

IN THE SUPREME COURT OF THE UNITED STATES

No. 128, Original

STATE OF ALASKA,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

—————
Before the Special Master
Gregory E. Maggs
—————

MOTION OF THE UNITED STATES FOR PARTIAL SUMMARY JUDGMENT
AND MEMORANDUM IN SUPPORT OF MOTION
ON COUNT IV OF THE AMENDED COMPLAINT
—————

Theodore B. Olson
Solicitor General

Edwin S. Kneedler
Deputy Solicitor General

Jeffrey P. Minear
Assistant to the Solicitor General

Gary B. Randall
Bruce M. Landon
Michael W. Reed
Trial Attorneys

United States Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

IN THE SUPREME COURT OF THE UNITED STATES

No. 128, Original

STATE OF ALASKA,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

—————
**Before the Special Master
Gregory E. Maggs**
—————

MOTION OF THE UNITED STATES FOR PARTIAL SUMMARY JUDGMENT
ON COUNT IV OF THE AMENDED COMPLAINT
—————

In accordance with Rule 56, Fed. R. Civ. P., the United States moves for partial summary judgment on Count IV of the Amended Complaint of the State of Alaska in this original action. Specifically, the United States moves for an order ruling that the United States reserved the marine submerged lands within Glacier Bay National Monument at the time of Alaska's admission to the Union, decreeing that Alaska does not possess title to those submerged lands, and entering judgment on Count IV in favor of the United States. There are no disputed material issues of fact and the United States is entitled to judgment as a matter of law. This motion is supported by the attached Memorandum.

Respectfully submitted.

Theodore B. Olson
Solicitor General

Edwin S. Kneedler
Deputy Solicitor General

Jeffrey P. Minear
Assistant to the Solicitor General

Gary B. Randall
Bruce M. Landon
Michael W. Reed
Trial Attorneys

*United States Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217*

By: _____

Bruce M. Landon
*Trial Attorney, General Litigation Section
Environment and Natural Resources Division
United States Department of Justice
801 B Street, Suite 504
Anchorage, AK 99501
(907) 271-5452*

July 24, 2002

IN THE SUPREME COURT OF THE UNITED STATES

No. 128, Original

STATE OF ALASKA,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

—————
Before the Special Master
Gregory E. Maggs
—————

MEMORANDUM IN SUPPORT OF MOTION OF THE UNITED STATES FOR
PARTIAL SUMMARY JUDGMENT
ON COUNT IV OF THE AMENDED COMPLAINT
—————

TABLE OF CONTENTS

	Page
Introduction	1
Statement	4
A. The legal principles governing federal reservations of submerged lands	4
1. The United States can retain submerged lands by reserving them at statehood for any appropriate public purpose	5
2. In order to retain submerged lands, the United States must reserve the lands with the intent to prevent passage of title to the State	5
B. The pertinent history of Glacier Bay National Monument	6
1. Creation of the Glacier Bay National Monument in 1925	6
2. The 1925 boundaries of Glacier Bay National Monument	6
3. The 1939 boundaries of the expanded Glacier Bay National Monument	7
4. Purposes of the Monument	10
a. Tidewater glaciers and fjords	11
b. Remnants of ancient inter-glacial forests	13
c. Protection of flora and fauna in the 1925 Proclamation	14
d. Expansion of Glacier Bay National Monument to create a refuge for the protection of brown bear and other species	15
e. Brown bear use of marine submerged lands	19
f. Interior Department determinations that the marine submerged lands form part of the Monument and remain in federal ownership	20

	Page
Summary of argument	24
Argument	26
I. The United States reserved the submerged lands within the exterior boundaries of Glacier Bay National Monument as an integral part of that Monument	26
A. The boundary description in President Coolidge’s 1925 Proclamation expresses the clear intent to include submerged lands	26
B. The boundary description in President Roosevelt’s 1939 Proclamation expresses the clear intent to include submerged lands	29
C. Excluding submerged lands from the Monument would compromise the purposes of the reservation	30
1. Excluding the submerged lands would undermine the purpose of setting aside and studying the tidewater glaciers because the glaciers themselves sit on fjord bottoms and their behavior can only be understood in relation to the geometry of the fjords in which they are located	30
2. Excluding the submerged lands would undermine the purpose of protecting the remnants of ancient inter-glacial forests because those forests are located both above and below mean high tide	31
3. Excluding the submerged lands would undermine the purpose of protecting wildlife, particularly the brown bear, which makes extensive use of submerged lands	32
D. The Department of the Interior has consistently interpreted the proclamations to include the marine submerged lands	34
II. Congress retained the submerged lands in Glacier Bay National Monument at statehood	35
A. Congress intended to defeat state title to the submerged lands in Glacier Bay National Monument when it enacted Section 6(e) of the Alaska Statehood Act	37

	Page
1. National monuments under the administration of the NPS are generally set apart for the protection of wildlife therein	38
2. Congress was on notice that Glacier Bay National Monument in particular had been set apart for the protection of wildlife	39
B. Congress clearly expressed its intent to retain the submerged lands by rejecting attempts to abolish or diminish the Monument	39
1. National monuments are intended to be permanent	39
2. Congress was aware that abolition of a national monument requires an Act of Congress	40
3. Congress rejected changes to the boundaries of the Monument	41
Conclusion	46

TABLE OF AUTHORITIES

FEDERAL CASES

Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) 28

Alaska v. United States, 213 F.3d 1092 (9th Cir. 2000) 1, 5, 28

Cappaert v. United States, 426 U.S. 128 (1976) 32

Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) 5

Idaho v. United States, 533 U.S. 262 (2001) 5, 6, 27, 28, 35, 36, 45

Lessee of Pollard v. Hagan, 3 How. (44 U.S.) 212 (1845) 4

Montana v. United States, 450 U.S. 544 (1981) 6

Shively v. Bowlby, 152 U.S. 1 (1894) 5

Udall v. Tallman, , 380 U.S. 1 (1965) 34, 35

United States v. Alaska, 521 U.S. 1 (1997) passim.

United States v. California, 436 U.S. 32 (1978) 29, 34

FEDERAL STATUTES

Alaska Statehood Act, Note Prec. 48 U.S.C. § 21, 6(e), 72 Stat. 340-341
. passim.

Antiquities Act of 1906, 16 U.S.C. § 431 6, 29

Park Service Organic Act of 1916, 16 U.S.C. § 1 . 6, 8, 14, 32, 33, 39, 40

Submerged Lands Act, 43 U.S.C. § 1301 *et seq* 4

16 U.S.C. § 22, 17 Stat. 33 38

16 U.S.C. § 43 38

16 U.S.C. § 92 38

16 U.S.C. § 410hh-1(1)	1
16 U.S.C. § 410hh-2	1
Pub.L. 81-292, 63 Stat. 691	40
Pub.L. 81-648, 64 Stat. 404	40
Pub.L. 81-652, 64 Stat. 405	40
Pub.L. 83-360, 68 Stat. 98	40
Pub.L. 84-179, 69 Stat. 380	40
Pub.L. 84-447, 70 Stat. 61	41
Pub.L. 84-846, 70 Stat. 730	41
Pub.L. 84-891, 70 Stat. 898	41

MISCELLANEOUS

Report of the Special Master in United States v. Alaska No. 84 Orig. (Mar. 1996)	28
Presidential Proclamation of March 2, 1909, 35 Stat. 2247	38
Proc. No. 1733, 43 Stat. 1988	passim.
Proc. No. 2330, April 18, 1939	passim.
Proc. No. 3089, 20 Fed. Reg. 2103, April 5, 1955	21, 40
Proc. No. 3443, December 28, 1961, 76 Stat. 1441	29
Proc. No. 4346, February 1, 1975, 89 Stat. 1237	29
Proc. No. 4359, March 28, 1975, 89 Stat. 1254	29
Proc. No. 7392, January 17, 2001, 66 Fed. Reg. 7335	29
Executive Order 3983, April 1, 1924	9, 30

39 Op. Att'y Gen. 185 (1938)	36, 40
3 CFR (1938-1943 Compilation) Chap IV Reorganization Plan 2 § 4(f)	14
1 Fed. Reg. 573 (June 11, 1936)	15, 30
24 Fed. Reg. 4519 (June 3, 1959)	23
Fed. R. Civ. P. 56(b), (c)	4

INTRODUCTION

The State of Alaska brought this original action to quiet title to marine submerged lands in the vicinity of the Alexander Archipelago. The Special Master's Report on Intervention describes the nature and scope of the four counts of Alaska's amended complaint. *See* Report of Special Master on the Motion to Intervene 1-3 (Nov. 2001). In Count IV of the Amended Complaint, Alaska seeks to quiet title to marine submerged lands within the external boundaries of Glacier Bay National Monument, as they existed on the date of Alaska's Statehood, on the theory that they passed to the State under the equal footing doctrine and the Submerged Lands Act. The United States contends that it has reserved those lands, which are a critical component of Glacier Bay National Park and Preserve, for all of the citizens of the United States.¹

Glacier Bay is one of the most visited national parks in Alaska, receiving an average of 390,000 visitors per year in the 1990s. Declaration of Tomie Lee, US-IV-8.² Virtually all of the visitors access and travel through the park by water. *Ibid.* The visitors are attracted by the magnificent tidewater glaciers that sit on fjord bottoms and calve into Glacier Bay and its tributary fjords, as well as by the populations of humpback whales, other marine mammals, bears, and other species. *Ibid.* In 1986, Glacier Bay was designated a UNESCO Biosphere Reserve, and in 1992, it

¹In 1980, Congress added certain lands to the Glacier Bay National Monument and redesignated it as the Glacier Bay National Park and Preserve. 16 U.S.C. § 410hh-1(1). The statute provides: "Lands, waters, and interests therein withdrawn or reserved for the former . . . Glacier Bay National Monument[] are hereby incorporated within and made a part of . . . Glacier Bay National Park. . . ." 16 U.S.C. § 410hh-2. The submerged lands in the 1980 additions are not at issue. Because federal retention is determined as of the date of Alaska Statehood, *Alaska v. United States*, 213 F.3d 1092, 1097-98 (9th Cir. 2000), this memorandum will refer to the area in dispute as the Glacier Bay National Monument or Monument.

² Please see the Table of Exhibits for an explanation of the designation of exhibits used in this memorandum.

was designated a World Heritage Site. *Ibid.* Along with the adjacent Wrangell-St. Elias National Park and Preserve, Kluane National Park of Canada and Tatshenshini-Alsek Wilderness Provincial Park of British Columbia, Glacier Bay forms the world's largest area of protected lands and waters. *Ibid.* That combined World Heritage Site is subject to joint management pursuant to international agreements with the Canadian federal and provincial governments. *Ibid.*

In *United States v. Alaska*, 521 U.S. 1 (1997), the Supreme Court held that the United States can retain title to submerged lands by reserving those submerged lands prior to statehood with the intent of preventing passage of title to the State. Whether the United States intended to reserve submerged lands as well as uplands and whether Congress intended to prevent passage of title are "ultimately a matter of federal intent." *Id.* at 36. The Court identified two controlling principles that are directly applicable here. First, a reservation order will be deemed to reserve submerged lands when it "necessarily embrace[s] certain submerged lands," or where the purpose of the reservation would be undermined if it did not include the submerged lands. *Id.* at 39. Second, Congress manifested its intent, at the time of Alaska's Statehood, to retain federal ownership of certain categories of submerged lands that are critically important to federal activities. *Id.* at 41-43, 55-57.

In this case, the boundaries of Glacier Bay Monument necessarily embrace submerged lands. The boundaries are drawn through the center of Excursion Inlet, Icy Passage, North Indian Pass and Cross Sound to the Pacific Ocean. Proc. No. 2330 of April 18, 1939 (1939 Proclamation), US-IV-2. On the Gulf of Alaska, the boundary follows the general contour of the coast at a distance of three nautical miles therefrom. *Ibid.* Furthermore, the purposes of the Monument would be undermined in at least three crucial respects if the submerged lands were excluded from it. First, the Monument's fundamental goal of creating a federal reserve embracing Glacier Bay's magnificent tidewater glaciers

would be thwarted. The termini and a significant portion of those glaciers rest on fjord bottoms. The glaciers, their submerged moraines, and the underlying submerged lands are inextricably related. Second, the Monument was also established for the study and protection of remnants of ancient inter-glacial forests, which occur both above and below the high tide line. Failure to include submerged lands in the Monument would undermine the study and protection of the remnants. Third, the Monument was created for the study and protection of flora and fauna and was later expanded specifically to serve as a sanctuary for brown bears. Brown bears, which were hunted from boats before that expansion, make significant use of marine submerged lands for foraging, fishing and travel. Failure to include marine submerged lands as part of the Monument would, therefore, undermine the goal of creating a bear refuge.

The Court's decision in *Alaska* likewise controls the issue of congressional intent to prevent passage of title. The Court held that Congress, through Section 6(e) of the Alaska Statehood Act (ASA), *note prec.* 48 U.S.C. § 21, "clearly contemplated continued federal ownership of certain submerged lands – both inland submerged lands and submerged lands beneath the territorial sea – so long as those submerged lands were among those 'withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife.'" *Alaska*, 521 U.S. at 57. There is no dispute that the Monument was "withdrawn or otherwise set apart for the protection of wildlife." Alaska itself alleges in the Amended Complaint that "[t]he primary purposes of the 1939 Expansion of Glacier Bay National Monument were to set aside *a refuge for brown bears* and to preserve a coastal forest." Amended Complaint para. 57 (emphasis added). Consequently, Section 6(e) retained the submerged lands within the Monument in federal ownership. Congress's intent to retain title is also clear from the fact that Congress was on notice that the Monument included submerged lands and was intended

to be permanent, yet it rejected attempts during the deliberations leading up to the ASA to diminish the Monument.

Summary judgment is appropriate where there are no material, disputed issues of fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(b), (c). The United States is entitled to judgment as a matter of law in accordance with the controlling legal principles set out in *United States v. Alaska, supra*. Although we rely on expert reports to demonstrate how exclusion of submerged lands would undermine the purposes of the Monument, those reports are based on well-established scientific findings as to which we do not believe there will be any dispute.

STATEMENT

A. The Legal Principles Governing Federal Reservations Of Submerged Lands

Under the doctrine of *Lessee of Pollard v. Hagan*, 3 How. (44 U.S.) 212, 228-229 (1845), new States are admitted to the Union on an “equal footing” with the original 13 Colonies and succeed to the United States’ title to the beds of inland navigable waters within their boundaries. *Alaska*, 521 U.S. at 5. The bed of the territorial sea did not pass to the States under the equal footing doctrine, but remained subject to the paramount sovereign rights of the United States. *Ibid*. In 1953, Congress enacted the Submerged Lands Act, 43 U.S.C. § 1301 *et seq.* (SLA), which granted the States title to “lands beneath navigable waters within the boundaries of the respective States.” 43 U.S.C. § 1311(a). The SLA defines “lands beneath navigable waters” to include both inland waters and some of the lands beneath the territorial sea over which the United States has paramount sovereign rights and which the United States would otherwise own. *Alaska*, 521 U.S. at 5-6. In the case of Alaska, those submerged lands would include a 3-mile belt of territorial sea, excluding those lands that the United States has reserved for public purposes at the time of the State’s admission to the Union.

*Ibid.*³

1. *The United States can retain submerged lands by reserving them at statehood for any appropriate public purpose.* The Property Clause of the Constitution, Art. IV, § 3, cl.2, provides that “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.” In *Shively v. Bowlby*, 152 U.S. 1, 48 (1894), the Supreme Court concluded that the Property Clause power extended to granting submerged lands to private parties during the territorial period, thereby defeating a future State’s equal footing title. See *Idaho v. United States*, 533 U.S. 262 (2001) (United States retained bed of navigable lake for benefit of tribe); *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970) (bed of Arkansas River conveyed to tribe prior to Oklahoma Statehood).

In *United States v. Alaska*, the Court held that Congress can also defeat a State’s title to submerged lands by reserving those lands (rather than conveying them to a third party) during the territorial period. 521 U.S. at 33-34; accord *Alaska v. United States*, 213 F.3d 1092 (9th Cir. 2000). In *Shively*, the Court recognized a general congressional policy of granting away land beneath navigable waters only “in the case of some international duty or public exigency.” 152 U.S. at 50. Despite that policy, “the only constitutional limitation on a conveyance or reservation of submerged lands is that it serve an appropriate public purpose.” *Alaska*, 521 U.S. at 40.

2. *In order to retain submerged lands, the United States must reserve the lands with the intent to prevent passage of title to the State.* Under the Supreme Court’s submerged lands cases,

³Although the distinction between inland waters and territorial sea is important to understanding the source for state claims to submerged lands, it is not necessary to determine which waters in the Monument are inland waters and which are territorial sea in order to resolve this summary judgment motion. The test for federal retention of submerged lands is the same for inland waters and the territorial seas. *Alaska*, 521 U.S. at 35-36.

“[a] court deciding a question of title to the bed of navigable water must . . . begin with a strong presumption against defeat of a State’s title.” *Alaska*, 521 U.S. at 34, quoting *Montana v. United States*, 450 U.S. 544, 552 (1981). The courts will not infer an intent to defeat a future State’s title to inland submerged lands “unless the intention was definitely declared or otherwise made very plain.” *Alaska*, 521 U.S. at 34 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)). The issue, however, is “ultimately a matter of federal intent.” *Id.* at 36. The United States demonstrated the requisite federal intent in *Alaska* by showing that the United States reserved the submerged lands in the National Petroleum Reserve and the Arctic National Wildlife Refuge through pre-statehood executive action and retained them at statehood through the ASA. *Id.* at 36-61. It similarly demonstrated the requisite federal intent in *Idaho* to retain a portion of the bed of Coeur d’Alene Lake for the Coeur d’Alene Indian Tribe. 533 U.S. at 281.

B. The Pertinent History Of Glacier Bay National Monument

1. *Creation of the Glacier Bay National Monument in 1925.* By proclamation dated February 26, 1925, President Coolidge “set apart as the Glacier Bay National Monument,” a tract of land lying within the boundaries set forth in the proclamation. Proclamation No. 1733, 43 Stat. 1988 (1925 Proclamation), US-IV-1. The President created the Monument pursuant to the Antiquities Act of 1906, 16 U.S.C. § 431, and directed that it be administered by the National Park Service (NPS) in accordance with the Park Service Organic Act of 1916, 16 U.S.C. § 1. US-IV-1 p.2.

2. *The 1925 boundaries of Glacier Bay National Monument.* President Coolidge set aside as Glacier Bay National Monument “the tract of land lying within the following described boundaries.” The boundary description reads in pertinent part:

Beginning at the most southerly point of North Marble Island in approximate

latitude 58 degrees 40' north and approximate longitude 136 degrees 4' west as shown on Coast and Geodetic Survey chart No. 8306; Thence southeasterly to the most westerly point of the largest island at the entrance of Bear Tract Cove in approximate latitude 58 degrees 34' north and approximate longitude 135 degrees 56' west; thence following the mean high water of the southerly shore to the most easterly point of said island; thence east on a parallel of latitude to the crest of the divide between the waters of Bear Tract Cove [there follows a description of boundaries through uplands] thence northeasterly to the most southerly point on the north shore of Geikie Inlet; thence northeasterly following the mean high water of this shore to the most easterly point of land at the entrance of Geikie Inlet, then southeasterly to the place of beginning, containing approximately 1,820 square miles.

1925 Proclamation, US-IV-1. The described boundaries enclose the marine submerged lands of the west and east arms of Glacier Bay and a portion of the Bay itself. *Ibid.*; see US-IV-3 p.31.

The 1925 Proclamation states that the “tract of land” being described contained approximately 1,820 square miles. That figure includes both uplands and submerged lands. In 1938, when National Park Service (NPS) employees John Coffman and Joseph Dixon prepared their *Report on Glacier Bay National Park (Proposed) Alaska*, in connection with proposals to expand the Monument, they calculated that the 1925 Monument consisted of approximately 1,549 square miles of uplands and 271 square miles of water-covered areas. US-IV-9 p.3.

3. *The 1939 boundaries of the expanded Glacier Bay National Monument.* John Coffman, the NPS Chief of Forestry, and NPS Field Naturalist Joseph Dixon were assigned to investigate the Glacier Bay area and report on the areas proposed for inclusion in the expanded Monument. Kaufman, US-IV-7 p.29. On December 20, 1938 they made their report which begins:

Summary of Recommendations for the Proposed Glacier Bay National Park

Boundaries and Area. — The proposed boundaries are outlined on the accompanying map. The total area recommended for inclusion amounts to approximately 3,850 square miles, or 2,463,996 acres, of which 1,917,244 acres are land surface and 546,742 acres, or 22.19 percent, are covered by water.

Detailed description of the boundaries and area may be found on pages 2, 2A, 2B, 2C and 3.

With this material extension of the Glacier Bay National Monument, rounding it out into a biological unit representative of the flora and fauna from the bare glaciers to the mature forests of the seacoast and with the special purpose of preserving the Alaska bear, it is deemed unnecessary to establish any national park or national monument on Admiralty Island for that purpose.

US-IV-9 p.ii.

In reference to mammals within the area proposed for the expansion, Coffman and Dixon reported that “[w]hales, porpoises, and hair-seals are quite commonly observed in Glacier Bay and adjacent waters.” *Id.* at 9. They added that “[s]almon, halibut, and many other species of fish inhabit the waters of Glacier Bay and other bays and inlets of the proposed park. . . . Commercial fishing for salmon and halibut is carried on within the waters of Glacier Bay, Excursion Inlet, and elsewhere within the boundaries proposed, but there are no canneries operating within those boundaries.” *Id.* at 10. Coffman and Dixon stated at the end of their description that their proposal included “all submerged lands and water areas within the above described boundaries.” *Id.* at 2 .

On April 18, 1939, President Franklin Roosevelt expanded the Monument. The boundaries of the Proclamation track identically the boundaries recommended by Coffman and Dixon. *Compare* boundary description in 1939 Proclamation, US-IV-2, *with* description at US-IV-9 p.2.⁴

The description reads:

Beginning at the summit of Mount Fairweather, on the International Boundary line between Alaska and British Columbia; thence southeasterly along present southern boundary of Glacier Bay National Monument to the point of the divide

⁴ Although the location of the boundaries is identical, the language to express that location differs slightly. For example, the Proclamation simply describes the northern boundary of the expansion as running southeasterly along the southern boundary of the original Monument, while Coffman and Dixon described some of the turns in that original southern boundary.

between the waters of Glacier Bay and Lynn Canal where said divide is forked by the headwaters of Excursion Inlet; thence easterly and southeasterly along the divide between the waters of Excursion Inlet and Lynn Canal to a point in approximate latitude 58 degrees 27' N., longitude 135 degrees 18' W., where said divide meets a subsidiary divide between streams flowing into Excursion Inlet; thence westerly and northwesterly along said subsidiary divide to the east shore of Excursion Inlet; thence due west to the center of the principal channel of Excursion Inlet; thence southerly along the center of the principal channel of Excursion Inlet to its junction with the Icy Passage; thence westerly and southwesterly along the center of Icy Passage, North Passage, North Indian Pass and Cross Sound to the Pacific Ocean; thence northwesterly following the general contour of the coast at a distance of 3 nautical miles therefrom to a point due west of the mouth of Seaotter Creek; thence due east to the north bank of Seaotter Creek and easterly along the north bank of Seaotter Creek to its headwaters; thence in a straight line to the summit of Mount Fairweather, the place of beginning. Containing approximately 904,960 acres.

1939 Proclamation, US-IV-2. The Monument boundaries described in President Roosevelt's Proclamation run "along the principal channel of Excursion Inlet" to "the center of Icy Passage, North Passage, North Indian Pass and Cross Sound to the Pacific Ocean." In the Pacific Ocean, the boundary follows "the general outline of the coast at a distance of 3 nautical miles therefrom." *Ibid.* The Proclamation's placement of the boundaries through the center of those water bodies was a departure from previous practice.⁵

One week after President Roosevelt issued his Proclamation, the NPS issued a press release explaining the action, stating in relevant part:

The increase in area, as recommended by the National Park Service of the United States Department of the Interior, extends the boundaries of the monument from the Canadian-Alaska border *to the three-mile limit off the sea coast*. The extension makes the glacial and mountain area more accessible to visitors and *provides sanctuary for native wildlife, especially several species of Alaskan bears*.

⁵ In 1924, President Coolidge had issued a temporary withdrawal in the Glacier Bay area "pending determination as to the advisability of including the same in a National Monument." Executive Order 3983, US-IV-10. The boundary of that withdrawal follows "the north shores of Icy Strait and Cross Sound to the Pacific Ocean; thence in a general northwesterly direction along the shore of the Pacific Ocean." *Ibid.*

U.S. Department of the Interior Memorandum for the Press (April 25, 1939), US-IV-11(emphasis added). The press release continued:

Inclusion of the coastal area in the monument provides a natural feeding ground for wildlife that will find sanctuary there. The Alaska brown bear is the most common species in the monument and is in most need of protection, being the bear most sought by hunters. There are three species of grizzlies within the area, numerous black bears and the blue or Glacier bear, found only on the glaciated coasts of Alaska. There are many other animals, including Sitkan deer, mountain goats, wolves, coyotes, wolverines, red foxes, lynx, otter, ermine, marten and mink.

Whales, porpoises and seals are commonly observed in Glacier Bay and adjacent waters. The waters abound with water fowl during the summer, and there are many land birds, the bald eagle being the most conspicuous. Salmon, halibut and many other fish inhabit the waters of Glacier Bay and other bays and inlets.

Id. at 2.⁶

4. *Purposes of the Monument.* President Coolidge's 1925 Proclamation included the following "whereas" clauses, listing a number of the factors that had led him to establish the Monument:

Whereas, There are around Glacier Bay on the southeast coast of Alaska a number of tidewater glaciers of the first rank in a magnificent setting of lofty peaks, and more accessible to ordinary travel than other similar regions of Alaska,

And, Whereas, The region is said by the Ecological Society of America to contain a great variety of forest covering consisting of mature areas, bodies of youthful trees which have become established since the retreat of the ice which should be preserved in absolutely natural condition, and great stretches now bare that will become forested in the course of the next century,

And, Whereas, This area presents a unique opportunity for the scientific study of glacial behavior and of resulting movements and development of flora and fauna and of certain valuable relics of ancient interglacial forests.

⁶ For a more detailed discussion of the history of the boundaries see Catton, *Historical Report Relating to Claims of Submerged Land in Glacier Bay National Park, Alaska* (Catton), US-IV-3 and Kaufmann, *Glacier Bay National Monument, Alaska, A History of its Boundaries* (Kaufmann), US-IV-7.

And, Whereas, The area is also of historic interest having been visited by explorers and scientists since the early voyages of Vancouver in 1794, who have left valuable records of such visits and explorations.

US-IV-1. Those purposes bear a close relationship to Glacier Bay's submerged lands.

a. Tidewater glaciers and fjords. A "tidewater glacier," as referenced in the first of the "whereas" clauses of the 1925 Proclamation, is a "glacier that terminates in the sea, where it usually ends in an ice cliff from which icebergs are discharged." Molnia, *The State of Glacier Science and its Relationship to the Submerged Lands Adjacent to and Beneath the Tidewater Glaciers of Glacier Bay at the Time of the Founding and Expansion of Glacier Bay National Monument, Alaska* (Molnia) at 7, US-IV-4. A glacier is a "large mass of ice formed, at least in part, on land by the compaction and recrystallization of snow, moving slowly by creep downslope and outward in all directions due to the stress of its own weight, surviving from year to year." *Id.* at 6 .

Tidewater glaciers are dynamic and can experience rapid changes. Molnia, US-IV-4 p.8. The history of Glacier Bay bears out that phenomenon. When Vancouver made the first recorded European visit to Glacier Bay in 1794, glaciers covered almost the entirety of Glacier Bay. Trabant, *Expert Witness Report for Glaciology Relating to Claims to Submerged Lands in Glacier Bay* (Trabant) at 2, US-IV-5. Glacier retreat was the dominant trend of glacier behavior in Glacier Bay from about the middle of the 18th century until about the middle of the 20th century. *Ibid.* Some glaciers began slow advances as early as the 1920's. *Ibid.* Nevertheless, the general trend of two hundred years of glacial retreat in Glacier Bay opened approximately 200 kilometers of fjords. Trabant 2. Between the mid-18th century and the early 20th century, John Hopkins Glacier retreated as much as 100 kilometers, exposing significant areas of its bed, which were inundated by seawater. Molnia, US-IV-4 p.9. In the early 20th century, its behavior changed from retreat to advance and its

terminus readvanced several kilometers, reoccupying significant parts of its fjord. *Ibid.*

The advance and retreat of glaciers is not necessarily gradual, and lands covered by water one year may be covered by a glacier the next and vice-versa. Although the behavior of individual glaciers is unique, generally, advancing-tidewater-glacier-termini move forward at maximum rates of several tens-of-meters per year. Molnia, US-IV-4 p.9. During periods of glacial surge, however, the advance may increase by more than one hundred times. *Ibid.* For example, in 1912-1913, the Grand Pacific Glacier surged 1200 meters. Trabant, US-IV-5 p.4. Tidewater glaciers retreat in a process called calving, which is the breaking away of a mass or block of ice from the glacier's terminus. Molnia, US-IV-4 pp.5, 8, 9. Glacial retreat can be very rapid. The Bering Glacier, for example, retreated 2,600 meters between 1977 and 1978. *Id.* at 9.

The key to understanding the advance and retreat of individual glaciers is an understanding of the geometry of the glacial bed. Trabant, US-IV-5 p.6. The rate of glacial retreat is controlled more strongly by the calving rate than by climate, and the rate of calving is determined by the geometry of the glacial bed. Molnia, US-IV-4 p.9. A tidewater glacier needs to be in shallow water to minimize its rate of calving, and the rate of calving increases in an exponential fashion with an increase in terminus water depth. *Ibid.* A stable tidewater glacier has its base grounded on the floor of its fjord with its terminus in relatively shallow water on a terminal moraine that the glacier built. *Ibid.* When a glacier is advancing, it does so by pushing a moraine in front of it. *Ibid.* When a glacier loses contact with its moraine, water fills the area between the moraine and the glacier's terminus. *Ibid.* Because the floor of the fjord is much deeper than the moraine, the surface area of the terminus exposed to seawater increases dramatically and the glacier will begin to retreat at a substantially increased rate. *Ibid.* The drastic retreat ends when the terminus recedes into shallow

water, usually at the head of the fjord. Trabant, US-IV-5 p.6.

Although scientific understanding of the behavior of glaciers has advanced since the 1925 and 1939 Proclamations, by the late 19th century, several American scientists had already developed insights into the integrated relationship between tidewater glaciers and their associated submerged lands. Molnia, US-IV-4 p.37. In 1890, Israel Russell did soundings and identified the glacial moraine in front of Muir Glacier. *Id.* at 1-2. In 1891, Ralph Tarr and Lawrence Martin determined that “[b]elow sea level the trough characteristics of the fiord, a flat-bottomed, U-shaped form is exactly that of ice-eroded valleys on land.” *Id.* at 18. Henry Reid recognized in 1895 that glaciers exhibited both advances and retreats. *Id.* at 25.

Those insights continued through the early 20th century. In 1904, Grove Karl Gilbert identified the submarine moraines in Yakutat Bay. Molnia, US-IV-4, p.17. In 1910, Earnest F. Bean used soundings in Prince William Sound to chart the location of former glaciers and their influence upon pre-glacial valleys. *Ibid.* Bean also determined that glaciers do not float in fjords, but rather sit upon the fjord bed. *Id.* at 17-18. Also in 1910, Tarr and Martin confirmed that fact with respect to Nunatak Glacier. *Id.* at 18. In his 1937 work, *The Problem of Glacier Bay Alaska: a Study of Glacial Variations*, W. S. Cooper recognized that “[c]onfiguration of the drainage basin seem[s], then, to have been an important cause of the intensification of increase and decline over the area as a whole.” Trabant, US-IV-5 p.3.⁷

b. Remnants of ancient inter-glacial forests. In establishing the Monument, the 1925 Proclamation identified the remnants of ancient inter-glacial forests as ancient relics warranting

⁷ For a more detailed analysis of the effect of the geometry of a glacial bed on advance and retreat of tidewater glaciers, and the history of glaciology, see the full reports of Molnia, US-IV-4, and Trabant, US-IV-5.

protection and scientific study. The forests exist at several locations within Glacier Bay where rooted tree trunks were sheared at a common level by a past glacier advance only to be exposed by subsequent retreat. Molnia, US-IV-4 p.3-4. The forests were described by Wright in 1889, Russell in 1897, the Harriman Expedition of 1899, as well as many other pre-1925 investigators. *Id.* at 4. Those forest remnants still exist and are located both above and below the high tide line. *Id.* at 37.

c. Protection of flora and fauna in the 1925 Proclamation. The 1925 Proclamation cites the study of the movement of flora and fauna as among the purposes of Glacier Bay National Monument. The Proclamation also specifies that the Monument will be administered pursuant to the Park Service Organic Act of 1916, which requires the Monument to be administered “to conserve . . . the wild life therein” 16 U.S.C. § 1. In September 1929, the Department of Agriculture, through its Biological Survey, compiled a list of “National Wild-Life Reservations.” United States Department of Agriculture Miscellaneous Publication No. 51, US-IV-12.⁸ That publication, which includes Glacier Bay National Monument on the list of wildlife reservations, indicates that the chief species protected were puffins, pigeon guillemots, gulls, terns, cormorants, eider ducks, mountain goats, bears and foxes. *Id.* at 5; *see id.* at 9 (map of Wild-life Reservations of Alaska). That compilation and the inclusion of the Monument came to the attention of members of the Senate Special Committee for Conservation of Wild Life Resources. *See* US-IV-14 (inquiry by Senator Norbeck referencing the compilation and inquiring about mountain goats in the Monument); US-IV-15 p.2 (indicating Senator Norbeck’s presence on the Special Committee). In 1932, H. W. Terhune of the

⁸ Until 1939, the Department of Agriculture conducted wildlife studies through a component called the Biological Survey. In that year, the Department of the Interior assumed responsibility for the Biological Survey, which later became the U.S. Fish and Wildlife Service. 3 CFR (1938-1943 Compilation) Chap IV Reorganization Plan 2, § 4(f), US-IV-13.

Biological Survey testified to the Senate Special Committee on Conservation of Wild Life Resources that “Glacier Bay is an absolute sanctuary” for brown bears. US-IV-15 p. 32. In 1936, the Biological Survey issued regulations for the protection of brown bears. Those regulations prohibited the hunting of:

Large brown or grizzly bear in that area of *land and water embracing the Glacier Bay National Monument*

1 Fed. Reg. 573, 577 (June 11, 1936), US-IV-16 (emphasis added).

d. Expansion of Glacier Bay National Monument to create a refuge for the protection of brown bear and other species. In 1927, E. W. Wilson, Chief of the Biological Survey, suggested the expansion of the Monument to provide a suitable reserve for the protection of Alaska brown bear. US-IV-17.⁹ Shortly thereafter, the Senate, through Senate Resolution 246, 71st Cong., 2d Sess. (1930), provided for the appointment of a committee of five senators “to investigate all matters pertaining to the replacement and conservation of wild animal life (including aquatic and birdlife)” US-IV-18. In 1931, the Special Committee submitted a report to Congress pursuant to Senate Resolution 246 and recommended the enlargement of Glacier Bay and its designation as a national park:

Alaska National Park – It is strongly recommended that the Director of the National Parks be requested to make a thorough study of Glacier Bay and its vicinity, now a national monument, with the idea of adding to the national monument some of the forest area along the gulf coast and to the south and to the southeast perhaps as far as the Lynn Canal westward to Mount St. Elias, *which would protect a certain number of large brown bears*, and be as far as scenic wonders are concerned, the

⁹ Although the creation of a bear sanctuary was the primary reason for the 1939 Expansion, other species were to be protected as well. In 1926, the Biological Survey representative on the Alaska Game Commission suggested expansion of the Monument to protect sea birds. He specifically recommended extension to the Beardslee Islands, which he described as “low and sandy with sand bars, sand spits and reefs adjacent,” in order to protect birds. Kaufmann, US-IV-7 p.12.

most magnificent of all the national parks.

US-IV-19 p.253 (quoting report of Special Senate Committee on Conservation of Wild Life Resources submitted pursuant to Senate Resolution 246)(emphasis added).

In 1932, the Special Committee held a hearing on the “Protection and Preservation of the Brown and Grizzly Bears of Alaska.” US-IV-15. Although that hearing focused primarily on the possibility of creating a bear sanctuary on Admiralty and Chichagof Islands, Senator Walcott invited H. W. Terhune to address the possibility of enlarging Glacier Bay “as a bear sanctuary.” Mr. Terhune responded:

MR TERHUNE That is a proposition that is heartily endorsed. It will not only serve the purpose of a vacation land, but also serve the purpose of a bear sanctuary. There are a considerable number of bears within that area consisting of the small strip that could be added on the east side of Glacier Bay and the coastal strip from Cape Spencer westward to Yakutat Bay, including Lituya Bay, which lies midway between Cape Spencer and Yakutat Bay. It has more bears in a small area than you will find on either Admiralty or Chichagof Island. It is known to be a good bear country and such a sanctuary would not only serve to protect the large brown and grizzly bears, but would have a dual purpose in protecting the well-known but not often seen blue or glacial bear which is found only in the Yakutat area as far as is generally known. That is something that I believe has been overlooked by the supporters of the protection of the brown and grizzly bears. I think it is highly important and perhaps just as important as the protection of the large brown bear and grizzlies.

THE CHAIRMAN. I think, Mr. Wickersham [Alaska’s Delegate to Congress], it might be pertinent to be put in the record at this point that this committee made that specific recommendation that Mr. Terhune has just described.

Senate, Special Committee on Conservation of Wildlife Resources, *Protection and Preservation of the Brown and Grizzly Bears of Alaska*, January 18, 1932, US-IV-15 p.32.

In 1932, NPS Field Naturalist Joseph Dixon, in his field report on the proposed expansion, expressed concern about brown bears being killed when they stray outside the original Monument boundaries. Kaufmann, US-IV-7 p.19. He also stated that no location of a “bear refuge” in southeast

Alaska would be acceptable to everyone. *Ibid.* Nevertheless, that same year, the Governor of the Territory of Alaska, George Parks, and District Forester Heintzleman met and advocated “that the Glacier Bay National Monument be increased in size in order to make a suitable reserve for brown bear” Cover Letter and Notes on Proposed Glacier Bay National Park, US-IV-20. On March 18, 1932, Senator Walcott, Chairman of the Senate Special Committee for Conservation of Wild Life Resources wrote to the Director of the NPS:

I cannot see any reason for not getting an executive order to extend the confines of the Glacier Bay National Monument to include some of those coastal forests and the further protection for the brown bear, if this can be accomplished. It may be better to do it this way than to attempt to dignify that area by a park status.

Letter from Senator Frederic C. Walcott to Horace M. Albright (March 18, 1932), US-IV-21. On March 24, 1932, the Director of the NPS informed Congressman Milton W. Shreve that the NPS was considering expansion of Glacier Bay National Monument in order to protect brown bears. US-IV-22.

The need to protect the Alaskan brown bears also came to the attention of President Roosevelt. In a memorandum, dated June 6, 1934, to Secretary of Interior Harold Ickes, President Roosevelt expressed his concern about a report he had received about hunters shooting bears from yachts in Alaska. Barnes, *Brown Bear Use of Marine Habitats in Alaska with Emphasis on Glacier Bay* (Barnes), US-IV-6 p.16. Roosevelt wrote: “This horrifies me as much as it does my friend David Wagstaff. If these bears come under your jurisdiction, will you please have the matter checked up? It seems to me that that kind of slaughter ought to be stopped.” *Ibid.* Ickes responded that his department had enlarged Katmai and planned a similar proclamation for Glacier Bay Monument for the purpose of protecting brown bears. *Ibid.*

On April 21, 1937, President Franklin Roosevelt wrote to the Secretary of Interior concerning the possibility of making Admiralty Island a wildlife sanctuary until such time as it might be turned into a national park. US-IV-23. On June 25, 1937, the Acting Secretary of Interior advised that the NPS considered Admiralty Island of doubtful national park quality, but that “a desirable extension of Glacier Bay National Monument would provide comparable wildlife sanctuary in a region of great scenic beauty and scientific interest.” US-IV-24.

In the summer of 1937, Concurrent Resolution 24 requested the Roosevelt Administration to investigate Alaska conditions and report to the next session of Congress with a ten-year plan for the Alaska Territory. US-IV-19 p.1. The Alaska Resources Committee completed its report in December 1937. Volume I of that report includes a discussion of wildlife resources. In a section entitled “Refuges”, the Committee reported:

Furthermore, wild animals and birds are especially protected by the National Park Service in the Mount McKinley National Park, Katmai National Monument, and Glacier Bay National Monument.

Id. at 147. With regard to the proposed expansion of the Monument, the Committee reported:

The extension of the present Glacier Bay National Monument was first proposed in 1927 by the then Chief of the United States Biological Survey, as a means of providing a suitable wildlife refuge for the Alaska brown bear.

The chief reasons that the present monument be increased in size are: (1) it will make a suitable reserve for the brown bear, (2) it will include some of the finest scenery in all Alaska, and (3) it will preserve intact a suitable section of the coast forest of Alaska, including the finest extensive stand of Sitka spruce in the Territory. These features, when combined with the glaciers and the unique exhibit of plant and animal life found in the present monument, qualify the enlarged area in the opinion of the National Park Service, as a national park. That Service is now proposing such a designation.

US-IV-19 p.252-253.

The Alaska Resources Committee provided an abbreviated description of the boundaries of the proposed expansion, specifically noting that the boundary would run “through Cross Sound and Icy Strait north of the Inian, Lemesurier and Pleasant Islands” *Id.* at 253. The Committee also noted that the proposed expansion was smaller than the boundaries previously suggested by the Senate Committee on Conservation of Wild Life Resources. *Ibid.*¹⁰

e. Brown bear use of marine submerged lands. Brown bear make significant use of marine habitats. They make extensive use of tidelands where they forage for mollusks, other crustaceans, and washed-up carcasses of marine mammals and fish. Barnes, US-IV-6 p.3. They make use of estuarine grasslands. *Id.* at 7. In Glacier Bay, brown bear have been observed lying in seaweed eating barnacles and rye and sedge grasses from tidelands. *Ibid.* Additionally, bears swim considerable distances in order to access islands where they forage for sea bird eggs. *Id.* at 9. Within the Monument, brown bear have been sighted on Russell, Composite, Drake, Sturgess and Garforth islands as well as the Beardslee Islands and islands off North and South Sandy Cove. *Id.* at 11. Brown bear require large home ranges to meet their habitat needs. *Ibid.* Use of the small islands, therefore, indicates that the bears almost certainly swam to them. *Ibid.* Brown bear have been sighted up to four miles from shore. *Ibid.* Beaches, including tideland areas, are important travel corridors for males seeking out females during the spring breeding season. *Id.* at 7.

The brown bears’ use of tidelands was well known by 1939. US-IV-6 p.15. Although the swimming habits of brown bears in Glacier Bay were less well known at that time, sightings of brown bear on small islands had occurred. For example, W.G. Cooper sighted brown bear on Russell Island

¹⁰ For a more detailed account of the history of the 1939 Expansion of the Monument, *see* Catton, US-IV-3 pp.32-34, 84-96.

in Tarr Inlet in 1916. *Id.* at 11. Dixon, who co-authored the 1938 NPS report on the proposed expansion of the Monument, documented use of tidal sloughs by brown bear in his 1932 “Glacier Bay National Monument Field Notes.” US-IV-48 p.2. Not only are brown bear present in marine areas, they were traditionally hunted in those areas from boats. US-IV-6 p.16. During a 1932 hearing on brown bear in Alaska, which included testimony on the expansion of the Monument as a bear sanctuary, H.W. Terhune of the Biological Survey testified that bears were shot from passing boats in Southeast Alaska. US-IV-15 p.37.¹¹

f. Interior Department determinations that the marine submerged lands form part of the Monument and remain in federal ownership. During the summer of 1939, NPS officials Earl A. Trager and Frank T. Been visited the expanded Monument. Catton US-IV-3 p.34. In his report on the trip, Mr. Trager observed that the expanded Monument included 2,299,520 acres, a figure that includes the submerged lands. US-IV-47 p.6. In 1940, the NPS reported the 1939 Expansion to the Senate Special Committee on Conservation of Wildlife Resources, giving an acreage that includes submerged lands and stating that the Expansion “gave much-needed protection to the giant brown bear and other subarctic species.” *Status of Wildlife in the United States* S. Rep. 1203, 76th Cong., 3d Sess. 353 (Feb 7, 1940), US IV-25 p.353.

In 1954, the NPS Chief of Wildlife, Victor H. Cahalane, prepared a detailed report entitled “A Boundary Study of Glacier Bay National Monument,” in connection with proposals to exclude certain lands from the Monument in the Gustavus and Excursion Inlet areas.” US-IV-26. Cahalane reported:

¹¹ For a more detailed description of brown bear use of marine submerged lands, *see* Barnes, US-IV-6.

Glacier Bay National Monument contains almost 2,300,000 acres - a very sizeable area. Unfortunately for the land-dwelling types of animal life, much of this area is unusable. Approximately 27 percent of the monument, or 610,000 acres, consists of waters of Glacier Bay and other bays and inlets, and the portions of Icy Strait and the North Pacific Ocean which are included within the boundaries.

Id. at 19. In 1955 President Eisenhower signed Proclamation No. 3089 “Excluding Certain Lands from the Glacier Bay National Monument and Adding a Portion Thereof to the Tongass National Forest.” US-IV-27. That Proclamation excluded from the Monument the small homesteader community of Gustavus and transferred certain lands to the Tongass National Forest in the Excursion Inlet area. The Proclamation described the uplands in the Gustavus area to be excluded from the Monument by aliquot parts and then provided:

Also, all water and islands lying directly south and offshore between the above-described lands and the center of Icy Passage.

The areas described, including both public and nonpublic lands, aggregate approximately 14,741 acres of land and 4,193 acres of water.

Ibid.

In its 1956 prospectus on Glacier Bay and the Sitka National Monument, entitled *Mission 66 Prospectus; Sitka and Glacier Bay National Monuments*, the NPS recognized both the purpose of the Monument to protect the real habitat of the brown bear, and the fact that the Monument included submerged lands on the Gulf of Alaska coast:

The monument was established February 26, 1925 under Presidential Proclamation No. 1733, pursuant to the Act for the preservation of American Antiquities of June 8, 1906. Further study of the Area and vicinity disclosed that the boundaries so defined did not include the real habitat of the Alaska brown bear. . . . Under the proclamation of April 18, 1939 (No. 2330) an addition was made which included the latter area. It should also be noted that the second proclamation added the waters adjacent to the coast line for three nautical miles and the islands within these waters.

US-IV-28 p.30. U.S. Geological Survey maps from the period bracketing Alaska Statehood also

showed the national monument boundary following the three-mile limit along the outer coast and through the middle of Icy Strait, Cross Sound, and Excursion Inlet. US-IV-29.

The 1964 *Master Plan of Glacier Bay National Monument* contains a detailed inventory of the submerged lands of the Monument, including 857 square miles covered by salt water made up of 522.88 square miles in Glacier Bay and connecting inlets and bays, 201 square miles of “outside waters,” 46.24 square miles in Cross Sound and Icy Straits, and 86.88 square miles in other small bays and inlets. US-IV-30 p.25. A 1971 draft master plan mapped the “monument lands” into different classifications. Class III - Natural Environment Areas included “[m]ajor water bodies used as transportation corridors.” US-IV-31 p.26. The plan calculated the total area of the Monument as 4,381 square miles with the marine submerged lands comprising 973 square miles or 22 percent of the total. *Id.* at 33.

After the 1925 Proclamation creating the original Monument, the issue arose whether the Natives of Hoonah across Icy Strait could continue hunting seal within waters covering the marine submerged lands of the Monument. Alaska’s delegate to Congress, Anthony Dimond wrote to Secretary of the Interior Ickes asking: “Will you please tell me what the situation is with respect to taking fish and other aquatic life in the ocean waters included in the Glacier Bay National Monument, and whether if such waters are now closed to fishing, the order may be modified so as to permit the taking of hair seals therein.” Letter from Anthony Dimond to Harold Ickes (August 24, 1937), US-IV-32. Assistant Secretary Oscar Chapman replied that “the boundaries described in this [1925] proclamation include waters north of North Marble Island and Drake Island in Glacier Bay.” Letter from Oscar Chapman to Anthony Dimond (September 2, 1937), US-IV-33. Given Park Service policy that all areas supervised by the Park Service “are wildlife sanctuaries,” the Assistant Secretary

believed that the regulations should not be changed so as to permit the taking of hair seals in Glacier Bay National Monument. *Ibid.*

After the 1939 Expansion of the Monument, the issue of seal hunting in Monument waters was again raised. Been, *Preliminary Report, Inspection of Glacier Bay National Monument, Alaska, August 1 to August 27, 1939*, US-IV-34 pp.29-31. In 1946, the Acting Director of the NPS, Newton Drury wrote to the Commissioner of Indian Affairs that “Hair seals may be hunted in the waters of the national monument, at least for the present.” *Memorandum from Acting Director NPS to Commissioner of Indian Affairs* (May 14, 1946), US-IV-35. In 1954, the NPS entered an agreement with the Bureau of Indian Affairs that allowed continuance of Hoonah seal hunting in the Monument, but required the Hoonah residents to obtain a written free-use permit from the NPS to engage in the hunt. Letter from Assistant Secretary, U.S. Department of the Interior to Mayor Richard Dalton (May 25, 1954), US-IV-36. In 1974, the Acting Superintendent of Glacier Bay wrote to the Mayor of Hoonah that “all seal hunting in Glacier Bay has been terminated.” US-IV-37.¹²

In 1959, the NPS issued regulations for landing of aircraft in the Monument. The regulations permitted aircraft landings in “[t]he entire water area of the Monument, except Adams Inlet and any of the lakes within the Monument; provided, however, landings and takeoffs shall not be made on beaches or tidal flats or within one nautical mile of any tidewater glaciers in the Monument.” 24 Fed. Reg. 4519 (June 3, 1959), US-IV-38.

Both before and after Alaska Statehood, the NPS has studied the wildlife and fish of the marine submerged lands of the Monument as part of its wildlife function. Catton, US-IV-3 pp.50-59;

¹² For a more detailed discussion of seal hunting in the Monument see Catton, US-IV-3 pp.41-50.

Declaration of Tomie Lee, US-IV-8. Since Statehood, the NPS has built structures on marine submerged lands within the Monument without seeking a tidelands lease or permit from the State of Alaska. US-IV-8. The NPS has continuously administered the uplands, submerged lands, and waters as integral parts of the Monument. *Ibid.* Congress has appropriated monies for control, management, and study of the waters and submerged lands of the Monument. *Ibid.* Over the years since the creation of Glacier Bay, more money has been appropriated for the marine resources than for the uplands. *Ibid.*

When the United States applied for World Heritage Site status for Glacier Bay, the nomination stated:

The park is unique in the US in that the legislation establishing the area gave management of the ocean waters and bottom of the Bay itself, as well as an outer coastal fringe, to the National Park Service.

Declaration of Tomie Lee, US-IV-8.

SUMMARY OF ARGUMENT

When the United States established Glacier Bay National Monument, it reserved as part of that Monument its most fundamental and obvious feature – Glacier Bay. Alaska’s startling view to the contrary cannot be reconciled with law, fact, or common sense. Presidents Coolidge and Roosevelt clearly included the submerged marine lands of Glacier Bay National Monument as part of the federal reservation through boundary descriptions that run through the centers of straits and bays and extend three miles out from the Gulf of Alaska coast. As the Supreme Court ruled in *United States v. Alaska*, 521 U.S. 1 (1997), boundaries drawn in that manner necessarily include the submerged lands within. Furthermore, as in *Alaska*, the purposes of the Monument require the inclusion of the submerged lands. The submerged lands are an integral part of the Monument

because: (1) the tidewater glaciers and their moraines rest on the bottom of the fjords of Glacier Bay and have dynamic termini so that their study requires the submerged lands; (2) the remnants of ancient inter-glacial forests to be protected by the Monument occur both above and below the high tide line; and (3) brown bears and other species, for whose protection the Monument was expanded in 1939, use submerged lands as part of their habitat. Thus, it comes as no surprise that the Interior Department, which drew up the legal descriptions of the Monuments, has consistently interpreted the Monument to include the submerged lands.

Congress's intent to retain title to the submerged lands at statehood, including Glacier Bay, is also clear. As the Supreme Court held in *United States v. Alaska, supra*, Section 6(e) of the ASA retained in federal ownership submerged lands withdrawn or otherwise set aside as a refuge or reservation for the protection of wildlife. National monuments in general are reservations for the protection of wildlife and have been repeatedly termed "wildlife refuges" and "wildlife sanctuaries." The historical record of Glacier Bay National Monument demonstrates that Glacier Bay, in particular, was set aside for the protection of wildlife and that its boundaries were expanded in 1939, at Congress's urging, to create a sanctuary for brown bear. Indeed the State concedes that a primary purpose of the 1939 Expansion was to create a refuge for brown bears. Congress's intent to retain those lands is also clearly manifested by the fact that, at the time of its deliberations on Alaska's admission to the Union, Congress was well aware that the abolition of a national monument required congressional action. Congress, however, took no action to eliminate or diminish Glacier Bay National Monument at the same time that it affirmatively abolished Old Kasaan, another national monument in Southeast Alaska. Indeed, Congress specifically questioned the NPS Director whether any part of Glacier Bay could be removed from the Monument in order to provide additional acreage

to the State and was told that the entirety of the Monument was needed for the purposes for which it was established. In short, the record is clear. Glacier Bay National Monument is indeed *Glacier Bay National Monument*.

ARGUMENT

I. The United States Reserved The Submerged Lands Within The Exterior Boundaries Of Glacier Bay National Monument As An Integral Part Of That Monument

Alaska contends that, when the United States created Glacier Bay National Monument, it did not include Glacier Bay within the Monument. The Supreme Court's decision in *United States v. Alaska*, 521 U.S. 1, (1997), leaves no doubt that Alaska's remarkable suggestion is wrong. The Court instructed that, in determining whether the United States intended to reserve submerged lands located within the exterior boundaries of a reserve, the courts look both at the description of the boundaries and the purposes of the reserve. In addition, the practical interpretation of a reservation order by the agency entrusted with the management of the reserve is entitled to deference. The examination of those factors confirms that the United States reserved the submerged lands within Glacier Bay National Monument as part of the Monument.

A. The Boundary Description In President Coolidge's 1925 Proclamation Expresses The Clear Intent To Include Submerged Lands

The Supreme Court concluded in *United States v. Alaska* that the placement of reservation boundaries seaward of the high-water mark provides compelling evidence of the government's intention to include marine submerged lands within the reservation. 521 U.S. at 38-39. The reservation boundaries in this case are indistinguishable in that respect from the boundaries at issue in Alaska. The boundary description in the 1925 Proclamation by its terms necessarily embraces

submerged lands. The prescribed boundary cuts across Glacier Bay in an irregular line from the most easterly point of land at the entrance to Geikie Inlet, southeasterly to the most southerly point of North Marble Island, thence southeasterly to the most westerly point of the largest island at the entrance of Bear Track Cove, thence following the mean high tide line of the southerly shore of that island to its most westerly point and thence due west to the mainland. That boundary includes the upper part of Glacier Bay within the Monument.¹³

Four elements are especially significant about this carefully written description. First, the boundary crosses Glacier Bay. When the intent is to exclude the bed of a navigable water body from a reservation, the standard practice is to “meander” the boundary along the shoreline rather than drawing the boundary across the water body. *Idaho*, 533 U.S. at 266 (noting district court’s finding that the 1873 Executive Order establishing the Coeur d’Alene Indian Reservation set the northern boundary across Coeur d’Alene Lake, which was “contrary to the usual practice of meandering a survey line along the mean high water mark”). Second, the portion of the boundary crossing Glacier Bay is not a straight line, but contains a number of changes in direction from island to island, making clear the intent to include a specific area of submerged lands. Third, the carefully written boundary follows the mean high tide line only in instances where the intent was to exclude the waters to the south. Such was the case with Geikie Inlet, where the boundary ran along the mean high tide line of the northern shore. Even more telling is the treatment of the island at the entrance of Bear Track Cove. The boundary in this area runs from the southern point of North Marble Island to the “*most westerly* point of the largest island at the entrance of Bear Track Cove” thence “following the mean

¹³ The boundary description is set out at pp.8-9, *supra*, and at US-IV-1. A map depicting the 1925 boundary may be found at Catton, US-IV-3 p.35.

high water of the southerly shore to the most easterly point of said island” (emphasis added). If the intention had been merely to include the island without any of its appurtenant submerged lands, the boundary would have been written to proceed from the southern point of North Marble Island to the *most northerly* point of the island at the entrance of Bear Track Cove, and thence following the mean high water line. The description as written necessarily includes the tidelands and appurtenant waters between the most northerly point of the island and its most westerly point. Fourth, the 1925 Proclamation states that the land described contained approximately 1,820 square miles, a figure that includes both uplands and submerged lands. *See* US-IV-9 p.3. The Proclamation thereby necessarily included the submerged lands. *Idaho*, 533 U.S. at 274 (citing with approval the district court’s finding that the acreage figure of the survey of the Coeur d’Alene Reservation necessarily included the lake bed).

The United States was under no obligation, in describing the boundaries of the reserved lands, to describe the submerged lands more specifically. The Supreme Court and other courts have repeatedly held that the term “land” in the context of reservations can include both uplands and submerged lands. *Alaska*, 521 U.S. at 40 (executive order setting aside as a national petroleum reserve “all of the public lands within the following described area”¹⁴ reserved submerged lands); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 87-89 (1918) (reservation of a “body of lands” in southeastern Alaska for the Metlakatla Indians included adjacent waters and submerged lands); *Alaska v. United States*, 213 F.3d at 1094 (9th Cir. 2000)(“United States clearly intended to

¹⁴ Report of the Special Master in *United States v. Alaska*, No. 84, Orig. (Mar. 1996), at 343 n.1.

include submerged lands when it withdrew ‘public lands’ within PLO 82”).¹⁵

B. The Boundary Description In President Roosevelt’s 1939 Proclamation Expresses The Clear Intent To Include Submerged Lands

President Roosevelt’s boundary description in the 1939 Expansion of the Monument likewise necessarily includes submerged lands. The 1939 Proclamation provides that “all of the following-described lands in Alaska are hereby added to and made a part of the said Glacier Bay National Monument.” US-IV-2. The boundary runs along “the principal channel of Excursion Inlet” then along “the center of Icy Passage, North Passage, North Indian Pass and Cross Sound to the Pacific Ocean.” *Ibid.* In the Pacific Ocean (the Gulf of Alaska), the boundary is described as “following the general contour of the coast at a distance of 3 nautical miles therefrom.” *Ibid.*

The intent to include the submerged lands is clear not only from the words of the legal description appearing in the 1939 Proclamation, but also from the history of that description. The decision to place the boundary through the center of water bodies and three miles out into the Pacific Ocean was a departure from a 1924 temporary withdrawal issued by President Coolidge when he was considering how much land to include in the Monument. The boundary in the 1924 withdrawal

¹⁵ The President had undeniable authority to reserve Glacier Bay and other submerged lands as part of the Monument. The Antiquities Act of 1906 authorizes the President, “in his discretion to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned and or controlled by the Government of the United States to be national monuments.” 16 U.S.C. § 431. The term “lands owned and or controlled by the Government of the United States” includes submerged lands prior to the time such lands pass to a State. *United States v. California*, 436 U.S. 32, 36 (1978) (“There can be no serious question, therefore, that the President in 1949 had power under the Antiquities Act to reserve the submerged lands and waters within the one-mile belts as a national monument, since they were ‘controlled by the Government of the United States.’”). See also Proc. No 3443, December 28, 1961, 76 Stat. 1441; Proc. No. 4346, February 1, 1975, 89 Stat. 1237; Proc. No. 4359, March 28, 1975, 89 Stat. 1254; Proc. No. 7392, January 17, 2001, 66 Fed. Reg. 7335 (relating to the designation of submerged lands of the Buck Island Reef National Monument). The issue is one of Executive intent and not one of Executive authority.

follows the shore of Icy Strait, Cross Sound and the Pacific Ocean. Executive Order 3948 (April 1, 1924), US-IV-10. While placing the boundary through the center of Icy Strait and Cross Sound was a departure from the 1924 withdrawal, it was consistent with the boundary of the area described in the 1936 Alaska hunting regulations where bear hunting was prohibited. 1 Fed. Reg. 577 (June 11, 1936), US-IV-16 p.577.

The 1939 Proclamation's boundaries are located exactly as proposed in 1938 by NPS Chief of Forestry Coffman and Field Naturalist Dixon in their "Report on Glacier Bay National Park (Proposed), Alaska." US-IV-9 p.2. Their report leaves no doubt that the intent was to include submerged lands. Coffman and Dixon set out detailed figures on the breakdown between uplands and submerged lands in the original Monument, in the additions as a whole, in the additions from the Tongass National Forest, and the additions from the public domain. US-IV-9 p.3. At the end of their description, they state unequivocally that the expansion includes submerged lands. *Id.* at 2.

C. Excluding Submerged Lands From The Monument Would Compromise The Purposes Of The Reservation

1. *Excluding the submerged lands would undermine the purpose of setting aside and studying the tidewater glaciers because the glaciers themselves sit on fjord bottoms and their behavior can only be understood in relation to the geometry of the fjords in which they are located.* The 1925 Proclamation identifies the presence in Glacier Bay of "tidewater glaciers of first rate." As explained above (pp. 11-13), tidewater glaciers sit on the fjord bottoms and demonstrate a pattern of advance and retreat and, consequently, the location of the terminus is constantly changing. During periods of glacial surge or rapid calving, the terminus location can change more than a kilometer in a single year. During the two-hundred-year period stretching from the middle of the 18th century until

the middle of the 20th century, when retreat was the dominant trend of glacier behavior in Glacier Bay, the retreat opened approximately 200 kilometers of fjords. The dynamics of glacial advance and retreat is controlled by and can only be understood by studying the geometry of the fjord, including the submarine moraines.

Although the science of glaciology has advanced since the time of the creation of the Monument, by the early 20th century, glacial science had clearly established a linkage and identified the relationship between tidewater glaciers and the fjords in which they existed. For several decades prior to the Proclamations, the study of glacier systems included not only the glacier, but also the glacier's bed, its valley or fjord, and the deposits it produced. Glacial science recognized that the dynamics of glacier advance and retreat were intimately coupled with the adjacent and underlying submerged lands. Thus, a national monument set aside for the "scientific study of glacial behavior" (1925 Proclamation, US-IV-1) would be incomplete without the inclusion of submerged lands. It is simply not plausible that a reservation setting aside Glacier Bay as a national monument because of its tidewater glaciers would exclude from the monument the fjord bottoms on which the glaciers now sit, or the fjord bottoms on which the glaciers sat in the past and may once again sit in the future.

2. *Excluding the submerged lands would undermine the purpose of protecting the remnants of ancient inter-glacial forests because those forests are located both above and below mean high tide.* As explained above (pp.13-14), the 1925 Proclamation also set aside the Monument for preservation and study of remnants of ancient inter-glacial forests. Those remnants occur both above and below the high water line. Molnia, US-IV-4 p.37;US-IV-7 p.36 (March 6,1939, letter from the Interior and Agriculture Departments to President Roosevelt supporting expansion of the Monument and noting that the ancient forest remnants had been uncovered "by the erosive action of streams *and*

waves” (emphasis added)). If the Monument were limited to uplands, it would not provide the full measure of envisioned federal protection to those unique geologic specimens, which were deemed especially worthy of preservation and study.

3. *Excluding the submerged lands would undermine the purpose of protecting wildlife, particularly the brown bear, which makes extensive use of submerged lands.* The 1925 Proclamation set aside the Monument for the study of movements of “flora and fauna.” Where the purpose of a national monument is to study wildlife, the proclamation will be interpreted so as to provide protection for that wildlife. *Cappaert v. United States*, 426 U.S. 128, 141 (1976). (where proclamation creating monument designated fish as object of scientific interest, proclamation reserved sufficient water to protect the fish). Additionally, the 1925 Proclamation directed that the Monument be administered pursuant to the Park Service Organic Act of 1916, which requires that the unit be administered “to conserve the scenery and the natural and historic objects *and the wild life therein* and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” 16 U.S.C. § 1 (emphasis added).

As Alaska itself recognizes, the primary purpose of the 1939 Expansion of the Monument was to create a “refuge for brown bear.” Amended Complaint para. 57. The administrative history as set forth above (pp. 15-19), confirms Alaska’s concession. The administrative history also indicates that the creation of the wildlife sanctuary for brown bears was done at the recommendation of congressional committees that recognized the need to set aside habitat for the protection of the species.

Excluding submerged lands from the Monument would undermine the protection of brown bears, both because the bears use marine submerged lands and because they were customarily hunted

from boats in southeast Alaska. The administrative history of the expansion of the Monument reveals a keen awareness that, although the Monument, as created in 1925, contained some brown bears, it did not adequately protect brown bear habitat. As Coffman and Dixon explained in their 1938 report, the proposed expansion of the Monument would “round[] it out into a biological unit representative of the flora and fauna from the bare glaciers to the mature forests of the seacoasts and with the special purpose of preserving the Alaska bear” US-IV-9 p.ii. That biological unit clearly included the marine submerged lands. Coffman and Dixon laboriously calculated and reported the acreage of submerged lands to be added to the Monument. *Id.* at 3. In addition to identifying the broader needs of brown bears, they spoke of whales, porpoises and hair seals as well as salmon, halibut and other species of fish in the area proposed for the expansion. *Id.* at 9, 10.

Coffman and Dixon’s desire to “round out” the Monument into a complete biological unit represented NPS policy. During 1938 hearings before the House Select Committee on Conservation of Wildlife Resources, NPS Director Cammerer stated:

Examinations of areas proposed for addition to the national park system are made to determine the fitness of such areas as biological units or as sanctuaries for the preservation of rare species of wildlife not adequately represented elsewhere.

US-IV-39 p.202. In addition, NPS understood that the 1939 Expansion was needed to include the “real habitat” of the brown bear. A 1954 prospectus on the Monument explained the purpose of the expansion as follows:

The monument was established February 26, 1925 under Presidential Proclamation No. 1733. . . . Further study of the Area and vicinity disclosed that the boundaries so defined did not include the real habitat of the Alaska brown bear. . . . Under the proclamation of April 18, 1939 (No. 2330) an addition was made which included the latter area.

US-IV-28 p.30.

Given that history, it would be wrong to limit the Monument to uplands and exclude the marine habitat of the brown bear populations in that region. As explained above (pp. 19-20), brown bear make extensive use of marine submerged lands. They rely on tidelands to forage for mollusks, other crustaceans, and washed-up carcasses of marine mammals and fish. They fish in the mouths of streams, and they swim across fjords and to islands where they forage for bird eggs. They have been sighted on many of the small islands in the Monument and up to four miles from shore. Although bear biology has progressed since 1939, bear use of tidelands was well known at that time, and bear had been observed on small islands in Glacier Bay.

In creating a sanctuary for brown bear, the President and Congress recognized the importance of preventing hunting practices that could lead to their indiscriminate slaughter. In Southeast Alaska, hunters regularly killed bears from boats, shooting the animals as they roamed or foraged on the shore and tidelands. Both President Roosevelt and the Senate Special Committee on Conservation of Wild Life Resources (which recommended the expansion) were aware of the practice of shooting bear from boats. Thus, including marine submerged lands in the 1939 Expansion not only provided brown bear an important part of their habitat, but also gave the federal government indisputable authority to forbid a hunting practice that threatened those bear populations.

C. The Department Of The Interior Has Consistently Interpreted The Proclamations To Include The Marine Submerged Lands

Congress has authorized the President to establish national monuments that include submerged lands. *California*, 436 U.S. at 36. The question whether a proclamation includes submerged lands is accordingly one of Executive intent. *Ibid*. The Supreme Court accords great weight to the Department of the Interior's interpretation of withdrawal orders. *Udall v. Tallman*,

380 U.S. 1, 4 (1965). That deference is warranted here. Although the President signed the Proclamations, the Supreme Court accords deference to the Interior Department's interpretation of the President's executive orders as well as the Secretary of the Interior's public land orders. *Id.* at 3-4, 16-18. Congress likewise relies on the Interior Department's interpretation of executive orders. *Idaho*, 533 U.S. at 268 (Senate sought determination from the Secretary of Interior whether an executive order establishing the Coeur d'Alene Reservation included the bed of the navigable Coeur d'Alene Lake and St. Joe River therein). The Interior Department's interpretations are entitled to especial weight here because the Department prepared the Proclamations and recommended their signing. See US-IV-7 p.36. The Department's practical implementation of those Proclamations is very probative of their proper interpretation. *Tallman*, 380 U.S. at 17-18.

The Department of Interior has consistently interpreted the Proclamations as including Glacier Bay and other marine submerged lands within the Monument boundaries as part of the Monument. The Department of the Interior's press release announcing the 1939 Expansion specifically noted that the Monument extended to the three-mile limit in the Gulf of Alaska. US-IV-11 p.1. The press release also included whales, other sea mammals and fish among the list of wildlife in the Monument. *Id.* at 2. As set forth above (pp. 20-24), the Interior Department has consistently interpreted the Monument to include the submerged lands therein. That consistent interpretation of the Monument boundaries properly reflects the plain terms of the boundary descriptions and the purposes for which the Monument was created.

II. Congress Retained The Submerged Lands In Glacier Bay National Monument At Statehood

The Supreme Court has instructed that "we must ask not only whether the United States

intended a reservation to include submerged lands, but also whether the United States intended to defeat a future State's title to those lands." *Alaska*, 521 U.S. at 41. The Court has since elaborated on the proper analysis of this part of the *Alaska* test:

We explained that the two-step test of congressional intent is satisfied when an Executive reservation clearly includes submerged land, and Congress recognizes the reservation in a way that demonstrates the intent to defeat state title. We considered whether Congress was on notice that the Executive reservation included submerged lands, and whether the purpose of the reservation would have been compromised if the submerged lands had passed to the State. Where the purpose would have been undermined, we explained "[i]t is simply not plausible that the United States sought to reserve only the upland portions of the area."

Idaho, 533 U.S. at 273-274 (citations to *Alaska* omitted).

Congress's intent to retain the marine submerged lands at issue here, and correspondingly to defeat the State's title, is clear from two sources. First, as the Supreme Court held in *Alaska*, Section 6(e) of the ASA defeated Alaska's title to any lands, including submerged lands, "withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." 521 U.S. at 57. Alaska itself alleges in its Amended Complaint that a primary purpose of the 1939 Expansion of the Monument was to create a "refuge for the protection of brown bear." Amended Complaint para. 57. The administrative history set out above (pp. 14-20), confirms that the Monument was withdrawn or otherwise set apart as a refuge or reservation for the protection of wildlife.

Second, Congress's intent to retain title to the submerged lands in the Monument is also apparent from Congress's decision in the ASA to leave the Monument unimpaired. National monuments are intended to be permanent. Once designated, national monuments can only be abolished by Act of Congress. 39 Op. Atty. Gen. 185 (1938). Early Alaska statehood bills contained provisions that would have abolished some monuments and diminished others. During the

deliberations on Alaska Statehood, Congress was on notice of the extent of Glacier Bay National Monument and interrogated Park Service officials on whether the monuments in Alaska could be diminished in size. The Director of the NPS testified that all lands then in Glacier Bay National Monument should remain part of that monument. Congress also received maps showing that Glacier Bay National Monument included marine submerged lands. Ultimately, Congress took no action to diminish any of the Alaska monuments other than Old Kasaan.

A. Congress Intended To Defeat State Title To The Submerged Lands In Glacier Bay National Monument When It Enacted Section 6(e) Of The Alaska Statehood Act

Section 6 of the ASA granted certain lands and other property to the new State. In Section 6(e), Congress granted certain property relating to fish and wildlife conservation and protection to the State, subject to an important proviso:

Provided, That such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife nor facilities utilized in connection therewith, or in connection with general research activities relating to fisheries or wildlife.

72 Stat. 340-341. The Supreme Court concluded in *Alaska* that “[i]n § 6(e) of the Statehood Act, Congress clearly contemplated continued federal ownership of certain submerged lands – both inland submerged lands and submerged lands beneath the territorial sea – so long as those submerged lands were among those ‘withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife.’” 521 U.S. at 57. The Court explicitly held that “the operative provision of the Alaska Statehood Act, § 6(e), reflects a very clear intent to defeat state title.” *Ibid*.

At the date of Alaska Statehood, Glacier Bay National Monument had clearly been set apart for the purposes described in Section 6(e). That Section refers, without limitation, to “lands

withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife.” When Secretary of Interior Oscar Chapman proposed this language in 1950, he clarified that lands set aside for the protection of wildlife would remain in federal ownership regardless of the statutory authority under which they were set aside:

On the other hand, the United States would retain administrative jurisdiction over the Pribilof Islands, and over *all other Federal lands and waters* in Alaska which have been set aside as wildlife refuges or reservations pursuant to the fur seal and sea otter laws, the migratory bird laws *or other Federal statutes of general application*.

US-IV-40 p.49 (emphasis added). Thus, lands reserved for wildlife purposes under the Antiquities Act remain in federal ownership. Because the broad language of what became Section 6(e) included national parks and monuments, it removed a significant obstacle to Alaska’s admission. The NPS, which had objected to former statehood bills because of provisions that threatened to convey all or portions of NPS lands in Alaska to the State, ceased its opposition to the statehood bills once the Chapman language was added in 1950. Catton, US-IV-3 p.110.

1. National monuments under the administration of the NPS are generally set apart for the protection of wildlife therein. Since their inception, national parks and monuments have had, as a core purpose, the protection of wildlife. The 1872 statute that created Yellowstone National Park as the world’s first national park prohibited the “wanton destruction” of fish and wildlife inside the park. Act of May 1, 1872, 17 Stat. 33, 16 U.S.C. § 22. This ban on wanton destruction was extended to other early-established parks. 16 U.S.C. §§ 43, 92. In 1909, President Roosevelt created the Mount Olympus National Monument (now Olympic National Park), and identified the summer range of the Olympic elk as one of the two objects of scientific interest justifying the establishment of the monument. Presidential Proclamation of March 2, 1909, 35 Stat. 2247, US-IV-

41. Since 1916, Congress has directed that the NPS administer national monuments to conserve the “wild life therein” so as to “leave them unimpaired for the enjoyment of future generations.” 16 U.S.C. § 1. Thus, as a general matter, monuments administered by the NPS are set apart for protection of the wildlife therein.

2. *Congress was on notice that Glacier Bay National Monument in particular had been set apart for the protection of wildlife.* Section 6(e) prevents all lands, including submerged lands set apart for the protection of wildlife, from passing to the State of Alaska regardless of whether Congress focused specifically on the individual reservation at issue. *Alaska*, 521 U.S. at 61 (holding that submerged lands in the proposed Arctic National Wildlife Range did not pass to State because the lands had been set apart as wildlife refuge). Alaska itself alleges that a primary purpose of the 1939 Expansion was the protection of brown bear. Indeed, Congress was repeatedly put on notice that Glacier Bay had been set aside for the protection of wildlife.

The Department of Agriculture placed Glacier Bay on its list of wildlife refuges. US-IV-12 p.5. As explained above (pp. 15-19), the Interior Department repeatedly informed Congress that the NPS was considering an expansion of Glacier Bay to protect brown bear. The Interior Department informed Congress that the proposed boundaries of the expansion would run through the center of Icy Strait and Cross Sound. The expansion was made largely at the behest of the congressional wildlife committees. After the 1939 Proclamation, the NPS informed Congress that the expansion had occurred and that it “gave much-needed protection to the giant brown bear.” US-IV-25 p.353.

B. Congress Clearly Expressed Its Intent To Retain The Submerged Lands By Rejecting Attempts To Abolish Or Diminish The Monument

1. *National monuments are intended to be permanent.* In 1916, Congress specified that the

National Monument designations are permanent. In that year, Congress established the NPS and directed the NPS to administer the monuments so as to “conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will *leave them unimpaired for the enjoyment of future generations.*” 16 U.S.C. § 1 (emphasis added). The Attorney General thereafter issued an opinion advising that the Executive is without authority to abolish a national monument once it has been established. 39 Op. Atty. Gen. 185 (1938). The Attorney General did suggest that the President could diminish the size of a national monument if he found that the areas to be excluded from the monument were outside the smallest area compatible with the proper care and management of the monument. *Id.* at 188. President Eisenhower made such a finding when excluding Gustavus and portions of Excursion Inlet from Glacier Bay Monument in 1955. US-IV-27. But abolition, or diminishment in the absence of a finding that the area to be excluded from the monument was not needed for proper care and management, would be contrary to the congressional directive.

2. *Congress was aware that abolition of a national monument requires an Act of Congress.* Given the Executive’s inability to abolish national monuments, the abolition of national monuments must occur through the legislative process. During the period that the ASA was under consideration, Congress passed no fewer than 8 statutes abolishing national monuments. Pub.L. 81-292, 63 Stat. 691, September 7, 1949 (abolishing Father Millet (Fort Niagara) National Monument, NY); Pub.L. 81-648, 64 Stat. 404, September 3, 1950 (abolishing Holy Cross National Monument, Colorado); Pub.L. 81-652, 64 Stat. 405, August 3, 1950 (abolishing Wheeler National Monument, Colorado); Pub.L. 83-360, 68 Stat. 98, May 17, 1954 (abolishing Shoshone Cavern National Monument, Wyoming); Pub.L. 84-179, 69 Stat. 380, July 26, 1955 (abolishing Old Kasaan National Monument,

Alaska); Pub.L. 84-447; 70 Stat. 61, March 29, 1956 (abolishing Castle Pinkney National Monument, S.C.); Pub.L. 84-846, 70 Stat. 730, July 30, 1956 (abolishing Verendrye National Monument, N.D.); Pub.L. 84-891, 70 Stat. 898, August 1, 1956 (abolishing Fossil Cycad National Monument, S.D.).

In light of its actions, Congress understood the permanency of national monuments and the need for congressional action to abolish them. Indeed, Congress specifically discussed the abolition of Old Kasaan National Monument in Alaska during hearings leading up to the ASA. The Senate Committee on Interior and Insular Affairs invited the Director of the NPS, Conrad Wirth, to address the Committee on whether any areas being administered by the NPS could appropriately be returned to the public domain so as to become available to the proposed State. Director Wirth identified Old Kasaan as a monument that could be abolished because the antiquity that had justified its creation, old totem poles, had disappeared. *Hearing before the Senate Comm. on Interior and Insular Affairs on Statehood for Alaska*, 83rd Cong., 2d Sess. 55 (1954), US-IV-42.

3. *Congress rejected changes to the boundaries of the Monument.* During the Alaska statehood deliberations, Congress was on notice that Glacier Bay National Monument included marine submerged lands, and it rejected any attempt to change its boundaries. In April 1947, the House Subcommittee on Territorial and Insular Affairs held hearings on H.R. 206. *Hearings before the House Subcomm. on Public Lands on Alaska Statehood*, 80th Cong., 1st Sess., US-IV-43. Section 4 of that bill would have granted “all public property and all vacant and unappropriated lands” in Alaska to the State except:

- (a) All such lands and property as are in the possession of and actually used by the United States or some department or agency thereof for some governmental purpose, but not including lands reserved or withdrawn from entry, embraced within the boundaries of the said state, except as herein specifically described;
- (b) lands reserved or devoted to the support of the common schools of Alaska and the University of

Alaska hereinafter described; (c) Mount McKinley National Park; (d) *Glacier Bay National Monument, as established, described, and delimited in the proclamation of the President of the United States dated February 26, 1925 (43 Stat.1988)*; (e) the naval petroleum reserve situated in northern Alaska, as established, described, and delimited in Executive order of the President of the United States dated February 27, 1923.

Id. at 2 (emphasis added). Unlike the ASA as enacted, Section 4 of H.R. 206 provided that “[a]ll of the property of the United States situated in the Territory of Alaska used in connection with the conservation and protection of fisheries, and of the fur and game of Alaska are hereby conveyed to the State of Alaska. *Ibid.*

Even before the House Subcommittee held hearings, the bill’s omission of Katmai National Monument and the reference to the 1925 boundaries of Glacier Bay National Monument caused protests from conservationists. Alaska Delegate Bartlett, who had introduced the bill, responded by letter, explaining why he believed that Katmai National Monument should be abolished. Letter from E. L. Bartlett to Fred Packard (February 3, 1947), US-IV-44. It appears from his response that the reference to the 1925 boundaries of Glacier Bay in H.R. 206 was an oversight on his part. In the letter, Bartlett stated that “nor with a trifling exception have [sic] to do only with a few square miles of land, has any suggestion been made which would affect the status of Glacier Bay National Monument.” *Ibid.*¹⁶

In the same hearing in which NPS Director Wirth informed Congress that the Old Kasaan National Monument no longer served the purpose for which it was reserved, Wirth reviewed the status of Glacier Bay National Monument and concluded that all of it should be in federal ownership. US-IV-42 p.54. Mr. Wirth used a map to indicate the location of the Monument and provided

¹⁶ Bartlett’s reference to “a few square miles of land” appears to be a reference to calls to exclude Gustavus from the Monument. Catton, US-IV-3 p.107.

acreage figures for the Monument *that included the submerged lands*. US-IV-42 p.46. He described the Monument as “a series of glaciers on a mountain range, *with the Glacier Bay going up through the center.*” *Ibid.* (emphasis added). Wirth explained to the Senators that, despite the recession of some of the glaciers, there were still numerous tidewater glaciers in the Monument and that the purpose for which the Monument had been established had in no way disappeared. *Id.* at 47.

Director Wirth also expressed the belief that “any land within an approved boundary, good land used for national-park purposes, ought to be in Federal ownership.” US-IV-42 p.54. Significantly, Wirth’s testimony regarding Glacier Bay contrasted with his testimony regarding Katmai National Monument and Mt. McKinley National Park, where the NPS was giving consideration to recommending deletions. In Katmai, Mr. Wirth was adamant about retaining Brooks Lake:

Mr. WIRTH. I think all of Brooks Lake should be in the boundary, because that is a protection. That is one of the main breeding grounds of salmon, and the Fish and Wildlife Service has a station there to protect and count the salmon and regulate it.

Id. at 39.

In the course of the legislative deliberations leading up to the ASA, the Department of Interior prepared a series of atlases showing the extent of federal withdrawals and reservations in Alaska. *Atlas of Alaska Showing Federal Withdrawals and Reservations, February 1952 – United States Department of the Interior; Bureau of Land Management, Marion Clawson, Director.* In March 1957, during the House Subcommittee’s hearings on Alaska statehood, Representative A.L. Miller of Nebraska referred to the atlas and asked that it be made a part of the file. US-IV-45 p.195. The atlas was also apparently available during the 1954 Hearings at which NPS Director Wirth testified about the extent of the Monument and his view that all lands within the Monument should be in

federal ownership. See US-IV-42 p.10. The Department of Interior issued a final version of the atlas in July 1958. The 1958 Atlas shows the Monument taking in portions of Icy Strait and Cross Sound, as well as Glacier Bay, Dundas Bay, Taylor Bay, and the offshore area along the Outer Coast extending to the three-mile limit. US-IV-46. The 1958 Atlas also shows the 1955 exclusion of Gustavus from the Monument. *Ibid.* Thus that Atlas graphically depicted for Congress the full extent of Glacier Bay National Monument, including its submerged lands. The 1958 Atlas put Congress on notice that Glacier Bay National Monument included submerged lands. *United States v. Alaska*, 521 U.S. at 56 (with regard to another map in the same atlas, the Supreme Court stated “By virtue of that submission, Congress was on notice when it passed the Alaska Statehood Act that the Secretary of the Interior had construed his authority to withdraw or reserve lands delegated by the President, . . . to reach submerged lands.”); *see id.* at 56 n.2.

Viewed against this record, Congress’s intent could not be more clear. Congress broadly authorized the President to establish national monuments, including reservations that embrace submerged lands. The establishment of a national monument was intended to be permanent – both because the statute specified that the purpose of the establishment was to preserve the national monuments unimpaired for future generations and because only Congress could abolish a national monument. Congress was well aware of the need for legislation to abolish national monuments. Congress was also made aware, both by NPS testimony and by the 1958 Atlas, that Glacier Bay National Monument included the submerged lands. During its deliberations on the ASA, Congress passed no fewer than 8 statutes abolishing national monuments, including Old Kasaan, Alaska. Congress considered statehood bills that would have abolished Katmai National Monument and limited Glacier Bay National Monument to its 1925 boundaries, but rejected those proposals. Thus,

as in *Idaho* and *Alaska*, Congress was on notice of the extent of the reservation and that the purposes of the reservation would be undermined if the lands passed to the State. *See Idaho*, 533 U.S. at 273-274 (citing *Alaska*, 521 U.S. at 41-46, 55-61). Congress rejected proposals to diminish the Monument. Thus, Congress “recognize[d] the reservation in a way that demonstrates an intent to defeat state title.” *Id.* at 273. “It is simply not plausible that the United States sought to reserve only the upland portions of the area.” *Id.* at 274 (quoting *Alaska*, 521 U.S. at 39-40).

CONCLUSION

The motion of the United States for summary judgment should be granted.

Respectfully submitted.

Theodore B. Olson
Solicitor General

Edwin S. Kneedler
Deputy Solicitor General

Jeffrey P. Minear
Assistant to the Solicitor General

Gary B. Randall
Bruce M. Landon
Michael W. Reed
Trial Attorneys

*United States Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217*

By: _____

Bruce M. Landon
*Trial Attorney, General Litigation Section
Environment and Natural Resources Division
United States Department of Justice
801 B Street, Suite 504
Anchorage, AK 99501
(907) 271-5452*

July 24, 2002

TABLE OF EXHIBITS
MOTION OF THE UNITED STATES
FOR PARTIAL SUMMARY JUDGMENT
ON COUNT IV

To avoid confusion between the exhibits relating to the various motions for partial summary judgment in this action, each exhibit of the United States is designated as “US” followed by a Roman numeral that corresponds to the count in Alaska’s Amended Complaint to which the individual motion for partial summary judgment applies, followed by the number of the exhibit and page number (where appropriate). The bottom of each page of the exhibits has been labeled with the number of the exhibit as well as the number of the page in that exhibit. Because many exhibits are excerpts of longer documents or have title pages or tables of contents, the pagination of an exhibit may not correspond to the pagination of the original documents. Whenever we indicate a page number in an exhibit citation in this memorandum, the page number refers to the pagination of the original document.

One exhibit calls for comment. Appendix 6 to US-IV-8 is a pre-release version of a DVD entitled “Glacier Bay-Beneath the Reflections - A Celebration of Glacier Bay’s Underwater Environment” The original is in DVD format. The copies are in VHS format. In order to avoid breakage of the VHS version, Appendix 6 is in a video jacket separate from the three-ring binder holding the remaining exhibits.

US-IV-1	Proclamation No. 1733 of February 26, 1925, 43 Stat. 1988
US-IV-2	Proclamation No. 2330 of April 18, 1939
US-IV-3	Catton, “Historical Report Relating to Claims to Submerged Lands in Glacier Bay National Park, Alaska” December 2001
US-IV-4	Molnia, “The State of Glacier Science and its Relationship to the Submerged Lands Adjacent to and Beneath the Tidewater Glaciers of Glacier Bay at the Time of the Founding and Expansion of Glacier Bay National Monument, Alaska” December 18, 2001
US-IV-5	Trabant, “Expert Witness Report for Glaciology Relating to Claims to Submerged Lands in Glacier Bay, Alaska” December 18, 2001
US-IV-6	Barnes, “Brown Bear Use of Marine Habitats in Alaska with Emphasis on Glacier Bay” February 1, 2002
US-IV-7	Kaufmann, “Glacier Bay National Monument, Alaska, A History of its Boundaries.” June 1954
US-IV-8	Declaration of Tomie Lee

- US-IV-9 Coffman and Dixon "Report on Glacier Bay National Park (Proposed), Alaska" December 20, 1938
- US-IV-10 Executive Order No. 3983, April 1, 1924
- US-IV-11 U.S. Department of the Interior Memorandum for the Press, April 25, 1939
- US-IV-12 "National Wild-life Reservations" United States Department of Agriculture Miscellaneous Publication No. 51 (1929)
- US-IV-13 3 CFR (1938-1943 Compilation) Chap. IV Reorganization Plan 2 § 4(f)
- US-IV-14 Letter from Senator Peter Norbeck to NPS Director Horace Albright dated January 10, 1931
- US-IV-15 "Protection and Preservation of the Brown Bear and Grizzly Bears of Alaska" Hearing before the Special Committee on Conservation of Wild Life Resources, U.S. Senate, January 18, 1932
- US-IV-16 Regulations Respecting Game Animals, Land Fur-bearing Animals, Game Birds, Nongame Birds, and Nests and Eggs of Birds in Alaska, 1 Fed. Reg. 573, June 11, 1936
- US-IV-17 Letter from Acting Dir. NPS De Maray to Secretary of Interior Ickes dated September 2, 1938
- US-IV-18 Senate Resolution No. 246, 71st Cong., 2d Sess.
- US-IV-19 Regional Planning - Part VII Alaska: Its Resources and Development, 1937 (Excepts)
- US-IV-20 Notes on Proposed Glacier Bay National Park and cover letter, 1932
- US-IV-21 Letter of Senator Walcott to NPS Director Albright, dated March 18, 1932
- US-IV-22 Letter of NPS Director Albright to Cong. Shreve, dated March 24, 1932
- US-IV-23 Memorandum from President Franklin D. Roosevelt to Secretary of Interior Ickes dated April 21, 1937
- US-IV-24 Memorandum from Acting Secretary of the Interior West to President Franklin D. Roosevelt, dated June 25, 1937, compiled in Nixon, *Franklin D. Roosevelt and Conservation, 1911-1945*
- US-IV-25 "The Status of Wild Life in the United States," S. Rept. 1203, 76th Cong., 3d Sess. (Feb. 7, 1940)

- US-IV-26 Calahane, "A Boundary Study of Glacier Bay National Monument" Dec. 20, 1954
- US-IV-27 Proclamation No. 3089, 20 Fed. Reg. 2103 (April 5, 1955)
- US-IV-28 Mission 66 Prospectus, Sitka and Glacier Bay National Monuments, April 20, 1956
- US-IV-29 United States Geological Survey 1:63,600 Maps Mt. Fairweather (B-1), (B-2), (C-5) and Juneau (B-5)
- US-IV-30 Butts, "Master Plan of Glacier Bay National Park" 1964
- US-IV-31 Draft Master Plan Glacier Bay National Monument, 1971 (Excerpts)
- US-IV-32 Letter from Anthony Dimond to Secretary of the Interior Ickes dated August 24, 1937
- US-IV-33 Letter from Asst. Secretary of Interior Oscar Chapman to Anthony Dimond dated September 2, 1937
- US-IV-34 Been "Preliminary Report Inspection of Glacier Bay National Monument, Alaska, August 1 to August 27, 1939"
- US-IV-35 Memorandum from Acting Director NPS to Commissioner of Indian Affairs dated May 14, 1946
- US-IV-36 Letter from Asst. Secretary, U.S. Dept. of the Interior to Mayor Richard Dalton of Hoonah, Alaska
- US-IV-37 Letter of Charles Janda to Mayor Frank See, dated April 2, 1974
- US-IV-38 NPS General Rules and Regulations, Landing of Aircraft, 24 Fed. Reg. 4519 (June 3, 1959)
- US-IV-39 "Conservation of Wildlife," Hearing before the House Select Committee on Conservation of Wildlife Resources, Pursuant to H. Res. 11, 75th Cong. 3rd Sess. (1938) (Excerpts)
- US-IV-40 "Alaska Statehood" Hearings on H.R. 331 and S. 2036, 81st Cong., 2d sess., April 24-29, 1950 (Excerpts)
- US-IV-41 Proclamation of March 2, 1909, 35 Stat. 2247
- US-IV-42 U.S. Senate, Committee on Interior and Insular Affairs, Hearings on Alaska Statehood, 83rd Cong., 2d Sess. (1954) (Excerpts)

- US-IV-43 H.R. Subcommittee on Territorial and Insular Possessions, Hearings on H.R. 206 and H.R. 1808 (1947) (Excerpts)
- US-IV-44 Letter from Delegate Bartlett to Fred Packard dated February 3, 1947
- US-IV-45 "Statehood for Alaska," Hearings before the House Subcommittee on Territorial and Insular Affairs, 85th Cong., 1st Sess. 1957 (Excerpts)
- US-IV-46 1958 Atlas of Alaska showing Federal Withdrawals and Reservations, Bureau of Land Management, U.S. Department of Interior
- US-IV-47 Trager, "Glacier Bay Expedition 1939"
- US-IV-48 Dixon, "1932 Glacier Bay National Monument Field Notes" with cover letter

IN THE SUPREME COURT OF THE UNITED STATES

No. 128, Original

STATE OF ALASKA,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

**Before the Special Master
Gregory E. Maggs**

CERTIFICATE OF SERVICE

A copy or copies* of the Motion of the United States for Partial Summary Judgment and Memorandum in Support of Motion on Count IV of the Amended Complaint were served by hand or by standard overnight courier to:

Paul Rosenzweig
Joanne Grace
G. Thomas Koester
John G. Roberts, Jr.

Dated this 24th day of July, 2002

Lorraine Carter

* Two copies were served on counsel unless the individual counsel requested that he or she receive only one copy. Counsel for amici, Darron C. Knutson requested that only briefs relating to Count III of the amended complaint be sent to him and Ms. Fishel. Accordingly, this motion and memorandum were not served on counsel for amici.