sound, and all other areas enclosed by near-shore fringing islands that are less than ten miles apart. *See Alabama and Mississippi Boundary Case*, 470 U.S. at 111 (discussing Mississippi Sound); Report at 166. The State Department determined that no foreign policy reasons justified refusing to use 10-mile straight baselines in the Alexander Archipelago, the area addressed in the 1903 Alaska Boundary Arbitration at which the 10-mile rule was first so clearly articulated. *See* Alaska's Brief at 39-40. Nonetheless, solely because of domestic Submerged Lands Act concerns, the United States refused to reconsider its renunciation of the 10-mile rule. *Id.*

In sum, the evidence of the United States' pre- and post-Convention use of the 10-mile rule establishes that it was the United States' consistent international *and* domestic policy from at least 1903 until 1971 when it renounced that policy under circumstances strongly suggesting (and undisputed by the United States) that it did so solely to gain an advantage over the States in these Submerged Lands Act cases.

Thus, the "variations" and "differences" in the ways it expressed its policy that the United States emphasizes, U.S. Opp. at 19-20, do not detract from the two facts necessary to resolve this issue: (1) the United States employed the 10-mile rule and rejected the arcs-of-circles method from at least 1903 to 1971; and (2) the United States renounced this policy in 1971 for reasons unrelated to international relations. Under the *Louisiana Boundary Case*, 394 U.S. at 73-74 n.97, this constituted an impermissible attempt to contract the States' recognized territory, including Alaska's.

Before leaving this issue, Alaska must respond to the United States' parting remark that, "[a]t bottom, there is no consistency to Alaska's position save the principle of maximizing the State's submerged lands grant." U.S. Opp. at

27. To put these two charges of inconsistency and acquisitiveness in proper context, it is first useful to recall Justice Black's description of the *United States'* prosecution of these cases as "useless, unnecessary litigation, over an issue than can well be characterized as *de minimis* so far as the practical effect to the United States is concerned." *Louisiana Boundary Case*, 394 U.S. at 80 (Black, J., dissenting). Today, when the United States claims ownership of the submerged lands from three to at least 200 miles offshore (*see, e.g.*, Figure 1 in Alaska's Brief facing p. 4), his comment is more apt than ever.

As to the charge of inconsistency, Alaska's position is fully consistent with the Court's finding in the *Alabama and Mississippi Boundary Case* that the 10-mile rule was the United States' consistent practice from at least 1903 to 1961. 470 U.S. at 106-07. It is consistent with the United States' rejection of the arcs-of-circles method for such areas in international relations in 1930 and the Submerged Lands Act in 1953. And it is consistent with this Court's decisions interpreting and applying the Submerged Lands Act, including the Court's adoption of the Convention for Submerged Lands Act purposes in *California II*. It is the United States that has been inconsistent, changing its position radically and to the hoped-for detriment of Alaska and the other States, by renouncing the 10-mile rule in 1971.

As to acquisitiveness, it is the United States, not Alaska, that over the past sixty years has relentlessly adopted new positions to enlarge its submerged lands domain as against both other nations and the States. In the international context, the United States has made increasingly expansionist claims of dubious legality. In 1945, it claimed the resources of the entire continental shelf off its shores, Proclamation No. 2667, 3 C.F.R. 67 (1943-1948) (reprinted in 59 Stat. 884 (1945)), a claim described as the United States' most notorious break with customary international law in this area. A. Hollick, *U.S. Foreign Policy and the Law of the Sea* 61 (1981); *see also* S. Swarztrauber, *The Three-Mile Limit of Territorial*

Seas 162-65 (1972). In 1976, The United States claimed a 200-mile "fishery conservation zone," Magnuson Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified as amended at 16 U.S.C. §§ 1801-82 (1985)), soon after the International Court of Justice had indicated that 12 miles was the most permitted. *Fisheries Jurisdiction (U. K. v. Iceland)*, 1974 I.C.J. 3, 23. In 1983, the United States claimed a 200-mile Exclusive Economic Zone ("EEZ"), Proclamation No. 5030, 3 C.F.R. 22 (1983) (reprinted in 16 U.S.C. § 1453 (1985)), even though many have argued that it is not entitled to a 200-mile EEZ while it refuses to join the 1982 Convention on the Law of the Sea,[5] because the EEZ is a creature not of customary international law but of the 1982 Convention.[6] The United States announced two years later that, by virtue of its 200-mile EEZ, it also was entitled to continental shelf rights well beyond 200 miles. 92 Interior Dec. 459, 487 (1985).

In its relations with the States, the United States in the 1930s broke with its prior practice and disputed the applicability of the equal footing doctrine to offshore submerged lands in *United States v. California (California I)*, 332 U.S. 19 (1947). *See United States v. Louisiana*, 363 U.S. 1, 16-17 (1960). Congress then enacted the Submerged Lands Act to "undo" that decision, *United States v. California*, 436 U.S. 32, 37 (1978), only to see the United States initiate the string of cases decried by Justice Black as *de minimis* to the United States. In these cases, the United States first used the 10-mile rule to delimit the States' inland

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[5] *See The Law of the Sea, Official Text of the United Nations Convention on the Law of the Sea*, U.N. Sales No. E.83.v.5 (1983).

[6] *See, e.g.*, H. Caminos, *The Law of the Sea Convention, Customary International Law, and the Role of Law within the International Community*, Law of the Sea, Eighteenth Annual Conference (1984), *reprinted in The Developing Law of the Oceans* 475, 477-78 (R. Krueger and S. Riesenfeld, eds., 1985); *see also* J.N. Moore, *Customary International Law after the Convention, reprinted in The Developing Law of the Oceans, supra*, at 41, 43.

waters only to renounce it in 1971 and apply the arcs-of-circles method to contract the States' boundaries and attendant submerged lands rights. In its 1968 *Louisiana* brief, the United States admitted that Article 4 of the Convention permits claiming areas like Chandeleur Sound as inland waters but simultaneously claimed that doing so was "at variance with" the Convention. Following the Court's 1985 finding that the 10-mile rule was the United States' policy from at least 1903 to 1961, it claimed that the policy had only been stated in 1951 and "survived barely a decade" until the United States ratified the Convention in 1961. Supplemental Post Trial Brief of the United States before the Special Master, *United States v. Maine* (No. 35 Original) (Oct. Term, 1984) (Ak. Ex. 85-333) at 5. In this case, however, it claimed that it renounced the 10-mile rule and moved to the Convention's rules immediately upon signing the Convention in 1958, Report at 134, even though Assistant State Department Legal Adviser Yingling earlier had testified that the United States first moved to the Convention upon ratification in 1961. *See* Alaska's Brief at 36-37 n.20. Not coincidentally, a change in policy in 1958 conveniently would have predated Alaska's 1959 admission to the Union and the vesting of its submerged lands entitlement under both the equal footing doctrine and the Submerged Lands Act.

Alaska accordingly is entitled to use the 10-mile rule, now authorized by Article 4 of the Convention which the Court has adopted for Submerged Lands Act purposes, to delimit its submerged lands entitlement in Stefansson Sound and all other areas enclosed by near-shore fringing islands less than ten miles apart.

II. Dinkum Sands is an island.

Dinkum Sands is a permanent alluvial feature of the Flaxman Island chain about eleven miles north-northeast of

Prudhoe Bay.[7] It is mostly above water at high tide, as Alaska has explained and summarizes below, only occasionally slumping below high tide. The question is whether, having this characteristic, it is an island within the meaning of Article 10 of the Convention.

Article 10 defines an island as "a naturally-formed area of land, surrounded by water, which is above water at high tide." The Master finds this definition inadequate, and infers that "Article 10 contains an *implicit modifier* that is at least as strong as 'generally,' 'normally,' or 'usually.'" Report at 302 (emphasis added). Having thus re-written the Convention's definition, he then recommends against Alaska on Question 5, finding that Dinkum Sands does not meet the modified definition. Report at 310.

In excepting to this recommendation, Alaska showed that a feature retains its status as an island even if it is occasionally submerged, that Dinkum Sands is far more stable than the Mississippi mudlumps that undisputedly are islands, and that Dinkum Sands in any event is an island except when it is below high tide. Alaska's Brief at 45-46.

The United States makes three arguments in opposing Alaska's exception on this question. First, it claims that the *deletion* of the word "permanently" by the Convention's drafters proves that the Convention's definition of island includes an implicit modifier — in its view, apparently, the word "permanently." U.S. Opp. at 27-38. Second, it asserts that Dinkum Sands is "frequently" below mean high water and thus is not an island under the Master's revised definition, U.S. Opp. at 38-46, even though the evidence shows it mostly above that datum. Third, it argues that Dinkum Sands should not be treated as an island even for the nine or ten months of

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[7] *See* Report at 227, 288 and Figure 3.4, facing 28. Dinkum Sands is located in the nine-mile-wide water entrance to Stefansson Sound between Cross Island and Narwhal Island, slightly landward of the line connecting the two islands. Thus, if Alaska's submerged lands entitlement is measured under the 10-mile rule, like Louisiana's, Alabama's, and Mississippi's, Alaska is disadvantaged by having Dinkum Sands treated as an island.

the year that it is above high tide. U.S. Opp. at 46-49.

A. An island need not be "permanently" above water.

The United States argues that Article 10 impliedly requires that an island be "permanently" above water at high tide. U.S. Opp. at 28-36.

The United States unsuccessfully made a similar argument in the *Louisiana Boundary Case*, claiming that a dredged spoil bank should not be deemed part of the coast line under Article 3 of the Convention because "it is not 'purposeful or useful' and is likely to be 'short-lived.'" 394 U.S. at 40-41 n.48. The Court rejected the claim on grounds equally applicable here: "It suffices to say the Convention contains no such criteria." *Id.*

Although Article 10 now contains no requirement that an island be "permanently" above high tide, the United States bases its argument on an earlier draft definition that included this modifier. Before any international consensus had been reached, the International Law Commission in 1956 proposed defining an island as "an area of land, surrounded by water, which *in normal circumstances* is *permanently* above high-water mark." Report at 298 (emphasis added). At the United States' urging, however, the words "permanently" and "in normal circumstances" were *deleted* from this definition. *Id.* at 299-300. The *deletion* of these words, the United States now claims, proves that the definition now *includes* the word "permanently" as an implicit modifier. U.S. Opp. at 31-32.

The United States asserts that the Conference intended no "departure from the basic meaning of prior drafts" by this deletion. U.S. Opp. at 35. "Permanence," however, was not a fixture in the many and varied definitions of "island" in the years before a definition was first codified in the 1958 Convention. *See* Report at 294-302. Indeed, the common law of England and the United States has never required that an island be permanently above high-water mark, and permits much longer submergence than Dinkum Sands experiences.

See Alaska's Brief at 45-51. The United States apparently concedes as much, but describes the cases Alaska cites as "of no value" and "not helpful" in interpreting Article 10 of the Convention. U.S. Opp. 36-37 and n.29. It is simply implausible, however, that the United States urged the Convention to delete "permanently" and "in normal circumstances" in order to establish a new rule requiring that islands be "permanently" above water contrary to the common law rule.[8] Under such a definition, the ephemeral Mississippi mudlumps would lose their status as islands, a status that has been a permanent fixture of the United States' and international maritime delimitation practice ever since *The Anna*, 165 E.R. 809 (1805).[9]

Dinkum Sands is far more stable than these mudlumps that have been uniformly treated as islands. Alaska's Brief at 51-54. The United States' response -- that the Court should discount that treatment as a precedent for Dinkum Sands "because of the absence of evidence concerning their behavior," U.S. Opp. at 36 -- is less than wholly forthcoming. "Solicitor General Archibald Cox described them as islands despite their highly changeable and perhaps mobile nature." Report at 292. Justice Black described them more graphically, noting that the Mississippi would "build up little

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[8] Indeed, if the Conference intended to clarify only a perceived conflict between the word "permanently" and the phrase "in normal circumstances" while maintaining a supposed "permanence" requirement as the United States suggests, U.S. Opp. at 32-33, the obvious solution was to retain "permanently" and delete "in normal circumstances." That was not done.

[9] The United States claims that these mudlumps have never been determined to be islands within the meaning of Article 10 of the Convention. U.S. Opp. 36-37 n.29. In the *Louisiana Boundary Case*, however, the United States argued that *The Anna* held that the territorial sea is to be measured from these mudlumps "as Article 10 now provides." *Louisiana Boundary Case*, 394 U.S. at 64 n.84 (citation omitted). The United States' treatment of the mudlumps as islands *under Article 10* in that case reflects its consistent recognition of their insular status both in its international relations and for Submerged Lands Act purposes. *See* Alaska's Brief at 47.

islands and mud elevations one day and destroy them the next" and that they "sometimes appear or disappear spontaneously." *Louisiana Boundary Case*, 394 U.S. at 83-84 (Black, J., dissenting); *see also* Alaska's Brief at 45-46 n.28.

In short, there is no supposed requirement that an island be either "permanent" or "permanently" above high tide. Further, as we show in the next section, Dinkum Sands is far more stable, "permanent" even, than Louisiana's mudlumps.

B. Dinkum Sands is above mean high tide most of the time.

One is tempted to charge the United States with disingenuousness for claiming that Dinkum Sands is "frequently" below mean high water, U.S. Opp. at 38, when the evidence shows that it is mostly *above* that datum. The fact that the Master found the feature to be "not generally above mean high water," Report at 310, perhaps insulates the Government from such a charge. In any event, the Court, not its Masters, determines the facts in original jurisdiction cases. *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984).

The terrain of the Master's Report describing the physical characteristics of Dinkum Sands is difficult to negotiate. *See* Report at 236-287. The Master's own findings, however, establish certain facts. Dinkum Sands is a permanent feature of the Flaxman Island chain. Report at 288. During the open-water months of July through September, it declines in elevation. *Id.* at 309 n.66. Just before freeze-up in the fall, natural processes build it up. *Id.* at 286. Freeze-up then locks in the area for the entire winter. *Id.* The plain conclusion, lost in the denseness of the Report, is that Dinkum Sands is above mean high water for at least the nine to ten months of the year the area is frozen over.

The evidence also shows that Dinkum Sands is usually above mean high water in the summer. The Master speculated that it "may" have fallen below this datum in four of the five summers from 1979 to 1983. Report at 309 n.66.

The only summer that it was below the federal estimated value for mean high water, however, was 1981, and if Alaska's value were used, Dinkum Sands was below high water only part of that summer. Report at 249-269. The 1979 and 1980 observations were not related to mean high water, and the only observations in 1982 and 1983 that were related to mean high water showed it *above* that datum.[10]

In short, the evidence accordingly shows that Dinkum Sands is above mean high water during the nine to ten months the area is frozen over and for much of the open water season as well.

C. Dinkum Sands is an island at least when it is above high tide.

The United States argues that Dinkum Sands should not be considered an island even during the nine or ten months of the year that it is consistently above high tide. It asserts that making that determination would be expensive and contrary to law and that, because the Submerged Lands Act permits the Court to fix the offshore boundary between the United States and a State, it may disregard the substantial times that the feature is above mean high tide. U.S. Opp. 47-48.

Determining the height of Dinkum Sands on a periodic basis might be expensive, but is unnecessary. The Court could simply decree, on the basis of the evidence recited above, that Dinkum Sands is an island for ten months a year. Alternatively, it could direct the parties to reach agreement on

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[10] "Observations alone, of course, are not enough to say where Dinkum Sands lies with respect to mean high water." Report at 246. In the open water season, the water level may be as much as 1.5 feet higher than at other times as a result of seasonal variations. *Id.* at 237-238. Meteorological factors can cause the water level to rise or drop as much as four feet. *See* IV Tr. 479 and Inupiat Exhibit 84A-1 at 7. The Master's conclusion that Dinkum Sands "may" have fallen below mean high water in four of the five summers from 1979 to 1983 based on anecdotal observations of it below water is thus pure speculation.

submit it to the Court on the evidence or the Court could refer this narrow technical question to a master. *See, e.g., Texas v. New Mexico*, 482 U.S. 124, 134-35 (1987).

The United States writes that "Alaska suggests that this Court has found itself bound by the Submerged Lands Act to recognize ambulatory boundaries." U.S. Opp. at 47 (citation omitted). The Submerged Lands Act, and the Court's decisions under it, do of course dictate that coastal boundaries are ambulatory,[11] as do more than two centuries of this Court's decisions in other cases.[12]

The United States' argument that the Court should not adopt a rule under which a boundary "would oscillate suddenly and unpredictably between two distant locations," U.S. Opp. at 48, is directly contrary to the position it took when an even more dramatic oscillation favored it. Kotzebue Sound in northwestern Alaska had long been considered a juridical bay because its closing line was less than 24 miles in length as required by Article 7 of the Convention. The United States conceded that the submerged lands belonged to Alaska. When one of the headlands appeared to have eroded so the closing line slightly *exceeded* 24 miles, however, the United States claimed that the boundary had not merely oscillated but had leaped shoreward so that the United States was now entitled to the one million acres of land underlying the Sound that had previously been Alaska's sovereign submerged lands. *See* Memorandum from the State of Alaska to the United States Baseline Committee (July 10, 1990); and Letter from J. Ashley Roach, Chairman of the Baseline Committee, to the State of Alaska (October 31, 1990).[13]

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[11] *See, e.g., Louisiana Boundary Case*, 394 U.S. at 32-33; *United States v. Louisiana (Texas Boundary Case)*, 394 U.S. 1, 4-5 (1969); *California II*, 381 U.S. at 176-77.

[12] *See, e.g., County of St. Clair v. Lovingston*, 90 U.S. (23 Wall.) 46, 66 (1874), and cases collected in *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 278 (1982).

[13] Copies of these two documents have been lodged with the Court.

Ashley Roach to the State of Alaska (October 31, 1991).[13]

Nothing in the Submerged Lands Act requires that the Court fix Alaska's submerged lands rights at a time when Dinkum Sands is temporarily submerged, as the United States suggests. U.S. Opp. at 47-48. As discussed above, that result would be contrary to law.

The Court accordingly should find that Dinkum Sands is an island for Submerged Lands Act purposes. Alternatively, it should find that it is an island for Submerged Lands Act purposes at least when it is above mean high tide.

III. Submerged lands within the exterior boundaries of NPRA passed to Alaska at statehood.

A. The same presumption of State ownership that applies to lands beneath inland waters also applies to offshore submerged lands.

As Alaska has shown, the same presumption of State ownership of lands underlying inland waters that pass to the States under the equal footing doctrine applies to offshore submerged lands granted to the States under the Submerged Lands Act. *See* Reply Brief for the State of Alaska ("Alaska's Reply") at 29-38. This presumption is based on Congress's historical reluctance to defeat a future State's title prior to statehood except in the most extreme and unusual circumstances. *See Utah Div. of State Lands v. United States*, 482 U.S. 193, 201-02 (1982). When it passed the Submerged Lands Act in 1953, Congress made clear that it intended offshore submerged lands within State boundaries to be subject to the same principles that apply to lands underlying inland waters, and that every State should own these lands as it had understood the law to provide before *California I*. *See* Alaska's Reply at 29-38.

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[13] Copies of these three documents have been lodged with the Court. Alaska respectfully requests that the Court take judicial notice of them.

Congress also intended the future State of Alaska to take title to these lands at statehood. It placed lands underlying navigable waters in Alaska, including those under tidal waters, in a statutory trust for the future State in the Alaska Right-of-Way Act of May 14, 1898, ch. 299, 30 Stat. 409 (formerly codified at 48 U.S.C. § 411; current version primarily codified at 43 U.S.C. §§ 942-1 to 942-9). Following passage of the Submerged Lands Act, Congress incorporated it into every Alaska statehood bill from 1954 to 1958[14] and made clear in its deliberations on Alaska statehood that it considered the submerged lands off Alaska's shores as held in trust for the future State. *See, e.g., Alaska Statehood: Hearings on S. 50 before the Senate Committee on Interior and Insular Affairs*, 83d Cong., 2d Sess. 281 (1954). Congress thus viewed the lands beneath the territorial sea in Alaska as it had viewed such lands offshore other States before statehood — lands held in trust for a future State whose title would not be defeated except in extreme circumstances.

The United States claims that the Court already has rejected this argument. U.S. Opp. at 56 n.39. It points to the Court's remark that its decision to choose federal common law over State law "adheres to the principle that federal grants are to be construed strictly in favor of the United States." *State Lands Comm'n*, 457 U.S. at 287. This remark was dictum. *See* Alaska's Reply at 36 n.20. It also ignores the Court's recognition four years earlier that "[t]he very purpose of the Submerged Lands Act was to *undo* the effect of this Court's 1947 decision in *[California I]*."[15]

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[14] *See* S. 49, S. Rep. No. 1163, 85th Cong., 1st Sess. (1957); H.R. 7999, H.R. Rep. No. 624, 85th Cong., 1st Sess. (1957); H.R. 2535, H.R. Rep. No. 88, 84th Cong., 1st Sess. (1955); S. 50, S. Rep. No. 1028, 83d Cong., 2d Sess. (1954).

[15] *California*, 436 U.S. at 37. The other cases cited by the United States and the Master (Report at 392-93 and U.S. Opp. at 56 n.39, *citing Oregon ex. rel State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), and *United States v. Maine*, 420 U.S. 515 (1975)) do not address Alaska's argument. Alaska does not argue that lands underlying the territorial sea

B. Congress did not "clearly intend" to include submerged lands in NPRA and did not "affirmatively intend" to defeat Alaska's title.

1. The Pickett Act does not authorize withdrawal of submerged lands.

The United States argues that Congress intended the 1910 Pickett Act[16] to authorize the federal executive to withdraw submerged lands that in territories were, under congressional policy, held in trust for future States. U.S. Opp. at 60-61. Congress in 1910, however, knew that the term "public lands" in federal laws did not include submerged lands unless it made that intent clear.[17]

Indeed, the United States has relied on the Court's decisions holding that the term "public lands" does not include submerged lands. In *California I*, California had argued that the United States had recognized California's title to such lands, citing as evidence the United States' rejection of numerous applications for oil and gas leases and permits. Brief of the United States in Support of Motion for Judgment, *United States v. California* (No. 12, Original) (Oct. Term, 1946) at 194. The United States responded that it denied the

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passed under the equal footing doctrine, but that Congress in the Submerged Lands Act intended them to be subject to the same presumption against defeat of State title as equal footing doctrine lands.

[16] Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847 (formerly codified at 43 U.S.C. §§ 141-142; repealed in part 1976; current version at 43 U.S.C. § 142 (1986)).

[17] In considering an Act authorizing the issuance of scrip for "unoccupied and unappropriated public lands of the United States," the Court stated: "[T]he term 'public lands' does not include tide lands" for "[t]he words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Mann v. Tacoma Land Company*, 153 U.S. 273, 284 (1894), *quoting Newhall v. Sanger*, 92 U.S. (2 Otto) 761, 763 (1875).

applications under the Mineral Leasing Act because that Act applied only to "public lands" which did not include lands below the low water mark, and not because it recognized California's title. *Id.* Because "the term 'public lands' has been held not to extend to land situated below high water mark," the United States wrote, the Department had no reason to determine ownership of the lands. *Id.* at 195.

In urging a different definition of "public lands" in the Pickett Act, a definition unique to Alaska, the United States argues that Congress must have intended the Act to include authority to withdraw submerged lands in Alaska because it had opened certain Bering Sea tidelands to mining in 1900. U.S. Opp. at 60-61, citing Report at 408 and n.49. This does not evidence any congressional understanding that "public lands" as used in the later Pickett Act included submerged lands, however. Indeed, Congress knew that the mining laws generally applied only to "public lands" or the "public domain,"[18] terms that uniformly did *not* include submerged lands. That is why, in extending the mining laws to Alaska in 1900, it *expressly* extended that authority to the Bering Sea tidelands. Act of June 6, 1900, ch. 786, § 26, 31 Stat. 3231, 320-30 (current version at 30 U.S.C. § 49a (1988)). Had Congress intended the Pickett Act to apply to such lands, it would have explicitly referred to them as well, but it did not.

The Pickett Act, moreover, neither was unique to Alaska nor authorized the executive to withdraw lands from the operation of the mining laws. The United States claims that these facts are irrelevant, that the Master simply finds it anomalous for Congress not to grant the President authority to reserve submerged lands for public use while authorizing parties to appropriate those lands for private use. U.S. Opp.

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[18] *See* Lode and Water Law of July 26, 1866, ch. 262 § 1, 14 Stat. 251, (codified at 30 U.S.C. §§ 43, 46, 51 (1976)); Mining Act of May 10, 1872, ch. 152 § 3, 17 Stat. 91, (codified as amended at 30 U.S.C §§ 22-47 (1976)); 1 *American Law of Mining* §§ 4.10, 4.11, 3.02, and n.10 (Rocky Mountain Mineral Law Foundation, eds., 2d ed. 1994).

at 61. That is not what the Master says. *See* Report at 408.

Further, even had the Master considered it anomalous, that does not make it so. Neither the Master nor the United States has identified any submerged lands in Alaska or elsewhere that were subject to settlement, location, sale, or entry. Congress opened a small area of Bering Sea tidelands to the mining laws, laws from which the Pickett Act did *not* authorize withdrawal. The only anomaly is the United States' argument that Congress was so concerned about mining the Bering Sea tidelands that, in the Pickett Act, it authorized withdrawal of such lands from laws providing for settlement, location, sale, or entry, laws that did *not* apply to those lands, but did not authorize withdrawal from the mining laws, the only laws that *did* apply.

The United States also implies that Congress was especially concerned with Alaska in passing the Pickett Act, arguing that the Act's objectives demonstrate a congressional intent to allow the President to reserve submerged lands. U.S. Opp. at 61. It argues that the Pickett Act's objective of preserving federal ownership of petroleum resources would have been hampered if the United States could not reserve submerged oil-bearing lands. *Id.* at 62. This argument makes little sense in historical context. Except for NPRA, all the oil and oil shale reserves created under the Pickett Act were in States that already existed and where reservation of submerged lands was impossible.[19] In Alaska, moreover,

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[19] Naval Petroleum Reserve Numbered 1 (Elk Hills) in California (admitted in 1850) was established by executive order on September 2, 1912; Naval Petroleum Reserve Numbered 2 (Buena Vista), also in California, was established by executive order on December 13, 1912; Naval Petroleum Reserve Numbered 3 (Teapot Dome) in Wyoming (admitted in 1890) was established by executive order on April 30, 1915; Oil Shale Reserve Numbered 1 in Colorado (admitted in 1876) was established by executive order on December 6, 1916, as amended by executive order on June 12, 1919; Oil Shale Reserve Numbered 2 in Utah (admitted in 1896) was established by executive order on December 6, 1916; and Oil Shale Reserve Numbered 3 in Colorado was established by executive order on September 27, 1924. *See* 10 U.S.C. § 7420(2) (1996).

withdrawal of the uplands alone would preclude private appropriation of the oil resources underlying *both* the uplands *and* the submerged lands. Withdrawal of the uplands would prevent development of those lands and associated drainage of the submerged uplands. Development of the submerged lands and any associated drainage of the uplands was already precluded under the reservation for the future State in the Alaska Right-of-Way Act.[20]

2. An "important purpose" is not a "public exigency."

The United States defends the Master's view that a pre-statehood conveyance requires only "an important purpose" to defeat a future State's equal footing doctrine rights. U.S. Opp. at 65. The Court has made clear, however, that a "public exigency" denotes extreme circumstances, not just an important purpose. The United States disposes of lands under navigable waters in territories only when "impelled" to do so in "exceptional instances." *Utah*, 482 U.S. at 197 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)). The only pre-statehood conveyance of submerged lands was a "singular exception" in which the result depended "on very peculiar circumstances." *Montana v. United States*, 450 U.S. 544, 555 n.5 (1981). Indeed, the very rarity of this occurrence, found "only in the *most unusual* of circumstances," underlies the principle that the Court will not lightly infer a congressional intent to defeat a State's title to

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[20] The United States mischaracterizes Alaska's reliance on the Alaska Right-of-Way Act. The State does not argue, as the United States claims, U.S. Opp. at 58, that this Act precluded the President from withdrawing submerged lands because an earlier Congress bound a later one. Alaska's point is that Congress, having unambiguously codified its intent to hold submerged lands in Alaska in trust for the future State, would have no need twelve years later to silently grant the federal executive the authority to withdraw them from the operation of the public land laws to which they were not subject in any event.

land under navigable waters. *Utah*, 482 U.S. at 197 (emphasis added).

The same principles apply when the United States claims that a pre-statehood reservation defeated State title. A reservation would hardly be made for an *un*important purpose, and *all* reservations thus would defeat State title unless the State could establish that the reservation was for *no* important purpose. This would reverse the Court's equal footing doctrine jurisprudence and establish a presumption that Congress *intended* to defeat State title. The Court has held directly to the contrary: The *United States* must "establish that Congress affirmatively intended to defeat the future State's title to such land." *Utah*, 482 U.S. at 202.

The United States also argues that creation of NPRA was in response to a "public exigency" requiring that it retain all of the submerged lands in this 23 million acre reserve. U.S. Opp. at 65-66. It does not dispute that the United States controlled the submerged lands when it created NPRA, however, and that these lands were unavailable for any oil development that might hinder the reserve's purpose as a possible "future supply of oil for the Navy." *See* Alaska's Brief at 62. Alaska statehood, moreover, did not constitute a "public exigency" justifying defeat of Alaska's equal footing doctrine title for in Alaska as elsewhere the United States retains the power to regulate navigable waters for national defense purposes. *See* Alaska's Brief at 64.

3. Section 11(b) of the Alaska Statehood Act does not express an affirmative intent to defeat Alaska's title to submerged lands.

In arguing that section 11(b) of the Alaska Statehood Act demonstrates that Congress affirmatively intended to defeat Alaska's title to the submerged lands in NPRA, the United States disregards this Court's admonition that this intent will not be found unless it was "definitely declared or otherwise made very plain, or was rendered in clear and especial words,

or unless the claim confirmed in terms embraces the land under the waters of the stream." *Utah*, 482 U.S. at 197-98 (citations omitted). The United States instead urges the Court to infer Congressional intent to defeat State title from a provision of the Statehood Act intended solely to give the United States the option to exercise exclusive legislative jurisdiction in military areas. This argument is unsupported by the section's stated purpose or its legislative history, and is based on unfounded speculation.

The United States argues that section 11(b) necessarily must include submerged lands because "'[n]othing in section 11(b) suggests that different jurisdictional patterns were to apply within NPRA, depending on whether the lands were upland or submerged.'" U.S. Opp. at 71, quoting Report at 434. This speculation that Congress might not have wanted different "jurisdictional patterns" hardly constitutes an *affirmative* showing that Congress intended to defeat the State's title to equal footing doctrine lands. It also does not follow from its premises. The United States argues that (1) section 11(b) establishes exclusive federal jurisdiction over lands owned by the United States; (2) Congress must have wanted exclusive jurisdiction to apply throughout NPRA; so (3) section 11(b) must say that the United States owns all lands within the reserve. Section 11(b) does not say this, and Congress did not intend it to. It is unambiguous in its jurisdictional purpose.

The United States also is incorrect in arguing that legislation enacted shortly before the Alaska Statehood Act shows that Congress intended section 11(b) to defeat State title. U.S. Opp. at 71 n.53. The Act of July 3, 1958, Pub. L. No. 85-505, 72 Stat. 322, extended the Mineral Leasing Act to submerged lands in Alaska. The Act of September 7, 1957, Pub. L. No. 85-303, 71 Stat. 623, granted certain lands beneath tidal waters to the Territory of Alaska. In both of these Acts, Congress took affirmative steps to ensure that they would not lead to the production of oil from NPRA. This is not *affirmative* evidence that Congress intended the same

result under the Alaska Statehood Act. Indeed, if that had been Congress's intent, it would have included similar provisions in the Alaska Statehood Act. It did not. If anything, this demonstrates that Congress anticipated that the State would take title to *all* of the submerged lands in Alaska, *including* those in NPRA, as the legislative history shows. *See* Alaska's Brief at 25-29 and 45-46.

Because section 11(b) is part of the Alaska Statehood Act, *Congress*'s intent is not the sole inquiry, for its power of exclusive jurisdiction under the Enclave Clause also depends on *State* consent. *Paul v. United States,* 371 U.S. 245, 264 (1963). The purpose of section 11(b) was to obtain State consent to exclusive jurisdiction over military reservations. Under sections 5 and 8(b) of the Alaska Statehood Act, Alaskans consented to the terms of the Alaska Statehood Act when they voted to accept it. 72 Stat. at 340 (section 5) and 343 (section 8). To have given their consent to a federal retention of submerged lands in NPRA, Alaskans would have had to understand that section 11(b) would defeat the new State's title to lands underlying all navigable waters in all military reservations in Alaska, including a 48 million acre reservation comprising fully thirteen percent of the State that was revoked in 1961, less than two years after statehood.[21] Alaskans could not have divined this meaning from section 11(b), for that is not what the section says. Section 11(b) does not address title to submerged lands and does not affirmatively express an intent to defeat State title to them.[22]

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[21] Public Land Order 82 ("PLO 82"), 8 Fed. Reg. 1599 (1943), withdrew, *inter alia*, the entire North Slope of Alaska and reserved the mineral therein "for use in prosecution of [World War II]." PLO 82 was revoked by Public Land Order 2215, 25 Fed. Reg. 12,599 (1960). The United States takes the position that section 11(b) defeated the State's title to all of the submerged lands within the area withdrawn by PLO 82 despite the end of the war in 1945 and repeal of PLO 82 less than two years after Alaska's admission to the Union. *See Alaska v. United States (Unpublished Opinion)*, No. A87-0450-CV (HRH) (D. Alaska 1996) (Order on State of Alaska's Motion for Partial Summary Judgment) (Appendix B to Alaska's Brief) at 4-6.

[22] The United States responds to the State's point that section 11(b) does

C. An attempt by the United States to retain title to submerged lands in a statehood act would violate the equal footing doctrine.

1. Withholding sovereign rights as a condition of statehood would violate the equal footing doctrine.

The United States disputes the State's contention that Congress cannot withhold equal footing doctrine lands as a condition of statehood by arguing that if the United States can retain submerged lands for itself, then it can do so "through legislation of its choice." U.S. Opp. at 72. The United States is confusing Congress's authority as to submerged lands in *territories* and its authority as to submerged lands in *States.* Because the United States does not have authority to defeat a State's title to submerged lands after statehood, it cannot do so as a condition of statehood:

> [W]hen a new state is admitted into the Union, it is so admitted with all the powers of sovereignty and jurisdiction which pertain to the original states, [and] *such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of Congressional legislation after admission.*

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not address title by asserting that when the United States exercises its power of exclusive legislative jurisdiction under the Enclave Clause, U.S. Const. art. I, § 8, cl. 17, it necessarily acquires title to the property. U.S. Opp. at 69. This response begs the question. The United States does not exercise exclusive jurisdiction and thereby incidentally acquire title. The United States must have both title and consent of the State in order to be able to exercise exclusive legislative jurisdiction under the Enclave Clause. The issue here is whether section 11(b) shows that Congress affirmatively intended to defeat Alaska's equal footing doctrine entitlement and retain title for the United States.

Coyle v. Smith, 221 U.S. 559, 573 (1911) (emphasis added). The rule is the same with respect to lands underlying navigable waters. *See Corvallis Sand & Gravel Co.*, 429 U.S. at 374 (neither a provision in an Act admitting a State to the Union nor a grant from Congress to a third party after statehood is capable of defeating the State's absolute title to the beds of navigable waters).

Actions by the United States as sovereign that affect one of its territories do not implicate the equal footing doctrine as does the admission of the territory to the Union as a State. The distinction begins at statehood. Congress can dictate the capital city of a territory but cannot dictate that of a State. *Coyle*, 221 U.S. at 574. Congress can convey submerged lands in a territory in extreme circumstances, *Shively v. Bowlby*, 152 U.S. 1, 48 (1894), but cannot convey those of a State. *See Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 17-19 (1935). The equal footing doctrine thus requires that all submerged lands held by the United States in trust for a future State pass at statehood.

The United States' suggestion that Congress is attentive to States' interests and might convey these lands to Alaska if it chooses, U.S. Opp. at 73, provides scant comfort. Despite universal support from all forty-eight States, it took four Congresses following *California I* to enact the Submerged Lands Act even though that Act confirmed *every* State's title. *Louisiana*, 363 U.S. at 6

n.4. Alaska is the only State with an interest in the submerged lands in NPRA. For Alaska to persuade Congress to act would be far more difficult.

2. When an international duty or a public exigency requires federal retention of submerged lands, the retained interest should be limited to only those rights absolutely necessary.

Alaska argued in its opening brief that when the United States must retain submerged lands, it should be deemed to

retain only those rights absolutely necessary to meet the exigency, rather than full fee title. Alaska's Brief at 70-71. The United States characterizes this as "second guessing" Congress's judgment as to whether the national interest requires retention of full fee title. This characterization is far-fetched. Congress did not express its judgment as to any interest, much less specify that it was retaining full fee interest. Further, the issue is not the extent of Congress's power under the Property Clause,[23] as the United States frames it. U.S. Opp. at 73. Instead, the issue is the limits on that power imposed by the constitutional requirement that new States be admitted to the Union on an equal footing with all other States.

A reservation can survive statehood without forever defeating the State's title to the land subject to the reservation. Assuming that Congress clearly stated an intent to reserve submerged lands, *not* the case here, the reservation need not wholly defeat the State's title to the lands. Title can pass subject to a reservation of oil and gas, as Congress provided in section 3(d) of the Act of September 7, 1957, Pub. L. No. 85-303, 71 Stat. 623, 624. Since that title to submerged lands is "an inseparable attribute of the equal sovereignty guaranteed to it on admission" to the Union. *Louisiana*, 363 U.S. at 16 (citation omitted), the equal footing doctrine at minimum requires that title pass to the new state subject only to a limited reservation of those interests absolutely essential to the United States.[24]

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[23] U.S. Const. art. IV, § 3, cl. 2.

[24] Alaska could exist as a State for a thousand years, moreover. The fact that the United States might has used or intended to use some submerged lands on the date of statehood should not forever defeat the State's title to these sovereign lands. For example, if the Department of Interior in PLO 82 in 1943 (*see* n.21, *infra*) had reserved the minerals in the submerged lands in the 48 million acres of Alaska's North Slope for use in prosecuting World War II, defeating State title merely because the lands were reserved at statehood would be wholly arbitrary considering that World War II ended in 1945 and PLO 82 was revoked less than two years after Alaska statehood. Admission on an equal footing would be a feeble doctrine if a federal reservation the purpose of

Conclusion

For the reasons stated above, the Court should rule that (1) Alaska's submerged lands entitlement is to be determined on the basis of the 10-mile rule, (2) Dinkum Sands is an island and constitutes part of Alaska's coast line for Submerged Lands Act purposes (or, alternatively, is an island except when it is below high tide), and (3) the submerged lands in NPRA passed to Alaska at statehood.

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Respectfully submitted,

Bruce M. Botelho
Attorney General

Joanne M. Grace
Assistant Attorney General

G. Thomas Koester

John Briscoe
Washburn, Briscoe & McCarthy

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which no longer existed but nonetheless remained in effect until shortly after statehood forever deprives Alaska of its sovereign lands in nearly half a million acres of the State.