No. 13-36165

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN STURGEON, *Plaintiff/Appellant*

v.

UNITED STATES OF AMERICA, BERT FROST, in his official capacity as Alaska Regional Director of the National Park, *et al.*, *Defendants/Appellees*.

ON REMAND FROM THE UNITED STATES SUPREME COURT
No. 14-1209

BRIEF OF AMICI CURIAE MENTASTA TRADITIONAL COUNCIL, VILLAGE OF DOT LAKE, TANANA CHIEFS CONFERENCE, KENAITZE INDIAN TRIBE, THE ORGANIZED VILLAGE OF SAXMAN, CHUGACHMIUT AND NORA DAVID

Heather R. Kendall Miller
ABA No. 9211084
Matthew N. Newman
ABA No. 1305023
NATIVE AMERICAN RIGHTS FUND
745 W. 4th Avenue, Suite 502
Anchorage, AK 99501
Telephone: (907) 276-0680
Facsimile: (907) 276-2466
Email: kendall@narf.org
mnewman@narf.org

Robert T. Anderson
ABA No. 8506043
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
Box 353020
Seattle, WA 98195
Telephone: (206) 685-2861
Facsimile: (206) 616.3426
Email: boba@uw.edu

Lloyd B. Miller
ABA NO. 7906040
SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON
900 W. 5th Avenue, Suite 700
Anchorage, AK 99501
Telephone: (907) 258-6377
Facsimile: (907) 272-8338
Email: lloyd@sonosky.net

Riyaz A. Kanji
KANJI & KATZEN, PLLC
303 Detroit Street, Suite 400
Ann Arbor, MI 48104
Telephone: (734) 769-5400
Facsimile: (734) 769-2701
Email: rkanji@kanjikatzen.com

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes and Regulations

Other Authorities

STATEMENT OF INTEREST

Amici Curiae are federally recognized Alaska Native tribes, inter-tribal organizations, and an Alaska Native individual who support federal jurisdiction to regulate waters in Conservation System Units (CSUs) to protect the subsistence fishing way of life upon which rural Alaska Native people vitally depend.

Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA or Act) defines "subsistence uses" as "the customary and traditional uses by rural Alaska residents of wild, renewable resources," of which fish are the most significant resource. 16 U.S.C. § 3113. Title VIII makes subsistence uses the priority use on federal "public lands," a term defined in Title I. 16 U.S.C. § 3102. The term federal "public lands" encompasses federal "interests" in "waters," *id.*, and this Circuit has three times held that federal reserved water rights in rivers running through and adjacent to CSU's are federal "interests" in "waters," and are therefore federal "public lands" where Amici's subsistence fishing priority applies. *Infra* at 3 (citing this Court's "*Katie John*" cases).

In its Supplemental Brief (Doc. 103), the State of Alaska argues that ANILCA's "public lands" definition cannot include federal reserved waters. Were that the case—and putting aside that this Circuit reached the precise opposite conclusion in the *Katie John* cases—Title VIII's protection for subsistence fishing would effectively be null and void, for there would be no place for it to apply.

This would run completely counter to Congress's intent and be no less than a disaster for subsistence users because "[a]pproximately 40 million pounds of fish and wildlife are harvested annually by subsistence users, of which fish account for 60 percent." Dep't of the Interior, ENVIRONMENTAL ASSESSMENT, MODIFICATION OF THE FEDERAL SUBSISTENCE FISHERIES MANAGEMENT PROGRAM ch. III, at 1 (June 2, 1997), *available at* https://www.doi.gov/sites/doi.gov/files/migrated/subsistence/library/ea/upload/EAModFSFMP.PDF.

For the reasons set forth herein, this Court should reject all of the State's arguments and render judgment in favor of the United States.

SUMMARY OF ARGUMENT

The State and Mr. Sturgeon's arguments that the National Park Service lacks authority to regulate hovercraft on the Nation River within the Yukon-Charley Rivers National Preserve fail on two substantive grounds.

First, the National Park Service has the authority to regulate hovercraft on the Nation River because all rivers within Park Service Units are covered by a general statute providing precisely such authority to the Secretary. 54 U.S.C. § 100751 ("The Secretary, under such terms and conditions as the Secretary considers advisable, may prescribe regulations under subsection (a) concerning boating and other activities on or relating to water located within [Park] System units, including water subject to the jurisdiction of the United States"). The State's

claim to the contrary would mean that Congress established the Yukon-Charley Rivers National Preserve to "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; to protect habitat for, and populations of, fish and wildlife," 16 U.S.C. § 410hh(10)—but denied the Park Service authority to regulate and protect any navigable rivers within the Park. Such a futile and absurd intent cannot be attributed to Congress.

Second, in the long-running "*Katie John*" litigation, this Court upheld the United States's determination that certain navigable waters within CSUs are "public lands" as that term is defined in Title I of ANILCA, because the United States holds federally-reserved water rights in those waters necessary to carry out the purposes of the CSUs. *John v. United States* (*Katie John III*), 720 F.3d 1214, 1224 (9th Cir. 2013), *cert. denied sub nom.*, *Alaska v. Jewell*, 134 S. Ct. 1759 (2014); *John v. United States* (*Katie John II*), 247 F.3d 1032 (9th Cir. 2001) (en banc) (per curium); *Alaska v. Babbitt* (*Katie John I*), 72 F.3d 698 (9th Cir. 1995), *cert. denied*, 517 U.S. 1187 (1996) (collectively, "*Katie John* litigation"). Alaska lost all three of those cases. Unperturbed, the State attempts a fourth bite at the apple and once again argues that ANILCA's definition of "public lands" does not include federal reserved waters. State's Supp. Br. at 3-19. While the State claims that it is not seeking to disturb this Circuit's *Katie John* rulings (Alaska Opp. to

Amici's Intervention (Doc. 101 at 2)), its position here cannot be reconciled with that precedent. All three decisions hinge on the definition of "public lands" in Title I of ANILCA, 16 U.S.C. § 3102. "Section [3102] provides that the definitions apply to the entire Act, except that in Title IX, which provides for implementation of ANCSA and the Alaska Statehood Act, 72 Stat. 339, and in Title XIV, which amends ANCSA and related provisions, the terms shall have the same meaning as they have in ANCSA and the Alaska Statehood Act." *Amoco Prod. Co. v. Native Vill. of Gambell*, 480 U.S. 531, 546 n.13 (1987). There is no separate definition of "public lands" for purposes of this case. Principles of issue preclusion foreclose this fourth attempt to reverse the United States's determination, repeatedly upheld by this Circuit, that federal reserved waters are "public lands." And even if this were not enough, Congress has plainly ratified the Secretaries of Agriculture and Interior's interpretation of the term "public lands" in various enactments adopted in the late 1990s.

ARGUMENT

I. CONGRESS PROPERLY AUTHORIZED THE NATIONAL PARK SERVICE TO REGULATE NAVIGABLE WATERS WITHIN ALASKA CONSERVATION SYSTEM UNITS.

Congress indisputably enjoys the constitutional power to authorize the Park Service to regulate navigable waters of the United States within National Parks and Preserves, and did so through the 1976 amendments to the Park Service organic

act. Congress did not curtail that authority in 16 U.S.C. § 3103 of ANILCA, which protects Alaska Native corporation and State inholdings from some Park Service regulations within CSUs in Alaska.

A. Congress Validly Exercised Its Broad Power To Regulate Navigable Waters.

No party disputes the Nation River's status as a navigable river for purposes of federal law. The Park Service regulation at issue states, "[t]he operation or use of hovercraft [in National Parks] is prohibited." 36 C.F.R. § 2.17(e). Congress authorized that regulation in 1976, when it provided that "[t]he Secretary, under such terms and conditions as the Secretary considers advisable, may 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*." 54 U.S.C. § 100751 (emphasis added). Because Congress's powers over navigable waters under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and the Property Clause, U.S. Const. art. IV, § 3, cl. 2, are extremely broad, there is no doubt that federal regulatory authority extends to navigable waters within national parks and preserves. *See Kleppe v. New Mexico*, 426 U.S. 529 (1976); A. Dan Tarlock, *Law of Water Rights and Resources* 9.6 (2015) ("Federal jurisdiction over waters now extends to all activities subject to the full Commerce Clause.").

Contrary to the State's view, navigable waters within the Yukon-Charley Rivers National Preserve are not "owned" by the State, and they were never "conveyed" to the State. To be sure, the State may own the submerged lands pursuant to the equal footing doctrine. *PPL Mont. LLC v. Montana*, 132 S. Ct. 1215, 1227-28 (2012) ("Upon statehood, the State gains title within its borders to the beds of waters then navigable."). But the actual water column is not owned by any private or governmental entity in the same sense that fast lands are owned. *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913) ("Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable."); *see also United States v. Twin City Power Co.*, 350 U.S. 222, 226 (1956) (federal navigational servitude can preempt any use rights granted by a State to a private party, so that compensation under the Fifth Amendment is not required for taking such interests).

The fact that the States do not "own" the water column is illustrated by the federal reserved water rights doctrine, which was central to the *Katie John* litigation and is once again central here. Federal reserved rights to waters are established "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, [and] the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to

accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976). In *Arizona v. California*, the Supreme Court rejected the state ownership theory of navigable waters when it concluded that *even after statehood* there is no "doubt about the power of the United States under [the Commerce Clause and Property Clause] to reserve water rights for its reservations and its property." 373 U.S. 546, 597-98 (1963). If the States were the actual "owners" of the water column (as Alaska claims here), there would be no water for the United States to reserve. *Cappaert* and *Arizona* teach otherwise, and in *United States v. New Mexico*, 438 U.S. 696 (1978), the Supreme Court similarly recognized federal reserved waters for the National Forest system.

Nor does the Submerged Lands Act (SLA) insulate navigable waters from federal regulation, or eliminate federal interests in those waters. State's Supp. Br. at 7-9. Congress enacted the SLA in 1953 to reverse several Supreme Court decisions holding that the United States, and not the States, held title to the beds underlying the marginal sea. "In the wake of the U.S. Supreme Court's decision in *United States v. California*, Congress . . . 'correct[ed]' the Court's holding by 'returning' the first three miles of ocean submerged lands to the coastal States." Robin Kundis Craig, *Treating Offshore Submerged Lands As Public Lands: A Historical Perspective*, 34 Pub. Land & Resources L. Rev. 51, 69-70 (2013) (footnotes omitted). The language of the SLA bears out Congress's recognition of

state ownership of submerged lands, but not of any water. *Compare* 43 U.S.C. § 1311(a)(1) (confirming title and ownership of submerged lands), *with* 43 U.S.C. § 1311(a)(2) (confirming state rights to regulate land and water-related resources). In other words, States do not "own" the water column merely by virtue of having some regulatory authority over use of the waters.

As Justice Scalia explained in a case involving a national park in Alaska, state ownership of submerged lands has little effect on federal authority to regulate activities in navigable waters.

> 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. *See, e.g.*, 43 U.S.C. § 1314(a) (under the Submerged Lands Act, the United States retains "powers of regulation and control of . . . navigable waters for the constitutional purposes of commerce [and] navigation"); . . . *United States v. California*, 436 U.S. 32, 41, and n. 18, 98 S.Ct. 1662, 56 L.Ed.2d 94 (1978) (noting that the United States retained "its navigational servitude" even when California took the "proprietary and administrative interests" in submerged lands surrounding islands in a national monument). . . . It is thus unsurprising that States own submerged lands in other federal water parks, such as the California Coastal National Monument and the Boundary Waters Canoe Area in Minnesota.

Alaska v. United States, 545 U.S. 75, 116-18 (2005) (Scalia, J., concurring in part and dissenting in part) (footnote omitted); *see also United States v. Rands*, 389 U.S. 121, 127 (1967) (concluding the SLA "left congressional power over commerce . . . precisely where it found [it]").

The Park Service regulation at issue here is a classic example of the exercise of federal power over the use of navigable waters. Congress authorized the Park Service to set the terms for the use of navigable waterways by private citizens and others in national parks and refuges. Such regulation is the bread and butter of the federal commerce power over navigable waters. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426-27 (1940) ("The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government."). By their very nature, navigable waters are channels of commerce subject to federal regulations related to their use.

Thus, while a State may have authority to regulate water use within its boundaries if not preempted by federal law, that "power" is not ownership. *See* Thompson, Leshy & Abrams, *Legal Control of Water Resources* 588 (5th ed. 2013) ("[T]he most distinctive legal feature of water is its status as a public resource that cannot be privatized in the ordinary way."). And as the Supreme Court has noted, whatever the extent of the State's power, it is subject to "the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce." *PPL Mont.*, 132 S. Ct. at 1228.

In sum, the Nation River is not private property, nor is it owned by the State of Alaska. It therefore remains fully subject to Congress's constitutional authority over navigable waters. As explained in the next section, nothing in 16 U.S.C. §

1303 of ANILCA evidences any congressional intent to relinquish that authority.

B. Section 103 of ANILCA Does Not Remove Rivers from Park Service Jurisdiction.

No statute, including ANILCA, limits the National Park Service's authority to regulate waters within National Parks and Preserves. To the contrary, 16 U.S.C. § 3207 of ANILCA provides that "[n]othing in this Act shall be construed . . . as superseding, modifying, or repealing, except as specifically set forth in this Act, existing laws applicable to the various Federal agencies which are authorized to . . . exercise licensing or regulatory functions in relation thereto." *See also* 43 U.S.C. § 1314(a) (under the SLA, the United States retains "powers of regulation and control of . . . navigable waters for the constitutional purposes of commerce [and] navigation.").

The State argues that the first sentence of section 3103(c) precludes applying the statute and regulation to the waters here in question—by providing that "only those lands . . . which are public lands . . . shall be deemed to be included as a portion of such unit." State's Supp. Br. at 21-22, 24. However, the next sentence in section 3103(c) gives meaning to the first by explicitly exempting Alaska Native corporation lands and state lands from the Units: "[n]o 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." 16 U.S.C. § 3103(c). As explained in section I.A., the

navigable waters of the Nation River have never been "conveyed to" the State, let alone to a Native corporation or private party, so they cannot fall within the scope of the second sentence. While the State holds title to the submerged lands beneath the River, title was never conveyed to the water column and those waters remain part of the national parks and preserves in Alaska. The National Park Service therefore retains regulatory power over that water.

Congress enacted 16 U.S.C. § 3103(c) of ANILCA to protect state and Native corporation *lands* within CSUs from federal regulation. Nothing in that subsection so much as hints that Congress intended also to exempt entire federal water bodies from federal regulation. And sensibly so: if the navigable waters within the Yukon-Charley Rivers National Preserve were deemed immune from such regulation, a primary purpose of establishing the Park and Preserve would be defeated. Congress set the Preserve aside in the following terms:

> The preserve shall be managed for the following purposes, among others: *To 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; to protect habitat for, and populations of, fish and wildlife.

16 U.S.C. § 410hh(10) (emphasis added). It would be absurd to read ANILCA as setting aside for permanent protection an entire river basin to be managed by the Park Service, and then to deny the agency any authority to protect the river.

It is particularly inconceivable that Congress would establish a National

Rivers Preserve in one section of ANILCA, and then (tucked into a section dealing with maps) exclude that very river from inclusion in the unit. As the Supreme Court reiterated recently, statutes must be construed as a whole, and isolated sections must be considered in their context, with an eye toward accomplishing the broad objectives of the statute. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)) ("[W]hen deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.'"). The Court's "duty, after all, is 'to construe statutes, not isolated provisions.'" *Id.* (quoting *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010)).

Regulations concerning navigable rivers do not affect state property interests in submerged lands, and the Park Service regulation at issue here therefore does not touch any of the areas within Preserve boundaries that are protected from some or all Park Service regulation by section 3103(c)'s carve-out for non-federal inholdings. This sensible reading of the statute preserves the status of the Nation River as a part of a CSU that was expressly created for that river's protection, while recognizing that section 3103(c) carves out for special protection the state and Native corporation lands that are actually specified in that section.

II. THE STATE IS PRECLUDED FROM ARGUING THAT ANILCA DOES NOT APPLY TO NAVIGABLE WATERS UNDER THE RESERVED WATER RIGHTS DOCTRINE.

A second, independent basis supports the exercise of federal authority over the waters of the Nation River. Federal authority under ANILCA extends to federal "public lands," 16 U.S.C. 3102(3), which include federal "lands, waters, and interests therein." 16 U.S.C. § 3102(1). The State argues that the term "public lands" in section 3102(3) does not include any navigable waters. In the *Katie John* litigation, this Circuit held 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 doctrine." *Katie John I*, 72 F.3d at 703-04; *Katie John II*, 247 F.3d at 1033. So while the State may disavow any intent to disturb this Circuit's *Katie John* rulings (*see* State's Supp. Br. at 19), its position is in irreconcilable conflict with the law of this Circuit and the terms of the statute. The panel decision in *Katie John I* rejected a narrow reading of the "public lands" definition. *Katie John I*, 72 F.3d at 703. The Supreme Court similarly rejected a narrow reading of the definition as applied to submerged lands in the Outer Continental Shelf (OCS):

> Petitioners also assert that the OCS plainly is not "Federal land" because the United States does not claim "title" to the OCS. *See* ANILCA § 102(2), 16 U.S.C. § 3102(2). The United States may not hold "title" to the submerged lands of the OCS, but we hesitate to conclude that the United States does not have "title" to any "interests therein." Certainly, it is not clear that Congress intended to exclude

> the OCS by defining public lands as "lands, waters, and interests therein" "the title to which is in the United States." We also reject the assertion that the phrase "public lands," in and of itself, has a precise meaning, without reference to a definitional section or its context in a statute.

Vill. of Gambell, 480 U.S. at 548 n.15.

It cannot reasonably be argued that the term "public lands" means one thing for purposes of Title VIII's subsistence preference, but another thing for the remainder of the statute. After all, Title I expressly provides that its definitions apply to the entire Title, and only excepts from that coverage two titles not at issue here (Titles IX and XIV). 16 U.S.C. § 3102. Because the "public lands" definition interpreted in the *Katie John* litigation applies just as equally to Title I (including to section 3103), as it does to Title VIII, the State cannot prevail on its public lands argument without reopening the *Katie John* cases. And that it cannot do.

In *Katie John III*, this Circuit specifically upheld the federal government's determination that the Nation River (along with many other rivers within and adjacent to CSUs) are "public lands" as defined in Title I of ANILCA. *Katie John III.*, 720 F.3d at 1222 (upholding "[t]he 1999 Rules [that] provide that the Rules apply to all public lands including all non-navigable waters located on these [land units], on all navigable and non-navigable water within the exterior boundaries of the [land units], and on inland waters adjacent to the exterior boundaries of the [land units]."). In doing so, the Court reaffirmed the law of this Circuit as

established in *Katie John I* and *II*. The Supreme Court denied certiorari, just as it had in *Katie John I*. The State cannot now collaterally attack issues it conclusively lost in successive Ninth Circuit rulings, and upon which the Supreme Court twice declined review.[1]

Mr. Sturgeon is likewise bound by these prior rulings, both because they are the law of this Circuit, and because the State represented the interests of its citizens in the prior litigation. Mr. Sturgeon can claim no private rights in the subject matter of this case, for the Nation River is a public resource subject to state and federal jurisdiction. The *Katie John* litigation resulted in binding final judgments that the water within and adjacent to CSUs, including the waters of the Nation River, are federal "public lands" despite the State's arguments to the contrary. Mr. Sturgeon is bound because, as the State recently argued, "Alaska's fundamental, structural interest in litigating the relative scope of federal and state authority to regulate in navigable waters in Alaska cannot be adequately protected by an

[1] The State attempts to avoid the binding effect of Circuit law by indulging in some creative vote counting of the various concurring and dissenting opinions in the three *Katie John* decisions. State's Supp. Br. at 15-19. This ignores the fact that in the 2001 *en banc* decision in *Katie John II*, this Circuit unquestionably adopted en banc the *Katie John I* panel decision holding that ANILCA's "public lands" definition includes federal reserved waters, and that in *Katie John III* a unanimous Court reaffirmed this holding. No amount of selective quotations from concurring or dissenting opinions changes the fact that this Circuit has twice affirmed the original panel's interpretation of the public lands definition, and in *Katie John III* applied that interpretation to find the waters of the Nation River to be "public lands."

individual citizen." Mot. for Clarification Regarding Alaska's Party Status at 3 (Doc. 106) (internal quotations and footnote omitted). In a case such as this, there is ample precedent for extending the bar on relitigation of these issues to citizens of the state. *See, e.g.*, *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 693 (1979), *modified sub nom.*, *Washington v. United States*, 444 U.S. 816 (1979) ("But in any case, these individuals and groups are citizens of the State of Washington, which was a party to the relevant proceedings, and 'they, in their common public rights as citizens of the State, were represented by the State in those proceedings, and, like it, were bound by the judgment.'"); *Tacoma v. Taxpayers*, 357 U.S. 320, 340-41 (1958); *see also* 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4458.1, 585 (1981). Claim preclusion may even bar an action by a non-party to a lawsuit litigated to final judgment by one in privity with the prior losing party. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 375-76 (1993); Restatement (Second) of Judgments § 51 (1982) (recognizing general rule that judgment in an action against either party to a vicarious liability relationship establishes preclusion in favor of the other). Any other rule would permit serial litigation by those who did not participate in the prior litigation when that litigation involves state sovereign interests trumped by federal law. So Mr. Sturgeon, too, is bound.

The State's Motion for Clarification makes it clear that it seeks to relitigate the *Katie John* public lands issue. But it may not bootstrap on to Mr. Sturgeon's case to do so because the prior litigation is binding on both the State and Mr. Sturgeon. *See* Restatement (Second) of Judgments § 41, comment d ("Where the interest to be protected is one held by members of the public at large, an action by a public official on behalf of that interest may be held preemptive of private remedies and preclusive effects accordingly given to a judgment in an action involving the official."). Members of this Court have expressed concern with Alaska's persistence in flouting this Circuit's precedents. In *Katie John II*, concurring members of the en banc panel expressed their concern that "Alaska has had two bites at the same apple" because it was "raising precisely the same issue on this appeal as we heard and determined on the last one." *Katie John II*, 247 F.3d at 1050-51 (Rymer, J., special statement); *Id.* at 1033-34 (Reinhardt, J., concurring). The State chose not to seek certiorari from *Katie John II*, and at that point this Court's holdings became final and binding with respect to the State. A further effort to challenge this Court's public lands ruling was rejected on the merits in *Katie John III*, 720 F.3d at 1245, which upheld the agency rule implementing this Court's two prior rulings and which became effective in 1999. *See* 64 Fed. Reg. 1,276 (Jan. 8, 1999).

It is a "general and well-established . . . maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401-02 (1981). "By precluding parties from contesting matters that they have had a full and fair opportunity to litigate, [the doctrines of issue and claim preclusion] protect against the expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibility of inconsistent decisions." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (internal citations and quotation omitted). Indeed, these preclusion doctrines are "demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination." *San Remo Hotel L.P. v. City & Cnty. of S.F.*, 545 U.S. 323, 337 (2005). Here, these "rule[s] of fundamental and substantial justice, of public policy and private peace," *Federated Dep't Stores*, 452 U.S. at 401 (quoting *Hart Steel Co. v. R.R. Supply Co.*, 244 U.S. 294, 299 (1917)) (internal quotation marks omitted), mean quite simply that the State's serial efforts to litigate the question of ANILCA's applicability to navigable waters under the reserved water rights doctrine must come to an end.

The same issues that the State seeks to raise in its amicus brief—whether the federal reserved water rights doctrine authorizes the federal government's rule, and

whether the Ninth Circuit properly proceeded on the premise that ANILCA could be interpreted to federalize navigable waters—were actually litigated in *Katie John I* and *II*. In *Katie John I*, the plaintiffs "argued that public lands include virtually all navigable waters, . . . [t]he state contended that public lands exclude navigable waters," and the federal government argued "that public lands include those navigable waters in which the federal government has an interest under the reserved water rights doctrine." *Katie John I*, 72 F.3d at 701; *see also id.* at 700 ("[T]he parties dispute whether navigable waters fall within the statutory definition of public lands and are thus subject to federal management to implement ANILCA's subsistence priority."). This Court decided those issues, "hold[ing] that the subsistence priority applies to navigable waters in which the United States has reserved water rights." *Id.* There can be no dispute that this holding was essential to the judgment, for these were the only issues decided on appeal.

"[P]recisely the same issue[s]" were again litigated and necessarily resolved in *Katie John II*; "[i]ndeed, Alaska's brief frame[d] the issue as whether the prior panel got it right." *Katie John II*, 247 F.3d at 1051 (Rymer, J., special statement). In the en banc proceedings, the State made the identical "clear statement," "unmistakability," and "deference" arguments the State presses here. *Compare*, En Banc Reply Br. for Appellants State of Alaska and Frank Rue at 3-29, *Katie John II*, 247 F.3d 1032 (No. 00-35121), 2000 WL 33981053, *with* State's Supp. Br. at

11-19. This Court rejected that argument and held that ANILCA applies to navigable waters under the reserved water rights doctrine, "determin[ing] that the judgment rendered by the prior panel, and adopted by the district court, should not be disturbed or altered by the en banc court." *Katie John II*, 247 F.3d at 1033.

The State raised the same issues a third time when it petitioned for Supreme Court review in *Katie John III*. Pet. for a Writ of Certiorari at 13, *Jewell*, 134 S. Ct. 1759 (No. 13-562), 2013 WL 5936539. ("[T]he Ninth Circuit decision conflicts with this Court's decisions requiring courts to insist on a clear statement of congressional intent before altering the traditional balance of power."). Again, the argument was rejected when the Court denied review. *Jewell*, 134 S. Ct. 1759. Issue preclusion therefore bars the State from relitigating those issues here. *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 171 (1984) ("[W]hen the claims in two separate actions between the same parties are the same or are closely related . . . it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the same issue in what is essentially the same controversy, *even if the issue is regarded as one of* '*law.*'") (emphasis added).

Furthermore, this is not an instance where "controlling facts or legal principles have changed significantly" since the prior judgment, *Montana v. United States*, 440 U.S. 147, 155 (1979), nor where '"unmixed questions of law' in successive actions involv[e] substantially unrelated claims." *Id.* at 162. Most of

the cases that the State relies on for its navigable waters arguments were decided prior to *Katie John III*, and the State makes no assertion that the subsequent decisions broke new legal ground. There is likewise no significant difference in the factual setting, and the claims can hardly be called "unrelated." Indeed, the State raises the exact same claims in its Supplemental Brief that it made in *Katie John I*, *II*, and *III*: that Department of the Interior rules implementing ANILCA are invalid because ANILCA's "public land" definition does not apply to navigable waters under the reserved water rights doctrine. This Court should accordingly deny the State's effort to relitigate legal issues previously rejected.

III. CONGRESS RATIFIED THE FEDERAL AGENCIES' INTERPRETATION OF ANILCA'S "PUBLIC LANDS" PROVISION TO INCLUDE FEDERAL RESERVED WATERS.

The *Katie John III* litigation upheld a comprehensive 1999 federal rule in which the government asserted reserved water rights in rivers within and adjacent to each conservation system unit in Alaska. *Katie John III*, 720 F.3d at 1229. In its Rule identifying which waters are public lands under the reserved water rights doctrine, the federal government included the waters of the Yukon-Charley Rivers National Preserve, including the Nation River. *See* 64 Fed. Reg. at 1,286-87, *codified at* 36 C.F.R. § 242.3(c)(28) (2009).

This regulatory path began in 1996 when the Secretaries issued an Advance Notice of Proposed Rulemaking (ANPR) announcing their intent to develop

subsistence fishing regulations based upon the government's ownership of reserved waters in the Alaska CSUs. *See* 61 Fed. Reg. 15,014 (Apr. 4, 1996). At that point, Congress intervened and enacted what became a series of moratoria delaying the effective date of the proposed rule. Congress took this action to give Alaska time (and incentive) to amend its laws and thus regain state management authority over subsistence fishing in all waters of Alaska. State management through a cooperative federalism program was Congress's original plan in Title VIII, and Congress was eager to see the State get back into compliance with the program. *See Katie John III*, 720 F.3d at 1219-21 (discussing history of the State's management of subsistence fishing, and the events which led to the federal government reasserting its Title VIII authority).

The first congressional moratorium was passed by Congress a mere twenty-two days after the ANPR was published in the Federal Register. Omnibus Consolidated and Rescissions Appropriations Act of 1996, Pub. L. No. 104-134, § 336, 110 Stat. 1321 (1996). It prevented any fiscal year 1996 funds from being used by the Departments of the Interior or Agriculture to implement this Court's *Katie John* judgment. *Id.* The second moratorium was enacted several months later covering fiscal year 1997. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 317, 110 Stat. 3009 (1997). Both acts afforded Alaska time

to bring state law into conformity with federal law, and they demonstrate Congress's early attention to the issue.

But by November 1997, it appeared the Alaska Legislature would not act without additional enticements. Congress then adopted a stick-and-carrot approach: new legislation carrying the threat of implementation of this Court's decision—including the Secretary's interpretation of "public lands" as encompassing federally-reserved waters—if the Alaska Legislature failed to act, and weakening amendments to ANILCA if it did act. Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, § 316(a), 111 Stat. 1543 (1998). The threat of implementation included statutory language expressly referring to this Court's 1995 decision, and adding language to ANILCA's "Federal lands" definition. *See id*. § 3l6(b)(3)(B), *amending* 16 U.S.C. § 801 (adding section 801(b)(5): "the Ninth Circuit Court of Appeals determined in 1995 in *State of Alaska v. Babbitt* (72 F.3d 698) [sic] that the subsistence priority required on public lands under section 804 of this Act applies to navigable waters in which the United States has reserved water rights as identified by the Secretary of the Interior"); *id.* § 3l6(b)(2) (excluding from "Federal land" any lands owned by the State, a Native Corporation or other private landowner). To provide maximum persuasive effect, Congress added that other amendments which would have weakened federal authority in Alaska waters would be automatically repealed

if Alaska failed to bring state law into conformity with federal law by December 1, 1998. *Id*. § 316(d).

When that deadline came and went, the ANILCA amendments included in the 1998 Appropriations Act were automatically repealed and the original provisions of ANILCA were effectively reenacted. The following year Congress gave the State one final chance to adopt state laws consistent with Title VIII. Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 339, 112 Stat. 2681 (1999).[2] The measure gave the State until December 1, 2000, to act. *See* 16 U.S.C.A. § 3102 (West 2010) (historical note). But that reprieve was effective only if the Secretary of the Interior certified that "a bill or resolution ha[d] been passed by the Alaska State Legislature to amend the Constitution of the State of Alaska that, if approved by the electorate, would enable the implementation of state laws of general applicability consistent with, and which provide for the definition, preference, and participation specified in sections 803, 804, and 805 of the Alaska National Interest Lands Conservation Act." Pub. L. No. 105-227, § 339. When Alaska failed to act, this enactment lapsed and Congress permitted the Title VIII rules to take effect.

Under these circumstances, it is plain that Congress was fully aware of this Circuit's *Katie John I* decision, that by positive law it referred to that decision, and

[2] By this time the ANPR had been superseded by a proposed rule. 62 Fed. Reg. 66,216 (Dec. 17, 1997).

that it expressly permitted the proposed rulemaking based upon that decision to go into effect. Congress thus ratified this Circuit's interpretation of ANILCA's "public lands" definition. *See Tex. Dep't of Hous. & Cmty. Aff. v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2519-20 (2015) (congressional awareness of uniform interpretation of statute is "convincing support" of ratification of interpretation); *id.* at 2520 (quoting Scalia & Garner, *Reading the Law: The Interpretation of Legal Texts* 322 (2012)) ("'If a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation.'") (ellipsis in original).

The fact that the "congressional approval" here occurred in appropriations statutes is immaterial, "so long as it is demonstrated that Congress had knowledge of the precise action or project at issue and was explicitly and specifically addressing that project." *Sierra Club v. Andrus*, 610 F.2d 581, 601-02 (9th Cir. 1979), *rev'd on other grounds*, 451 U.S. 287 (1981); *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569, 573 (9th Cir. 1980) (citing cases) (ratification by appropriation will be found where there is "congressional knowledge of the precise course of action alleged to have been acquiesced in"); *Brooks v. Dewar*, 313 U.S. 354, 361 (1941) ("appropriation[] . . . not only confirms the departmental

construction of the statute, but constitutes a ratification of the action of the Secretary as the agent of Congress in the administration of the act.").

Here, the appropriations acts plainly show a studied intent to confirm the very authority the Secretary now claims and exercises. *Accord Zarr v. Barlow*, 800 F.2d 1484, 1493 (9th Cir. 1986). Indeed, Congress expressly described *Katie John I* in the fiscal year 1998 moratorium amendments, including a congressional finding that under the decision "the subsistence priority required on public lands under section 804 of this Act applies to navigable waters in which the United States has reserved water rights as identified by the Secretary of the Interior." Pub. L. No. 105-83, § 316(b)(5).

To borrow from *United States v. Sheffield Board of Commissioners*, "[i]n [1996 through 1999], Congress was clearly aware of [the prior panel's] interpretation . . . [of 16 U.S.C. § 3102(3)] and plainly contemplated that the Act would continue to be so construed." 435 U.S. 110, 132 (1978). "When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, [as it has here,] Congress is treated as having adopted that interpretation, and this Court is bound thereby." *Id*. at 134; *see also Ward v. Commissioner*, 784 F.2d 1424, 1430 (9th Cir. 1986) (where agency interpretations of a statute are deemed to have been approved by Congress because the statute to which they apply is reenacted unchanged, "those interpretations have the force of

law and can only be changed by Congress"). In short, Congress has not merely acquiesced in the panel decision and the Secretary's interpretation; Congress has expressly embraced them. Given the herculean efforts to get Alaska to come back into compliance, "it is hardly conceivable that Congress . . . was not abundantly aware of what was going on." *Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983). And given the focus of multiple legislative actions, it is difficult to conceive of a clearer indication of congressional knowledge and ratification of this Court's decision and the Secretaries' statutory interpretation sustained by that decision. The ratification of the Secretary's regulations is "a deliberate congressional choice with which the courts should not interfere." *Cent. Bank v. First Interstate Bank*, 511 U.S. 164, 184 (1994).

CONCLUSION

For the reasons stated above, the State's arguments as amicus should be rejected, and judgment entered for the United States.

By: /s/hkendall-miller

Heather R. Kendall Miller
ABA No. 9211084
Matthew N. Newman
ABA No. 1305023
NATIVE AMERICAN RIGHTS FUND
745 W. 4th Avenue, Suite 502
Anchorage, AK 99501
Telephone: (907) 276-0680
Facsimile: (907) 276-2466
Email: kendall@narf.org

Robert T. Anderson,
ABA No. 8506043
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
Box 353020
Seattle, WA 98195
Telephone: (206) 685-2861
Facsimile: (206) 616.3426
Email: boba@uw.edu

mnewman@narf.org

Lloyd B. Miller, ABA No. 7906040
ABA NO. 7906040
SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON
900 W. 5th Avenue, Suite 700
Anchorage, AK 99501
Telephone: (907) 258-6377
Facsimile: (907) 272-8338
Email: lloyd@sonosky.net

Riyaz A. Kanji
KANJI & KATZEN, PLLC
303 Detroit Street, Suite 400
Ann Arbor, MI 48104
Telephone: (734) 769-5400
Facsimile: (734) 769-2701
Email: rkanji@kanjikatzen.com

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 14th day of October, 2016, I electronically filed the foregoing BRIEF OF AMICI CURIAE with the Appellate Court using the CM/ECG system.

Participants in this case who are registered CM/ECF users will be served by the CM/ECF system.

Respectfully submitted this 14th day of October, 2016.

By: /s/hkendall-miller

Heather R. Kendall Miller
ABA No. 9211084
Matthew N. Newman
ABA No. 1305023
NATIVE AMERICAN RIGHTS FUND
745 W. 4th Avenue, Suite 502
Anchorage, AK 99501
Telephone: (907) 276-0680