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# CASE COMMENT: *United States v. Alaska*

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**United States v. Alaska**—Proof of sovereignty exercised by Alaska over Cook Inlet was insufficient to establish the inlet as an historic bay and thus the United States, as against Alaska, has rights to the oil and gas lands beneath the lower portion of the inlet.

## INTRODUCTION

One of the most controversial areas of international law since the end of World War II has been the freedom of the seas. Historically, the use of the high seas has been reserved for the community of nations, with States maintaining jurisdiction over areas adjacent to their coasts.[1] However, the emergence of technology for exploitation of the continental shelf has led to the expansion of claims to the sea and to the seabed.[2]

The continental shelf of the United States presents unique problems. Not only must the federal government assert sovereignty over the continental shelf as against other nations, but its claims are also limited by claims of individual states, which have paramount rights to the seabed and resources beneath inland waters.[3]

In *United States v. Alaska*,[4] the Supreme Court considered whether Cook Inlet could be properly characterized as an historic bay and, therefore, as inland waters of Alaska. The decision of the Court that the inlet was not an historic bay clarified the proof necessary to establish historic title. The decision must also be viewed in light of its ultimate effect—the granting of immense reserves of oil and gas to the United States Government.

## I. BACKGROUND

Cook Inlet is a body of water which creates a large indentation in the Alaska coastline. It is more than one hundred fifty miles long and its headlands at Cape Douglas, its natural entrance, are more than twenty-four miles apart.[5] In April, 1967, Alaska offered a tract of submerged lands in lower Cook Inlet for

1. M. McDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 1-2 (1962).
2. *Id.* at 636-37.
3. *See* Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1970).
4. 422 U.S. 184 (1975).
5. *Id.* at 185-86. Cook Inlet is approximately equal in size to Lake Erie. *Id.* at 185 n.1.

a competitive oil and gas lease sale.[6] The lands to be leased were situated more than three miles both from the shore of Cook Inlet and from a line drawn across the inlet at Kalgin Island, where the headlands are about twenty-four miles apart.[7] Therefore, the lands would not come within the lands granted to a state by the provisions of the Submerged Lands Act unless the inlet were to be characterized as an historic bay.[8] One month after the land was offered for lease, the United States brought suit in the District Court for the District of Alaska to quiet title and for injunctive relief. The federal government contended that the waters seaward of a point three miles below Kalgin Island constituted high seas, and that therefore the submerged lands for which leases were to be negotiated were subject to the sovereignty of the United States. Alaska argued that Cook Inlet in its entirety was an historic bay and therefore the waters were inland waters subject to the exclusive sovereignty of the state of Alaska. The district court held for Alaska,[9] and the Court of Appeals for the Ninth Circuit affirmed.[10] "[B]ecause of the importance of the litigation and because the case presented a substantial question concerning the proof necessary to establish a body of water as a historic bay,"[11] the Supreme Court granted certiorari.[12]

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6. *Id.* at 186.

7. *Id.*

8. The upper portion of Cook Inlet, landward of the Kalgin Island line where the inlet is twenty-four miles wide is inland waters as defined by the Convention on the Territorial Sea and the Contiguous Zone, Mar. 24, 1961, art. 7, para. 4, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (effective Sept. 10, 1964) [hereinafter cited as Territorial Sea Convention]. For the text of paragraph 4, see note 37 *infra*. Pursuant to the Submerged Lands Act, Alaska has title to the inlet only as far as three miles seaward of this line if the inlet is not established as an historic bay. 43 U.S.C. § 1301(c) (1970).

9. 352 F. Supp. 815 (D. Alaska 1972). The Supreme Court commented that this case appeared to qualify for its original jurisdiction under Art. III, § 2, cl. 2 of the Constitution, and that it was "not enlightened as to why the United States chose not to bring an original action in this Court." 422 U.S. at 186 n.2. In fact, this is the first of the major submerged lands cases where an original action was not brought in the Supreme Court.

10. 497 F.2d 1155 (9th Cir. 1974) (per curiam). The court reaffirmed the Supreme Court's reasoning in *United States v. Louisiana*, 394 U.S. 11 (1969), that since the concept of the historic bay was relatively imprecise, the issues were primarily factual. Therefore, the findings of the district court would have to be affirmed unless the inferences drawn from the testimony received and the voluminous documents examined were clearly erroneous. 497 F.2d at 1157.

11. 422 U.S. at 187.

12. 419 U.S. 1045 (1974).

## II. THE DELIMITATION OF THE SEA

In order to understand the basis for the determination of this issue, the term historic bay must be examined in the context of the United States Submerged Lands Act[13] and in light of definitions of the territorial sea, the high seas, and the continental shelf. The territorial sea denotes waters adjacent to the coast of a State.[14] Historically, territorial waters extended three miles from the low water mark of the coast.[15] In recent years, many coastal States have claimed larger areas, in some instances up to two hundred miles.[16] However, as yet there is no internationally recognized standard for the delimitation of the territorial sea.[17] As defined by the 1958 Convention on the Territorial Sea and the Contiguous Zone [hereinafter referred to as the Territorial Sea Convention], sovereignty over the territorial sea includes sovereignty over the water itself as well as over the air space above and the bed and subsoil below.[18] The only limitation on this sovereignty is that the coastal State must allow the innocent passage of foreign vessels through the territorial waters.[19]

Beyond the territorial sea lie the high seas, which are not subject to the sovereignty of any State. "No part of the open sea

13. 43 U.S.C. §§ 1301-1315 (1970).

14. Territorial Sea Convention at art. 1.

15. The notion of the three-mile territorial sea developed in the seventeenth century, as a result of either economic considerations or military needs. The "cannon-shot rule," the original basis for the three-mile limit in Europe, delimited the territorial sea by the range of a cannon shot from the shore. It was most likely started by the Dutch during a fishing dispute with Great Britain in 1610. The Scandinavian countries, on the other hand, asserted sovereignty by a measured distance, as when Denmark reserved to its citizens a belt two leagues off the coast of Iceland to use for fishing purposes. Eventually the cannon-shot rule and the measured widths merged, and the three-mile territorial sea became a standard limit of sovereignty asserted by a nation. Kent, *The Historical Origins of the Three-Mile Limit*, 48 AM. J. INT'L L. 537, 538-39 (1954).

16. R. & B. SMETHERMAN, TERRITORIAL SEAS AND INTER-AMERICAN RELATIONS 4-10 (1974); Nweihed, *Venezuela's Contribution to the Contemporary Law of the Sea*, 11 SAN DIEGO L. REV. 603, 621-23 (1974).

17. The International Law Commission, in its final report before the 1958 Vienna Conference on the Law of the Sea, failed to agree to a standard width. The Commission, however, went on record as stating that "international law did not permit" an extension of the territorial sea beyond twelve miles. *Report of the International Law Commission*, 11 U.N. GAOR Supp. 9, at 13, U.N. Doc. A/3159 (1956). The Vienna Conference also refused to set a standard. In addition to a lack of conventional agreement, the great diversity of claims, ranging from three miles to two hundred miles, makes it impossible to derive customary law on the subject.

18. Territorial Sea Convention at art. 2.

19. Territorial Sea Convention at art. 14; P. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION xxxiv (1927).

is allowed by international law to be subjected to the exclusive domination by one State, to become the exclusive sphere of validity of one national legal order, to become the territory of a State in the narrower sense."[20] Thus, while a nation may exercise almost total sovereignty over its territorial sea, it may assert no claim to the waters beyond the territorial limit.[21] However, the lands lying beneath the sea beyond the territorial sea may be subject to sovereignty exercised pursuant to the definition of the continental shelf.

Geologically, the continental shelf consists of "the zone around the continent extending from the low water line to a depth at which there is usually a marked declivity to greater depth."[22] The Convention on the Continental Shelf[23] has expanded this definition, referring to the continental shelf as "the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, *to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.*"[24] This definition has given rise to some controversy because its exploitability criterion could conceivably lead to indefinite expansion of the shelf.[25] However, it is recognized that a coastal State has the right to explore and exploit the natural resources lying on its continental shelf.[26] This right is exclusive unless the

20. H. KELSEN, GENERAL THEORY OF LAW AND STATE 211 (1949); Convention on the High Seas, Mar. 24, 1961, art. 2, 13 U.S.T. 2313, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (effective Sept. 30, 1962).

21. Article 24(1) of the Territorial Sea Convention, however, established a zone contiguous to the territorial sea in which the coastal State may exercise control when necessary to compel compliance with its customs, fiscal, immigration, and sanitary regulations and to punish infringement of these regulations. Section (2) provides that the "contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured."

22. 2 A. SHALOWITZ, SHORE AND SEA BOUNDARIES 342 (1962).

23. Convention on the Continental Shelf, Mar. 24, 1961, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (effective June 10, 1964) [hereinafter cited as Continental Shelf Convention].

24. *Id.* at art. 1 (emphasis added).

25. F. NOLAND, A CASE FOR AN "INTERNATIONAL REGIME" FOR THE SEABEDS 10 (1971). One scholar has labeled Article 1 as "one of the most disastrous clauses ever inserted in a treaty of vital importance to mankind." Friedmann, *Selden* Redivivus—*Towards a Partition of the Seas?*, 65 AM. J. INT'L L. 757 (1971). *See generally* B. OXMAN, THE PREPARATION OF ARTICLE 1 OF THE CONVENTION ON THE CONTINENTAL SHELF (1968); Finlay, *The Outer Limit of the Continental Shelf*, 64 AM. J. INT'L L. 42 (1970); Henkin, *International Law and "the Interests": The Law of the Seabed*, 63 AM. J. INT'L L. 504 (1969).

26. Continental Shelf Convention at art. 2.

coastal State expressly authorizes another nation to undertake the exploitation of the shelf.[27] The geological continental shelf of the United States extends out from the coast approximately two hundred miles,[28] and the shelf off Alaska encompasses about 600,000 square miles, an area almost the size of Alaska itself.[29] While it is clear that international law grants to the United States sovereignty over the continental shelf as against other nations, a municipal law problem arises over rights to the resources of the seabed as between the federal government and the individual states.

The determination of sovereignty over submerged lands has been a congressional and judicial issue since 1947, when the Supreme Court concluded that rights to subsurface resources beneath the three-mile territorial sea were vested exclusively in the United States.[30] In response to that holding,[31] Congress enacted the Submerged Lands Act of 1953.[32] The Act granted to the states title and rights to the resources of submerged lands within three miles of their coastlines.[33] The term "coastline" was defined as including not only land delineations, but also "the seaward limit of inland waters."[34] The term "inland waters," however, was not

27. *Id.*

28. H.R. REP. No. 215, 83d Cong., 1st Sess. 16 (1953).

29. *Id.*

30. United States v. California, 332 U.S. 19 (1947).

31. The Supreme Court's holding in *United States v. California* was widely criticized. The House Committee on the Judiciary, in reporting on a predecessor bill to the Submerged Lands Act, stated that it was "of the opinion that no decision of the Supreme Court in many years has caused such dissatisfaction, confusion, and protest as the California case." H.R. REP. No. 1778, 80th Cong., 2d Sess. 6 (1948).

32. 43 U.S.C. §§ 1301-1315 (1970).

33. It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States . . . .

43 U.S.C. § 1311(a) (1970).

The term "boundaries" includes the seaward boundaries of a State . . . as they existed at the time such State became a member of the Union . . . but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean . . . .

43 U.S.C. § 1301(b) (1970).

34. "The term 'coast line' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." 43 U.S.C. § 1301(c) (1970).

defined in the Act.[35]

In *United States v. California*,[36] a 1965 case in which the Supreme Court was called upon to determine whether seven bays in California could be considered inland waters, the Court decided that the definitions provided in the Territorial Sea Convention[37] should be adopted in construing the Submerged Lands Act. Under Article 7 of the Convention, if the entrance points of a bay are twenty-four miles apart or less, the bay can be considered inland waters; if the bay has natural entrance points separated by more than twenty-four miles, the waters can be considered inland only if the bay is designated an historic bay. Although the Convention did not define historic bay, recognition of historic waters has been a part of customary international law.[38] The *California* Court, however, did state that an historic bay is a bay "over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations."[39]

It was not until 1969 that the Supreme Court, in *United States v. Louisiana* [hereinafter referred to as *Louisiana Boundary*],[40] indicated that at least three factors are significant in determining whether a maritime area is an historic bay. These factors, promulgated in an International Law Commission study,

35. An early version of the bill which became the Submerged Lands Act defined inland waters to include "all estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds, and all other bodies of water which join the open sea." S. REP. NO. 133, 83d Cong., 1st Sess. 18 (1953). The Senate Committee on Interior and Insular Affairs removed this definition. "By deleting the original definition of 'inland waters' Congress made plain its intent to leave the meaning of the term to be elaborated by the courts, independently of the Submerged Lands Act." United States v. California, 381 U.S. 139, 150-51 (1965).

36. 381 U.S. 139 (1965).

37. Territorial Sea Convention at art. 7 provides:

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

38. *See* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 170-71 (1973); JESSUP, *supra* note 19, at 362-63; MCDOUGAL & BURKE, *supra* note 1, at 341-73; 1 L. OPPENHEIM, INTERNATIONAL LAW 505-08 (8th ed. Lauterpacht 1955).

39. 381 U.S. at 172.

40. 394 U.S. 11, 23-24 n.27, 75 (1969).

*Juridical Regime of Historic Waters, Including Historic Bays* [hereinafter referred to as *Juridical Regime*],[41] are: "(1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign States."[42] The Court in *Louisiana Boundary* adopted these criteria in resolving a domestic controversy because it recognized that a claim to historic waters made by a state government could be a valid assertion of dominion as against other nations.[43] The Court, therefore, "treat[ed] the claim of historic waters as if it were being made by the national sovereign and opposed by another nation."[44]

The concept of historic waters developed from the necessity of recognizing a State's usage of maritime areas, even if the area were not part of the State's territorial sea.[45] Without this concept, the delimitation of the sea into inland waters, territorial seas, and high seas would have conflicted with existing claims to the sea. Therefore, such delimitations would not have been accepted by States whose claims over the ocean were adversely affected.[46] However, while States and commentators recognize the need for the concept of historic waters, there is dispute as to the nature of historic title. Some commentators[47] are of the opinion that a claim to historic waters is an exception to principles of international law because a State, through historic title, can claim as inland waters part of the ocean that would otherwise be considered high seas.

> The acquisition by historic title is "adverse acquisition," akin to acquisition by prescription, in other words, title to "historic waters" is obtained by a process through which the originally lawful owners, the community of States, are replaced by the coastal State. Title to "historic waters", therefore, has its origin in an illegal situation which was subsequently validated. This validation could not take place by the mere passage of time; it

41. *Juridical Regime of Historic Waters, Including Historic Bays*, [1962] 2 Y.B. INT'L L. COMM'N 1, U.N. Doc. A/CN. 4/143 (1962) [hereinafter cited as *Juridical Regime*].

42. *Id.* at 13.

43. 394 U.S. at 76 & n.103.

44. *Id.* at 77.

45. *Juridical Regime* at 6-7.

46. *Id.* at 7.

47. 3 G. GIDEL, DROIT INTERNATIONAL PUBLIC DE LA MER 532-593 (1934), *cited in Juridical Regime* at 6-8; Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources*, 30 BRIT. Y.B. INT'L L. 1 (1953), *cited in Juridical Regime* at 8.

must be consummated by the acquiescence of the rightful owners.[48]

Thus, those States and commentators who are in accord with the concept of historic waters as an exception to international law require that other nations acquiesce in the claim of the coastal State.[49]

Other commentators deny the existence of the rigid delimitation of the sea.[50] They are of the opinion that the claim to historic waters is not an exception to generally accepted rules, since they dispute the existence of such rules. Consequently, these commentators state that explicit acquiescence is not required for a valid claim to historic waters; mere "absence of any reaction by foreign States is sufficient."[51]

The United States appears to have adopted the view that historic claims constitute an exception to international law. Following the Supreme Court's 1947 decision in *United States v. California*,[52] a Special Master was appointed to determine which of certain disputed bodies of water were inland waters. In his report, the Special Master assumed that it was the federal government's position that according to international law, bays with headlands ten miles or less apart were inland waters, and those with headlands more than ten miles apart were international waters unless such bays were claimed as historic bays.[53] By referring to the specific delimitation of the entrance to a bay, the Special Master implicitly recognized and adopted the view that an historic bay is an exception to international law. The Court, in the 1965 *United States v. California* case, approved the Special Master's report, thus adopting the "exceptional" concept of historic bays.[54]

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48. *Juridical Regime* at 16.

49. *See id.* for a discussion of the logical problem raised by acquiescence.

50. Bourquin, *Les baies historiques*, MELANGES GEORGES SAUSER-HALL 37-51 (1952), *cited in Juridical Regime* at 9.

51. Bourquin, *supra* note 50, at 46, *cited in Juridical Regime* at 16. For a treatment of the opposing views of historic waters see *Fisheries Case* (United Kingdom-Norway), [1951] I.C.J. 116, in which the United Kingdom asserted the view that historic waters are an exception to international law and Norway argued to the contrary.

52. 332 U.S. 19 (1947).

53. Special Master's Report, No. 6, Original, Oct. Term, 1952, *quoted in* 1 A. SHALOWITZ, SHORE AND SEA BOUNDARIES 329 (1962).

54. 381 U.S. 139. The Court, however, apparently misread the Special Master's report with respect to the status of historic bays as an exception to international law. In response to California's assertion that the Special Master erroneously thought the concept of his-

Once it is acknowledged that historic title is an "exceptional" title, however, there remains dispute as to the type of acquiescence required for the title to ripen. Logically, acquiescence implies a form of explicit consent.[55] Nevertheless, some commentators who support the "exceptional" view assert that mere toleration, that is, the absence of opposition, is sufficient to establish valid title.[56] It is interesting to note that accepting the requirement of mere toleration, rather than explicit acquiescence, brings adherents of the "exceptional" theory closer to the adherents of the theory that historic title is not an exception to international law: both come to the same conclusion that the only acquiescence needed is the lack of any opposition by foreign States.

## III. Evidence of Sovereignty

In deciding whether Cook Inlet could qualify as an historic bay, the Supreme Court, utilizing the International Law Commission study as a general guideline, examined the exercise of sovereignty over lower Cook Inlet in three time periods: the Russian period, the United States period, and the period of Alaskan statehood. If the authority exercised during any one of these three periods was sufficient to establish the inlet as an historic bay, the claim to historic waters would be currently valid. Once in existence, historic title cannot be divested by later opposition.[57]

In considering the evidence of authority exercised over Cook Inlet, the district court had concluded that there were three facts indicating Russian sovereignty over the lower portion of the inlet: (1) the existence of four Russian settlements on the shores of Cook Inlet; (2) the firing by a Russian fur trader on a British ship that tried to enter the inlet around 1768; and (3) an 1821 ukase by Czar Alexander I excluding foreign vessels within one hundred miles of the Alaska coastline.[58]

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toric waters to be an exception to the general rule, the Court stated that it found "no substantial indication of this [concept] in his report." *Id.* at 174. Yet by adopting the report, the Court implicity adopted that very concept of historic waters.

55. *Juridical Regime* at 16.

56. *Id.*

57. *Id.* at 18.

58. The Supreme Court explained that "[t]he reported opinion of the District Court did not discuss the exercise of sovereignty prior to 1906, but the unreported findings indicate that the court relied on assertions of authority dating from Russian territorial times as well as the early American period." 422 U.S. at 190 n.9.

The Supreme Court dealt with this evidence summarily. It stated that the existence of the four Russian settlements established no claim to the lower portion of the inlet.[59] Secondly, the Court attached little legal significance to the fur trader's firing on the British ship because there was no indication that the fur trader was acting with governmental authority rather than as a private citizen.[60] In any case, the Court pointed out, the firing could be viewed as an assertion of sovereignty only over the three-mile territorial limit covered by the range of the cannon shot.[61] Finally, the fact that the Czar's ukase was unequivocally withdrawn because of protests from the United States and England indicated that there was no acquiescence to his claim by other nations.[62] The Court therefore concluded that during the period of Russian sovereignty there was not sufficient exercise of sovereignty over lower Cook Inlet to justify a finding of historic bay status.

In considering the second period of sovereignty, when Alaska was a territory of the United States (1867-1959), the Court examined five documents which the district court had relied upon in finding that the federal government had continuously exercised authority over all the waters constituting the inlet: three federal statutes,[63] a map of waters covered by United States fishing regulations,[64] and an executive order concerning fishing regulations.[65] Only one of the statutes[66] differentiated between American nationals and foreigners, but that statute was never enforced in lower Cook Inlet.[67] The other two statutes were enforced in the

59. *Id.* at 190. "The presence of early Russian settlements on the shores of Cook Inlet certainly demonstrates the existence of a claim to the land, but it gives little indication of the authority Russia may have exerted over the vast expanse of *waters* that constitutes the inlet." *Id.* (emphasis added).

60. *Id.* at 191. *See Juridical Regime* at 14-15.

> In the first place the acts [asserting sovereignty] must emanate from the State or its organs. Acts of private individuals would not be sufficient—unless, in exceptional circumstances, they might be considered as ultimately expressing the authority of the State.

*Juridical Regime* at 14-15.

61. 422 U.S. at 191. *See* note 15 *supra.*

62. 422 U.S. at 191-92.

63. Act of July 27, 1868, 15 Stat. 241, *as codified*, Rev. Stat. § 1956 (1878); Alien Fishing Act, ch. 3299, 34 Stat. 263 (1906); White Act, ch. 272, 43 Stat. 464 (1924).

64. Gharrett-Scudder Line, *discussed in* 422 U.S. at 194-96.

65. Exec. Order No. 3752 (Nov. 3, 1922).

66. Alien Fishing Act, ch. 3299, 34 Stat. 263 (1906).

67. 422 U.S. at 193 & n.15.

lower portion of the inlet, but only against Americans. The map had been drawn in connection with discussions between the United States and Canada concerning the control of salmon fishing in the high seas of the North Pacific, and it delineated the area governed by Alaska fishing regulations. However, the map had been transmitted to Canadian representatives with "express disclaimers that the line was intended to bear any relationship to the territorial waters of the United States in a legal sense."[68]

The last document, the executive order, created a fisheries reservation and specifically embraced all of Cook Inlet. The Supreme Court, however, rejected the contention that the creation or enforcement of fishing regulations was sufficient to establish historic title to Cook Inlet. It referred to its previous decision in *Louisiana Boundary*, which recognized that the nature of the control resulting from the exercise of authority must be commensurate with the type of authority actually exercised.[69] Inland waters are subject to the contiguous State's complete sovereignty, "as much as if they were a part of its land territory."[70] The Court determined in *Louisiana Boundary* that the enforcement of navigation regulations was an incident of territorial waters, rather than of inland waters, because the innocent passage of foreign vessels was not prohibited.[71] For sovereignty to have been exercised commensurate with a claim to inland waters, all foreign vessels and navigation would have to have been excluded. Therefore, since Lousiana had not treated the waters in question as inland waters, it could not claim them as historic.[72]

In following its decision in *Louisiana Boundary*, the Court in the instant case reiterated the necessity for Alaska to have treated Cook Inlet as inland waters in order to establish the inlet as an historic bay. The Court found that "[t]he enforcement of fishing and wildlife regulations, as found and relied upon by the District Court, was patently insufficient in scope to establish historic title to Cook Inlet as inland waters."[73] The decision appears to be consistent with customary and conventional international law, which recognize the enforcement of fishing regulations in the

68. *Id.* at 196.
69. 394 U.S. at 24-26. *See also Juridical Regime* at 23.
70. 394 U.S. at 22.
71. *Id.* at 24-26. *See* text accompanying note 19 *supra*.
72. 422 U.S. at 197.
73. *Id.*

territorial sea and even in the high seas.[74] Several of the claims by nations to a wider territorial sea have been based upon the need to preserve fishery resources or to allow local fishermen exclusive access to larger portions of the ocean.[75] The United Nations Convention on Fishing and Conservation of the Living Resources of the High Seas[76] provides that

> [a] State whose nationals are engaged in fishing in any area of the high seas adjacent to the territorial sea of a coastal State shall, at the request of that coastal State, enter into negotiations with a view to prescribing by agreement the measures necessary for the conservation of the living resources of the high seas in that area.[77]

Thus, the fact that Alaska enforced fishing regulations or created a fisheries reservation in Cook Inlet was insufficient to establish a claim to inland waters because, according to international law, such regulations are incidents of sovereignty exercised over the territorial sea and the high seas, rather than over inland waters.

The third period of sovereignty over Cook Inlet considered by the Supreme Court was the period from 1959 when Alaska became a state, to 1967 when the present suit was initiated. The most significant event of that period, aside from continuing enforcement of fishing regulations, was the 1962 arrest of a Japanese fleet in the Shelikof Strait, about seventy-five miles from the lower portion of the inlet. The Supreme Court recognized that the arrest manifested a determination to exclude foreign vessels entirely from the inlet—an exercise of authority commensurate in scope with sovereignty over inland waters.[78] Since the incident could potentially establish historic title over inland waters, the Court carefully analyzed the seizure of the Japanese fleet.

The facts of the incident were not disputed either by the United States or by Alaska. Early in 1962, a private commercial fishing enterprise in Japan announced its intention to send a

74. JESSUP, *supra* note 19, at 11-211 *passim*; MCDOUGAL & BURKE, *supra* note 1, at 453-1078 *passim*; Convention on Fishing and Conservation of the Living Resources of the High Seas, Mar. 24, 1961, art. 6, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285 (effective Mar. 20, 1966).

75. MCDOUGAL & BURKE, *supra* note 1, at 453-82.

76. 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285.

77. *Id.* at art. 6.

78. *See* text accompanying note 19 *supra*.

fishing fleet into the waters of the Shelikof Strait and into Cook Inlet. The United States took no action with regard to the proposed intrusion. Six Japanese vessels thereafter sailed into the lower portion of Cook Inlet, remaining for one day. They subsequently left the inlet and sailed southwest into the Shelikof Strait, where they fished for ten days undisturbed. At that point, Alaskan officials boarded two of the vessels, arrested three of the fleet's captains, and charged them with violating Alaskan fishing regulations pertaining to the Shelikof Strait. The private Japanese company and the state of Alaska entered into an agreement whereby the officers were released in exchange for a promise that the company would not fish in the inlet or the strait pending judicial resolution of Alaska's jurisdiction over the area. The Japanese Government did not approve of the agreement, however, and lodged a protest with the United States Government. The United States refused to take an official position on the matter, and judicial proceedings were dismissed without reaching any conclusion as to Alaskan jurisdiction over the strait or the inlet.[79]

The district court viewed the incident as an assertion of sovereignty over all the waters of Cook Inlet.[80] The Supreme Court, however, stated that the seizure of the fleet was an assertion of sovereignty, "if at all," only over the waters of the Shelikof Strait.[81] It pointed out that Alaskan authorities allowed the vessels to enter Cook Inlet and took no action during the time the fleet remained in the inlet. The officers of the fleet were arrested only after they had left the inlet and were fishing seventy-five miles southwest of the nearest portion of the inlet. Moreover, the charges filed against the captains concerned only the intrusion into the strait, rather than the entry into the inlet. The seizure of the vessels thus did not constitute an assertion of sovereignty over the waters of Cook Inlet, but only over the Shelikof Strait.

The Supreme Court, assuming arguendo an assertion of sovereignty over the inlet as well as over the strait, considered the Japanese Government's attitude towards Alaska's seizure of the fleet. The attitude of a foreign nation is measured in terms of its acquiescence to a coastal State's claim of historic title.[82] The

79. 422 U.S. at 201-02.

80. 352 F. Supp. at 821.

81. 422 U.S. at 202.

82. *Juridical Regime* at 16. For a full discussion of acquiescence see text accompanying notes 55 & 56 *supra*.

district court interpreted the fact that Japanese fishing vessels did not return to the waters claimed by Alaska as recognition of Alaskan sovereignty over the waters in question.[83] The Supreme Court, however, adopted the more stringent view of acquiescence, requiring that "something more than the mere failure to object must be shown."[84] Despite Japan's tacit recognition of Alaskan sovereignty over the waters,[85] the Court held that such acquiescence was not sufficient to establish historic title to Cook Inlet.

Thus, after reviewing the three periods during which authority was exerted over Cook Inlet, the Supreme Court found that, in each period, the authority exercised was insufficient to establish sovereignty over inland waters. As a result, Cook Inlet could not be characterized as an historic bay.

## IV. Foreign Policy Considerations

The United States, in the course of the *Alaska* case, had filed disclaimers of sovereignty over the waters of lower Cook Inlet, and had alleged that a decision "upholding historic title substantially would interfere with the conduct of foreign relations by the Executive branch of the government."[86] According to the Supreme Court, the district court rejected these disclaimers "on the grounds that they were ill-advised and, perhaps, self-serving."[87] Although the Supreme Court stated that it was not necessary to determine whether the disclaimers could have defeated otherwise sufficient facts since it had found there was insufficient evidence to establish historic title,[88] the significance of the disclaimers was their origin in the foreign policy needs which impelled the United States to bring the suit.[89]

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83. 352 F. Supp. at 821.

84. 422 U.S. at 200.

85. *Id.* at 203. It is true that, as the Court pointed out, the formal agreement to respect Alaskan sovereignty over the inlet was entered into by a private company, rather than by the Japanese Government, and therefore the Japanese Government could not be bound by the agreement. *See* note 60 *supra*. However, the fact that neither public nor private Japanese vessels returned to waters claimed by Alaska can be interpreted as tacit recognition by the Japanese Government of Alaska's claim of sovereignty over Cook Inlet.

86. 352 F. Supp. at 821.

87. 422 U.S. at 203-04 n.17.

88. *Id.*

89. *See generally* R. Mancke, The Failure of U.S. Energy Policy (1974); The Economic Crisis Reader (D. Mermelstein ed. 1975); J. Ridgeway & B. Conner, New Energy (1975); M. Tanzer, The Energy Crisis: World Struggle for Power and Wealth (1975).

The claim of the United States that Cook Inlet is important to the government for foreign policy reasons seems indisputable in light of the immense oil reserves in the seabed of the inlet. This area and the Prudhoe Bay region in the north[90] are the two major potential oil-producing areas in Alaska. In 1970, the state had 10,149,000,000 barrels of proved reserves of crude petroleum, and only 202 producing oil wells. Texas, by comparison, had 13,195,000,000 barrels of proved reserves with 177,221 producing wells.[91] The urgency of the United States claim is underscored by the fact that the search for petroleum under the sea has intensified in recent years. In 1972, offshore exploration was being conducted on the continental shelves of eighty countries, including the United States, and involved one hundred thirty-four companies.[92]

The need for domestic sources of oil was the motivation behind the passage of the Submerged Lands Act in 1953.[93] The legislative history of the Act reveals that litigation between the states and the federal government over rights to submerged lands was delaying the production of domestic oil.[94] A 1953 House Committee report noted:

90. The extraction of oil from Prudhoe Bay has also been the subject of much dispute. The plan for the trans-Alaska pipeline, which will carry oil from Prudhoe Bay on the North Slope of the state down to the port of Valdez on the southern Pacific coast of Alaska, was attacked by environmental groups on several grounds, one of which was that the environmental impact of the pipeline had not been adequately studied. Suit was brought against the Secretary of the Interior, the Secretary of Agriculture, the pipeline construction company (Alyeska), and the state of Alaska to permanently enjoin the Secretary of the Interior from granting the permit necessary to construct the pipeline. Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973). Judge Skelly Wright held that the Secretary of the Interior did not have the authority to issue the land permit because it would violate section 185 of the Mineral Lands Leasing Act, 30 U.S.C. §§ 181-287 (1970), which placed a twenty-five foot limit on either side of the pipeline for all construction work. As a result of this holding, the Mineral Lands Leasing Act was amended in 1973 to allow a fifty foot right-of-way for pipeline purposes plus a provision permitting the Secretary to widen the right-of-way if he deems it necessary "for the operation and maintenance after construction, or to protect the environment or public safety." 30 U.S.C. § 185(d) (Supp. III, 1973), *amending* 30 U.S.C. § 185 (1970). The bill amending the Act also authorized the construction of the pipeline.

91. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACTS OF THE UNITED STATES 671 no. 1141 (1974).

92. The areas of exploration included the North Sea, waters off Indonesia, the continental margin of west Africa, the shelf off northwest Australia, and waters off Trinidad-Tobago. Albers, *Offshore Petroleum: Its Geography and Technology*, in LAW OF THE SEA: THE EMERGING REGIME OF THE OCEANS 293 (J. Gamble & G. Pontecorvo eds. 1974).

93. 43 U.S.C. §§ 1301-1315 (1970).

94. H.R. REP. No. 215, *supra* note 28, at 2-3.

> Since the court decisions in the cases involving the States of California, Louisiana, and Texas, new development of the vast potentialities located in these lands has been brought almost to a complete standstill, particularly in the Gulf of Mexico. The litigation which was the primary cause of these stoppages threatens to further retard any progress. Therefore, the committee feels that permanent legislation covering all phases of this litigation must be enacted.[95]

The primary purpose of the Submerged Lands Act, then, was to clarify rights to the lands under the sea so that the states and the federal government would resume the search for oil within the respective territories granted to each of them.

In 1947, before the passage of the Submerged Lands Act, the Supreme Court had explicitly recognized the foreign policy needs of the federal government when it granted rights to subsurface resources beneath the territorial sea to the United States.

> The government also appears in its capacity as a member of the family of nations. In that capacity it is responsible for conducting United States relations with other nations. It asserts that proper exercise of these constitutional responsibilities requires that it have power, unencumbered by state commitments, always to determine what agreements will be made concerning the control and use of the marginal sea and the land under it.[96]

In 1975, the Supreme Court has used principles of international law to allow the federal government to acquire sovereignty over submerged lands without explicitly deferring to the wishes of the executive.[97] Three months before the decision in *United States v. Alaska*, the Court decided the case of *United States v. Maine*.[98] It held that the United States, as against thirteen states on the eastern seaboard, was vested with the rights over the seabed and subsoil under the Atlantic Ocean more than three miles from the outer limits of inland waters. As in *United States v. Alaska*, the *Maine* Court relied upon the Submerged Lands Act and on its own previous decisions concerning submerged lands[99]

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95. *Id.* at 2.

96. United States v. California, 332 U.S. 19, 29 (1947).

97. *See* Charney, *Judicial Deference in the Submerged Lands Cases*, 7 VAND. J. TRANSNAT'L L. 383 (1974), for an extensive discussion of all submerged lands cases decided through 1973.

98. 420 U.S. 515 (1975).

99. United States v. Texas, 339 U.S. 707 (1950); United States v. Louisiana, 339 U.S. 699 (1950); United States v. California, 332 U.S. 19 (1947).

in granting oil-rich lands to the federal government. Thus, while recent Supreme Court decisions appear to minimize the wishes of the executive and to rely upon neutral principles of international law, the same foreign policy considerations that appeared expressly in earlier opinions decided before the passage of the Submerged Lands Act underlie the recent cases.

Seen in the light of the pragmatic needs of the federal government, the decision in *United States v. Alaska* takes on an added dimension. Not only does it clarify the proof required for the determination of historic bay status, but the impact of the decision is to reaffirm the right of the United States Government to exercise the sovereignty it deems necessary to carry out foreign policy.

*Martha J. Salper*