No. 13-36165

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN STURGEON,
Plaintiff-Appellant

v.

BERT FROST, in his capacity as Alaska Regional Director of the National Park Service, et al.
Defendants-Appellees

On Appeal from the United States District Court for the District Of Alaska, Hon. H. Russel Holland

FEDERAL APPELLEES' RESPONSE TO SUPPLEMENTAL BRIEF FOR THE STATE OF ALASKA

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INTRODUCTION AND SUMMARY OF ARGUMENT

The question in this case is whether section 103(c) of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. § 3103(c), places all navigable waters located within "conservation system units" ("CSUs") beyond the reach of federal regulation. ANILCA set aside millions of acres of lands and waters in Alaska for conservation and other federal purposes. The State of Alaska now asserts that in section 103(c), added as a "technical correction" to the final version of ANILCA, Congress both fundamentally altered the balance of sovereign power between the federal government and the State over navigable waters within the areas reserved to the United States by the statute and revised the boundaries of those areas to exclude any waters located within them that are determined to be navigable.

Section 103(c) provides, as relevant here, that "[o]nly those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation,

or to any private party shall be subject to the regulations applicable solely to public lands within such units." Sturgeon sought to invalidate any Park Service regulation "purporting to authorize the NPS to enforce its regulations within the reach of navigable waters located within the boundaries of park areas in Alaska," (Doc. 1 at 20; ER 142) on the theory that navigable waters are "lands conveyed to the state" within the meaning of this provision.

ANILCA defines both "public lands" and "conservation system unit" as "in Alaska."[1] The district court in this case therefore

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[1] As defined by ANILCA section 102, 16 U.S.C. § 3102:

(1) The term "land" means lands, waters, and interests therein.

(2) The term "Federal land" means lands the title to which is in the United States after December 2, 1980.

(3) The term "public lands" means land situated in Alaska which, after December 2, 1980, are Federal lands, except –

(A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;

* * * * *

(4) The term "conservation system unit" means any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument including existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such units, and any

determined that the regulation challenged in this case, which applies to all units of the National Park System, is not "applicable solely to public lands within CSUs;" and this Court affirmed its decision. The Supreme Court, however, concluded that interpreting the language of the statute to restrict only the application of "Alaska-specific" regulations was at odds with the remainder of the statute. It vacated this Court's decision but left several questions as to whether section 103 is inapplicable to the circumstances here for other reasons to be considered as necessary in this Court. *Sturgeon v. Frost,* 136 S. Ct. 1061, 1072 (2016). Those questions include 1) whether ANILCA limited the Park Service's authority under 16 U.S.C. § 100751(b) to regulate Sturgeon's activities on the Nation River, 2) whether the navigable waters at issue here are "public lands" within the meaning of ANILCA, and 3) whether the Park Service retains any authority to regulate non-federally owned lands within CSUs in Alaska. The State of Alaska has filed "supplemental" arguments as *amicus curiae* in this case addressing all of the questions

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such unit established, designated, or expanded hereafter.

left open after the Supreme Court's decision.[2]

This case is a challenge to the Park Service's authority to prohibit the operation of hovercraft in navigable waters within the boundaries of the National Park System. Alaska contends that all navigable waters in Alaska are state-owned and subject exclusively to regulation by the State. It therefore construes Section 102 of ANILCA defining "public lands" to exclude navigable waters, and further construes section 103(c), the "maps" provision of the statute, to exclude navigable waters from the areas administered by the federal government, and to prohibit the application of federal regulations to them. But the State's argument is unsupported by ANILCA's text and structure, and is

[2] The State brings a new theory to the case in its supplemental brief, newly asserting that ANILCA must be administered to maintain a balance between the United States' conservation interests and the State's competing economic interests. This issue has not been presented by the parties to this litigation. This Court generally does not review issues raised only by an *amicus curiae*. See *Chaker v. Crogan*, 428 F.3d 1215, 1220 (9th Cir. 2005); *Russian River Watershed Protection Committee v. City of Santa Rosa*, 142 F.3d 1136, 1141 (9th Cir. 1998); *Swan v. Peterson*, 6 F.3d 1373, 1383 (9th Cir. 1993). It has only done so in the unusual instance where the issue raised by the amicus party is "central" to the case and is readily answered. *Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, 498 F.3d 1031, 1043-1044 (9th Cir. 2007). That is not the situation here.

inconsistent with the statute's purposes. In addition, the State's contention that ANILCA prohibits administration of navigable waters within CSUs as "public lands" has been rejected by this Court in earlier litigation, in which it held that ANILCA unambiguously includes some navigable waters within its definition of "public lands."

BACKGROUND

The question in this case is whether the National Park Service, which administers CSUs throughout the State of Alaska, may prohibit the use and operation of hovercraft on navigable waters within the boundaries of those units. It is undisputed that the hovercraft prohibition applies on all federally-owned lands, including non-navigable waters on those lands, within National Park System units in Alaska, as it has on all lands and waters within the National Park System since 1983. It is also undisputed that four years before ANILCA was adopted, Congress expressly affirmed the Park Service's authority to regulate boating and other activities on or related to navigable waters located within units of the National Park System throughout the United States. 54 U.S.C. § 100751. The question in this case is whether Congress withdrew the Park Service's statutory

authority to regulate the navigable reaches of waters located within the areas reserved as National Park System lands in Alaska by enacting section 103 of ANILCA.

I. Statutory and Regulatory Background

A. The statutory provisions at issue

The National Park Service Organic Act, c. 408, 39 Stat. 535 (2016), as amended, directs NPS to "promote and regulate" the national parks "to conserve the scenery, natural and historic objects, and the wild life in such manner any by such means as will leave them unimpaired for the enjoyment of future generations;" 54 U.S.C. § 100101, and contains broad authorization to promulgate regulations necessary or proper for the use and management of the parks. 54 U.S.C. § 100751. As relevant here, Congress has expressly authorized NPS to "promulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States." *Ibid.*

In ANILCA, Congress greatly expanded the National Park system by creating "conservation system units," such as national parks,

preserves, and wild and scenic river segments. 16 U.S.C. § 3101, 16 U.S.C. §§ 410hh, 410hh-1 (reserving lands and waters, expressly including specified navigable waters); *John v. United States*, 720 F.3d 1214, 1218 (9th Cir. 2013). Congress directed that the Secretary "shall administer the lands, waters, and interests therein" within new and expanded National Parks "as new areas of the National Park System," under the provisions of the Organic Act.

ANILCA's four stated objectives are:

1) To preserve the "lands and waters" protected by the Act for "the benefit, use, education, and inspiration of present and future generations," based on their scenic, geological, wildlife, and other values, 16 U.S.C. § 3101(a);

2) To protect the areas' "natural landscapes," wildlife, "resources related to subsistence needs," historical locations, "rivers, and lands," and "wilderness resource values and related recreational opportunities," including opportunities for canoeing, fishing, and hiking "on wildlands and on freeflowing rivers," and to "maintain opportunities for scientific research and undisturbed ecosystems," 16 U.S.C. § 3101(b);

3. To "provide the opportunity for rural residents engaged in a

subsistence way of life to continue to do so," where "consistent with management of fish and wildlife" and other principles, 16 U.S.C. § 3101(c); and

4. To "obviate[] . . . the need for future legislation designating" new areas in Alaska for federal protection, 16 U.S.C. § 3101(d).[3]

B. Relevant Park Service regulations

General Park Service regulations apply to "all persons entering, using, visiting, or otherwise within . . . [t]he boundaries of federally owned lands and waters administered by the National Park Service, or . . . waters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters . . . without regard to the ownership of submerged lands, tidelands, or lowlands." 36 C.F.R. § 1.2(a)(3); see 61 Fed. Reg. 35,133 (July 5, 1996).[4]

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[3] The State overlooks three of Congress's four stated purposes, contending (Br. 7) that Congress enacted ANILCA to serve the "twin goals" of protecting the national interest in Alaska's public lands, while simultaneously "provid[ing] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." The language the State quotes from the statute relates only to Congress's fourth goal, obviating the need for further legislation designating lands for federal protection.

[4] When the Park Service promulgated the current rule, which

This case concerns the application of a general Park Service regulation found at 36 C.F.R. § 2.17(e), which provides that "[t]he operation or use of hovercraft is prohibited," on navigable waters within the Yukon-Charley Rivers National Preserve, a National Park and preserve established in 1980 by ANILCA.

C. This Court's decisions interpreting "public lands" as defined by ANILCA

Beginning in 1995, this Court issued a series of decisions addressing ANILCA's definition of "public lands" as that term applies to navigable waters within federal reservations Alaska, *Alaska v. Babbitt*, 72 F.3d 698 (1995) ("*Katie John I*"); *John v. United States,* 247 F.3d 1032 (2001) ("*Katie John II*"); *John v. United States*, 720 F.3d 1214 (2013), cert. denied, 134 S. Ct. 1759 (2014)) ("*Katie John III*"). In the

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clarified the geographic scope of its regulatory authority, Alaska submitted comments on this proposed regulation asserting that ANILCA § 103(c) preempts NPS's authority on navigable waters. 61 Fed. Reg. at 35,135. The Park Service explained that where Congress has charged it with protecting populations of fish and wildlife and habitat – which "necessarily includes the great river systems running through and within the parks" – reading § 103 to preempt NPS's well-established authority to regulate activities in or affecting navigable waters is inconsistent with ANILCA's underlying protective purposes. 61 Fed. Reg. 35133-01.

first of those decisions, this Court held that "ANILCA's language and legislative history indicate clearly that Congress spoke to the precise question of whether *some* navigable waters may be public lands." *Katie John I,* 72 F.3d at 702. The Court found that ANILCA clearly protects subsistence fishing, which traditionally has taken place in navigable waters, on "public lands," and concluded therefore that there is "no doubt that public lands include at least some navigable waters." *Ibid.* Taking into account that Congress defined "public lands" to include waters in which the United States owns "interests," the majority of the *Katie John I* panel held that "public lands" include "those navigable waters in which the United States has reserved an interest by virtue of the reserved water rights doctrine." *Id.* at 704.

Following the decision in *Katie John I*, the agencies charged with administering ANILCA promulgated regulations determining, consistent with this Court's decision, that waters in which the United States holds reserved rights for purposes relevant to fishing or subsistence are "public lands." See 62 Fed. Reg. 66,216, 66,217-218 (Dec. 17, 1997) (proposed rule); 64 Fed. Reg. 1279 (Jan. 8, 1999) (final rule). Those regulations did not go into effect immediately, because

Congress imposed a series of temporary moratoria to allow the State to enact legislation providing the subsistence priority.[5] Finally, when the State failed to enact its own subsistence legislation, Congress expressly directed that these "*Katie John*" regulations take effect, without any modification of their approach to "public lands." § 339, P.L. 105-277; 112 Stat. 2681-296 (Oct. 21, 1998).

II. Factual background

This controversy arose when Park Service law enforcement officers observed the plaintiff, John Sturgeon, repairing a hovercraft in the Nation River within Yukon-Charley Rivers National Preserve. Sturgeon complied with their instruction to remove his vehicle from the Preserve because Park Service regulations prohibit use and operation of hovercraft within the National Park System. Sturgeon then filed suit challenging the Park Service's action on the ground that ANILCA § 103(c) withdrew the Park Service's authority to regulate in navigable

[5] See 1996 Appropriations Act § 336, 110 Stat. 1321-210; 1998 Appropriations Act § 316(a), 111 Stat. 1592; 1999 Appropriations Act § 339(a)(1), 112 Stat. 2681-295. And it set forth modifications of the subsistence-use scheme (but not of the "public lands" definition) that would take effect if the State enacted a subsistence-priority statute. § 316(b), 111 Stat. 1592.

waters, and seeking an order voiding the effect of the hovercraft ban as to him and declaring void the Park Service's assertion of regulatory authority in navigable waters in Alaska.

The district court held that that Section 103(c) did not affect the applicability of the hovercraft ban, because the ban is not "applicable solely to public lands within Conservation System Units." Sturgeon appealed to this Court, which affirmed the district court's interpretation of the relevant provision of ANILCA. This Court concluded that the district court had correctly determined that Park Service authority to enforce the regulation at issue is not affected by ANILCA § 103(c). It therefore did not reach the United States' arguments that the district court's judgment could be affirmed on alternative grounds. As we explained in our brief in this case, navigable waters are not owned by State, and the United States retains regulatory authority over both navigable waters and submerged lands concurrent with the state. And in any event, this Court has previously held that some navigable waters, including the river in which Sturgeon was observed operating a hovercraft, are "public lands" as that term is defined by ANILCA. The Supreme Court vacated this Court's decision affirming the district

court's interpretation of ANILCA § 103(c) and remanded the case, leaving the alternative grounds for affirmance that were briefed in this Court, and later in the Supreme Court, for consideration as necessary by this Court.

ARGUMENT

I. The navigable waters in National Park System units in Alaska are not subject to the limitations in Section 103(c)

As explained above, this Court unanimously held in *Katie John I* that ANILCA on its face subjects *some* navigable waters to administration as "public lands." The State's assertion that *no* navigable waters may be administered as "public lands," because the State owns the submerged lands under them, is the very argument it advanced in *Katie John*, and is foreclosed by this Court's precedents. This Court accordingly is bound by its precedents with respect to the arguments advanced in the State's supplemental brief concerning the definition of "public lands" in ANILCA as it relates to navigable waters. And even if the State's arguments were not foreclosed by precedent in this Court, they are incorrect.

A. Navigable waters are not "State owned"

The challenge in this appeal rests on ANILCA Section 103(c),

which provides that only "public lands" are included as "a portion" of any CSU, and that "[n]o lands which before, on or after the date of ANILCA's enactment "are conveyed to the State, to any Native corporation, or to any private party shall be subject to the regulations applicable solely to the public lands within such units." This provision is a subsection of a congressional directive to prepare and maintain maps to illustrate the boundaries of "areas added to the National Park, Wildlife Refuge and National Forest Systems" by ANILCA. See 16 U.S.C. § 3103(a)). The State contends (Br. 18) that by excluding "lands conveyed to the State" from National Park System units, Congress expressed its intent to exclude all navigable waters from those areas, because the State owns the submerged lands under them. The State's argument is inconsistent with both the text and context of the statute as a whole.

An important function of ANILCA was to facilitate completion of the land selection and conveyance processes begun by the Alaska Statehood Act and the Alaska Native Claims Settlement Act. See ANILCA §§ 901-911. ANILCA therefore contains numerous references to lands removed, or in the process of being removed, from the public

domain in Alaska, including its exclusion of lands "conveyed to the State, to any Native corporation or to any private party" in section 103. See §§ 1406, 1410, 1421 (entitled "conveyance to the State"), 1437 (entitled "conveyance to Village Corporations"). The reference in section 103 to "lands conveyed" and section 102's similar exclusions of lands conveyed, granted or confirmed to the State or to Native corporations from the definition of "public lands" therefore reasonably includes all of these inholdings and expresses Congress's intent to exclude them from the areas administered by the Secretary.

Alaska contends that section 103 also excludes navigable waters because the submerged lands under them are owned by the State. Under the SLA, "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters" is "recognized, confirmed, established, and vested." 43 U.S.C.A. § 1311. Asserting that the navigable waters therefore are "State waters," Alaska contends that treating them as "public lands" would contravene ANILCA, because Congress did not intend ANILCA to "transform entire waterways into 'public lands' and thus displace the State's traditional authority to

regulate its lands and waters." But Alaska's interpretation of ANILCA is founded on an in accurate understanding of its "traditional authority."

Under the traditional balance of state and federal sovereign powers, states do not have exclusive regulatory authority over navigable waters that would be "displaced" by federal regulation of activities in those waters. To the contrary, the SLA "the Submerged Lands Act did provide the states with concurrent jurisdiction over the waters above the submerged lands." *Barber v. Hawaii,* 42 F.3d 1185, 1190-91 (9th Cir.1994): see also *Wisconsin v. EPA*, 266 F.3d 741, 747 (7th Cir. 2001) (State ownership of submerged lands did not erode federal power to regulate water quality of navigable lake). As this Court correctly observed in *Katie John II*, Congress did not relinquish its constitutional authority by enacting the SLA, nor did it confer upon states title to, or exclusive regulatory authority over, fish in navigable waters within state boundaries. *Katie John II*, 247 F.3d at 1035. The premise of Alaska's argument – that the State has exclusive regulatory authority over navigable waters unless Congress expressly preempts that authority – therefore is faulty, and the State's interpretation of

section 103, which rests on that faulty premise, fails.

B. The Park Service's statutory authority to regulate activities on or affecting waters of the United States does not depend on ownership of submerged lands

This case concerns the United States' power to regulate navigable waters where it has reserved the lands surrounding them for federal purposes. When the United States reserves public lands for federal purposes, it retains both its sovereign power over those lands and its property interests in them, including a property interest in water necessary to effectuate the purposes of the reservation. Alaska contends that under section 103 of ANILCA, the State's property interest in submerged lands and navigable waters entirely displaces the United States' sovereign power to regulate, and subsumes the federal property interest reserved, in navigable waters appurtenant to lands reserved as National Parks. The State recognizes Congress's authority to authorize federal regulation of navigable waters, but contends (Br. 21) that in ANILCA section 103(c), Congress withdrew all navigable waters from the areas the Secretary is authorized to administer and thus eliminated Park Service authority over all such waters in Alaska National Park System units. But the State's interpretation of this

provision cannot be reconciled with ANILCA's purposes or its text, and in addition is foreclosed by this Court's *Katie John* precedents.

The Submerged Lands Act ("SLA") by its terms does not transform navigable waters into state lands. Although, as the State notes (Br. 7 n.21), the Supreme Court "has referred to the Submerged Lands Act as a grant of 'submerged lands and waters,'" *United States v. California*, 436 U.S. at 37, the Supreme Court has also stated that "[n]either sovereign nor subject can acquire anything more than a mere usufructuary right in navigable waters." *Federal Power Comm'n v. Niagara Mohawk Power Corp.,* 347 U.S. 239, 247 n.10 (1954); see also *United States v. Gerlach Live Stock Co.,* 339 U.S. 725, 744-745 (1950) ("As long ago as the Institutes of Justinian, running water, like the air and the sea, were *res communes* – things common to all and property of none"). The SLA expressly preserves the United States' "powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs" 43 U.S.C. § 1314(a); see *Alaska v. United States*, 545 U.S. 75, 116–17 (2005) (Scalia, J., concurring in part and dissenting in part) ("If title to submerged lands passed to Alaska, the

Federal Government would still retain significant authority to regulate activities in the waters of Glacier Bay by virtue of its dominant navigational servitude, other aspects of the Commerce Clause, and even the treaty power."). State ownership of the submerged thus lands does not amount to ownership, or preclude federal regulation, of navigable waters; and nothing in Section 103 suggests that Congress intended to withdraw this well-established federal sovereign authority in Alaska. Accordingly, the State is incorrect in asserting that it has exclusive regulatory authority over navigable waters by virtue of the SLA.

Premised on its incorrect view of the SLA, the State contends (Br. 19) that navigable waters located within CSUs are "state lands" that are excluded from CSUs under section 103(c), which therefore are not subject to Park Service regulation under 54 U.S.C. § 100751. According to Alaska, the Yukon-Charley Rivers National Preserve, where Sturgeon was prevented from operating his hovercraft, does not include any of the navigable rivers it surrounds, because it was created by ANILCA, which excludes such waters from CSUs. The State incorrectly contends that because "the critical starting point for determining the extent of the Park Service's jurisdiction is each park's particular

enabling statute," the Park Service never had regulatory authority over any navigable waters in the Preserve.

While the Park Service has authority to promulgate park-specific regulations (54 USC § 100751, 36 CFR Parts 7 and 13), and Congress may limit or expand the Park Service's mandate with respect to particular parks, the broad authority of the Organic Act governs the extent of Park Service jurisdiction absent a clearly-stated congressional directive to the contrary. The Park Service General Authorities Act, 54 U.S.C. § 100101(b), directs that that "the promotion and regulation of the various [National Park] System units shall be consistent with . . . the common benefit of all the people of the United States in light of the high public value and integrity of the National Park System" and "not * * * in derogation of the values and purposes for which [they] have been established, except as * * * directly and specifically provided by Congress."

The question here is whether ANILCA specifically directs the Secretary to exclude navigable waters from the areas subject to Park Service regulatory authority, and it plainly does not. First, ANILCA directs the Secretary to "administer the lands, waters, and interests

therein" within new and expanded National Parks "as new areas of the National Park System," under the provisions of the Organic Act. 16 U.S.C. § 410hh-2. ANILCA section 201(10) reserves the Yukon-Charley Rivers National Preserve, in which the events at issue in this case occurred "[t]o maintain the environmental integrity of the entire Charley River basin, including streams, lakes and other natural features, in its undeveloped natural condition for public benefit and scientific study." 94 Stat. 2381-82 (1980). ANILCA also designates 26 rivers, including the Charley River within the Preserve, to be "administered by the Secretary of the Interior" under the Wild and Scenic Rivers Act (94 Stat. 2412-13), among numerous references to protection and preservation of "free flowing rivers" and opportunities for recreation and research on them. See, *e.g.* 16 U.S.C. § 3101(b) (listing as ANILCA's purposes protection of "freeflowing rivers," "waters," and "fish," as well as "preserv[ing] . . . recreational opportunities including . . . canoeing [and] fishing. . . ."). And as the Supreme Court observed, "ANILCA requires the Secretary of the Interior to permit the exercise of valid commercial fishing rights or privileges within the National Wildlife Refuge System in Alaska," subject to reasonable regulation.

Sturgeon v. Frost, 136 S. Ct. at 1070. It also directs the Secretary to administer the Yukon Delta Wildlife Refuge "so as to not impede the passage of navigation and access by boat on the Yukon and Kuskokwim Rivers" (§ 303(7)(D)), and to permit the use of motorboats within conservation system units for travel to and from villages and homesites (§ 1110(a)), and the "the taking of fish and wildlife for sport purposes and subsistence uses" within National Preserves in Alaska, subject to regulation and certain exceptions. *Ibid.*; 16 U.S.C. § 3201. Thus, far from containing a "direct or specific" congressional directive to exclude the navigable portions of the waters from the areas the Secretary is directed to administer as National Park System units in Alaska, ANILCA expresses the opposite intent, repeatedly referencing protection of rivers and waters without once distinguishing the navigable portions of those waters from the federally-administered areas in which they are located. The State's contention (Br. 19) that section 103(c) excludes the Nation River and other navigable waters from the CSUs surrounding them accordingly cannot be squared with the remainder of ANILCA's text.

C. The "clear statement principle" is not implicated by Congress's delegation of authority to regulate traditionally navigable waters

The State contends that unless Congress clearly stated its intention to grant the United States authority to regulate "state waters," ANILCA must be interpreted to preclude the application of Park Service regulations to navigable waters. As discussed above, navigable waters in Alaska, like navigable waters throughout the United States, are subject to the paramount power of the United States to regulate them. Under the "clear statement doctrine" the State invokes, "where an administrative interpretation of a statute invokes the outer limits of Congress" power, we expect a clear indication that Congress intended that result." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172–73, citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988). But the regulation of hovercraft on navigable waters in National Parks does not approach the "outer limits" of Congress's power to regulate navigable waters or "usurp Alaska's traditional sovereign power over its waters" (see Br. 14). Rather, the federal authority to regulate navigation exercised by the Park Service

and challenged by Sturgeon is at the heart of the sovereign power of the United States expressly preserved by the SLA.

Congress has directed the Park service to prescribe such regulations as the Secretary considers necessary or proper for the use and management of System units, 54 U.S.C.A. § 100101, and reaffirmed Park Service authority to prescribe regulations concerning "boating and other activities on or relating to water located within System units, including water subject to the jurisdiction of the United States" in 1976, just four years before ANILCA was enacted. P.L. 94-458, 90 Stat. 1939 (1976), 54 U.S.C.A. § 100751(b). Alaska concedes that ANILCA makes no mention of navigable waters, and it therefore does not expressly withdraw the authority of 54 U.S.C. § 100751 in Alaska. The State nonetheless interprets section 103(c), which does not reference waters at all, as an expression of Congress's intent to remove all navigable waters from the areas administered by the Park Service and to prohibit Park Service regulation of them.

It is thus the State's interpretation of §103 that disturbs the traditional balance of sovereign powers. In the SLA, Congress conferred on states regulatory authority concurrent with that of the

United States, which has express congressional authorization to regulate waters within the National Park System. Moreover, this Court held in *Katie John I* that ANILCA on its face includes *some* navigable waters as "public lands" subject to federal management. 72 F.3d at 708. And in *Katie John II*, this Court rejected Alaska's assertion that ANILCA lacked the "clear statement" required to partially preempt the authority States traditionally exercise over management of fish and wildlife on federal lands. *Katie John II*, 247 F.3d at 1035; see *Alaska v. Babbitt*, Brief for the State of Alaska, 1994 WL 16012377 (C.A.9), 6. No such preemption of traditional state authority is at issue here, and even if it were, this Court has held that Congress clearly intended *some* federal regulation of navigable waters as "public lands."

The State concedes that ANILCA does not expressly exclude navigable waters from the areas administered as "public lands." Br. 13. It instead relies on an inference from the state supreme court's interpretation of the SLA. *Id.* The statute thus plainly does not expressly repeal the authority granted by 54 U.S.C. § 1001751. Moreover, ANILCA was enacted "to preserve wilderness resource values and related recreational opportunities * * * on freeflowing rivers," 16

U.S.C. § 3101, and contains numerous provisions that rely on continued federal authority to regulate activities in navigable waters in Alaska. Because Congress does not "hide elephants in mouseholes," *Whitman v. American Trucking Assns.*, 531 U.S. 457, 468 (2001), Alaska's interpretation of § 103(c) as a sweeping withdrawal of the Secretary's authority to regulate activities in navigable waters in Alaska is implausible.

II. Binding precedent in this Court forecloses the State's argument that navigable waters are excluded from "public lands" in ANILCA

Sturgeon does not take issue with the *Katie John* decisions or with treating "waters with associated federal reserved water rights [as] 'public lands' " for the "purpose of giving effect to ANILCA's subsistence provisions in Title VIII," See *Katie John I*, 72 F.3d at 702 n.9, 704, and *Katie John III*, 720 F.3d 1214, 1245 (9th Cir. 2013). Alaska nonetheless raises the exact arguments this Court rejected in the State's two earlier appeals concerning the interpretation of ANILCA's definition of "public lands" in the *Katie John* case. The State attempts to relitigate *Katie John* by suggesting (Br. 20) that "the unusual procedural history of the *Katie John* case and the multiple opinions it generated" somehow left

the questions they decided open. It incorrectly asserts that "a majority of this Court determined that Congress did not intend ANILCA's definition of "public lands" to include navigable waters by virtue of reserved water rights," and that it therefore may now challenge the treatment of navigable waters, including the Nation River, as "public lands" subject to administration by the Park Service. According to the State, the decision of the *en banc* court that affirmed *Katie John I* was splintered, and therefore actually rejected the holding of *Katie John I.* The State is incorrect.

A. This Court unanimously held in *Katie John I* that some navigable waters are "public lands."

In *Katie John I*, this Court ruled on the United States' and the State of Alaska's interlocutory cross-appeals from a district court decision concerning the scope of ANILCA's priority for subsistence use of wild, renewable resources by rural Alaska residents on "public lands." The State and the United States appealed from a district court holding that the priority extended to fishing in all navigable and non-navigable waters in the State. See *Katie John I*, 72 F.3d at 701. Alaska contended that "public lands" as defined by ANILCA excludes navigable waters because the federal government does not hold title to them by

virtue of the navigational servitude, and that the United States therefore lacks authority to regulate fishing in Alaska's navigable waters, despite ANILCA's subsistence priority. *Id.* at 702. The United States also appealed, but argued that "public lands" includes some navigable waters, namely those navigable waters in which the United States holds a reserved water right.

This Court reversed the district court and held instead that "ANILCA's language and legislative history indicate clearly that Congress spoke to the precise question of whether *some* navigable waters may be public lands." *Id.* at 702. Finding that ANILCA clearly protects subsistence fishing, which traditionally has taken place in navigable waters, the Court concluded that there is "no doubt that public lands include at least some navigable waters." *Ibid.* Taking into account that Congress defined "public lands" to include waters in which the United States owns "interests," the majority of the *Katie John I* panel concluded that, although the statute does not clearly identify the waters that are "public lands," the federal agencies' conclusion that the definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights was

reasonable and entitled to *Chevron* deference. *Id.* at 702-703. It therefore held that the definition of "public lands" in section 102 of ANILCA encompasses "those navigable waters in which the United States has reserved an interest by virtue of the reserved water rights doctrine." *Ibid.* Judge Hall dissented, but "agree[d] with the majority that Congress * * *must have intended *some* navigable waters to fall under ANILCA so that defining "interest" narrowly to exclude all navigable waters is probably incorrect." *Katie John I,* 72 F.3d at 706.[6]

B. Sitting *en banc*, this Court affirmed *Katie John I*

When the district court later dismissed the State's complaint, Alaska again appealed, seeking initial hearing *en banc*. See *Katie John II*, 247 F.3d 1032. In a *per curiam* decision, the *en banc* Court concluded that the 1995 panel decision in *Katie John I,* holding that "public lands" include "those navigable waters in which the United States holds an interest by virtue of the reserved water rights doctrine" should be neither disturbed nor altered. *Katie John II*, 247 F.3d at

[6] Judge Hall did not believe that Congress intended to include *all* navigable waters in Alaska as "public lands," and questioned whether the United States can reserve an interest under the reserved water rights doctrine where title to the submerged lands underlying the navigable waters has passed to the State. *Katie John I*, 72 F.3d at 708.

1033. Regardless whether there was unanimity as to the reasoning establishing this rule, the rule unequivocally is binding precedent in this Court.

Alaska cites no authority for its view that the *Katie John* rule is not final because the court was splintered in its reasoning. And in any event, the State is incorrect in concluding that the majority of the judges rejected the 1995 panel's reasoning. Three concurring judges opined that the statutory definition of "public lands" should not limit the subsistence priority, which should be applied statewide under the broad authority of the Commerce Clause. *Id.* at 1037 (Tallman, concurring, joined by Tashima and W. Fletcher) ("A fair reading of ANILCA leaves no doubt that Congress intended to shift regulatory authority over fishing in waters in the State of Alaska to the federal government"). Those judges expressed the view that "title" in the definition of "public lands" should not limit the geographic scope of the subsistence priority to only those navigable waters in which the United States holds federal reserved water rights. The three dissenting judges concluded that ANILCA does not contain the required "clear statement" to effectuate a transfer of regulatory authority over fishing, a

traditional State sovereign function, to the United States. They therefore expressed no view on the definition of "public lands." *Id.* at 10. Thus, even the view of the dissenting judges does not support the State's position. Moreover, even if it did, the law of this Circuit is the ruling of the majority of the *en banc* court, which affirmed the district court's decision that navigable waters in which the United States has reserved water rights are appropriately regarded as "public lands."

C. Congress has ratified the treatment of navigable waters as "public lands" in the regulations promulgated in the wake of *Katie John I*

Following this Court's decision in *Katie John I,* the Secretaries of Agriculture and the Interior, who are charged with administering ANILCA, promulgated notice-and-comment regulations concluding – consistent with *Katie John I* – that the United States has reserved water rights within CSUs and National Forest System lands in Alaska, and that navigable waters located within CSUs therefore are "public lands" within the meaning of ANILCA § 102. 64 Fed. Reg. 1279.[7]

[7] The regulations specifically identify the navigable waters within the Yukon-Charley Rivers National Preserve as "public lands." 36 C.F.R. § 242.3(c)(28), 50 C.F.R. § 100.3(c)(28). This Court sustained those regulations in *Katie John III*.

Congress delayed the implementation of the "*Katie John*" regulations for several years, imposing a series of temporary moratoria to allow time to enact a legislative "fix," as discussed above. Ultimately, however, Congress enacted legislation providing that the Secretaries' regulations would take effect unless Alaska enacted a subsistence-use priority before October 1, 1999. See 1999 Appropriations Act § 339(b)(1), 112 Stat. 2681-295. When Alaska failed to enact a subsistence-use priority, Congress expressly directed that the regulations take effect, without any modification of their approach to "public lands." § 339, 112 Stat. 2681-296; see 16 U.S.C. § 3102 note; and the federal regulations became effective. Congress accordingly has ratified the Secretaries' interpretation of public lands. Where "an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter the interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *Wilshire Westwood Assoc. v. Atlantic Richfield*, 881 F.2d 801, 808 (9th Cir.1989), quoting *North Haven Bd. of Educ. v. Bell*, 531 U.S. 512, 535 (1982) (citations omitted).

D. The definition of "public lands" in ANILCA includes navigable waters in which the United States has reserved water rights

The Secretary correctly concluded that reserved water rights in navigable waters within the boundaries of National Parks are necessary to achieve the objectives of the relevant reservations. See 64 Fed. Reg. at 1279; 50 C.F.R. § 100.3(b); see also 62 Fed. Reg. at 66,217-66,218 (proposed rule) (explaining doctrine of reserved water rights and considering alternative applications to waters within National Park units in Alaska). And because those reserved water rights constitute an "interest" in the navigable waters within the National Parks, such waters are part of the "public lands" subject to Park Service administration consistent with 103(c). See *Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 548 n.15 (1987).

This Court has long held that federal land reservations include interests in appurtenant waters that are necessary to effectuate the purposes for which the land is reserved. *Cappaert v. United States*, 426 U.S. 128, 138 (1976) ("[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then

unappropriated to the extent needed to accomplish the purpose of the reservation."); see *United States v. New Mexico,* 438 U.S. 696, 709-711 (1978) (reservation of water for National Park System units implied by broad conservation purposes of Organic Act). Those usufructuary water rights are property interests. *Niagara Mohawk Power Corp.*, 347 U.S. at 251 (Federal Water Power Act "treats usufructuary water rights like other property rights"); see *Gerlach Live Stock Co.*, 339 U.S. at 736 ("Congress has recognized the property status of water rights vested under California law."). Accordingly, "[t]he definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine." *Katie John I,* 72 F.3d at 703-704. As the Secretary of the Interior and the Secretary of Agriculture concluded in regulations promulgated pursuant to notice-and-comment procedures, under those principles, the United States has reserved water rights in the navigable waters that lie within the boundaries of the National Park System.

In ANILCA, Congress expressly stated that its purposes in reserving new lands to be administered under the Organic Act included safeguarding waters; protecting aquatic wildlife; preserving

opportunities for marine recreation; and preserving opportunities for subsistence use, including subsistence fishing. 16 U.S.C. § 3101. It accordingly reserved interests in the waters appurtenant to the land areas reserved for these purposes. The United States therefore holds title to interests in the appurtenant waters under the doctrine of reserved water rights, and those interests exist regardless of navigability. Congress understood both that navigable waters would be "public lands" and that they would be subject to Park Service regulation. Congress demonstrated these understandings by creating parks for the specific purpose of protecting rivers, including specific rivers well known to be navigable; by establishing a subsistence-use scheme that would make little sense if navigable waters were not public lands; and by constraining the Secretary's authority over particular types of fishing and boating.

Congress's enactment of Section 103(c) as a subsection of ANILCA's "Maps" section, through a unanimous consent resolution making "corrections" to the bill, confirms that Section 103(c) did not effect the sweeping withdrawal of Park Service authority that petitioner posits. And Congress's later ratification of this Court's *Katie John*

decisions and the resulting regulations including navigable waters as "public lands" subject to Title VIII of the statute further confirms that Congress intended no such withdrawal of authority.

III. ANILCA did not curtail the Park Service's general authority to regulate non-federal lands where necessary to protect National Park System lands and resources

Alaska is also incorrect in arguing that ANILCA section 103(c) precludes the exercise of the Park Service's authority to enforce regulations applicable to federal and non-federal lands alike on public lands in Alaska. The State contends that to the extent that the Park Service asserts that section 103(c) does not preclude the exercise of this authority on park lands in Alaska, it is "again asking this Court to allow it—not Congress—to decide which nonfederal lands the agency can control and to unilaterally prefer one of ANILCA's stated goals over the other." Br. 30. Alaska is wrong on both counts. The text of Section 103(c) and of ANILCA's management-plan section each unambiguously establishes that ANILCA does not deprive the Park Service of its authority to apply in park areas in Alaska the narrow but important class of park regulations that are not "applicable solely to public lands" within National Parks in Alaska.

Suggesting that the Park Service believes it may regulate private, state and native-owned lands as it pleases (Br. 30), Alaska inaccurately asserts that the text of section 103(c) prohibits regulation of non-federal land. Although the broad authority of the Organic Act does not prohibit application of park regulations to non-federal lands, park rules have been made generally applicable on such lands only where such application is necessary to fulfill the purpose of a NPS-administered interest (such as a federal easement), see 36 C.F.R. § 1.2(a)(5), and the rare cases in which the Park Service has issued a regulation "specifically written to be applicable on such lands and waters," 36 C.F.R. § 1.2(b). Under these principles, the Secretary has issued or proposed regulations applicable on private lands only in the case of activity on inholdings that poses a danger to park lands themselves. See 36 C.F.R. Pt. 6 (solid-waste disposal sites within National Park boundaries); 36 C.F.R. § 9.1 (mining within National Park boundaries under 1872 Act); see also 80 Fed. Reg. 65,572, 65,575 (Oct. 26, 2015) (proposed regulation requiring permitting of oil and gas facilities operating on private lands within parks, based on evidence of "at least 10 instances of sites with oil spills or leaks resulting in contamination of

soils and water").

Section 103(c) does not affect these regulations. It forecloses application only of rules "solely" for public lands within the National Parks, not rules for public and nonpublic lands alike. Its first sentence specifies that Native, State, and private lands do not become public lands simply because they fall within park boundaries. See 16 U.S.C. § 3103(c) ("Only those lands within the boundaries of any conservation system unit which are public lands * * * shall be deemed to be included as a portion of such unit."). Section 103(c) thus establishes that the Park Service may not treat inholdings in Alaska as though they were themselves public lands, subject to the panoply of park rules applicable to such lands. But in the narrow circumstances in which the Park Service may and does regulate all lands within park boundaries—as expressly authorized under statutes concerning mining, solid-waste treatment sites, and navigable waters within National Parks[8]—Section 103(c)'s first sentence does not by its terms forbid the Park Service from implementing regulations written without regard to land ownership.

[8] See 54 U.S.C. 54 U.S.C.A. § 100731(mining); 54 U.S.C.A. § 100903 (solid waste); 54 U.S.C. § 100175 (navigable waters).

The second sentence similarly addresses only "regulations applicable solely to public lands within such [conservation system] units." Alaska's reliance on section 103(c) as a basis for concluding that the Park Service lacks authority to apply its regulations to navigable waters because they are not owned by the federal government therefore is unavailing. The regulation identified in Alaska's supplemental brief applies to non-federal lands within parks in 49 states, but the Park Service intends to make it inapplicable in Alaska in light of this litigation and the absence in Alaska of any existing oil and gas operations that would be subject to it. If a similar rule is made applicable in Alaska, the State may challenge it, but nothing in section 103(c) precludes such a regulation from being made effective in Alaska.

And contrary to Alaska's assertions, ANILCA's management-plan provisions demonstrate that Congress plainly does not believe the Park Service lacks this authority within parks in Alaska. ANILCA specifically directs the Park Service to consider "issuance and enforcement of regulations" governing activities in "privately owned areas" within the boundaries of National Parks in Alaska, where such regulation is needed to serve the purposes of the park unit as a whole.

16 U.S.C. § 3191(b)(7). Congress would not have directed the Park Service to consider "issu[ing] and enforc[ing]" rules for privately owned areas if Section 103(c) barred the Secretary from issuing or enforcing such regulations. *Ibid.*

And ANILCA's requirement for federal-state cooperation does nothing to support the State's arguments. There is no issue presented here as to whether Congress "intend[ed] for the Park Service or other land management agencies to regulate non-federal lands and waters in Alaska whenever they chose to" (see Br. 33). Although management of national parks involves a great many issues of overlapping state and federal sovereign authority, the Park Service has made no effort to assert broad authority over non-federal lands over its hundred-year history. Throughout the National Park System, such matters as fish and wildlife management and the concurrent regulatory authority of the states and the United States in navigable rivers require coordination between state and federal administrators. Accordingly, Congress' expectation of federal-state cooperation in such matters, rather than preemptive regulation by the Park Service, does nothing to suggest that ANILCA eliminated the Park Service's regulatory

authority on non-federal lands.

The State also overlooks ANILCA's partial preemption of fish and wildlife management, which provided the context for the assertion of federal authority to regulate subsistence fishing in navigable waters that was at issue in the *Katie John* litigation. Congress intended the State to provide the federally-mandated priority for subsistence management on "public lands," and the State declined to do so. That decision by Alaska resulted in a federally-administered priority, requiring federal administrators, rather than the state managers otherwise responsible for regulating hunting and fishing on public lands in Alaska, to implement Title VIII of the statute.

Alaska is also incorrect to suggest that lands set aside by ANILCA must be administered in a manner that balances Alaska's "need for self-sufficiency" against the statute's conservation goals. The only statutory basis for Alaska's contention is a provision of ANILCA reflecting Congress's view that the statute itself achieves a balance between Congress's obligation to provide for the conservation, recreation, subsistence and scientific needs of the general public on Alaska lands subject to Park Service administration, on one hand, and

Alaska's economic interests on the other. Congress expressed the view that by striking this balance, ANILCA obviates the need for future legislation to expand the land area in Alaska subject to federal protection. See 16 U.S.C. § 3101(d). But no provision of ANILCA establishes "twin goals" for administration of National Park System lands in Alaska or exhorts federal managers to take account of Alaska's economic or self-sufficiency interests in administering them. To the contrary, three of the statute's four stated objectives are stated in terms of conservation and preservation of lands and resources and protection of the traditional way of life of rural residents, and the fourth is was to ensure that legislation to protect additional areas is not needed. As this Court acknowledged in the *Katie John* cases, Congress partially preempted State fish and wildlife management authority as a means to accomplish one of those goals. Moreover, the statute expressly directs federal administrators to consider its conservation, preservation and subsistence goals in planning for CSU administration, but contains no mention of balancing these factors against State economic interests. 16 U.S.C. § 3191(c). The State's suggestion that ANILCA requires the Park Service to avoid "privileging" these goals over Alaska's economic

and "self-sufficiency" interests has no foundation in the statute and should be disregarded.

As the Supreme Court noted, the unique circumstances of Alaska are reflected in many of the specific provisions of the statute. *Sturgeon v. Frost*, 136 S. Ct. at 1070-71. But ANILCA does not address the differences in Alaska's circumstances by restricting or diminishing the National Park Service's broad administrative authority to promulgate and enforce regulations as necessary to protect and preserve the lands, waters and resources reserved to the United States. Alaska has failed to identify any substantive injury to its sovereignty or "self-sufficiency" interests resulting from the Park Service's exclusion of hovercraft from navigable waters within CSUs. Indeed, in the decades since ANILCA was enacted, state and federal administrators have exercised their respective authority to administer the lands and waters located within CSUs without significant conflict, and those issues that have arisen – as a result of ANILCA's partial preemption of state fish and wildlife management authority – were settled by this Court's *Katie John* precedents.

CONCLUSION

For the foregoing reasons, the State's supplemental brief as *amicus curiae*, in which the State reiterates arguments rejected by this Court and presents new arguments not advanced by any party to this appeal, provides no basis for reversal of the district court's decision. This Court should affirm the district court's judgment on the alternate ground that Park Service authority to regulate navigable waters within CSUs is not limited by the provisions of ANILCA section 103(c).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Response to the Supplemental Brief of the State of Alaska, has been served on counsel this 14th day of October 2016, using the Court's ECF System.

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