

ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672
4761 HJUD SB 237 - SB 243

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STATE OF ALASKA
THE LEGISLATURE

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JUNEAU, ALASKA 99811
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May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

House Judiciary:

1987 - May 15

Ben Esch
ATTORNEY AT LAW, P.C.

3003 Minnesota Drive
Suite 301
Anchorage, Alaska 99503

(907) 272-4475

MAR 25 1987

March 23, 1987

Senator Jay Kerttula, Chairman
Senate Judiciary Committee
P. O. Box V
Juneau, AK 99811

Dear Senator Kerttula:

I would like to bring to your attention a particular problem I am presented with regarding a client. This individual is presently incarcerated awaiting sentencing for an offense committed last year here in Anchorage. He is subject to a presumptive sentence for his offense. Pending sentencing, my client provided substantial help to authorities both in discovering and turning over contraband (a handcuff key) which he was secreted inside the jail in which he was residing and further cooperated with authorities in providing trial testimony against an inmate who had made admissions to my client while he was in the institution. At the time of sentencing, it was discovered that my client had no statutory mitigating factors in his case and both the prosecutor and I began to examine AS 12.55.155. In the course of our review, it appeared to both of us that perhaps in enacting the statutory mitigators, there had been legislative oversight as to one of the mitigating factors. Under that statute, a mitigating factor exists if: "The defendant assisted authorities to detect or apprehend other persons who committed the offense with the defendant." See AS 12.55.155(d)(12). My client provided an equivalent service to the State, but due to the fact the individuals against whom he provided substantial assistance to the State in their prosecution and conviction were not co-defendants in his case, he was denied the application of this mitigating factor.

As I pondered this, I failed to discern any policy difference between a defendant who assists authorities to detect and/or apprehend co-defendants as opposed to someone

March 23, 1987
Senator Jay Kerttula
Page 2

who provides information as to third-parties. One result of this situation is that prosecutors are forced to enter "deals" with defendants who wish to provide information in other cases to get this help. Prosecutors are sometimes reluctant to do so given the fact that the existence of this "deal" will be brought out on cross-examination, if and when the informant testifies, thereby possibly weakening the strength of his testimony and resulting in tainting perfectly legitimate evidence by virtue of the fact that it is obtained through a direct quid pro quo transaction involving an individual who is facing charges himself. The current situation involving the star witness in the McKay case is a perfect example of this situation.

I would like to suggest to you for possible consideration of legislation to be introduced by your Committee, an amendment to AS 12.55.155(d) which reads as follows:

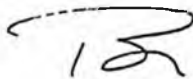
(12) The defendant assisted authorities to detect [or], apprehend, or prosecute other persons who committed [the] an offense [with the defendant].

Such an amendment would allow substantial cooperation with authorities to act as a mitigating factor at the time of sentencing for any individual. This could result in the trial judge being given the latitude to take into account any cooperation with authorities provided by an offender and provide a method of rewarding (or at least providing the opportunity for reward,) individuals who cooperate without creating the potential for any "stigma" to be suggested during cross-examination that this help is provided only in contemplation of a preferential treatment of or deal concerning their own charges. A provision similar to this is included in the new Anti-drug Abuse Act of 1986 on the federal level. There are certain minimum sentences which are required to be given (like presumptive sentences) and these can only be reduced upon a demonstration of "substantial assistance" in the investigation or prosecution of another person who has committed an offense (See § 1007.).

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Senator Jay Kerttula
Page 3

From the point of view of the prosecutor, I believe the statute solves one problem while providing an inducement to individuals to provide information without the necessity of entering into a specific deal. This will encourage individuals to provide whatever information they have or offer whatever assistance they can give. As such, I see this as an amendment which could benefit many people in general, and my client in particular, if such an amendment is made prior to his mid-June sentencing date. Thank you in advance for your consideration in this matter. I would enjoy hearing your thoughts.

Yours truly,

A handwritten signature in black ink, appearing to be 'BE' with a flourish above it.

Ben Esch

BE/cag



Official Business

Alaska State Legislature

Senate

P.O. BOX V
State Capitol
Juneau, Alaska 99811

MAY 14, 1987

MEMO

RE: SB-237 (AN ACT PROVIDING THAT ASSISTANCE TO AUTHORITIES TO DETECT, APPREHEND, OR PROSECUTE OTHER PERSONS IS CONDUCT CONSTITUTING A MITIGATING FACTOR IN CRIMINAL SENTENCING)

FROM: SENATOR JAY KERTTULA *[Signature]*

TO: REPRESENTATIVE JOHN SUND, CHAIR, HOUSE JUDICIARY,
& MEMBERS OF HOUSE JUDICIARY COMMITTEE

THIS BILL WAS INTRODUCED TO RESOLVE AN INEQUITY IN THE LAW. THE DEPARTMENT OF PUBLIC SAFETY SUPPORTS THE BILL.

CURRENTLY THERE EXISTS A POTENTIAL MITIGATOR IN THE PRESUMPTIVE SENTENCING CODE FOR DEFENDANTS WHO ASSIST AUTHORITIES WITH DETECTING OR APPREHENDING THEIR CO-DEFENDANTS. THIS BILL SLIGHTLY BROADENS THE POTENTIAL MITIGATOR TO INCLUDE DEFENDANTS WHO ASSIST AUTHORITIES WITH DETECTING, APPREHENDING OR PROSECUTING A PERSON WHO COMMITTED AN OFFENSE. THE DIFFERENCE IS SLIGHT, IT SIMPLY EXTENDS THE POTENTIAL MITIGATOR A LITTLE, TO ALLOW DEFENDANTS WHO HELP AUTHORITIES WITH INFORMATION CONCERNING ANY OTHER PERSON (NOT JUST THEIR CO-DEFENDANTS) TO BE ELIGIBLE FOR CONSIDERATION FOR THE MITIGATION OF THEIR SENTENCE, AND TO INCLUDE THE POINT THAT A DEFENDANT CAN BE ELIGIBLE FOR THE POTENTIAL MITIGATOR IF HE HELPED PROSECUTE ANOTHER PERSON AS WELL AS JUST DETECTING OR APPREHENDING ANOTHER PERSON.

ONLY IF A DEFENDANT ACTUALLY ASSISTS AUTHORITIES WILL HE BE ELIGIBLE FOR CONSIDERATION UNDER THE SUGGESTED MITIGATOR-THIS WON'T APPLY IF THE INFORMATION DOES NOT AID AUTHORITIES.

UNDER OUR STIFF PRESUMPTIVE SENTENCING CODE PRACTICALLY THE ONLY LEE-WAY A JUDGE HAS LEFT IS THROUGH THE LIST OF MITIGATORS AND AGGRAVATORS INCLUDED IN THE CODE. WHEN A DEFENDANT IS SENTENCED PRESUMPTIVELY THE DEFENDANT FITS INTO A SENTENCING "SLOT" (FOR LESSER FELONIES THIS ONLY APPLIES ON A SECOND OFFENSE-FOR MORE SERIOUS FELONIES SUCH AS RAPE OR MURDER DEFENDANTS ARE SENTENCED PRESUMPTIVELY FOR A FIRST OFFENSE). THE ONLY WAY THE SENTENCE CAN BE MODIFIED IS BY EITHER A MITIGATING OR AGGRAVATING FACTOR BEING FOUND BY CLEAR AND CONVINCING EVIDENCE AND BY THE JUDGE APPLYING

IT (AFTER FINDING IT THE JUDGE IS NOT BOUND TO APPLY IT). (THERE IS ALSO A PROVISION FOR A JUDGE TO GO OUTSIDE THE SENTENCING "SLOT" IF MANIFEST INJUSTICE WOULD ARISE FROM THE SENTENCE, BUT THIS IS EXTREMELY RARE.)

IF A DEFENDANT'S PRESUMPTIVE TERM IS 4 YEARS OR LESS, AND A MITIGATOR IS FOUND, A JUDGE HAS THE POWER TO MITIGATE THE SENTENCE DOWN 100%. IF A SENTENCE IS MORE THAN 4 YEARS A JUDGE CAN ONLY MITIGATE IT DOWN 50%.

BETWEEN 1980-1984, UNDER OUR CURRENT PRESUMPTIVE SENTENCING CODE, CRIMINAL SENTENCES ROSE 100%. WE HAVE A VERY STIFF CODE, WITH VERY LITTLE JUDICIAL DISCRETION REMAINING. THE LIST OF MITIGATORS AND AGGRAVATORS SHOULD BE SCRUTINIZED FOR THINGS THAT SHOULD BE ADDED OR DELETED. THIS BILL WILL AMEND A CURRENT MITIGATOR JUST SLIGHTLY SO THAT THE CODE IS A LITTLE MORE EQUITABLE.

THANK YOU FOR YOUR CONSIDERATION OF SB-237. I THINK THAT IT IS GOOD PUBLIC POLICY IN THAT IT AIDS THE POLICE AND THE DISTRICT ATTORNEYS BY ENCOURAGING DEFENDANTS TO COOPERATE WITH THEM BY PROVIDING INFORMATION THAT WILL ASSIST THEM IN RESOLVING CRIMES.

BILL NO: SB 237

DATE: 4/21/87

TITLE: "An Act providing that assistance to authorities to detect, apprehend, or prosecute other persons is conduct constituting a mitigating factor in criminal sentencing."

CONTACT: James D. Vaden
Deputy Commissioner

APR 23 1987

DEPARTMENT OF
PUBLIC SAFETY

Provides an incentive for persons accused of a crime to provide information to authorities to detect, apprehend, or prosecute other offenders involved in the commission of criminal offenses.

This proposed legislation would assist authorities by encouraging persons involved in or having knowledge of criminal activity to come forward with their information and assist the criminal justice agencies in identifying and prosecuting other offenders. This type of assistance to the criminal justice agencies would be considered by the sentencing court as a mitigator to presumptive sentencing as set out in 12.55.125.

The Department of Public Safety supports this legislation.


Arthur English
Commissioner

RECEIVED
APR 23 1987
DEPARTMENT OF
PUBLIC SAFETY

STATE OF ALASKA 1987 LEGISLATIVE SESSION

FISCAL NOTE

Bill Version: SB 237

Publish Date: _____

REQUEST

Revision Date: _____

Title: "An Act providing that assistance to authorities to detect..."

Sponsor: Senator Kerttula

Requestor: Senate HESS

Agency Affected: Public Safety

BRU: Alaska State Troopers

Components: Detachments & CIB

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING:: (Thousands of Dollars)

GENERAL FUNDS		0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME		0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact is anticipated.

Prepared by: Francis C. Allan *G.C.A.*

Division: Alaska State Troopers

Phone: 269-5691

Date: 4/15/87

Approved by Commissioner: _____

Agency: Public Safety

Date: 4/15/87

Distribution (by preparer):

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- Impacted Agency(ies)
- Senate Secretary

*JNA
4/16/87*

Francis C. Allan

3691), 578 P.2d 971 (1978); Putnam v. State, Sup. Ct. Op. No. 2251 (File No. 3475), 629 P.2d 35 (1980); State v. Brinkley, Ct. App. Op. No. 361 (File No. A-164), P.2d (1984); Cleary v. State, Sup. Ct. Op. No. 1257 (File No. 2623), 548 P.2d 952 (1976); Salazar v. State, Sup. Ct. Op. No. 1404 (File No. 2567), 562 P.2d 694 (1977); Cleary v. State, Sup. Ct. Op. No. 1431 (File No. 3059), 564 P.2d 374 (1977); .midon v. State, Sup. Ct. Op. No. 1434 (File Nos. 2511, 2512), 565 P.2d 1248 (1977); Black v. State, Sup. Ct. Op. No. 1506 (File No. 3327), 569 P.2d 804 (1977); Sumabat v. State, Sup. Ct. Op. No. 1648 (File No. 3739), 580 P.2d 323 (1978); Hansen v. State, Sup. Ct. Op. No. 1689 (File No. 3412), 582 P.2d 1041 (1978); Kanipe v. State, Sup. Ct. Op. No. 2242 (File No. 4993), 620 P.2d 678 (1980); Hintz v. State, Sup. Ct. Op. No. 2334 (File No. 3541), 627 P.2d 207 (1981).

Inclusion of improper reference to unverified police contacts did not require remand for resentencing before a different judge. — See Parks v. State, Sup. Ct. Op. No. 1529 (File No. 3209), 571 P.2d 1003 (1977).

Reference to unverified police contacts in a presentence report does not require a remand for resentencing where the record

indicates that the sentencing judge was not unduly or improperly influenced by reference to the unverified police contacts. Pascoe v. State, Sup. Ct. Op. No. 2249 (File No. 4290), 628 P.2d 547 (1980).

Case remanded for resentencing. — See Neal v. State, Sup. Ct. Op. No. 2341 (File No. 4787), 628 P.2d 19 (1981).

Case remanded for sentence review. — Although a sentence of 15 years' imprisonment with eligibility for parole at the discretion of the parole board upon conviction of manslaughter was not excessive, since the trial court had sentenced defendant as if his conviction had been obtained within one year of the crime and therefore substantially ignored his subsequent history of steady employment, his meritorious service in the army, and his lack of involvement in any criminal activity other than a few traffic offenses in the 12 years since the commission of the crime, the case was remanded for the purpose of permitting the trial court to review the sentence it imposed, in light of all available information concerning defendant without excluding the time period commencing one year from the time of the killing until the present. Padie v. State, Sup. Ct. Op. No. 1843 (File No. 3564), 594 P.2d 50 (1979).

Sec. 12.55.125. Sentences of imprisonment for felonies. (a) A defendant convicted of murder in the first degree shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years.

(b) A defendant convicted of murder in the second degree, kidnapping, or misconduct involving a controlled substance in the first degree shall be sentenced to a definite term of imprisonment of at least five years but not more than 99 years.

(c) A defendant convicted of a class A felony may be sentenced to a definite term of imprisonment of not more than 20 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 — 12.55.175:

(1) if the offense is a first felony conviction and does not involve circumstances described in (2) of this subsection, five years;

(2) if the offense is a first felony conviction, other than for manslaughter, and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, or knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, seven years;

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(3) if the offense is a second felony conviction, 10 years;

(4) if the offense is a third felony conviction, 15 years.

(d) A defendant convicted of a class B felony may be sentenced to a definite term of imprisonment of not more than 10 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 — 12.55.175:

(1) if the offense is a second felony conviction, four years;

(2) if the offense is a third felony conviction, six years;

(3) if the offense is a first felony conviction, and the defendant knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, two years.

(e) A defendant convicted of a class C felony may be sentenced to a definite term of imprisonment of not more than five years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 — 12.55.175:

(1) if the offense is a second felony conviction, two years;

(2) if the offense is a third felony conviction, three years;

(3) if the offense is a first felony conviction, and the defendant knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, one year.

(f) If a defendant is sentenced under (a) or (b) of this section,

(1) imprisonment for the prescribed minimum term may not be suspended under AS 12.55.080;

(2) imposition of sentence may not be suspended under AS 12.55.085;

(3) imprisonment for the prescribed minimum term may not be otherwise reduced.

(g) If a defendant is sentenced under (c), (d)(1), (d)(2), (e)(1), (e)(2), or (i) of this section, except to the extent permitted under AS 12.55.155 — 12.55.175,

(1) imprisonment may not be suspended under AS 12.55.080;

(2) imposition of sentence may not be suspended under AS 12.55.085;

(3) terms of imprisonment may not be otherwise reduced.

(h) Nothing in this section or AS 12.55.135 limits the discretion of the sentencing judge except as specifically provided.

(i) A defendant convicted of sexual assault in the first degree or sexual abuse of a minor in the first degree may be sentenced to a definite term of imprisonment of not more than 30 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 — 12.55.175:

(1) if the offense is a first felony conviction and does not involve circumstances described in (2) of this subsection, eight years;

(2) if the offense is a first felony conviction, and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 10 years;

(3) if the offense is a second felony conviction, 15 years;

(4) if the offense is a third felony conviction, 25 years. (§ 12 ch 166 SLA 1978; am § 18 ch 45 SLA 1982; am §§ 28-30 ch 143 SLA 1982; am § 8 ch 78 SLA 1983; am §§ 1-3 ch 92 SLA 1983)

Cross references. — For classification of felonies and misdemeanors, see AS 11.81.250; for authorized fines, see AS 12.55.035; for reduction of sentence for good behavior, see AS 33.20.010.

Effect of amendments. — The first 1982 amendment in subsection (b), deleted "or" preceding "kidnapping" and inserted "or misconduct involving a controlled substance in the first degree."

The second 1982 amendment in subsection (c), redesignated former paragraphs (1)-(3) as present paragraphs (2)-(4), added present paragraph (1), and substituted "possessed a firearm, used a dangerous instrument" for "possessed or used a firearm" and "seven years" for "six years" in present paragraph (2). The amendment also substituted "under (c), (d)(1), (d)(2), (e)(1), (e)(2), or (i) of this section" for

"under (c)(1), (c)(2), (c)(3), (d)(1), (d)(2), (e)(1), or (e)(2) of this section" in the introductory language of subsection (g), corrected the section number set out in paragraphs (1) and (2) of subsection (g), and added subsection (i).

The first 1983 amendment inserted "or sexual abuse of a minor in the first degree" in the introductory language of subsection (i).

The second 1983 amendment in (c)(2) added "or knowingly directed . . . at the time of the offense," added paragraph (3) of subsection (d), added paragraph (3) of subsection (e), and made other minor punctuation changes.

Editor's notes. — For declaration of legislative purpose, see § 1, ch. 45, SLA 1982 in the 1982 Temporary and Special Acts and Resolves.

NOTES TO DECISIONS

- I. General Consideration.
- II. Presumptive Sentencing.

I. GENERAL CONSIDERATION.

Limited use of both suspended jail time and probation is permitted under AS 12.55.155. *Lacquement v. State*, Ct. App. Op. No. 85 (File No. 5741), 644 P.2d 856 (1982). See also *Friedberg v. State*, Ct. App. Op. No. 258 (File No. 7015), 663 P.2d 558 (1983).

Probationary sentences. — Although a probationary sentence may properly be used when a first offender is convicted of a class C felony involving sexual abuse of a child, such a sentence will be appropriate only if mitigating circumstances exist and the offender is a promising candidate for rehabilitation through probationary supervision. *State v. Coats*, Ct. App. Op. No. 291 (File No. 7102), 669 P.2d 1329 (1983).

Under former law where statutory

mitigating factors warrant a sentence of 90 days to three years, extraordinary circumstances might justify a sentence of straight probation. *State v. Brinkley*, Ct. App. Op. No. 361 (File No. A-164), P.2d (1984).

Placement of offenders. — It is within the sentencing judge's authority to make a recommendation to the commissioner regarding the appropriate placement of the offender. Under AS 33.30.100, the commissioner has the power to effectuate such a recommendation by placing the offender in the appropriate facility, and although the commissioner is not bound by the sentencing court's recommendation, a demonstrated failure to provide an appropriate rehabilitation program or to further the purposes of the sentence may justify judicial intervention. *Nell v. State*, Ct. App. Op. No. 77 (File No. 5565), 642 P.2d 1361 (1982).

Sec. 12.55.135. Sentences of imprisonment for misdemeanors.**NOTES TO DECISIONS**

Sentence upheld. — Composite sentence of 24 months with six months suspended for refusal to submit to a chemical breath test and for driving with a suspended operator's license was affirmed where the defendant had five prior driving while intoxicated convictions and at

least four prior driving with suspended license convictions and was on probation for a prior driving while intoxicated and driving with suspended license conviction. *Witt v. State*, Ct. App. Op. No. 433 (File No. A-482), 692 P.2d 976 (1984).

Sec. 12.55.145. Prior convictions.**NOTES TO DECISIONS**

Section applied in defining what a "felony charge or conviction" is for purposes of AS 12.55.155(c)(20). — See *Kuvaas v. State*, Ct. App. Op. No. 450 (File No. A-547), 696 P.2d 684 (1985).

Prior conviction out of state.

Subsection (a)(2) of this section has consistently been interpreted to apply to the statute establishing the elements of the offense for which the defendant was previously convicted, which was an Oregon statute that is a class C felony in Oregon as it is in Alaska. Thus, it was not error to consider the previous conviction a felony even though the defendant was sentenced under an Oregon statute providing for the reduction of certain felonies to misdemeanors. *Wells v. State*, Ct. App. Op. No. 401 (File Nos. 7479, 7663), 687 P.2d 346

(1984) (decided prior to the 1982 amendment).

A 1983 Oklahoma conviction for felony escape while on work release from a Department of Corrections treatment facility was a prior conviction for purposes of presumptive sentencing, for the Oklahoma escape statute had elements "substantially similar" to AS 11.56.310, a class B felony. *Martin v. State*, Ct. App. Op. No. 508 (File No. A-722), 704 P.2d 1341 (1985).

Sufficient evidence of prior conviction. — An authenticated copy of a foreign docket abstract constituted sufficient evidence of a prior conviction. *Gant v. State*, Ct. App. Op. No. 576 (File No. A-1059), 712 P.2d 906 (1986).

Sec. 12.55.155. Factors in aggravation and mitigation. (a) If a defendant is convicted of an offense and is subject to sentencing under AS 12.55.125(c), (d)(1), (d)(2), (e)(1), (e)(2), or (i) and

(1) the presumptive term is four years or less, the court may decrease the presumptive term by an amount as great as the presumptive term for factors in mitigation or may increase the presumptive term up to the maximum term of imprisonment for factors in aggravation;

(2) the presumptive term of imprisonment is more than four years, the court may decrease the presumptive term by an amount as great as 50 percent of the presumptive term for factors in mitigation or may increase the presumptive term up to the maximum term of imprisonment for factors in aggravation.

(b) Sentence increments and decrements under this section shall be based on the totality of the aggravating and mitigating factors set out in (c) and (d) of this section.

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(c) The following factors shall be considered by the sentencing court and may aggravate the presumptive terms set out in AS 12.55.125:

(1) a person, other than an accomplice, sustained physical injury as a direct result of the defendant's conduct;

(2) the defendant's conduct during the commission of the offense manifested deliberate cruelty to another person;

(3) the defendant was the leader of a group of three or more persons who participated in the offense;

(4) the defendant employed a dangerous instrument in furtherance of the offense;

(5) the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill health, or extreme youth or was for any other reason substantially incapable of exercising normal physical or mental powers of resistance;

(6) the defendant's conduct created a risk of imminent physical injury to three or more persons, other than accomplices;

(7) a prior felony conviction considered for the purpose of invoking the presumptive terms of this chapter was of a more serious class of offense than the present offense;

(8) the defendant's prior criminal history includes conduct involving aggravated or repeated instances of assaultive behavior;

(9) the defendant knew that the offense involved more than one victim;

(10) the conduct constituting the offense was among the most serious conduct included in the definition of the offense;

(11) the defendant committed the offense pursuant to an agreement that the defendant either pay or be paid for the commission of the offense, and the pecuniary incentive was beyond that inherent in the offense itself;

(12) the defendant was on release under AS 12.30.020 or 12.30.040 for another felony charge or conviction or for a misdemeanor charge or conviction having assault as a necessary element;

(13) the defendant knowingly directed the conduct constituting the offense at an active officer of the court or at an active or former judicial officer, prosecuting attorney, law enforcement officer, correctional employee, fire fighter, emergency medical technician, paramedic, ambulance attendant, or other emergency responder during or because of the exercise of official duties;

(14) the defendant was a member of an organized group of five or more persons, and the offense was committed to further the criminal objectives of the group;

(15) the defendant has three or more prior felony convictions;

(16) the defendant's criminal conduct was designed to obtain substantial pecuniary gain and the risk of prosecution and punishment for the conduct is slight.

(17) the offense was one of a continuing series of criminal offenses committed in furtherance of illegal business activities from which the defendant derives a major portion of the defendant's income;

(18) the offense was a crime specified in AS 11.41 and was committed against a spouse, a former spouse, or a member of the social unit comprised of those living together in the same dwelling as the defendant;

(19) the defendant's prior criminal history includes an adjudication as a delinquent for conduct that would have been a felony if committed by an adult;

(20) the defendant was on furlough under AS 33.30 or on parole or probation for another felony charge or conviction that would be considered a prior felony conviction under AS 12.55.145(a)(2);

(21) the defendant has a criminal history of repeated instances of conduct violative of criminal laws, whether punishable as felonies or misdemeanors, similar in nature to the offense for which the defendant is being sentenced under this section;

(22) the defendant knowingly directed the conduct constituting the offense at a victim because of that person's race, sex, color, creed, ancestry, or national origin;

(23) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the delivery of a controlled substance under circumstances manifesting an intent to distribute the substance as part of a commercial enterprise;

(24) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the transportation of controlled substances into the state;

(25) the defendant is convicted of an offense specified in AS 11.71 and the offense involved large quantities of a controlled substance;

(26) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the distribution of a controlled substance that had been adulterated with a toxic substance.

(d) The following factors shall be considered by the sentencing court and may mitigate the presumptive terms set out in AS 12.55.125:

(1) the offense was principally accomplished by another person, and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim;

(2) the defendant, although an accomplice, played only a minor role in the commission of the offense;

(3) the defendant committed the offense under some degree of duress, coercion, threat, or compulsion insufficient to constitute a complete defense, but which significantly affected the defendant's conduct;

(4) the conduct of a youthful defendant was substantially influenced by another person more mature than the defendant;

(5) the conduct of an aged defendant was substantially a product of physical or mental infirmities resulting from the defendant's age;

(6) in a conviction for assault under AS 11.41.200 — 11.41.230, the defendant acted with serious provocation from the victim;

(7) except in the case of a crime defined by AS 11.41.410 — 11.41.470, the victim provoked the crime to a significant degree;

(8) [Repealed, § 42 ch 143 SLA 1982.]

(9) the conduct constituting the offense was among the least serious conduct included in the definition of the offense;

(10) before the defendant knew that the criminal conduct had been discovered, the defendant fully compensated or made a good faith effort to fully compensate the victim of the defendant's criminal conduct for any damage or injury sustained;

(11) the defendant was motivated to commit the offense solely by an overwhelming compulsion to provide for emergency necessities for the defendant's immediate family;

(12) the defendant assisted authorities to detect or apprehend other persons who committed the offense with the defendant;

(13) the facts surrounding the commission of the offense and any previous offenses by the defendant establish that the harm caused by the defendant's conduct is consistently minor and inconsistent with the imposition of a substantial period of imprisonment;

(14) the defendant is convicted of an offense specified in AS 11.71 and the offense involved small quantities of a controlled substance;

(15) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the distribution of a controlled substance, other than a schedule IA controlled substance, to a personal acquaintance who is 19 years of age or older for no profit;

(16) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the possession of a small amount of a controlled substance for personal use in the defendant's home.

(e) If a factor in aggravation is a necessary element of the present offense, or requires the imposition of a presumptive term under AS 12.55.125(c)(2), (d)(3) or (e)(3), that factor may not be used to aggravate the presumptive term. If a factor in mitigation is raised at trial as a defense reducing the offense charged to a lesser included offense, that factor may not be used to mitigate the presumptive term.

(f) If the state seeks to establish a factor in aggravation at sentencing or if the defendant seeks to establish a factor in mitigation at sentencing, written notice must be served on the opposing party and filed with the court not later than 10 days before the date set for imposition of sentence. Factors in aggravation and factors in mitigation must be established by clear and convincing evidence before the court sitting without a jury. All findings must be set out with specificity.

(g) Voluntary alcohol or other drug intoxication or chronic alcoholism or other drug addiction may not be considered an aggravating or mitigating factor.

(h) In this section, "serious provocation" has the meaning given in AS 11.41.115(f). (§ 12 ch 166 SLA 1978; am §§ 39-41 ch 102 SLA 1980; am §§ 19, 20 ch 45 SLA 1982; am §§ 36, 38, 39, 42 ch 143 SLA 1982; am §§ 6, 7 ch 92 SLA 1983; am § 19 ch 37 SLA 1986)

Effect of amendments. — The 1986 amendment, effective May 26, 1986, added "that would be considered a prior felony conviction under AS 12.55.145(a)(2)" at the end of paragraph (20) of subsection (c).

NOTES TO DECISIONS

I. GENERAL CONSIDERATION.

Sentences for sexual assaults. — Review of cases which address sexual assaults involving both adult and child victims supports a sentencing range for aggravated offenses of 10 to 15 years, and use of Atkinson and Depp as benchmarks for determining the kind of conduct warranting a sentence within that range. These benchmarks are applicable to all aggravated cases because of: (1) multiple victims; (2) multiple assaults on a single victim; or, (3) serious injuries to one or more victims. *State v. Andrews*, Ct. App. Op. No. 510 (File Nos. A-468, A-492, A-552), 707 P.2d 900 (1985).

Sentence upheld. — Where defendant received a ten-year presumptive sentence for attempted first-degree murder as a second felony offender and appealed on the ground that the trial court gave insufficient consideration to former paragraph (d)(8) of this section, the mitigating factor that his prior felony of burglary was a less serious crime than the present offense, the court of appeals held that the trial judge's decision to give the mitigator little weight because he stressed general deterrence and affirmation of community norms was appropriate and the sentence was not clearly mistaken. *Staael v. State*, Ct. App. Op. No. 454 (File No. A-78), 697 P.2d 1050 (1985).

Sentence of eight-year presumptive term for first-degree sexual abuse of a minor and concurrent sentences of three years for two counts of second-degree sexual abuse of a minor to run concurrently with the eight-year term were upheld. The defendant's continued efforts to justify his conduct as "sex education" and his only limited acceptance and understanding of the grave risks of psychological damage to children that his conduct presented led the court of appeals to conclude the trial judge was not clearly erroneous in concluding that the mitigating factor of

conduct among the least serious in the definition of the offense was not established by clear and convincing evidence. *S.B. v. State*, Ct. App. Op. No. 516 (File No. A-811), 706 P.2d 695 (1985).

Sentence not upheld. — Where a defendant was sentenced to consecutive sentences of 10 years for burglary in the first degree, 20 years for robbery in the first degree and 10 years for assault in the second degree made consecutive to a previously imposed eight-year sentence for shooting with intent to wound, the case was remanded for resentencing of the defendant as a second-felony offender with a total sentence, including the unserved portion of the previous sentence, not to exceed 40 years. *Larson v. State*, Ct. App. Op. No. 403 (File No. 6179), 688 P.2d 592 (1984).

Applied in *Depp v. State*, Ct. App. Op. No. 390 (File No. 7002), 686 P.2d 712 (1984); *Wells v. State*, Ct. App. Op. No. 401 (File Nos. 7479, 7663), 687 P.2d 917 (1984); *Travelstead v. State*, Sup. Ct. Op. No. 407 (File No. A-114), 689 P.2d 494 (1984); *Gregory v. State*, Sup. Ct. Op. No. 411 (File No. A-430), 689 P.2d 508 (1984); *Wortham v. State*, Sup. Ct. Op. No. 414 (File No. 7353), 689 P.2d 1133 (1984); *Carlson v. State*, Ct. App. Op. No. 448 (File No. A-346), 696 P.2d 178 (1985); *Benboe v. State*, Ct. App. Op. No. 466 (File No. A-225), 698 P.2d 1230 (1985); *Hart v. State*, Ct. App. Op. No. 482 (File No. A-295), 702 P.2d 651 (1985); *Thomas v. State*, Ct. App. Op. No. 549 (File No. A-721), 710 P.2d 1017 (1985); *Resek v. State*, Ct. App. Op. No. 597 (File No. A-787), 715 P.2d 1188 (1986); *Dymenstein v. State*, Ct. App. Op. No. 624 (File No. A-1210), P.2d (1986).

Quoted in *Lausterer v. State*, Ct. App. Op. No. 438 (File No. A-104), 693 P.2d 887 (1985); *Marin v. State*, Ct. App. Op. No. 475 (File No. A-556), 699 P.2d 886 (1985); *Hancock v. State*, Ct. App. Op. No. 518 (File No. 7818), 706 P.2d 1164 (1985).

sentencing purposes can be condoned only in those cases where the state, after exercising due diligence, is unable to meet the statutory requirements for proof of a

prior conviction. *Kelly v. State*, Ct. App. Op. No. 251 (File No. 6311), 663 P.2d 967 (1983).

Sec. 12.55.165. Extraordinary circumstances. If the defendant is subject to sentencing under AS 12.55.125(c), (d)(1), (d)(2), (e)(1), (e)(2), or (i) and the court finds by clear and convincing evidence that manifest injustice would result from failure to consider relevant aggravating or mitigating factors not specifically included in AS 12.55.155 or from imposition of the presumptive term, whether or not adjusted for aggravating or mitigating factors, the court shall enter findings and conclusions and cause a record of the proceedings to be transmitted to a three-judge panel for sentencing under AS 12.55.175. (§ 12 ch 166 SLA 1978; am § 37 ch 143 SLA 1982)

Effect of amendments. — The 1982 amendment substituted "AS 12.55.125(c), (d)(1), (d)(2), (e)(1), (e)(2), or (i)" for "AS 12.55.125(c)(1), (c)(2), (c)(3), (d)(1), (d)(2), (3)(1), or (e)(2), of this chapter" near the beginning of this section.

Editor's notes. — Section 23, ch. 166, SLA 1978, in subsection (c), provides: "AS 12.55.125 — 12.55.185, enacted in sec. 12

of this Act, apply only upon conviction of the crime of murder in the first or second degree, kidnapping, or any crime classified as a class A, B, or C felony or a class A or B misdemeanor. For purposes of AS 12.55.125, 12.55.145, and 12.55.155, the court shall consider prior convictions whether committed before, on, or after the effective date of this Act."

NOTES TO DECISIONS

Constitutionality of presumptive sentencing provisions. — See notes under same heading, AS 12.55.125, *Nell v. State*, Ct. App. Op. No. 77 (File No. 5565), 642 P.2d 1361 (1982).

Authority to sentence defendant. — See notes to AS 12.55.175 under catchline "Sentencing authority," *Heathcock v. State*, Ct. App. Op. No. 293 (File No. 6803), 670 P.2d 1155 (1983). See also *Winfree v. State*, Ct. App. Op. No. 378 (File No. A-156), P.2d (1984).

Manifest injustice. — Manifest injustice is basically a subjective standard because of the purpose that the standard serves in recognizing cases that will inevitably arise in which the subjective judgment of the sentencing court should take precedence over the objective limits imposed by statute. *Lloyd v. State*, Ct. App. Op. No. 307 (File No. 7393), 672 P.2d 152 (1983).

The judge did not commit error by refusing to find manifest injustice based on imposition of the adjusted presumptive term in light of the totality of the circumstances. *Lloyd v. State*, Ct. App. Op. No. 307 (File No. 7393), 672 P.2d 152 (1983).

Judge did not err in failing to refer defendant's case to the three-judge panel to allow further reduction of defendant's sentence based on his lack of prior criminal convictions. *Lloyd v. State*, Ct. App. Op. No. 307 (File No. 7393), 672 P.2d 152 (1983).

Judge did not apply an incorrect standard in determining the question of manifest injustice when he defined the term as "something that's shocking to the conscience," and remand for application of the obvious unfairness standard proposed by defendant was unwarranted. *Lloyd v. State*, Ct. App. Op. No. 307 (File No. 7393), P.2d (1983).

Applied in *McManners v. State*, Ct. App. Op. No. 123 (File No. 6065), 650 P.2d 414 (1982); *Sears v. State*, Ct. App. Op. No. 151 (File No. 6692), 653 P.2d 349 (1982); *Peetook v. State*, Ct. App. Op. No. 178 (File No. 6330), 655 P.2d 1308 (1982); *Seymore v. State*, Ct. App. Op. No. 196 (File No. 6995), 655 P.2d 786 (1982); *Shaw v. State*, Ct. App. Op. No. 313 (File No. 7561), 673 P.2d 781 (1983); *Walsh v. State*, Ct. App. Op. No. 338 (File No. 7887), 677 P.2d 912 (1984).

State, Ct. App.
663 P.2d 967

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Stated in Erhart v. State, Ct. App. Op. No. 185 (File No. 6244), 656 P.2d 1199 (1982); State v. Rastopsoff, Ct. App. Op. No. 228 (File No. 6295), 659 P.2d 630 (1983); Maldonado v. State, Ct. App. Op. No. 349 (File No. 7897), 676 P.2d 1093 (1984).

Cited in Juneby v. State, Ct. App. Op. No. 72 (File No. 5606), 641 P.2d 823 (1982); Lacquement v. State, Ct. App. Op. No. 85 (File No. 5741), 644 P.2d 856 (1982); Wolf v. State, Ct. App. Op. No. 99 (File No. 5882), 647 P.2d 609 (1982); Griffith v. State, Ct. App. Op. No. 154 (File No. 6233), 653 P.2d 1057 (1982); Neakok v.

State, Ct. App. Op. No. 163 (File No. 6418), 653 P.2d 658 (1982); Wright v. State, Ct. App. Op. No. 204 (File No. 6569), 656 P.2d 1226 (1983); Koteles v. State, Ct. App. Op. No. 232 (File No. 6782), 660 P.2d 1199 (1983); Langton v. State, Ct. App. Op. No. 236 (File Nos. 7188, 6247, 7114), 662 P.2d 954 (1983); Woods v. State, Sup. Ct. Op. No. 2698 (File No. 6180), 667 P.2d 184 (1983); Maal v. State, Ct. App. Op. No. 295 (File No. 7076), 670 P.2d 708 (1983); State v. LaPorte, Ct. App. Op. No. 306 (File Nos. 7220, 7285), 672 P.2d 466 (1983); Flink v. State, Ct. App. Op. No. 370 (File Nos. 6962, 7060, P.2d (1984).

Sec. 12.55.175. Three-judge sentencing panel. (a) There is created within the superior court a panel of five superior court judges to be appointed by the chief justice in accordance with rules and for terms as may be prescribed by the supreme court. Three judges of the panel shall be designated by the chief justice as members. The remaining two judges shall be designated by the chief justice as first and second alternates to sit as members in the event of disqualification or disability in accordance with rules as may be prescribed by the supreme court.

(b) Upon receipt of a record of proceedings under AS 12.55.165, the three-judge panel shall consider all pertinent files, records, and transcripts, including the findings and conclusions of the judge who originally heard the matter. The panel may hear oral testimony to supplement the record before it. If the panel finds that manifest injustice would result from failure to consider relevant aggravating or mitigating factors not specifically included in AS 12.55.155 or from imposition of the presumptive term, whether or not adjusted for aggravating or mitigating factors, it shall sentence the defendant in accordance with this section. If the panel does not find that manifest injustice would result, it shall remand the case to the sentencing court, with a written statement of its findings and conclusions, for sentencing under AS 12.55.125.

(c) The three-judge panel may in the interest of justice sentence the defendant to any definite term of imprisonment up to the maximum term provided for the offense or to any sentence authorized under AS 12.55.015.

(d) Sentencing of a defendant or remanding of a case under this section shall be by a majority of the three-judge panel. (§ 12 ch 166 SLA 1978)

Editor's notes. — Section 23, ch. 166, SLA 1978, in subsection (c), provides: "AS 12.55.125 — 12.55.185, enacted in sec. 12 of this Act, apply only upon conviction of the crime of murder in the first or second degree, kidnapping, or any crime classified

as a class A, B, or C felony or a class A or B misdemeanor. For purposes of AS 12.55.125, 12.55.145, and 12.55.155, the court shall consider prior convictions whether committed before, on, or after the effective date of this Act."



alaska judicial council

1031 W. Fourth Avenue, Suite 301, Anchorage, Alaska 99501 (907) 279-2526

ACTING DIRECTOR
Teresa W. Carns

March 19, 1987

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Hilbert J. Henrickson, M.D.
Renee Murray

ATTORNEY MEMBERS
William T. Council
James D. Gilmore
Barbara L. Schuhmann

CHAIRMAN, EX OFFICIO
Jay A. Rabinowitz
Chief Justice
Supreme Court

ALASKA FELONY SENTENCES: 1984

The Alaska Judicial Council found that presumptive sentencing caused only part of the increases in court felony trials and prison populations during the early 1980s. A one-hundred percent increase in the number of convicted offenders, and legislative reclassification of drug and sexual offenses contributed equally to high court caseloads and jail overcrowding. The Judicial Council's study was based on data about all 1984 felony case filings that resulted in a conviction and sentence. The data were provided by state agency computerized information systems, especially the Department of Law's PROMIS system. Department of Public Safety and Department of Corrections also contributed data for the report.

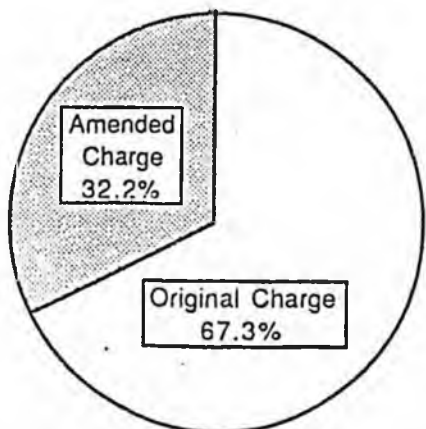
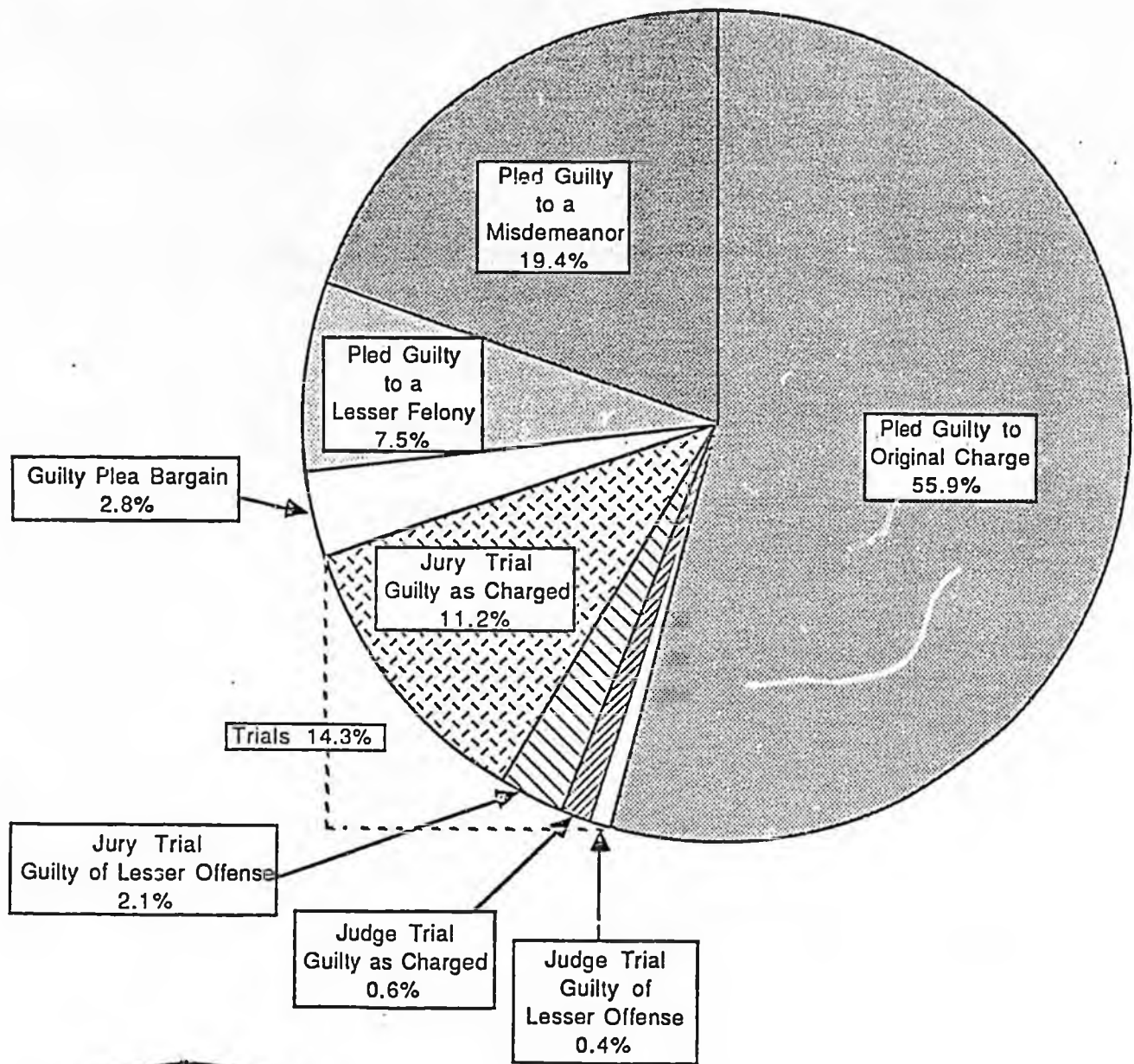
The study found that 14.3% of the offenders had been convicted after a trial. Nearly 20% of the 1984 offenders had a misdemeanor as their final, most serious charge of conviction. Only 2.8% of the convicted offenders pled guilty in a recorded plea bargain as an exception allowed under the Attorney General's prohibition of plea bargaining.

Sentence lengths for offenders were strongly related to the seriousness of the offense. The most serious offenses (Unclassified) received sentences ranging from 87.9 months for sexual abuse of a minor I to 401.3 months for murder I. Class A offenses typically received sentences of about 5 years, Class B offenses were sentenced to about 2 years and Class C offenses to about 1 year. The study found that the presumptive sentencing scheme had, with few exceptions, resulted in consistent sentence lengths for most offenders.

The report found a 100% increase in the amount of prison time imposed between 1980 and 1984. The study estimates that the increased numbers of convictions between 1980 and 1984 accounted for about 40% of the increased prison time in 1984. Legislative changes, including presumptive sentences for first-time felony offenders convicted of Class A offenses and reclassification of sexual and drug offenses, accounted for another 40% of increased prison time. The balance of the increase was due to the fact that a higher percentage of 1984 offenders were convicted of serious crimes than were 1980 offenders.

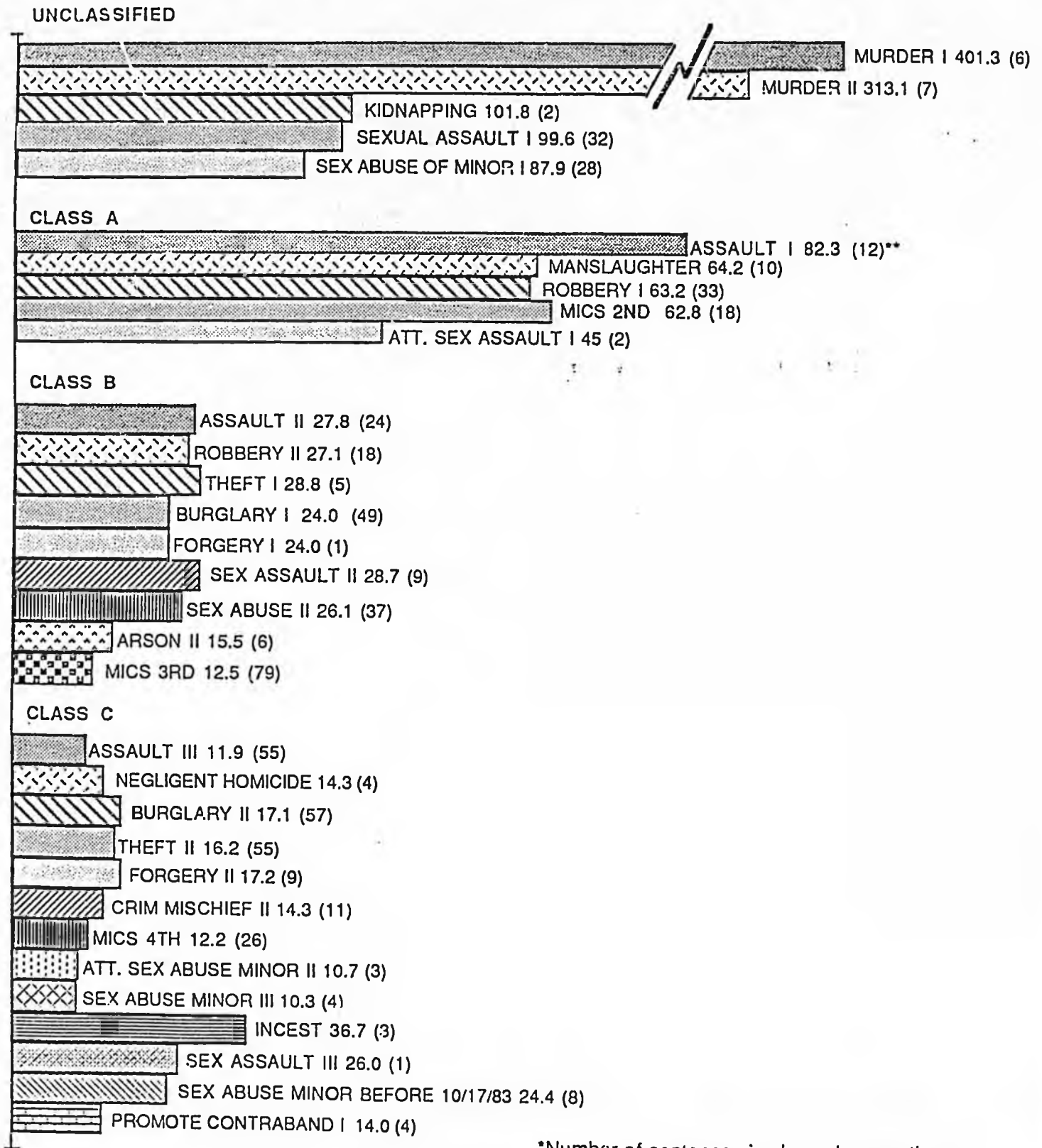
Additional copies of the report are available upon request from the Alaska Judicial Council. Contact: Teresa W. Carns, Acting Director, Alaska Judicial Council, 1031 W. 4th Avenue, Suite 301, Anchorage, Alaska 99501, telephone 279-2526.

FIGURE 3
(Alaska Felony Sentences: 1984)
Types of Convictions



Original vs. Amended Charge

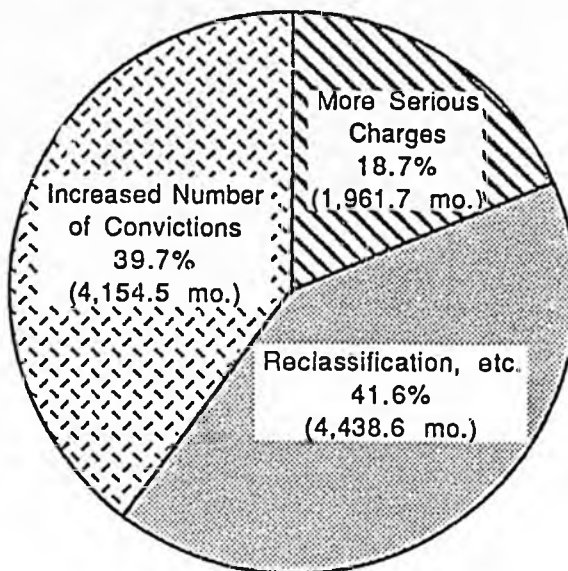
FIGURE 7
Alaska Felony Sentences: 1984
Comparison of Mean Sentence Length For Selected Offenses
by Class of Offense*



*Number of sentences is shown in parentheses.
 All sentence lengths are in months.

**Includes one sentence of 20 years (240 months)

FIGURE 6
(ALASKA FELONY SENTENCES: 1984)
Increase in Total Prison Time: Percent of
Increase Due to Specific Factors



HOUSE COMMITTEE REPORT

(7)

Date referred: 5/14/87

FURTHER REFERRALS:

DATE: 5/15/87

The Judiciary Committee has considered SB 237

"An Act providing that assistance to authorities to detect, apprehend, or prosecute other persons is conduct constituting a mitigating factor in criminal sentencing."

RECOMMENDS:

- replace with _____ the same title
- attached amendment(s) a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S):

- fiscal impact same as previous fiscal note published _____
- zero fiscal note same as previous zero fiscal note published _____
- zero with analysis

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

Chairman's signature

S B

243

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY
LEGISLATIVE REFERENCE LIBRARY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

House Judiciary:

1988 - January 20

SENATE COMMITTEE REPORT

FIRST COMMITTEE OF REFERRAL

Date of 5/4/87 5-DAY NOTICE
IN ACCORDANCE WITH UNIFORM RULE 23

FURTHER:

**FISCAL NOTE(S) ATTACHED **
IN ACCORDANCE WITH AS 24.08.035
(see below)

4/8/87 DATE TURNED INTO OFFICE 5/5/87
Mr. President:

FINANCE Committee considered SB 243

appropriating all proceeds of the Dinkum Sands Case to the budget reserve fund; efd.

and recommended:

- replace with CS _____ same title
- attached amendment(s) and new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- further referral to _____
- letter of intent adopted and attached

** Committee attached or adopted fiscal note(s)
 zero fiscal impact

MEMBERS SIGNING DO PASS

[Signature]
Kirk Cleckley (Do Pass)
Willie Humphrey
[Signature]
Charles Zharoff

OTHER RECOMMENDATIONS

[Signature]

John B. Bily Do Pass
Chairman signature and recommendation

Committee Backup Attached

**STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE**

REQUEST: _____

Bill Version: SB 243
Publish Date: _____

Revision Date: _____

Agency Affected: Department of Revenue

Title: Appropriating all proceeds of
Dinkum Sands Case to budget reserve fund

BRU: _____

Sponsor: Senators Bennett & Faiks

Components: _____

Requestor: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

GENERAL FUND		-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL		-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Senator John Binkley, co-chairman

Phone: 465-4985

Division: Senate Finance Committee

Date: 5/5/87

Approved by Commissioner: _____

Date: _____

Agency: _____

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

DRAFT BUDGET BRIEFING DOCUMENT
United States v. Alaska, No. 84 Original (Dinkum Sands)

Synopsis

For FY 89 the Department of Law seeks \$700,000 for the Dinkum Sands case, the case with perhaps the greatest long-term revenue potential for the state. As of September 30, 1987, escrowed funds from the lands at issue in the case (lease bonuses and rentals plus interest) totaled \$1,176,119,256.28. In addition, each of the disputed land leases entitles the owner (either the United States or Alaska, as ultimately adjudicated in the action) to a sliding scale production royalty of between 16 2/3 percent and 65 percent of the oil and gas ultimately produced. .

Background

This case presents three separate sets of issues relating to the ownership of submerged lands offshore Alaska's North Slope. The Submerged Lands Act of 1953, 43 U.S.C. 1301 et seq., made applicable to Alaska in section 6(m) of the Alaska Statehood Act, granted to the state the submerged lands within its seaward boundaries. As a general rule, the boundaries are three geographic miles seaward of the state's "coast line," defined as "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."

In 1979, the state and federal governments desired to lease lands offshore the North Slope, but could not agree on the application of the Submerged Lands Act to the area. An action to determine title was filed under the United States Supreme Court's original jurisdiction, and an interim agreement was entered permitting leasing of the lands pending final adjudication of ownership. The case was referred by the Court to a Special Master, J. Keith Mann, the Academic Dean of Stanford Law School, for trial and a recommended decision. The Supreme Court, however, will make the final adjudication.

A total of fifteen separate and discrete legal questions have been identified by the parties as requiring resolution. However, they can be separated into three basic categories: (1) the "enclave issues;" (2) is Dinkum Sands an island?; and (3) counterclaim issues. Each category will be described in turn.

1. The "enclave issues." These questions relate to application of the Submerged Lands Act to chains of near-shore barrier islands. The United States contends that the coast line of the mainland and of each individual island should be used to generate the three-mile lines delimiting Alaska's submerged land ownership. Where a barrier island chain is more than six miles

offshore, which is the case directly offshore Prudhoe Bay, this "strict application of the method of arcs and circles" would result in federal ownership of the "enclaves" between the state-owned three-mile belts measure from the mainland and the individual islands. The state contends that, where the islands in a chain are less than ten miles apart (as they are along most of the North Slope, including offshore Prudhoe Bay), "straight baselines" connecting the endpoints of the islands constitute the seaward limit of inland waters and therefore are part of the state's coast line, and the state's three-mile belt should be measured from those straight baselines and only the seaward shore of the islands, with the state owning all of the lands between the mainland and the islands, including the disputed "enclaves."

In addition, section 2 of the Statehood Act provides that the state "shall consist of all the territory, together with the territorial waters appurtenant thereto, now included in the Territory of Alaska." The state contends that the United States considered all such "enclaves" as underlying territorial waters at the time of Alaska's admission, and therefore they were within our seaward boundaries on the date of statehood and state ownership accordingly vested at that time. The United States disagrees.

On these issues, we had to research and prepare a detailed chronology of the United States' maritime delimitation practice, both domestic and in international relations, to show that the United States had never used strict application of the method of arcs of circles until long after Alaska's admission. The results of our research are summarized on the attached graphic timeline, which shows that the United States affirmatively rejected that method on two occasions, once before and once after Alaska's admission, and did not employ it for either domestic Submerged Lands Act purposes or in its foreign relations until long after our rights either vested or did not vest. We also had to prepare expert witnesses on the application of straight baselines to geographic situations like that presented offshore the North Slope, and depose and cross-examine expert witnesses called by the United States.

If the state prevails on any of the "enclave issues" under any theory, we will receive virtually all of the escrowed funds and will be entitled to production royalties from virtually all of the disputed lands currently under lease if commercial production ever commences.

2. Is Dinkum Sands an island? Right in the middle of the barrier island chain offshore Prudhoe Bay is a sand and

gravel formation named Dinkum Sands. Approximately 25 percent of the escrowed funds and potential production royalties are attributable to the lands within three miles of Dinkum Sands. Ownership of these disputed lands turns on whether Dinkum Sands is or is not above mean high tide -- i.e., whether it is an island. If it is, the state owns the disputed lands; if it is not, the United States owns them (unless the state prevails on the "enclave issues," in which case the state would own them irrespective of Dinkum Sands' status as an island).

In 1980-81, the state and federal governments collectively spent approximately \$5 million to monitor Dinkum Sands and determine whether it is or is not above the level of mean high tide. The data showed that, at least during that period, it ranged between 3 inches and two feet below the level of mean high tide. Independent state monitoring in 1983, however, found it between 3 inches and 3 feet above the level of mean high tide. Moreover, the value (datum) for mean high tide was developed from only 12 months of observations, while 19 years of observations are required for a truly accurate calculation of that datum. Finally, it was discovered that the high point of the feature migrates as a result of geomorphologic processes (e.g., ice push; storm surge; variations in sediment transport; etc.) and is dependent on subsurface incorporated "annual ice" lenses which

melt every year. The United States claims that this "lack of permanence" as to both horizontal location and vertical elevation disqualifies it as an island.

On this issue, we were required to prepare expert witnesses on barrier island formation, computation of the tidal datum, application of that datum to Dinkum Sands, geomorphologic processes in the Arctic, historic mapping and charting of the feature, and depose and cross-examine the federal government's expert witnesses in these areas as well. In addition, we had to identify percipient eyewitnesses who had visited the area and could relate their personal observations, and depose and cross-examine both the federal government's eyewitnesses and eyewitnesses presented by the Inupiat Community of the North Slope (ICAS) and Ukpeagvik Inupiat Corporation (UIC). (ICAS and UIC had been permitted to intervene pending resolution of their claim that ANCSA did not extinguish their aboriginal title to the outer continental shelf. Under their theory, this dispute is between Alaska and the Inupiat. Their claim now has been denied, and they are no longer parties to the case.)

3. Counterclaim issues. When the state filed its answer, we also filed a counterclaim against the United States with respect to four issues: (1) Whether the pre-statehood withdrawal

and reservation of Naval Petroleum Reserve No. 4 (Pet. 4, now the National Petroleum Reserve Alaska or NPRA) defeated Alaska's title to the submerged lands within its exterior boundaries; (2) whether the pre-statehood withdrawal and reservation for the Arctic National Wildlife Refuge (ANWR) defeated the state's title to the submerged lands underlying the coastal lagoons between the Canning River and the Canadian border; (3) whether the 1975 extension of the ARCO dock is part of the state's coast line; and (4) whether the southern portion of Harrison Bay is a juridical bay and therefore inland waters of the state.

There are no escrowed funds dependent on the outcome of these issues, and it appears that the ultimate value of the lands at issue under these questions does not approach that of the lands at issue under the first two sets of issues (although the ANWR lagoon lands appear to have significant potential). Accordingly, we will not discuss the parties' various legal contentions.

Current Status

All of the issues have been fully tried, briefed and argued before the Special Master, and we are awaiting his report and recommended decision. He has given no indication when his

report will be finalized. We are pressing him to complete it, although we must do so with caution since we do not want to prejudice our case by offending him.

In the meantime, however, cases involving other states in which similar issues are presented require continued activity. The most significant of these is a case involving the State of Mississippi which presents issues similar to the "enclave issues" described above. We are reluctant to have the Supreme Court decide the issues, the most significant monetarily in our case, only on the basis of facts and arguments presented by Mississippi.

Once the Special Master's report is filed with the Supreme Court, either party may file "exceptions" with the Court -- i.e., a brief arguing why the Special Master's recommended decision should not be accepted. The other party may file a response, in which case the matter is set on for argument. It is expected that either the United States or the state, or possibly both, will file exceptions. From the time exceptions are filed, it will probably take between eight and twelve months for a final ruling by the Court, with a final decree entered shortly thereafter.

Budget

The \$700,000 expenditure proposed for FY 89 consists of the following:

Outside counsel (Washburn & Kemp)	\$200,000
Preparation of briefs	\$ 25,000
Alaska's share of Special Master's costs and fees	\$400,000
Contingency (other cases, etc.)	\$ <u>75,000</u>
TOTAL	\$700,000

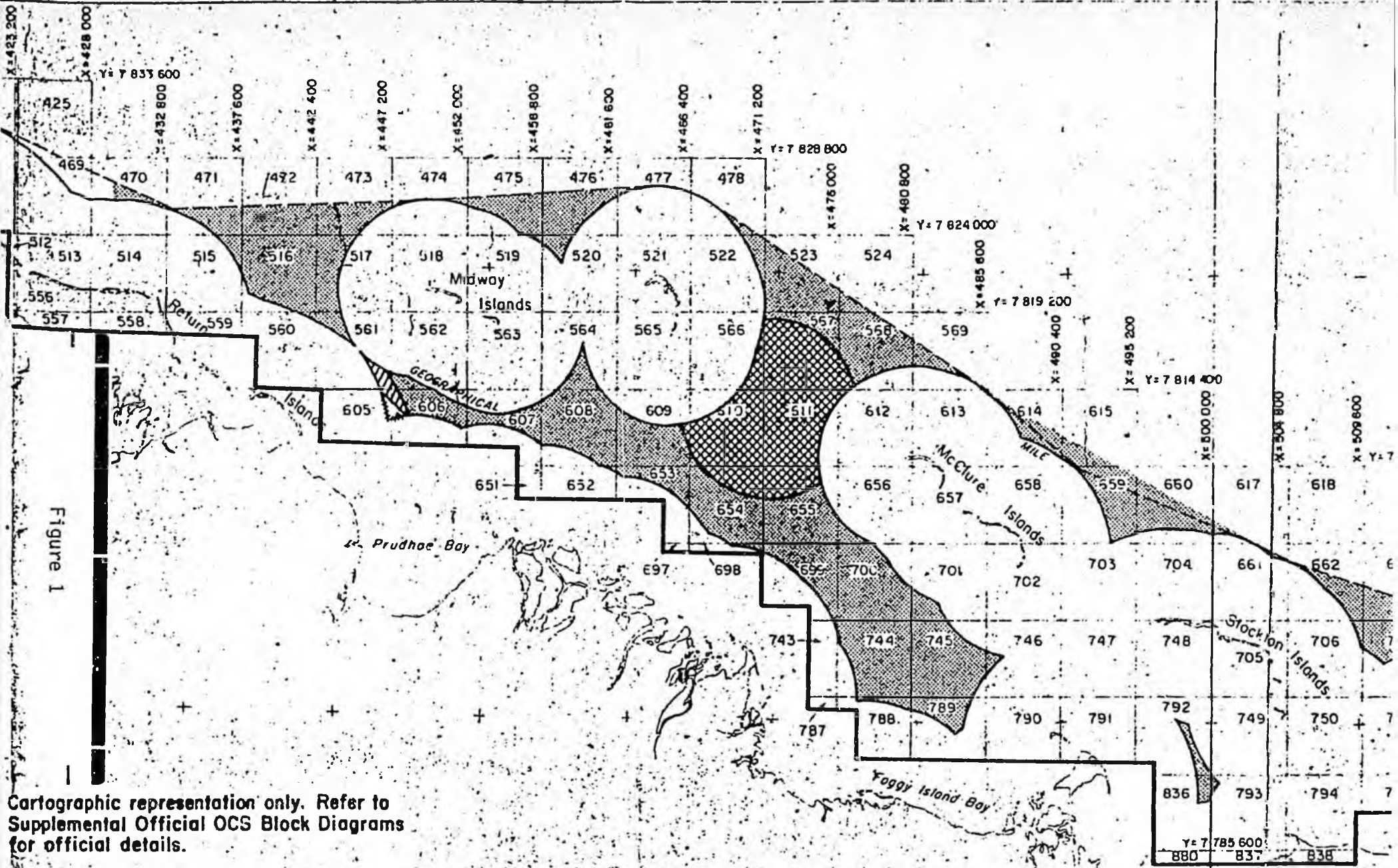


Figure 1

Cartographic representation only. Refer to Supplemental Official OCS Block Diagrams for official details.

STRICT APPLICATION OF 3 MILE ARCS
FROM ART. 3 "NORMAL BASELINE"
(PRESENT U. S. POSITION)

Figure 2

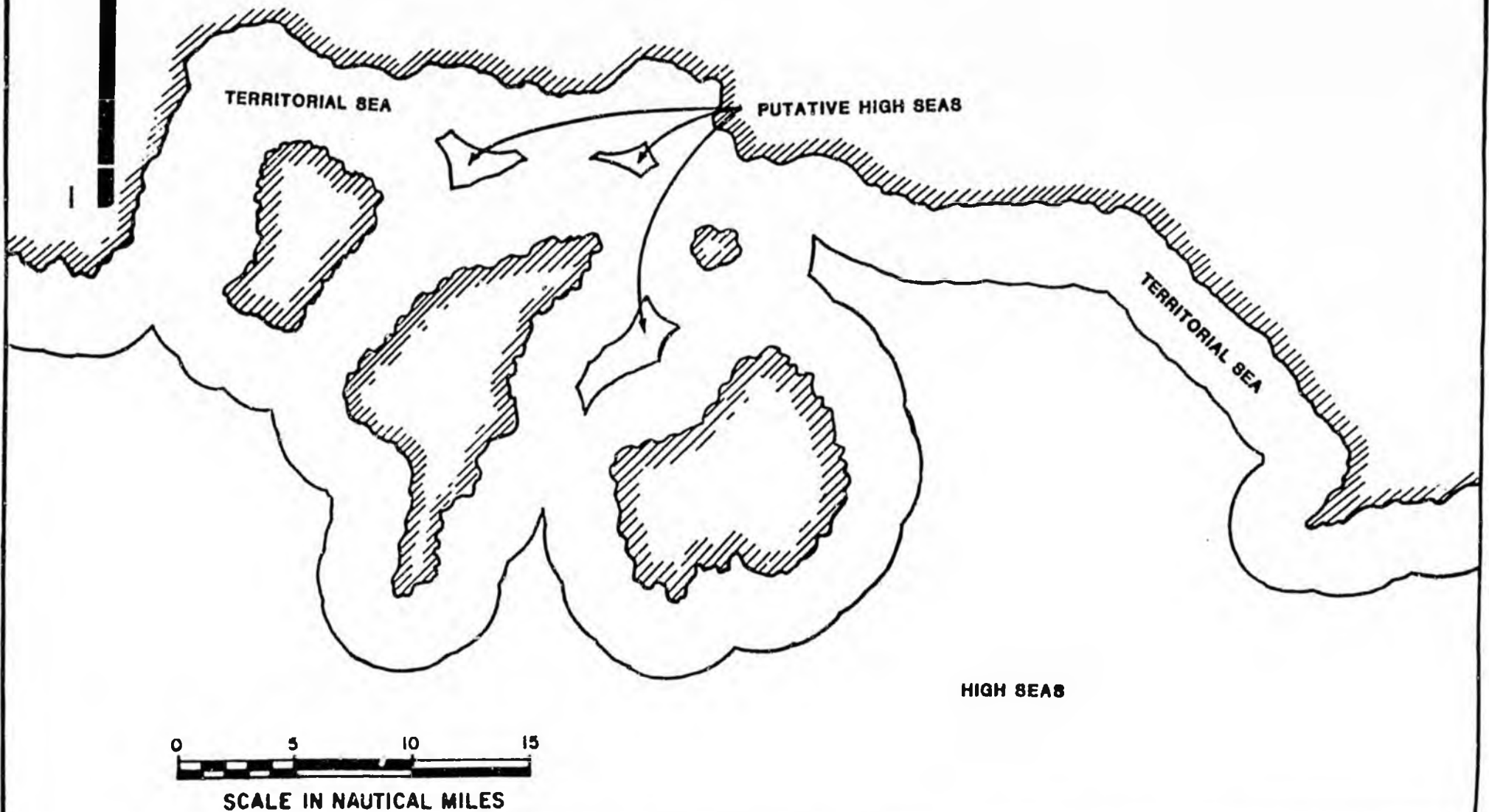
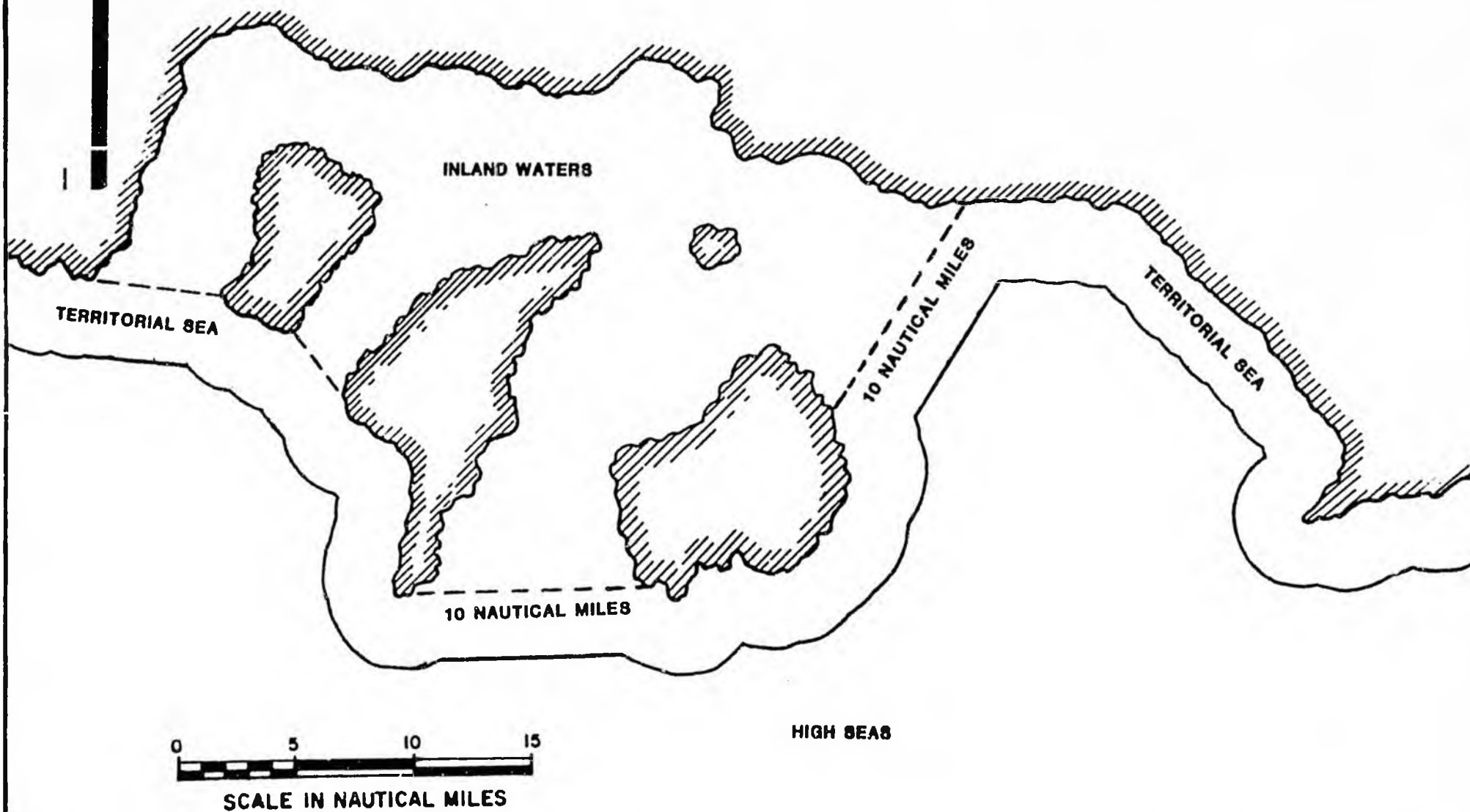


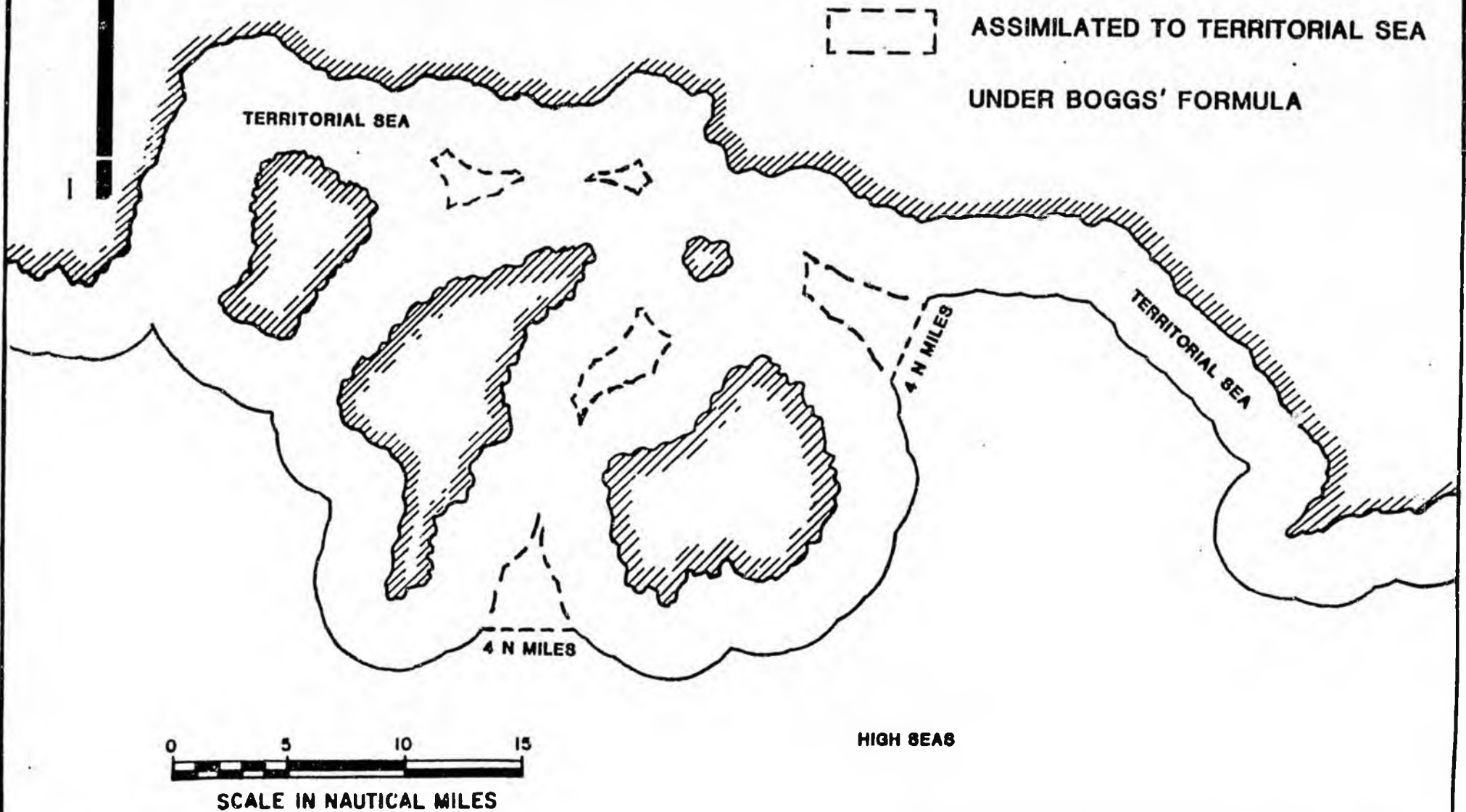
ILLUSTRATION OF THE 10 MILE RULE (A BASELINE RULE)

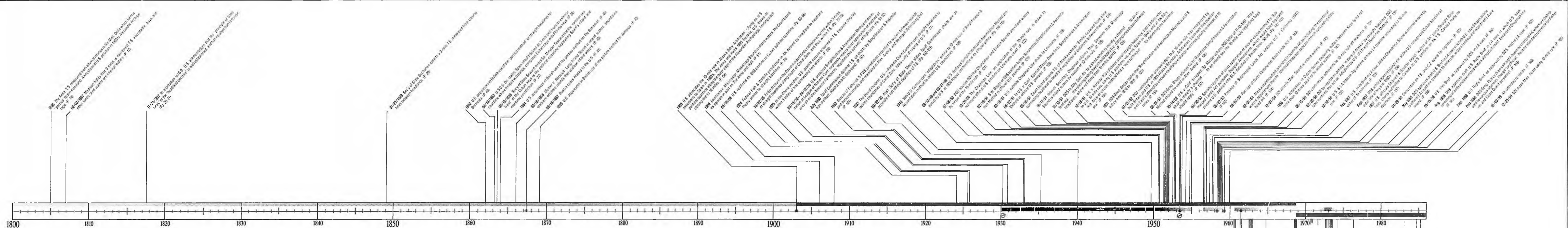
Figure 3



3 MILE ARCS FROM ART. 3 "NORMAL BASELINE"
WITH BOGGS' ASSIMILATION FORMULA APPLIED
TO OUTER LIMIT

Figure 4





- Legend**
- Island Fringes Delimit Inland Waters
 - Ten Mile Rule Encloses Inland Waters
 - Straight Baselines Delimit Inland Waters
 - Assimilation and Simplification Method for Territorial Waters
 - Strict Method of Arcs of Circles with Enclaves and Pockets of High Seas

Abbreviations

T.S.	Territorial Sea	DOJ	Department of Justice
C.Z.	Contiguous Zone	DOI	Department of Interior
OMB	Office of Management & Budget	DOC	Department of Commerce
U.S.C.S.	U.S. Coast Survey	SLA	Submerged Lands Act
DOS	Department of State	FCMA	Fishery Conservation & Management Act

This chart accompanies the Brief of the State of Alaska in Reply to the Post-Trial Memorandum of the United States on Questions 2, 3, 4, 12, 13 and 15 of the Joint Statement of Questions presented and Contentions of the Parties, filed with the Special Master in the spring of 1986. References such as "(P. 17)" are to the Chronological Outline of Relevant Events in American Foreign Policy with Respect to the Delimitation of the Territorial Sea and other Maritime Zones, 1782-1985, filed by Alaska with the Special Master May 28, 1985. That Chronology should be consulted for full citations to the evidence and to matters which may be judicially noticed.

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08/29/80 DOJ responds to Alaska's position that 10-mile rule was US policy

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No. 84, Original

In the Supreme Court of the United States
OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALASKA

BEFORE THE SPECIAL MASTER

JOINT STATEMENT OF QUESTIONS PRESENTED
AND CONTENTIONS OF THE PARTIES

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UNITED STATES OF AMERICA, PLAINTIFF

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BEFORE THE SPECIAL MASTER

JOINT STATEMENT OF QUESTIONS PRESENTED
AND CONTENTIONS OF THE PARTIES

INTRODUCTION

1. The United States and the State of Alaska jointly submit this statement of the questions presented by the Complaint of the United States and the Counterclaim of Alaska in this case, together with the contentions of the parties on each question. The submission is designed to aid the Special Master in identifying, with more particularity than do the pleadings, the issues in dispute and the legal theories

upon which each litigant relies. At the same time, the parties are making disclosure to each other and intend hereby to restrict themselves to the contentions outlined and those fairly comprised within the present statement.

2. To aid the Special Master in identifying the disputed submerged lands in what is referred to herein as "the leased area," the parties now tender a copy of the map annexed to an Interim Agreement entered on October 26, 1979 (Appendix I, *infra*). In accordance with the provisions of that Interim Agreement, the parties are bound to accept the low-water lines and the three-mile projections drawn on that map as fixed "for all relevant periods in the past and through the date of a final judicial determination" in this case. So, also, the map has been agreed to accurately indicate, for all relevant times, the location of the Arco Pier and the formation known as Dinkum Sands and the three-mile projections from those features. There is, however, no agreement as to the controlling date or dates for determining whether Dinkum Sands is part of the coast of Alaska and that matter may be disputed.

The parties have not reached agreement on a single definition and depiction of the coastline off the Petroleum Reserve and the Arctic Wildlife Range, effective for all relevant periods, but expect to do so. At that time, we will submit appropriate maps depicting the disputed submerged lands in those areas.

3. We also append, for the convenience of the Special Master, the relevant provisions of law re-

ferred to: portions of the Submerged Lands Act of 1953, made applicable to Alaska by the Alaska Statehood Act in 1959 (App. A); pertinent Articles of the international Convention on the Territorial Sea and the Contiguous Zone (App. B); a Regulation of the United States Corps of Engineers relating to permits for structures affecting the limits of the territorial sea (App. C); the Emergency Permit relating to the Arco Pier extension (omitting irrelevant provisions) (App. D); Executive Order No. 3797-A of February 27, 1923, creating Naval Petroleum Reserve No. 4 (App. E); the Notice of Proposed Withdrawal and Reservation dated January 14, 1958, reciting an application to create the Arctic National Wildlife Range (omitting irrelevant land descriptions) (App. F); Public Land Order 2214, dated December 6, 1960, establishing the Arctic National Wildlife Range (with like deletions) (App. G); and a Regulation of the Department of the Interior relating to the effect of applications for withdrawal of public lands (App. H).

QUESTIONS PRESENTED AND CONTENTIONS

Question 1: Should Alaska's Motion for Leave to File its Counterclaim be granted?

The *United States* and the *State of Alaska* both support the Motion. Plainly, the Court has jurisdiction to entertain the Counterclaim. 28 U.S.C. 1251 (b)(2). The sovereign immunity of the United States in respect of a claim of this kind has been waived by 28 U.S.C. 2409a and the waiver embraces

an original action in this Court. *California v. Arizona*, 440 U.S. 59 (1979). The exercise of that jurisdiction in this instance is appropriate, in the view of both parties. The Court has intimated that disputes under the Submerged Lands Act between the United States and a State should be begun here. *United States v. Alaska*, 422 U.S. 184, 186 n.2 (1975); *United States v. Louisiana*, 363 U.S. 1, 85 n.143 (1960). With the single exception of the earlier *Alaska* case just cited, every such controversy has been resolved in an original action in this Court—with or without the assistance of a Special Master. In this very case, the Court has granted the United States leave to file its original Complaint and there is no reason why Alaska's Counterclaim should not receive like treatment. Although the issues raised by the Counterclaim are independent of those presented by the Complaint, they arise under the same statutory and constitutional provisions and involve offshore submerged lands adjacent to those that are the subject matter of the Complaint. Judicial economy is served by consolidating the several submerged lands disputes off the North Slope of Alaska in a single case before the same tribunal.

In the circumstances, both parties urge the Special Master to proceed to hear the Counterclaim on the merits, without first submitting an interim Report to the Court on the Motion for Leave to File and awaiting the Court's final ruling. No doubt, the Master is free to seek the Court's decision now. But, in the

California v. Arizona of that jurisdiction, in the view of the court, is not dispositive of the issue between the parties to be begun here.

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we urge the Special
Master to file his
interim Report to
the Court and await
the Court's ruling.
But, in the

present situation, that would substantially delay proceedings and is, in our view, entirely unnecessary. The Court's initial Order of February 19, 1980 in this case expressly authorizes the Special Master to deal with "additional pleadings." The subsequent Order referring the Motion for Leave to File Counterclaim may be read as indicating the Court's view that such matters are for the Special Master to determine, subject only to the Court's ultimate review when the Master has fully concluded his task. That is the approach recently followed by Judge Harper, as Special Master, in *California v. Arizona and United States*, No. 78, Original, in which he permitted Arizona to file a Cross-Claim against the United States and is hearing it on the merits without any Report to the Court. A like procedure was adopted by Judge Tuttle, as Special Master, in *Arizona v. California*, No. 8, Original, when, without submitting the matter to the Court, he permitted five Indian Tribes to intervene, and the attempt to obtain interlocutory review of his action was rejected by the Court Order of January 7, 1980. Here, moreover, the acquiescence of all parties and the obvious appropriateness of entertaining the Counterclaim leave no doubt as to the Court's ultimate ruling.

Question 2: Should the extent of Alaska's submerged lands in the leased area be determined on the basis of "straight baselines?"

Under the doctrine of *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845), as explained in later cases, every State, upon its admission to the Union, is vested by the Constitution with title to the beds of all inland navigable waters within State boundaries which previously have not been appropriated by the United States or alienated to others. This includes submerged lands underlying offshore waters that are properly characterized as "inland." The Submerged Lands Act (unnecessarily, it may be) confirms this grant, with a like exception. In the leased area (unlike the situation off the Petroleum Reserve, see Question 8, and the Arctic Wildlife Range, see Question 9), there is no claim that any "inland" offshore submerged lands were reserved or alienated before Alaska became a State. Accordingly, Alaska is entitled, *inter alia*, to all submerged lands underlying "inland" waters off the shore of the State.

Additionally, the Submerged Lands Act grants to coastal States the offshore submerged lands within their "boundaries," as there defined. There is no dispute that this grant includes lands within three miles of the "coast line," defined as "the line of 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." The parties do not agree, however, whether, in a situation like that presented here, the so-called "3-mile rule" excludes areas shoreward of a fringe of islands which

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belong to the State. At all events, in measuring the Submerged Lands Act grant to Alaska, it may be relevant to fix the "seaward limit of inland waters."

The parties agree that the principles of the international Convention on the Territorial Sea and the Contiguous Zone have some application to this determination. However, they disagree on the way those principles should be applied to the issues presented in this case and on the extent to which those principles, as applied by the United States in its dealings with other countries, control resolution of these issues.

The international Convention permits, but does not require, a coastal nation to draw "straight baselines" joining offshore islands and to employ those lines as its "coastline" for purposes of marking the seaward limit of its inland waters, when a not too distant "fringe" of barrier islands shields its mainland coast. That is the situation in the leased area. However, the United States has chosen not to draw straight baselines in this area (or any other). The question is whether this international stance governs this domestic controversy in the particular circumstances presented here.

The *United States* contends that the decision of its Executive Branch not to draw straight baselines to mark the seaward limit of its inland waters for international purposes is controlling in this litigation, at least in the absence of any indication that it had earlier adhered to a firm and continuing international policy to enclose inland waters within bar-

rier islands and later abandoned that stance solely to gain advantage in a lawsuit to the detriment of a State (like Alaska), which is denied. Accordingly, the United States submits that the disputed lands which Alaska claims as being within boundaries determined on the basis of straight baselines do not belong to Alaska.

The *State of Alaska* contends (1) that the present international stance of the United States in this respect is not binding in this litigation; (2) that, before Alaska was admitted to the Union, the United States determined that it would be appropriate to delimit inland waters in the leased area by drawing straight baselines; (3) that Alaska entered the Union with its seaward boundaries in the leased area determined on the basis of straight baselines; and (4) that the United States is bound by that determination. Accordingly, Alaska submits that the submerged lands which it claims as being within boundaries determined on the basis of straight baselines belong to it.

Question 3: Do the submerged lands between the mainland and the barrier islands in the leased area (including areas more than three miles from any upland) belong to Alaska on the ground that they underlie inland waters?

If the "straight baseline" contention is not accepted, the question remains whether all the submerged lands shoreward of the barrier islands in the leased area nevertheless belong to Alaska on the ground that they underlie "inland" waters of the State.

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The *United States* contends that the submerged lands shoreward of the barrier islands in the leased area do not underlie inland waters, but, rather, areas of territorial sea and high seas, and that, insofar as those lands are more than three miles from the coast line of the mainland or any island, they do not belong to Alaska. It submits (1) that, with the single exception of so-called "historic waters", the only waters (at least in the case of Alaska) that qualify as inland for purposes of the *Pollard* rule or the Submerged Lands Act are those that satisfy the criteria of the international Convention; and (2) that the waters between the mainland and the barrier islands in the leased area—whether or not the Dinkum Sands formation is a part of Alaska's coast line—do not satisfy the Convention criteria for inland waters (except under a straight baseline theory, which the United States contends is inapplicable; see Question 2). To the extent that the criteria of the international Convention do not control resolution of this issue, the United States denies that Congress considered the waters in question as inland.

The *State of Alaska* contends that the submerged lands between the mainland and the barrier islands in the leased area underlie waters which Congress considered inland waters at the time Alaska was admitted to the Union. Accordingly, Alaska submits (1) that those lands vested in Alaska at the moment of statehood under the *Pollard* rule—whether or not the Dinkum Sands formation is a part of Alaska's coast line (see Question 5), but all the more so if it

is—and cannot be divested by any subsequent change of law; and (2) that the same result obtains under the Submerged Lands Act. Alternatively, to the extent that the criteria of the international Convention govern this domestic controversy (which is denied), Alaska contends that the waters in question qualify as inland under the Convention.

Question 4: If they do not underlie inland waters of Alaska, do the submerged lands between the mainland and the barrier islands in the leased area which are more than three miles from any upland, but are totally surrounded by submerged lands owned by Alaska, belong to Alaska on the ground that they lie within Alaska's most seaward contiguous boundary?

As already noted (see Question 2), the Submerged Lands Act granted to Alaska the submerged lands within its "boundaries," as defined in the Act. There is no dispute that this grant includes lands within three miles of Alaska's coast line, including (at minimum) the lands within three miles of the mainland and a three-mile belt around islands. A literal application of a three-mile limitation in the leased area produces a small "enclave" of submerged lands totally surrounded by submerged lands which both parties agree belong to Alaska, and another larger such enclave if the Dinkum Sands formation is an island forming a part of Alaska's coast line (see Question 5). The question is whether, in this situation, such enclaves should be treated as within the grant to Alaska on the ground that they are landward of Alaska's most seaward contiguous boundary

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under the Act, regardless of the international status
of such enclave waters (but assuming that they are
not part of Alaska's inland waters), or on the ground
that they underlie territorial waters.

The *United States* contends (1) that the Act con-
tains a three-mile limitation on the distance which
Alaska's boundaries may extend seaward from the
coast line; (2) that the international Convention con-
tains the same limitation on the distance which the
United States may claim its territorial sea extends
seaward (so long as it adheres to a 3-mile rule and does
not adopt straight baselines); (3) that such enclaves
are areas of high seas under the international Con-
vention; and (4) accordingly, that the submerged
lands underlying them do not belong to Alaska. Ad-
ditionally, the United States contends that, even if
these enclaves are part of the territorial sea of the
United States, the submerged lands underlying them
do not belong to Alaska because the Submerged
Lands Act grant is limited to submerged lands with-
in three miles of the coast line (including the coast
line on the landward side of islands) and does not
include such enclaves.

The *State of Alaska* contends that such enclaves,
even if they do not underlie Alaska's inland waters,
are nevertheless included in the Submerged Lands
Act grant to Alaska. It submits (1) that—except
in situations governed by Section 5 of the Act (con-
cededly not relevant in the leased area)—the Sub-
merged Lands Act cannot be construed to create en-

claves of federal lands shoreward of Alaska's most seaward contiguous boundary and wholly surrounded by submerged lands concededly belonging to the State; (2) that the status of such enclaves as areas of high seas under the international Convention is irrelevant for purposes of the Submerged Lands Act grant to Alaska; (3) that, in any event, the international Convention should be construed as treating such enclaves as part of the surrounding territorial sea and not as areas of high seas; and (4) that the whole of the submerged lands underlying the territorial sea, of whatever dimensions, belongs to Alaska. Additionally, Alaska contends that the coast line on the landward side of islands is not a part of Alaska's coast line under the Submerged Lands Act if determining Alaska's boundaries from the coast line on the open sea side of islands results in a single contiguous boundary.

Question 5: Is the formation, known as Dinkum Sands an island constituting part of Alaska's coast line for purposes of delimiting Alaska's offshore submerged lands?

The status of the Dinkum Sands formation as an island forming part of Alaska's coast line for purposes of delimiting Alaska's offshore submerged lands is disputed. As part of this inquiry, the parties agree that the relationship of the Dinkum Sands formation to the mean tidal planes of the Beaufort Sea must be determined. The parties are negotiating a monitoring agreement which, it is anticipated, will lead to a set of stipulated facts on this question.

But it is probable that a dispute will remain as to effect of the Dinkum Sands formation in delimiting the offshore submerged lands belonging to Alaska.

The *United States* contends (1) that the principles set out in the international Convention control resolution of this issue; and (2) that the Dinkum Sands formation is not an island forming a part of the coast line for purposes of measuring the territorial sea under the Convention, because it does not qualify as "a naturally formed area of land, surrounded by water, which is above water at high tide," but is, at best, a "low-tide elevation," defined as "a naturally formed area of land which is surrounded by and above water at low-tide but submerged at high tide," which enjoys no territorial sea of its own when, as here, it lies outside the territorial sea measured from the mainland or any island; and (3) that, accordingly, the Dinkum Sands formation and the submerged lands underlying a three-mile belt around the formation, and not within three miles of the mainland or any island, do not belong to Alaska. The United States further contends that the Dinkum Sands formation does not qualify as an island for any relevant purpose or any relevant period, even if (which is not admitted) the formation rises above the level of mean high water during portions of each year. In the alternative, the United States contends that the Dinkum Sands formation has no effect on the extent of Alaska's submerged lands for such periods as it is submerged at mean high tide.

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The *State of Alaska* contends (1) that the principles of the international Convention do not control resolution of this question; (2) that the Dinkum Sands formation possesses a "line of ordinary low water" for purposes of the Submerged Lands Act, thereby qualifying it as an island forming part of Alaska's coast line for purposes of the Act; and (3) that Alaska therefore is entitled to the resources of the Dinkum Sands formation and of the submerged lands within a three-mile radius. In the alternative, Alaska contends that it is entitled to the resources of the Dinkum Sands formation and the submerged lands within a three-mile radius for such periods as the formation is determined to possess a line of ordinary low water. Insofar as the principles of the Convention may control the extent of the grant of submerged lands to Alaska under the Submerged Lands Act, Alaska contends that the Dinkum Sands formation qualifies as an island under the Convention for all relevant purposes and at all relevant times, even if (which is denied) it is submerged below the level of mean high water during portions of the year. Alternatively, to the extent that the principles of the Convention control, Alaska contends that it is entitled to the resources of the Dinkum Sands formation and the submerged lands within a three-mile radius for such periods as the formation is determined to be above the level of mean high water. Additionally, to the extent that the principles of the Convention control, Alaska contends that it is entitled to the resources of the Dinkum

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Sands formation and the submerged lands within a three-mile radius to the same extent that the United States claims in its relations with other countries that the waters within that three-mile radius constitute a part of the United States' territorial sea.

Question 6: Should the extension of the Arco Pier constructed in 1976 be considered a part of the mainland for the purposes of measuring the three-mile Submerged Lands Act grant to Alaska in this portion of the leased area (assuming the submerged lands involved do not belong to Alaska on some other basis).

This question becomes relevant if the submerged lands between the natural mainland and the barrier islands do not belong to Alaska as otherwise underlying "inland" or territorial waters. On this assumption, the Arco Pier is so situated (on the western edge of Prudhoe Bay) that, if treated as an extension of the mainland or "coast", it would "push out" the territorial sea and Alaska's submerged lands grant. The Pier is a solid structure that would normally qualify for this purpose. Indeed, the older portion of the structure is conceded to have this effect. The issue relates only to an extension, added in 1976, under an "emergency permit" granted by the United States Corps of Engineers.

Then, as now, the regulations governing the Corps of Engineers forbade that agency from granting permission for the construction of any structure in the sea that would affect the extent of a State's offshore submerged lands without first submitting the matter

to the Solicitor of the Department of the Interior, and consulting the Attorney General of the United States, with a view to allowing those officials to exact from the potentially affected State a binding disclaimer of additional submerged lands. Such a submission was not made in this instance and no disclaimer was obtained from Alaska before the Arco Pier extension was completed, or since. Under the terms of the emergency permit and governing regulations, the Corps of Engineers is empowered to require removal of the extension.

The *United States* contends that the 1976 extension of the Arco Pier has no effect on the submerged lands belonging to Alaska. It submits that the extension can have no such effect, because the permit was issued in violation of governing regulations, because it was an emergency permit, and because the permit and governing regulations authorize the United States to require removal of the structure.

The *State of Alaska* contends that all submerged lands within three miles from the extension to Arco Pier (if not otherwise State lands) belong to the State on the ground that the extension is part of the Alaska "coast." It submits that the violation of internal regulations is irrelevant and that the structure, at least so long as it remains in existence, has its usual effect on the baseline for measuring the Submerged Lands Act grant to Alaska.

Question 7: Are Harrison Bay and Smith Bay part of National Petroleum Reserve—Alaska?

In 1923, by Executive Order, the President withdrew from the public domain some 23 million acres in northwestern Alaska and created Naval Petroleum Reserve No. 4, now known as National Petroleum Reserve—Alaska. The only question before this Court is the location of the seaward boundary of the Reserve, which concededly includes some submerged lands. It is agreed that whatever submerged lands are within the Reservation do not belong to Alaska, having been effectively withheld from the grant to the State at the time of its admission to the Union under both the *Pollard* doctrine and the Submerged Lands Act.

In 1972, the Department of the Navy purported to redefine the seaward boundary of the Reserve, by including, *inter alia*, Harrison Bay and Smith Bay. It is agreed that this redefinition is ineffective to defeat the grant made to Alaska in 1959, and that the controlling definition is that contained in the 1923 Executive Order. So far as relevant, that Order encompasses only submerged lands shoreward of "sandspits and islands forming the barrier reefs" when not more than three miles from the mainland and "small lagoons."

The *United States* and the *State of Alaska* both contend that neither Harrison Bay nor Smith Bay fits this definition and that the submerged lands therein are not within the Reserve, but are part of the grant to Alaska. Recognizing that the United

States at one time claimed these areas, that the Navy Department's redefinition Notice has never been withdrawn, and that Alaska is entitled to security of title, the parties jointly urge the Special Master to include a provision in a recommended Decree confirming Alaska's title to the submerged lands underlying Harrison Bay and Smith Bay.

Question 8: Is Peard Bay part of National Petroleum Reserve—Alaska?

The parties are *not* agreed whether Peard Bay is part of the Reserve. Peard Bay is partially enclosed by narrow "arms" extending from the mainland at either end and projecting toward each other. Within less than three miles from the extremities of these "arms," there are barrier islands further enclosing the bay. The barrier islands are, however, more than three miles from the "bottom" of the bay.

The *United States* contends that Peard Bay is part of the Petroleum Reserve because the barrier islands at its mouth are "not over three miles off shore." It submits that "shore" in the Executive Order definition includes the two mainland "arms" partially enclosing the bay.

The *State of Alaska* contends that Peard Bay is outside the Reserve because the bay is not a "small lagoon" and the barrier islands at its mouth are more than three miles "off shore." It submits that "shore" in the definition refers to the mainland at the "bottom" of the bay and does not include the narrow "arms" extending from the mainland mass.

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Question 9: Did the application for withdrawal and crea-
tion of the Arctic Wildlife Range, filed in 1958
but not finally confirmed until 1960, effectively
withhold from Alaska any offshore submerged
lands included within the application?

In 1958, before Alaska became a State, the Bu-
reau of Sport Fisheries and Wildlife of the Depart-
ment of the Interior filed and published in the Federal
Register an application to withdraw some 6,400,000
acres of land in northeastern Alaska with a view to
creating an "Arctic Wildlife Range." Under regula-
tions of the Department then in force, the effect of
the application was temporarily to segregate the
lands described from disposition pending the decision
of the Secretary. The Secretary did not finally act
on the application until December 1960, well after
Alaska became a State, when he permanently with-
drew the lands and created the Wildlife Range. It
is conceded that, if the application and its publication
were wholly ineffective for the purposes of the sub-
merged lands grant to Alaska, the later creation of
the Range was likewise ineffective. So far as rele-
vant, the lands applied for and the lands ultimately
included in the Range are the same.

The *United States* contends that the application
and tentative segregation of described lands for the
Range, which later became a permanent reservation,
were effective to withhold the acreage from the grant
to Alaska under the Submerged Lands Act, and, if
otherwise included, from the grant to the State under
the *Pollard* doctrine.

The *State of Alaska* contends that the application for the Range was not effective to withhold from the State any submerged lands included in the described lands, which vested in Alaska at statehood under both the *Pollard* rule and the Submerged Lands Act.

Question 10: Assuming the acreage included in the 1958 application for the Arctic Wildlife Range was effectively withheld from Alaska, does the Range embrace the submerged lands between the mainland and the barrier islands in the area between the Canadian boundary and Brownlow Point?

So far as relevant, the application and the Secretarial order establishing the Range both describe its seaward boundary as proceeding "along the * * * line of extreme low water [of the Arctic Ocean], including all offshore bars, reefs and islands." It is disputed whether the submerged lands between the barrier reef formations and the mainland are included within this description.

The *United States* contends that the intervening waters and submerged lands are included within the Range. It submits (1) that the description, on its face, encompasses these areas; and (2) that such a construction is required in light of the purposes for which the Range was established.

The *State of Alaska* contends that the intervening waters and submerged lands are not within the Range. It submits (1) that the description on its face excludes these areas; and (2) that excluding

the disputed waters and submerged lands is consistent with the purposes of creating the Range, if that inquiry is appropriate (which is contested).

CONCLUSION

The foregoing Questions are submitted to the Special Master for his preliminary decision. Although the issues overlap and an affirmative answer to one question, if final, would moot other issues, the parties urge the Master to address each Question Presented and to submit to the Court his recommendation on each. This course will avoid the risk of a remand should the Court disagree with the Master on any point.

In accordance with the understanding reached with the Special Master at the conference of March 31, 1980, it is stipulated by the parties that the initial hearing scheduled to begin on June 24 shall be confined to the issues embraced within Questions 6 through 10, at which hearing all evidence, documentary or testimonial, relevant to those issues shall be submitted. It is not anticipated that the Special Master will require any further submission with re-

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spect to Question 1. The remaining issues—embraced in Questions 2 through 5 herein—shall be considered at a later hearing, on a date to be fixed by the Master.

Respectfully submitted.

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MAY 1980

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PLAINTIFF

v.
STATE OF ALASKA

BEFORE THE SPECIAL MASTER

SUPPLEMENT TO JOINT STATEMENT OF QUESTIONS
PRESENTED AND CONTENTIONS OF THE PARTIES

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UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALASKA

BEFORE THE SPECIAL MASTER

**SUPPLEMENT TO JOINT STATEMENT OF QUESTIONS
PRESENTED AND CONTENTIONS OF THE PARTIES**

INTRODUCTION

1. In May 1980, the United States and the State of Alaska jointly submitted to the Court's Special Master a Statement of Questions Presented and Contentions of the Parties. The parties then believed they had identified all disputed issues that must be resolved in order to adjudicate the respective rights of the United States and the State to submerged lands off the North Slope of Alaska between Icy Cape and the Canadian boundary. However, the hearings held on July 28 and 29, 1980, and further consideration, have disclosed other questions with respect to the same area. Both parties are concerned not to leave any such question unsettled for future litigation. Accordingly, they now waive any objection that has or could be interposed to the consideration of the following additional issues, not expressly identified in their previous

Joint Statement, and they join in requesting the Special Master to submit to the Court his recommendations thereon.

2. Although the Complaint of the United States focuses particularly on what has been termed "the leased area" (between latitude 150° W and 146° W), it properly can be read as praying that the exclusive rights of the United States to submerged lands off the shore of Alaska be quieted as against the State throughout the area of the Beaufort Sea—which may be taken to include the whole of the Alaskan North Slope from Icy Cape on the west to the Canadian border on the east. So, also, although Alaska's Counterclaim specifically challenges only the federal claim to have effectively reserved the submerged lands "inside the barrier islands north of the Arctic National Wildlife Range and underlying the inland waters of Harrison Bay, Smith Bay and Peard Bay," it may be read to embrace also any areas of submerged lands adjacent to the Arctic Ocean which the United States asserts are included within the National Petroleum Reserve or the Arctic National Wildlife Range. At least, given that the parties so construe their pleadings and affirmatively urge the Special Master to consider all issues thereby included, the Master, we submit, is authorized to treat the reference made to him as encompassing the additional questions now tendered.

Such a course will permit the ultimate entry of a decree reciting a complete description of the offshore submerged lands of the parties between Icy Cape and the Canadian border, without the necessity of supplemental proceedings at a later date. Nor will present consideration of the additional questions burden the ongoing proceedings. The Special Master has already received all evidence relevant to Question 11. The other added issues (Questions 12 and

13) They extend to adjacent portions of the coast the same contentions already elaborated in Questions 2 and 3 of the original Joint Statement. It is not anticipated that the evidence relating to the new areas will do more than apply the same principles each party urges with respect to the "leased area." In these circumstances, judicial economy will be served by considering the additional questions together with those already before the Special Master.

ADDITIONAL QUESTIONS PRESENTED AND CONTENTIONS

Question 11: Are the submerged lands within Wainwright Inlet and the Kuk River, Kugrua Bay and River, and other small inlets, bays and river estuaries, between Icy Cape and Point Barrow and between Point Tangent and the Colville River, within the boundary of the National Petroleum Reserve - Alaska?

This question relates to the northern boundary of the Petroleum Reserve which is discussed in Questions 7 and 8 of the original Joint Statement (pages 17-18, 18a-20a).

The *United States* contends that, except from Point Tangent to Point Barrow (the case of the Plover Islands) and where barrier reefs less than three miles offshore create "small lagoons," the northern boundary of the Petroleum Reserve is the "coast line" along the Arctic Ocean, which includes at least short water crossings across river mouths and inlets and bays with narrow mouths. Accordingly, the *United States* submits that the submerged lands underlying Wainwright Inlet and the Kuk River, Kugrua Bay and River, and other smaller inlets, bays, and rivers emptying into the Arctic Ocean are

within the Petroleum Reserve, in accordance with the boundary depicted on U.S. Exhs. 87-91, except only in the area of Harrison and Smith Bays, where the boundary is depicted on U.S. Exh. 71. The United States further submits that the submerged lands underlying Kugrua Bay and River are included within the Reserve because they are within the boundary defined by a line connecting the barrier islands and the mainland arms of Peard Bay (see Question 8, Joint Statement at 18).

The *State of Alaska* contends that, except from Point Tangent to Point Barrow and where barrier reefs less than three miles offshore create "small lagoons," the northern boundary of the Petroleum Reserve is the line of mean higher high water on the shore of the mainland, which follows the sinuosities of the coast along the shore of bays, inlets and river estuaries, and does not include water crossings across bays, inlets or river estuaries. Accordingly, Alaska submits that lands submerged at mean higher high water underlying Wainwright Inlet and the Kuk River, Kugrua Bay and River, and all other inlets, bays, river estuaries or other bodies of water connected with the Arctic Ocean, are excluded from the Reserve, except only between Point Tangent and Point Barrow and where barrier reefs less than three miles offshore create small lagoons.

Question 12: Should the extent of Alaska's offshore submerged lands between Icy Cape and the Canadian border, not included within the "leased area," be determined on the basis of "straight baselines?"

The same issue originally identified as relating to the "leased area" between latitude 150°W and 146°W (see Question 2, Joint Statement at 6-8 and App. I) arises with

respect to offshore submerged lands to the west (almost entirely north of Naval Petroleum Reserve Alaska) and to the east (almost entirely north of the Arctic National Wildlife Range). There, also, barrier islands lie offshore, which, under the international Convention, could be used to define straight baselines. The drawing of straight baselines in these areas would not affect the Alaskan claim to the submerged lands shoreward of the barrier islands, because all such lands are less than three miles from the mainland or the islands and thus concededly are included within the grant to Alaska under the Submerged Lands Act unless previously reserved to the United States (as Alaska concedes in some areas and denies in others). But the effect of drawing a series of lines based on the barrier islands to define the coastline would, in some cases, extend Alaska's three mile belt of submerged lands on the seaward side of the islands. Alaska claims the "wedges" thus created and the United States denies that claim.

The *United States* and the *State of Alaska* advance the same contentions on this issue as they have already put forward with respect to Question 2 (Joint Statement at 7-8).

Question 13: Should the extent of Alaska's offshore submerged lands between Icy Cape and the Canadian border, not included within the "leased area," be determined on the basis that the waters between the mainlands and the barrier islands are inland waters, even if the "straight baseline" contention is not accepted?

The same issue originally identified as relating to the "leased area" (see Question 3, Joint Statement at 8-10) arises with respect to the other areas off the North Slope

where the barrier islands. As noted under Question 12, *supra*, outside the leased area, there is no dispute that the submerged lands shoreward of the barrier islands belong to Alaska if they were not effectively reserved by the United States before Alaskan statehood. But, in some cases, it makes a difference whether those lands are deemed to underlie State inland waters or the State's territorial sea. If the waters are inland, their seaward limit would be defined by lines connecting the barrier islands and the effect, in some places, would be to extend Alaska's three-mile belt of submerged lands on the seaward side of those lines—much as in the case of drawing straight baselines (see Question 12, *supra*).

The *United States* and the *State of Alaska* advance the same contentions on this issue as they have already put forward with respect to Question 3 (Joint Statement at 8-10).

CONCLUSION

The parties join in seeking leave to present the foregoing additional Questions to the Special Master for his preliminary decision. If the Master agrees, he should treat Question 11 as submitted on the evidence presented at the hearing held on July 28 and 29, 1980, subject to briefing and oral argument at a later date. Questions 12

and 13, it is suggested, should be considered with the other remaining issues in the case (Questions 2 through 5, Joint Statement at 8-15).

Respectfully submitted.

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v.

STATE OF ALASKA

BEFORE THE SPECIAL MASTER

SECOND SUPPLEMENT TO JOINT STATEMENT
OF QUESTIONS PRESENTED AND
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BEFORE THE SPECIAL MASTER

SECOND SUPPLEMENT TO JOINT STATEMENT
OF QUESTIONS PRESENTED AND
CONTENTIONS OF THE PARTIES

INTRODUCTION

1. In May 1980, the United States and the State of Alaska jointly submitted to the Special Master a Statement of Questions Presented and Contentions of the Parties. In September of that year, the parties submitted a Supplement to the earlier Joint Statement, adding three questions, Questions 11, 12 and 13, to those which had been tendered to the Special Master by the original Joint Statement. These three additional questions, like the original ten submitted questions, pertained to the respective rights of the

United States and the State of Alaska to submerged lands off the north slope of Alaska, between Icy Cape and the Canadian boundary.

2. The parties have identified two additional questions, relating to the same overall issue—the rights of the parties to the submerged lands off the north coast of Alaska between Icy Cape and the Canadian boundary—which have arisen since the Supplement to the Joint Statement was submitted to the Special Master in September 1980. As in the case of the three questions tendered in the September 1980 supplement, the parties do not believe that the addition of the two questions identified in this Second Supplement will appreciably add to the task of hearing and reporting on the issues already tendered.

3. Too, the purpose of these proceedings, as the parties stated in their Supplement to the Joint Statement, and with which the Special Master has presumably agreed, is to obtain “the ultimate entry of a decree reciting a complete description of the offshore submerged lands of the parties between Icy Cape and the Canadian border, without the necessity of supplemental proceedings at a later date.” (Supplement to Joint Statement of Questions Presented, page 2.) In accordance with the procedure suggested by paragraphs 2 and 5 of the Order of the Special Master dated January 10, 1984, the parties therefore submit the additional questions set forth below, and briefly describe those questions and their respective contentions.

ADDITIONAL QUESTIONS PRESENTED
AND CONTENTIONS

Question 14: Are certain geographic features within the Beaufort Sea, which appear on nautical charts published by the federal government but not on maps prepared by the State of Alaska in 1981 and 1982, to be deemed low-tide elevations and thus salient points from which the submerged-lands grant to Alaska is to be measured?

The United States has, for the north coast of Alaska, published through its National Ocean Service a series of nautical charts at a scale of approximately 1:50,000. While these charts have been periodically revised on the basis of new information obtained, the basic chart information is derived from field work done between 1948 and 1952. In 1981 and 1982, the State of Alaska contracted to have this area mapped using photogrammetric methods. The product of this project was a series of maps done at a scale of approximately 1:50,000 which, insofar as relevant here, fail to show certain features which appear on the NOS charts as shoals (that is, having an elevation between mean high water and mean lower-low water), or, in the terminology of the 1958 Convention on the Territorial Sea and the Contiguous Zone, "low-tide elevations." Article 11 of that Convention provides that if these features qualify as low-tide elevations, the outer limits of the territorial sea, and hence for present purposes the seaward boundary of the submerged-lands grant to Alaska, may be measured from the low-water line on the feature.

There are six areas along the north coast of Alaska where such features, if they are treated as low-tide elevations (or, *a fortiori*, as islands) will affect the

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seaward boundary of the State of Alaska. The first lies just west of Pogik Point. There, two small shoals are shown on the NOS charts as low-tide elevations approximately one-half mile from the mainland. If these features are deleted as salient points from which the outer boundary is delimited, the area belonging to the State of Alaska would be diminished by approximately 800 acres. The second area is a mudflat shown on NOS charts extending north of an island just east of Pogik Bay. The effect of this feature on the area of submerged lands is approximately 200 acres. The third area is approximately 5 miles east of Pogik Bay, and consists of two features approximately one-half mile from the mainland. Approximately 1100 acres are affected by the legal treatment of these features. The fourth area is one shown on the NOS charts as a low-tide elevation approximately one mile east of Cape Halkett. This feature has an effect of approximately 2,000 acres on the outer boundary of the State of Alaska. The fifth feature is a shoal approximately 3 miles east of Atigaru Point. Upon the status of this feature depends the title to approximately 15,000 acres of submerged land. Finally, the sixth area consists of the barrier islands east of the mouth of the Canning River. These features are shown on NOS chart No. 16045 between longitude $145^{\circ} 30' 43''$ W. and $145^{\circ} 34' 34''$ W. A substantial area of submerged land is determined by the status of the features.

The United States contends that the mapping of these areas done in 1981 and 1982, being the most current available, should control the question whether these features exist as low-tide elevations. In addition, the United States contends that Alaska officials made an agreement with it in 1982 that the State's

Alaska. The first two small shoals low-tide elevations the mainland. If present points from the area be diminished second area is a strip north of an effect of this feature is approximately 5 miles from the two features appear on the mainland. According to the legal treatment of the one shown elevation approximately 1000 acres on the mainland. The fifth feature is 3 miles east of the first feature and covers 1000 acres of submerged land is part of the Canning River on NOS chart No. 16064, 143° W. and 145° W. Submerged land is shown.

The mapping of the area, being the most important question whether the area is submerged. In addition, Alaska officials contend that the State's

maps would control, to the extent of conflicts with the NOS charts. And, finally, the United States contends that the alleged features are not, in fact, today low-tide elevations or islands, or are not so situated as to affect the coastline of Alaska.

For its part, Alaska asserts the presence of the features as above described and contends that its maps do not necessarily disprove the existence of the features in question. As for the first four and the sixth areas, Alaska contends that its maps are based on aerial photography taken when the tide was significantly above the relevant datum (mean lower-low water), and thus cannot serve as a basis for determining that the features do not exist as they are shown on the NOS charts. In addition, Alaska contends that the NOS charts in question represent the "large-scale charts officially recognized by the United States, within the meaning of Article 3 of the Convention. Finally, Alaska contends that no State officials agreed that the State's maps would control, to the extent of conflicts with the NOS charts, and indeed that no State officials had the legal authority to make such an agreement.

Question 15: Is the southern portion of the area shown as "Harrison Bay" on NOS chart 16064 a juridical bay, and if so, what is the location of the line enclosing the inland waters of the bay, from which the 3-mile grant to Alaska is to be measured?

It is Alaska's position that the southern portion of Harrison Bay meets the criteria of a bay set forth in article 7 of the Convention on the Territorial Sea and the Contiguous Zone. The position of the United States is that this indentation does not meet the requirements of a juridical bay, but that two smaller

indentations do, only one of which (South Harrison Bay East Arm) affects the delimitation of the territorial sea. The United States would also draw a closing line across the mouth of the Colville River, which takes the form of a delta. The drawing of such a baseline, in the position of the United States, would be in accordance with Article 13 of the Convention. In the position of Alaska, a closing line should be drawn across southeast Harrison Bay in accordance with Article 7 of the Convention, dealing with bays.

CONCLUSION

The parties join in seeking leave to present the foregoing additional questions to the Special Master for his preliminary decision. If the Master agrees that these questions are appropriate for consideration in these proceedings, it is suggested that evidence on these questions be received at the forthcoming hearings on Questions 2-5 and 12 and 13.

Respectfully submitted.

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JULY 1984

Joint Statement, and they join in requesting the Special Master to submit to the Court his recommendations thereon.

2. Although the Complaint of the United States focuses particularly on what has been termed "the leased area" (between latitude 150°W and 146°W), it properly can be read as praying that the exclusive rights of the United States to submerged lands off the shore of Alaska be quieted as against the State throughout the area of the Beaufort Sea—which may be taken to include the whole of the Alaskan North Slope from Icy Cape on the west to the Canadian border on the east. So, also, although Alaska's Counterclaim specifically challenges only the federal claim to have effectively reserved the submerged lands "inside the barrier islands north of the Arctic National Wildlife Range and underlying the inland waters of Harrison Bay, Smith Bay and Peard Bay," it may be read to embrace also any areas of submerged lands adjacent to the Arctic Ocean which the United States asserts are included within the National Petroleum Reserve or the Arctic National Wildlife Range. At least, given that the parties, so construe their pleadings and affirmatively urge the Special Master to consider all issues thereby included, the Master, we submit, is authorized to treat the reference made to him as encompassing the additional questions now tendered.

Such a course will permit the ultimate entry of a decree reciting a complete description of the offshore submerged lands of the parties between Icy Cape and the Canadian border, without the necessity of supplemental proceedings at a later date. Nor will present consideration of the additional questions burden the ongoing proceedings. The Special Master has already received all evidence relevant to Question 11. The other added issues (Questions 12 and

13) They extend to adjacent portions of the coast the same contentions already elaborated in Questions 2 and 3 of the original Joint Statement. It is not anticipated that the evidence relating to the new areas will do more than apply the same principles each party urges with respect to the "leased area." In these circumstances, judicial economy will be served by considering the additional questions together with those already before the Special Master.

ADDITIONAL QUESTIONS PRESENTED AND CONTENTIONS

Question 11: Are the submerged lands within Wainwright Inlet and the Kuk River, Kugrua Bay and River, and other small inlets, bays and river estuaries, between Icy Cape and Point Barrow and between Point Tangent and the Colville River, within the boundary of the National Petroleum Reserve - Alaska?

This question relates to the northern boundary of the Petroleum Reserve which is discussed in Questions 7 and 8 of the original Joint Statement (pages 17-18, 18a-20a).

The *United States* contends that, except from Point Tangent to Point Barrow (the case of the Plover Islands) and where barrier reefs less than three miles offshore create "small lagoons," the northern boundary of the Petroleum Reserve is the "coast line" along the Arctic Ocean, which includes at least short water crossings across river mouths and inlets and bays with narrow mouths. Accordingly, the United States submits that the submerged lands underlying Wainwright Inlet and the Kuk River, Kugrua Bay and River, and other smaller inlets, bays, and rivers emptying into the Arctic Ocean are

MEMORANDUM

Division of Policy
Office of the Governor

TO: Carol D. Wilkenson DATE: December 17, 1987
Lease Enforcement Supervisor
Department of Natural Resources

FROM: R.A. Fineberg, Policy Analyst
Division of Policy

SUBJECT: 8-g Escrow Account

Based on information you and others have provided, here is my understanding of the 8-g money. I've attached FYI the attorney general's opinion I mentioned.

Please let me know if you have any comments or corrections.

Thanks again for your help.

JQ
I understand the
amount received today
was \$322.9 million.
No breakdown yet
on the additional \$1.9
m rent/interest

MAF
12/31