No. 22-35097

IN THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF ALASKA DEPARTMENT OF FISH AND GAME,
Plaintiff - Appellant,

v.

FEDERAL SUBSISTENCE BOARD; et al.,
Defendants - Appellees,

and

ORGANIZED VILLAGE OF KAKE,
Intervenor-Defendant - Appellee.

On appeal from the U.S. District Court
for the District of Alaska, Anchorage
No. 3:20-cv-00195-SLG
Hon. Sharon L. Gleason

APPELLANT STATE OF ALASKA'S REPLY BRIEF

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SUMMARY

Regulating hunting within its borders is a core part of the State's historic police powers. *See Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976). When Congress enacted ANILCA, it expressly preserved those historic powers. 16 U.S.C. § 3202(a).

Congress made a narrow exception to the State's plenary control of its wildlife in Title VIII of ANILCA. *Id.* If the State does not implement a preference for rural subsistence users as defined in ANILCA, then the Secretaries of Interior and Agriculture will create "a joint program to grant a preference for subsistence uses of fish and wildlife resources on public lands." 67 Fed. Reg. 30,559, 30,560 (May 7, 2002) (interpreting Secretaries' responsibility if State cannot implement laws that provide for ANILCA's subsistence definition, preference, and regional participation); *see also* 16 U.S.C. § 3115(d). Since the Alaska Supreme Court concluded that the State is constitutionally unable to implement a preference that complies with ANILCA's definition of subsistence use, the Secretaries now have the responsibility of implementing the subsistence preference. To do so, the Secretaries (1) regulate who is a federally-qualified subsistence user, 16 U.S.C. § 3113; (2) apply the subsistence preference, 16 U.S.C. § 3114; and (3) incorporate recommendations from regional councils as to how to effectuate the preference, 16 U.S.C. § 3115.

The Secretaries have delegated their authority to the Federal Subsistence Board. 50 C.F.R. § 100.10; 36 C.F.R. § 242.10. This appeal involves two separate unlawful actions taken by the Board. First, the Board applied its "special action" regulation to open a one-month hunting season in an area the State had closed for hunting. Second, the Board closed to non-federally-qualified hunters federal public lands in Subunits 13A and 13B. Both challenged actions have expired, but they were both too-short-lived to be litigated and there is a reasonable expectation similar situations will recur.

The special action opening a hunting season was unlawful because ANILCA does not authorize the Secretaries to open seasons the State has closed. Rather than allowing the Secretaries to create a wholly new hunting season, ANILCA authorizes the Secretary to create a *preference* for federally-qualified hunters when there is an open hunting season by restricting the harvest.

The closure in Unit 13 was unlawful because the Secretaries cannot close hunting to non-federally-qualified users unless doing so is necessary for an enumerated reason. Closing hunting because federally-qualified hunters prefer to hunt with less competition is not necessary. Nor was it necessary to close a large swath of federal public lands to address safety issues about road hunting, when those safety concerns would have been better addressed by more law enforcement and more tailored closures. Finally, the Board acted arbitrarily and capriciously by

closing federal public lands within Unit 13 after rejecting a strikingly similar proposal the prior year.

I. The challenge to the Kake hunt satisfies the exception to mootness and the Board exceeded its authority under ANILCA.

A. Opening a "special action" hunting season when the State has closed hunting presents an issue that is capable of repetition and will evade review.

The State's challenge to the Board's application of its emergency "special action" regulation is capable of repetition and will evade review. *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 170 (2016). There is no dispute that an action that lasts a month or two is in its duration too short to be fully litigated prior to its expiration. U.S. Br. 27. The only question is whether the State has shown there is a "reasonable expectation" that it will once again be subjected to the challenged activity (i.e., that the Board will supersede state management of hunting by opening a "special action" emergency hunting season). *See Native Village of Nuiqsut v. Bureau of Land Mgt.*, 9 F.4th 1201, 1209 (9th Cir. 2021).

The State has met its burden. The Board's "special action" regulations (50 C.F.R. § 100.19 and 36 C.F.R. § 242.19) purport to allow the Board to temporarily open hunting seasons, and the Board has repeatedly used that regulation to open seasons the State had closed. Alaska Opening Br. 26–27.

The Village of Kake argues that just because there is a regulation authorizing the Board to open short-term hunting seasons and just because the

Board has done so at least twice in the past does not mean the Board will apply its regulatory authority in this way in the future. Kake Br. 14–15. But if this does not show a "reasonable expectation" of recurrence, what does? A "reasonable expectation" does not mean a virtual certainty. *Bd. of Trustees of Glazing Health and Welfare Trust v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019). "Reasonable expectation" means something less than a "demonstrat[ion] that a recurrence of the dispute was more probable than not." *Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988).

Asking whether the Board will open another temporary hunt for the Village of Kake during a pandemic is simply too narrow an understanding of the State's challenge. U.S. Br. 27; Kake Br. 13–14. The Village of Kake is correct that the State challenged many aspects of the Board's delegation of authority that are particular to the COVID-19 pandemic, challenges the State agrees may now be moot. Kake Br. 14. But the State *also* challenged, more broadly, the Board's authority to open hunting seasons under the special action regulation, which does not depend on any COVID-19-related facts. Alaska Opening Br. 25–26 (citing State's complaint and brief as well as district court order, all describing the State's as-applied challenge to the regulation). The question is *not* whether the Board will take the same exact action that it did before, or even whether the State will be harmed in the same way; the question is whether the Board is reasonably expected to again exceed its statutory authority by opening a special action hunt when the

State has closed the season. *See Fed'l Election Com'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 463 (2007) ("Requiring repetition of every 'legally relevant' characteristic of an as-applied challenge—down to the last detail—would effectively . . . mak[e] this exception [to mootness] unavailable for virtually all as-applied challenges.").

The United States' discussion of cases in which plaintiffs challenge rescinded laws are inapposite to the State's challenge of laws that are currently on the books. U.S. Br. 28–29. The United States points to a case in which parents challenged a state's executive orders restricting in-person education during the COVID-19 pandemic. U.S. Br. 28–29 (*Brach v. Newsom*, 38 F.4th 6 (9th Cir. 2022)). While litigation was underway, the state rescinded all restrictions on in-person schooling, the state showed commitment to keeping schools open, and vaccines altered the trajectory of the pandemic. *Brach*, 38 F.4th at 15. This Court concluded that the state's authority to enact a law, such as the Governor's power to issue an executive order, "cannot itself skirt mootness, because then no suit against the government would ever be moot." *Id.* at 14. Had the Board here rescinded its regulation purporting to authorize opening emergency hunting seasons, then the State would likely concede Brach's relevance. But unlike *Brach*, in which plaintiffs challenged *rescinded* regulations, the State here is challenging application of a regulation that, according to the United States, "will remain on the

books." U.S. Br. 28. Maintaining the purported regulatory authority to open emergency hunting seasons and repeatedly acting on that regulation satisfies the "reasonable expectation" prong.

The United States seems to suggest that because the State is raising an issue of statutory interpretation, there is no Article III case or controversy. U.S. Br. 29. While the United States is correct that the State is raising a legal rather than factual issue, the State's argument is grounded in an actual controversy: whether the Board had statutory authority to approve the Kake hunt.

The United States also appears to argue that there is no problem with precluding the State from ever getting judicial review of the Board's application of its special action regulations (50 C.F.R. § 100.19; 36 C.F.R. § 242.19) because the State could raise a similar legal argument in a challenge to a Board regulation that is unrelated to special actions. U.S. Br. 29–30. The Board has enacted regulations that extend the State's hunting seasons for federally-qualified users, and these regulations continue in effect until rescinded. U.S. Br. 9–10. The Board's extensions of state hunting seasons by a few days or weeks is also *ultra vires* because the Board lacks authority to open seasons the State has closed. But this does not undermine the State's demonstration that challenges to special actions opening emergency seasons are too short-lived to be fully litigated and that there is

a reasonable expectation the Board will again use § 100.19 or § 242.19 to open emergency hunting seasons.

Moreover, the Board's extensions of seasons do not always create the same management concerns for the State as special actions do. Opening emergency hunting seasons, like the Board did here, can impede the State's ability to effectively manage wildlife. They create a "harvest debt" drawing down the surplus available during the normal hunting season. 2-ER-103. And they can impede the State's ability to get harvest information from hunters in order to assure sustainable populations of game in the future. 2-ER-104, 108. For instance, to determine harvestable surpluses of moose in a given area, the State analyzes the harvested moose's jaw; antler size, points, and tines; and the number of moose spotted during a hunt. 2-ER-104–05; FER-3–8. When the federal government opens special hunts and denies the State this information, like it did here, the federal government impedes the State's ability to effectively manage its wildlife. 2-ER-104–05; FER-3–8. This particular injury compels the State to challenge the Kake hunt now. And unless a challenge to one of these special actions is heard, their validity is likely to forever evade review.

B. The Board lacks authority to open hunting seasons.

Because the district court concluded the issue was moot, it did not get to the merits of the State's argument. This Court could remand for the district court to

address the merits in the first instance. Alternatively, addressing the merits in this appeal would be appropriate because (1) the State's challenge presents a pure legal issue that does not require any fact-finding, (2) the merits are fully briefed and capable of clear resolution, and (3) remand would only entail further delay as this Court would review de novo an appeal of the remanded challenge. *See Planned Parenthood of Greater Wash. and N. Idaho v. U.S. Dep't of Health & Human Servs.*, 946 F.3d 1100, 1110–11 (9th Cir. 2020).

The State agrees that ANILCA gives the Secretaries some authority to implement §§ 3113, 3114, and 3115 of the Act. U.S. Br. 31–33. But whether the Secretaries have some authority is not the issue on appeal. The State's challenge pertains to the breadth of that authority. ANILCA specifically defines the Secretaries authority and it does not authorize the Board to open hunting seasons that the State has closed.

Contrary to the United States' argument otherwise, an unpublished decision from the district court did not "resolve[]" the scope of the Secretaries' authority to enact subsistence-related hunting regulations on federal public lands. U.S. Br. 31. In *John v. United States*, the district court held that unless the State is again in compliance with ANILCA, the Secretaries have "the authority to adopt regulations for the purpose of implementing" § 3113 (the definition of subsistence use), § 3114 (the subsistence preference), and § 3115 (regional participation). 1994 WL 487830,

at *5 (D. Alaska Mar. 30, 1994). The State appealed the district court's decision and then agreed to dismissal with prejudice as to the issue of *who* implements the subsistence priority program. *State of Alaska v. Babbitt (Katie John I)*, 72 F.3d 698, 700 n.2 (9th Cir. 1995). *John* spoke to *who* implements these three provisions in ANILCA; it did not speak to the *scope* of the Secretaries' authority under these provisions. That issue was simply not "subtended by the case." U.S. Br. 31.

Nor would that decision preclude the State from now arguing the correct interpretation of the limited scope of the Secretaries' authority. U.S. Br. 31. As discussed above, *John* concerned *who* could implement the subsistence priority, not *how* the priority could be implemented. Moreover, it is unlikely preclusion even applies against the State. The government is not in the same position as a private litigant for estoppel purposes. The issues the government litigates frequently involve legal questions of substantial public importance and implicate policy decisions that may change throughout different administrations. Applying estoppel against the government would harm the public and thwart the development of important questions of law. *See United States v. Mendoza*, 464 U.S. 154, 160–61 (1984) (declining to apply collateral estoppel against the United States); *State of Idaho Potato Comm'n v. G & T Terminal Packaging, Inc.*, 425 F.3d 708, 714 (9th Cir. 2005) (applying *Mendoza's* rationale to claims against state government). Moreover, to the extent preclusion applies, it applies narrowly

to prevent rearguing a previously-adjudged fact or question or right. It would not prevent the State from arguing the correct interpretation of the law involving a different claim: "Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action *upon a different demand* are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases." *Montana v. United States*, 440 U.S. 147, 162 (1979) (italics original).

Title VIII reflects a limited grant of authority to the Secretaries to effectuate the subsistence preference. 16 U.S.C. § 3115(d). When the United States issued its subsistence regulations, it clarified that its authority entails implementing a "program *to grant a preference* for subsistence uses of fish and wildlife resources on public lands." *Subsistence Mgt. Regs. for Public Lands in Alaska*, 67 Fed. Reg. at 30,560 (italics added).

A priority or preference means advantaging one group at the expense of another. *See* Merriam-Webster Online Dictionary, https://www.merriam-webster.com (search for "preference" and "priority"). It does not mean *creating* an option where none exists. For instance, if a frequent flyer has priority or preferred seating on a plane, she can get a better seat on a flight. But she cannot demand that the airline schedule an entirely new flight.

The Secretaries can implement the subsistence priority by defining who gets a preference. 16 U.S.C. § 3113; *see. e.g.*, 50 C.F.R. § 100.5 (eligibility for subsistence use), § 100.15 (rural determination process), § 100.16 (customary and traditional use determination process). The Secretaries can implement the preference by *restricting* hunting seasons or bag limits of non-federally-qualified users when necessary. 16 U.S.C. §§ 3112(2), 3114, 3125(3). And the Secretaries can use local and regional committees' recommendations to effectuate the preference. 16 U.S.C. § 3115.

To the extent the United States implies the State could "nullify" the subsistence preference by closing hunting seasons, this fear is unsubstantiated. U.S. Br. 33. The State opens hunting seasons whenever possible because state law requires the State to manage wildlife to support a renewable and high level of harvest of game. Alaska Const. art. 8 § 4; Alaska Stat. 16.05.255(k)(5). The State's management of wildlife is of constitutional import, part of the State's core police powers, and is executed in "the broad national interest." Alaska Const. art. 8 § 4; *Kleppe*, 426 U.S. at 545; Executive Order 10857, 25 Fed. Reg. 33 (Dec. 29, 1959). Accordingly, when Alaska became a state, Congress made clear that the State would control management of wildlife throughout its borders, including on federal public lands. Alaska Statehood Act, Pub. L. 85-508, § 6(e), 72 Stat. 339 (1958). And when Congress passed ANILCA, it intended to maintain the State's authority

to manage wildlife throughout federal public lands. 16 U.S.C. § 3202(a). Congress made a narrow exception for a federal program "to grant a preference for subsistence uses of fish and wildlife resources on public lands." 67 Fed. Reg. at 30,560; 16 U.S.C. § 3115(d).

The Secretaries' limited authority to implement the subsistence preference renders meaning to all sections in Title VIII, and would not, as the United States argues, make certain provisions in the title "inoperative." U.S. Br. 34–35. Section 3114 directs the Secretaries to prioritize federally-qualified users, and §§ 3125 and 3126 limit when such prioritization can be implemented. The Secretaries can work with regional councils to determine the needs of subsistence users and strategize about what types of restrictions on federal public lands would help satisfy those needs. 16 U.S.C. § 3115. This is important because the Secretaries can cooperate with adjacent landowners when "managing subsistence activities on the public lands." 16 U.S.C. § 3112(3). For instance, instead of restricting the bag limit of non-federally-qualified users on federal public land, the Secretaries could work with the State (an adjacent landowner) to determine whether a uniform bag limit for a larger area, including both state and federal land, would meet subsistence needs. The Secretaries' authority to prescribe regulations to carry out their responsibilities under Title VIII does not redefine what those responsibilities are. 16 U.S.C. § 3124.

This interpretation also gives meaning to the multiple purposes of ANILCA. There is no question that Congress meant Title VIII to provide federally-qualified users with an opportunity to continue their way of life. 16 U.S.C. §§ 3112(1); 3101(c); U.S. Br. 33. But the statute also intended to "preserve . . . recreational opportunities" like "sport hunting,"[1] and to "provide[] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people," which includes providing hunting opportunities for all Alaskans. 16 U.S.C. § 3101(b), (d); *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1192 (9th Cir. 2000) (declining to read subsistence preference as negating other purposes of ANILCA, such as preserving non-federally-qualified hunting).

This interpretation also gives meaning to Congress's stated intent, which was to effectuate the subsistence priority when "necessary to *restrict* taking in order to assure . . . the continuation of subsistence uses." 16 U.S.C. § 3112(2) (emphasis added). The federal government seems to argue that federal restrictions will not effectuate the subsistence priority because restrictions will not address circumstances when federally-qualified users are not getting enough of a resource to continue subsistence living. U.S. Br. 37–38. But the Senate Report explained

[1] As AOC explains in its brief, game are regularly hunted by both rural and urban Alaskans for food, rather than for pure recreational "sport." AOC Amicus Br.11. In ANILCA, any hunting by non-federally-qualified hunters falls under the category of "sport hunting."

that restrictions would address this very problem: "If the continued viability of a particular population or *the ability of rural subsistence-dependent residents to satisfy their subsistence needs* would be threatened by a harvest by all such persons," regulations must be established *"*which *restrict* the taking of such population" to federally-qualified users. S. Rep. 96-413, at 269–70 (1979), A-22–A-23 (emphases added).

The United States also misinterprets the purpose of regional participation, arguing that Congress intended the Secretaries would use local knowledge to establish a broad subsistence hunting program, including establishing seasons. U.S. Br. 32, 38. The regional advisory councils can help the Secretaries establish "regulations, policies, [and] management plans" *within the Secretaries' authority*. 16 U.S.C. § 3115. That authority consists of effectuating the subsistence preference. It does not supplant all State management of wildlife on federal public lands. 16 U.S.C. § 3202(a).

Nor does the Senate Report indicate that the Secretaries have authority to create new seasons. U.S. Br. 38. That report merely confirms *the State's* authority to create seasons. S. Rep. 96-413, at 270, A-23. The Senate Report discusses how providing greater support to the *State's* existing advisory councils "will have a major role in *the State rulemaking authority's establishment of seasons*, bag limits and the provision of the preference for subsistence uses in their respective areas."

Id. (emphasis added). The State still uses local advisory councils, which help it manage wildlife—including determining seasons. *See* Alaska Stat. 16.05.260; Alaska Admin. Code tit. 5 § 96.010 *et seq.* The fact that the State uses these councils to advise its management of wildlife does not somehow enlarge the Secretaries' authority.

The State agrees with the United States that the Secretaries' authority to implement the subsistence preference diminished the State's otherwise plenary authority to manage wildlife. U.S. Br. 35; 16 U.S.C. § 3202(a). But the United States overstates the power Congress granted to the Secretaries. U.S. Br. 35. The legislative history shows that in drafting the subsistence title, "[t]hrough the various legislative sessions, the role of the Secretar[ies] was consciously and intentionally reduced, and the role of the State was correspondingly increased." *John*, 1994 WL 487830, at *7. One of these intentional reductions of Secretarial authority appears in a penultimate version of the bill, when Congress deleted the provision authorizing the Secretaries to *open* seasons. Alaska Opening Br. 29–31.

Contrary to the United States' argument, the final version of ANILCA did not suddenly *expand* the Secretaries' authority to manage wildlife. U.S. Br. 39. Neither the penultimate nor the ultimate version of the bill delegated authority to or compelled the State to enact laws compliant with ANILCA's standards. *Compare* § 704 of H.R. 39 (1978) at A-77, *with* 16 U.S.C. § 3115(d). Both versions recognized

that the State would continue to regulate the taking of fish and wildlife on public lands, and both versions gave the Secretaries limited authority to supersede state regulation when the State's program did not meet ANILCA's minimum standards. *Compare* § 704 of H.R. 39 (1978) at A-77, *with* 16 U.S.C. § 3115(d). The difference is that the earlier version contemplated that "the Secretary's discretion would be limited to closing the public lands to subsistence and nonsubsistence uses under certain circumstances and opening the lands to subsistence uses by local residents under very extraordinary circumstances." H. Rep. 95-1045 at 26–27, 91–93 (1978) (42a–43a, 49a–51a). The ultimate version that became Title VIII gave the Secretaries *less* authority. Relevant here, it deleted the provision authorizing the Secretaries to open public lands in emergency situations. Alaska Opening Br. 29–31. That curtailment of federal authority is consistent with the legislature's very intentional reduction of federal authority throughout each legislative session. *See John*, 1994 WL 487830, at *7.

Although Congress likely did not anticipate that the State would be constitutionally barred from providing hunting preferences for rural subsistence users, U.S. Br. 37, Congress did create a Plan B. If the State could not implement a program that incorporated the definition of subsistence use (§ 3113), the subsistence preference (§ 3114), and regional councils to help implement the subsistence preference (§ 3115), the Secretaries would take over that

responsibility. 16 U.S.C. § 3115(d). The fact that Congress created a Plan B did not vitiate its consistent intent to narrow federal authority in managing wildlife while increasing the State's.

That a prior Attorney General opinion came to a different conclusion regarding the scope of federal authority under Title VIII is not helpful to resolution of this legal issue, which the Court reviews de novo. U.S. Br. 40–41. That opinion was drafted in a different context with different concerns, is not the State's current view of the law, and is not binding on this Court.

The United States appears to argue that because the State is constitutionally prohibited from prioritizing rural subsistence users, this Court must defer to its interpretation of Title VIII, so long as its interpretation is reasonably related to the general purposes of Title VIII. U.S. Br. 44. The United States' "interpretation of [ANILCA] invokes the outer limits of Congress' power" because it "alters the federal-state framework by permitting federal encroachment upon a traditional state power." *See Solid Waste Agency of N. Cook County v. U.S. Army Corp of Eng'rs ("SWANCC")*, 531 U.S. 159, 172–73 (2001). If Congress truly meant to so broadly preempt the State's historic police powers, it would have provided a "clear indication" of that intention. *Id.* at 172. Instead, through each iteration of the bill that became Title VIII, "the role of the Secretar[ies] was consciously and

intentionally reduced, and the role of the State was correspondingly increased." *John*, 1994 WL 487830, *7.

Chevron deference does not give the Secretaries authority the statute does not provide. This case does not concern the Secretaries' interpretation of authority it clearly has, such as how the Secretaries *restrict* uses to implement the subsistence priority, *Ninilchik Traditional Council*, 227 F.3d at 1191. Congress gave the Secretaries limited authority: to effectuate a preference through restrictions. 16 U.S.C. §§ 3112(2), 3114. Congress did not intend to wholesale preempt state management of wildlife on federal public lands when reasonably related to providing for subsistence use. By opening hunting seasons, "the agency has gone beyond what Congress has permitted it to do." *City of Arlington v. F.C.C.*, 569 U.S. 290, 298 (2013).

Contrary to the United States' suggestion otherwise, courts do not blindly apply *Chevron* when interpreting provisions in ANILCA that implicate the State's traditional management authority. U.S. Br. 42. The United States cites *Katie John III* as an example of this Court giving *Chevron* deference to the agency's interpretation of ANILCA. U.S. Br. 42. That case, its history, and relevance merit more explanation. In *Katie John I*, the majority opinion gave the agency *Chevron* deference in construing the term "public lands" for purposes of regulating subsistence fishing. *State of Alaska v. Babbitt (Katie John I)*, 72 F.3d 698, 701–02

(9th Cir. 1995). In *Kate John II*, the en banc court maintained the holding, but three concurring judges and three dissenting judges concluded that *Chevron* deference was inappropriate, and the dissenting judges urged that the clear statement rule applied because an ambiguity in a statute was insufficient "to alter the usual federal-state balance with respect to a 'traditional and essential state function.'" *John v. United States (Katie John II)*, 247 F.3d 1032, 1033, 1038, 1044–45 (9th Cir. 2001). In *Katie John III*, the panel acknowledged the problems with *Katie John I*, but was bound by that earlier holding, and thus gave the agency "some deference" in its interpretation. *John v. United States (Katie John III)*, 720 F.3d 1214, 1228–29 (9th Cir. 2013). Since those decisions, the United States Supreme Court has recognized how ANILCA pits "state sovereignty" against "federal authority." *Sturgeon v. Frost*, 577 U.S. 424, 441 (2016). And the Supreme Court has since interpreted "public lands" in ANILCA as unambiguous, and has avoided applying *Chevron* deference. *Sturgeon v. Frost*, 139 S. Ct. 1066, 1079, 1080 n.3 (2019). Courts do not rotely apply *Chevron* deference when interpreting ANILCA, but carefully construe Congress's intentions to determine whether it *clearly* meant to alter the State's traditional police powers.

In sum, Congress intended to give the Secretaries *limited* authority to implement the subsistence preference by *restricting* non-federally qualified users.

II. The challenge to the Unit 13 closure is also excepted from mootness and the closure was unlawful.

A. The challenge to the Unit 13 closure is capable of repetition yet will evade review.

Although the regulation closing parts of Unit 13 has expired, the State's challenge is capable of repetition yet will evade review. First, two years is too short for full litigation. *Kingdomware Techs.*, 579 U.S. at 170; *Alaska Ctr. for Env't v. U.S. Forest Serv.*, 189 F.3d 851, 855 (9th Cir. 1999). Nor does mootness turn on the State's not seeking expedited consideration, a permissive court procedure that would not have guaranteed complete judicial review within those two years. *Alaska Ctr. for Env't*, 189 F.3d at 856.

Second, there is a "reasonable expectation" the Board will take similar action again. The dispute between local and non-local hunters over the land at issue in Unit 13 is "longstanding." 2-ER-82. The Board has been repeatedly asked to shut down hunting in this area for non-federally-qualified hunters. *See, e.g.*, 2-ER-130, 132, 136–37. And there is no reason to believe these requests will stop. In fact, the person who requested the closure at issue called it an "experiment" for future use. 2-ER-118, 2-ER-154. And the analysis the OSM used for the 2020 proposal builds upon and is materially comparable to the analysis for the 2019 proposal. *Compare* 2-ER-124–55 *with* 2-ER-168–94. If the district court's holding

stands, there is a reasonable expectation that the Board may rubberstamp its decision here to unlawfully support future closures.

The fact that a new request for closure might include some information that post-dates this particular challenge does not negate the exception to mootness. U.S. Br. 47. The legal standard for "reasonable expectation" of recurrence is not that the *same* exact action will happen. *See Fed'l Election Com'n*, 551 U.S. at 463. The Board's decision turned on a small number of persistent complaints from federally-qualified users stating that they preferred to hunt with fewer people and an even smaller number of people who said they felt unsafe. 2-ER-136–37. The Board received the same type of complaints in support of the 2019 proposal and it is reasonable to expect these same users will request additional closures—for the same reasons—in the future. 2-ER-178–79. Although the record in the next closure may not be exactly the same, the legal issue as well as the facts and circumstances giving rise to it are sufficiently similar such that this Court's resolution of the issue will have a meaningful impact.

B. If the Court concludes that the challenge to the Unit 13 closure is not excepted from mootness, the appropriate remedy is vacatur.

Should the Court find the State's appeal is not excepted from mootness, the appropriate remedy is vacatur of the portion of the district court's order concerning Unit 13. The State is the party seeking relief from the judgment below, and the State will have been prevented from appealing the district court's decision for

reasons outside its control. *U.S. Bancorp Mort. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23–24 (1994). Vacatur "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950); *see also Trump v. Hawaii*, 138 S. Ct. 377 (2017) (vacating decision about challenge to expired executive order); *NASD Dispute Resolution, Inc. v. Judicial Council of State of Cal.*, 488 F.3d 1065, 1068 (9th Cir. 2007) ("Under the "*Munsingwear* rule,' vacatur is generally 'automatic' in the Ninth Circuit when a case becomes moot on appeal."); *Native Village of Nuiqsut*, 9 F.4th at 1216 (vacating district court judgment because the preclusive effect of the judgment, "if unreviewed, may unfairly prejudice" plaintiffs in future cases).

C. The Board's closure of portions of Unit 13 was not necessary for the continuation of subsistence hunting or for public safety.

Congress understood there would be competition for game in Alaska but permitted closures to non-federally-qualified users only when *necessary* for certain enumerated reasons. Alaska Opening Br. 39–40. Necessary means "required," "compulsory," "essential," "absolutely needed," and "logically unavoidable." Merriam-Webster Online Dictionary, https://www.merriam-webster.com (search for "necessary"). The Board's internal policy recognizes the importance of the statutory term "necessary" because it requires consideration of alternatives that are "less restrictive than closures." 2-ER-154; *see also* SER-6 ("The analysis will

identify the availability and effectiveness of other management options that could avoid or minimize the degree of restriction to subsistence and non-subsistence users.").

The State's challenge to this closure involves questions of fact and of law. The factual question is whether the facts supported the Board's decision that closure was necessary. Although the Board's own policy does not require "complete certainty" of evidence before it initiates a closure, it does require that closures be based on "substantial evidence." SER-6. The legal questions are, when does competition make a closure necessary, and can a closure be necessary when it is overbroad in scope and when more effective alternatives are available?

i. The closure was not necessary to continue subsistence hunting.

The Board closed non-federally-qualified hunting on federal public lands within Unit 13 based on *zero* data that competition even minimally impeded the ability to continue subsistence use. The United States cites to data of success rates between harvests under the state permitting system and harvests under the federal permitting system as supporting its conclusion that the closure was necessary for the continuation of subsistence hunting. U.S. Br. 54–55. But that data does not imply any disparity in success rates between federally-qualified and non-federally qualified users. Alaska Opening Br. 44–45. Many federally-qualified hunters successfully hunt and report under state regulations. 2-ER-148, 150. This occurs

when a federally-qualified hunter follows game onto state land, takes an animal there, and reports under the state permitting system. And it occurs when federally-qualified hunters report under the state permitting system the taking of animals on federal public lands. It could be the case that, compared to non-federally qualified hunters, federally-qualified hunters are more than or equally as successful, but simply report more often under the state system. The data comparing hunting success under federal and state permitting systems simply does not indicate one way or the other. Alaska Opening Br. 44–45. What the available data does show, however, is that when game is present, everyone can harvest more if they participate. 2-ER-148, 158, 160.

The sparse anecdotal evidence does not support a "necessary" determination either. The United States points to some subsistence users choosing not to hunt because of competition, complaints that competition was driving game away from preferred road corridors, and a perception of being "outcompeted" as reasons why the closure was necessary. U.S. Br. 52. These reasons do not support the closure.

First, as the State explained in its opening brief, the fact that some subsistence hunters choose not to hunt in preferred road corridors when there is hunting competition does not make it *necessary* to restrict hunting opportunities for non-federally-qualified hunters. Alaska Opening Br. 42–44. Ask any hunter in the State if she would prefer less hunting competition and the answer would be

unanimous. Congress did not intend to authorize the Secretaries to close lands whenever preferential to federally-qualified users. Congress made clear its intent to "preserve . . . recreational opportunities" such as non-federally-qualified hunting and to authorize restriction to such hunting only when "necessary." 16 U.S.C. §§ 3101(b), 3125(3).

Second, while some local users complained that competition was driving game away from road corridors, the continuation of subsistence hunting does not require being able to successfully hunt from a roadway. U.S. Br. 52. The Board investigated the claim that crowds of people were driving game away from road corridors and Ms. Maas responded that people can affect "short-term," localized movement of game, but do not affect migration. 2-ER-90, 145. For instance, a crowd of people might influence whether a herd is going to "cross a road in a certain area," but does not influence the animals' ultimate path. 2-ER-90. This means that although competition might make it more difficult to shoot an animal next to the road, federally-qualified users are still able to intercept game as they migrate. The State is not arguing that the Secretaries can take action only once federally-qualified users are "physically 'unable' to hunt." U.S. Br. 53. The State is simply arguing that Congress did not equate the "continuation of subsistence use" with guaranteed success when hunting from the road.

Finally, the perception that non-local hunters were "outcompeting" local federally-qualified hunters does not make it necessary to close subsistence hunting. U.S. Br. 52. The question is not the perceived success between federally-qualified and non-federally qualified hunters, or even the actual success rates, but whether subsistence users could continue to subsistence hunt. That federally-qualified users preferred to hunt in road corridors and that there was competition to hunt in those preferred road corridors does not mean it was *necessary* to close federal public lands to non-federally qualified hunters.

ii. The closure was not necessary for public safety.

The question here is not whether there were safety concerns in Unit 13. U.S. Br. 48. Nor is the question whether the closure was intended to partially address safety concerns. U.S. Br. 50–51. The question here is whether an overbroad closure was *necessary* to alleviate safety concerns when less restrictive alternatives would better address those concerns.

The Board recognized that the closure could have been avoided by addressing safety concerns differently. Other solutions to safety issues were discussed, such as restricting shooting within a quarter mile of the road (i.e., where there were complaints of safety concerns), increased law enforcement, and public education. 2-ER-82, 84, 154, 146. The Board could have restricted hunting within

a quarter mile of the road.[2] As amicus AOC discussed, the individual Board members could have used their respective law enforcement authority to better regulate and enforce existing shooting restrictions. AOC Br. 10. And the Board could have coordinated with the State, an adjacent landowner, regarding law enforcement. 16 U.S.C. § 3112(3). Instead, the Board chose to unnecessarily close non-federally-qualified hunting on federal public lands within Subunits 13A and 13B.

The closure of all federal public lands within Subunits 13A and 13B was overbroad and therefore unnecessary because the area of concern consisted solely of federal public lands around the Richardson Highway. Alaska Opening Br. 47–48; U.S. Br. 51. The OSM report acknowledged that the "BLM managed lands along the Richardson Highway near Paxson [were identified as] the primary area of user conflicts, overcrowding, and safety concerns in Unit 13" and that "most of the safety concerns occur along the Richardson Highway." 2-ER-153–154. The Interagency Staff Committee Recommendation similarly discussed that the safety issues occurred "along the highway on Federal lands." 2-ER-156. The problem,

[2] The OSM Staff Report considered "restricting hunting within a certain distance of the road," to alleviate safety concerns but concluded this was "beyond the Board's authority." 2-ER-154. It is not clear why OSM concluded it could close to non-subsistence hunters *all* the federal public lands in Subunits 13A and 13B, but it was beyond the Board's authority to close a narrower band of land.

testifiers explained, was about "road hunting," specifically along the Richardson Highway. 2-ER-96; *see also* 2-ER-267, 279. In summarizing comments received from 2019, the OSM Staff recognized that "[a]ll testifiers focused their comments on the BLM lands on the Richardson Highway around Paxson." 2-ER-82, 147; *see, e.g.*, 2-ER-259–60, 264, 267. The same was true with the 2020 proposal. 2-ER-218–223, 229–30, 233–35. The record reflects that local residents wanted less competition on federal public lands adjacent to the Richardson Highway and the complaints of safety concerns centered around that highway. *See, e.g.*, 2-ER-136–37, 145–47; *see also* 2-ER-179–180. There were no comments—written or oral—about any problems on the federal public lands around the Gulkana and Delta Rivers or on other federal lands miles away from the Richardson Highway.

The Board's policy requires it to consider less restrictive alternatives. SER-6. Even the United States suggests in its briefing that an overly broad closure is legally indefensible. U.S. Br. 56. The closure here was unnecessarily broad and therefore legally indefensible.

D. The Board failed to explain why it closed federal public lands in Unit 13A and 13B after rejecting a strikingly similar proposal the year prior.

Although the Board showed awareness of its changed position, it did not show "good reasons for the new policy." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). As an initial matter, the 2019 proposal and 2020 closure

were not meaningfully different. The United States calls the 2019 proposal a "blanket" closure and the 2020 action a "targeted" closure. U.S. Br. 55. But, as discussed in the State's opening brief, there is little practical difference between closing the federal public lands within Subunits 13A and 13B and closing federal public lands within all of Unit 13. Alaska Opening Br. 50–51. Pointing to a meaningless difference between the proposals is not a good reason for granting the 2020 proposal after denying the 2019 one.

Nor did the new data about success rates under different permitting systems support a closure. U.S. Br. 57; Alaska Opening Br. 44–45. That data does not reveal anything about the comparative success rates of federally-qualified hunters and non-federally-qualified hunters. Alaska Opening Br. 44–45.

The Board did not, as the United States argues, *newly* consider that a closure to non-federally-qualified hunters would reduce the "density" of overall hunters on the federal public lands. U.S. Br. 50–51, 57. The entire point of both the 2019 and 2020 proposed closures was to reduce competition and thus the overall density of hunters on federal public lands. Plus, the record demonstrates that the Board expressly considered in 2019 and in 2020 whether reducing the density of hunters would help the safety issues, but simply came to opposite conclusions for no apparent reason. In 2019, the OSM Staff analysis speculated that closing federal public lands would make non-federally-qualified users "travel further to hunt"

from the highway, and that the closure might "reduce user conflicts [and] alleviate some safety concerns." 2-ER-193–94. But the 2019 Interagency Staff Committee explained this was just speculation as it was not clear whether closing to non-federally-qualified hunters the federal public lands in Unit 13 would enhance safety "or reshuffle the implicit dangers associated with many people hunting along the road system." 2-ER-195. In comparison, only a year later, a member of the Board chose to adopt the speculative conclusion based on the same facts, theorizing that reducing the density of hunters around the Richardson Highway "could lead towards addressing the safety concerns." 2-ER-101. How reducing density would (or would not affect) safety issues was not a new issue considered in 2020.

In sum, the Board's change in position between 2019 and 2020 was arbitrary and capricious.

CONCLUSION

For these reasons, the Court should reverse the district court's decision.

RESPECTFULLY SUBMITTED October 3, 2022.

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