Case No. 24-2251

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,
*Appellee/Plaintiff*,

and

KUSKOKWIM RIVER INTER-TRIBAL FISH COMMISSION *et al.*,
*Appellees/Intervenor-Plaintiffs*,

v.

STATE OF ALASKA *et al.*,
*Appellants/Defendants*.

On Appeal from the United States District Court for the District of Alaska
Hon. Sharon L. Gleason, Chief Judge | Case No. 1:22-cv-00054-SLG

# ANSWERING BRIEF OF INTERVENOR-APPELLEES ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS, BETTY MAGNUSON, AND IVAN M. IVAN

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 26.1(a), undersigned counsel certifies that Intervenor-Appellee Association of Village Council Presidents is a non-profit corporation that has no parent corporation and does not issue stock.

*/s/ Wesley James Furlong*
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## INTRODUCTION

"One of the fundamental reasons why subsistence is such a difficult issue in contemporary Alaskan politics is that it is really about Natives." ALASKA NATIVES COMM'N, FINAL REPORT VOL. III, at 11 (1994) [hereinafter ANC REPT.], http://www.alaskool.org/resources/anc3/ANCIII.htm.

Like Ahtna Elders Katie John and Doris Charles, the Elders at the center of the keystone *Katie John* line of cases,[1] Intervenor-Appellees Betty Magnuson and Ivan M. Ivan, as well as the citizens of the Tribal Nations that make up Intervenor-Appellee Association of Village Council Presidents (together, "AVCP *et al.*"), are culturally, spiritually, economically, and nutritionally bound to their rivers. The Kuskokwim River, at just over 700 miles long, is the longest free-flowing river in the United States. As on the Copper River, which was subject of the *Katie John* litigation, subsistence fishing on the Kuskokwim is central to the identities, traditions, and survival of the Alaska Native people and communities who live along the River.

[1] The *Katie John* litigation is the culmination of decades of litigation resulting in three decisions by this Court: *Alaska v. Babbit* ("*Katie John I*"), 72 F.3d 698 (9th Cir. 1995), *cert. denied* 516 U.S. 1036 (1996) *and sub nom. Alaska Fed'n of Natives v. United States*, 517 U.S. 1187 (1996); *John v. United States* ("*Katie John II*"), 247 F.3d 1032 (9th Cir. 2001) (en banc); and *John v. United States* ("*Katie John III*"), 720 F.3d 1214 (9th Cir. 2013), *cert. denied sub nom. Alaska v. Jewell*, 572 U.S. 1042 (2014).

The salmon that return each year to the Kuskokwim River are the cornerstone subsistence food in the region. Salmon make up the majority by poundage of all subsistence resources harvested in a year. *See* 3-JSER-657 (fish comprise up to 85% of the total poundage of subsistence harvests; salmon alone contribute up to 53% of subsistence harvests). For communities along the Kuskokwim River, the annual calendar is organized around subsistence activities, and residents rely on traditional knowledge to target ideal harvest times. *See* 3-JSER-621; ROBERT J. WOLFE ET AL., SUBSISTENCE-BASED ECONOMIES IN COASTAL COMMUNITIES OF SOUTHWEST ALASKA 50–51, 311–13 (1984). As the communities within the Yukon and Kuskokwim Rivers Delta otherwise face high levels of food insecurity, these traditional, healthy, wild food sources are essential. *See* 3-JSER-612, 620; Yereth Rosen, *Western Alaska Salmon Crisis Affects Physical and Mental Health, Residents Say*, ALASKA PUB. MEDIA (Nov. 14, 2023), https://alaskapublic.org/2023/11/14/western-alaska-salmon-crisis-affects-physical-and-mental-health-residents-say/.

The importance of salmon and subsistence to Kuskokwim region communities is diminished when they are discussed only in terms of calories, poundage, or even physical health. Subsistence fishing is deeply intertwined with religion, community, identity, and tradition. *See, e.g.*, HAROLD NAPOLEON, YUUYARAQ: THE WAY OF THE HUMAN BEING 4–5 (2002). "The word 'subsistence' reminds most Americans of dirt-

poor farmers, scratching a living from marginal land. In Alaska, however, subsistence means hunting, fishing, and gathering. More than that, it means a way of life—far from being marginal—subsistence fulfills spiritual as well as economic needs." THOMAS R. BERGER, VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION 5 (1985). Sharing subsistence harvests is a deeply held cultural value in Kuskokwim region communities; it ensures that neighbors, Elders, and the entire community are well cared for. In the words of Intervenor-Appellee Magnuson, sharing fish caught from the Kuskokwim River is a "part of our way of life." 3-JSER-618. Participating in subsistence activities is also fundamental for the transmission of culture. During salmon runs, families along the Kuskokwim River gather at fish camps to practice and share traditional knowledge and ways of life. 3-JSER-613. Fish camps are multi-dimensional places of enrichment where families learn essential subsistence skills, pass traditional knowledge through generations, enjoy kinship and cultural growth, and set aside food for leaner seasons. 3-JSER-613. Further, Alaska Native subsistence fishers have always respected and cared for the river, so that the salmon and other subsistence resources will continue to return. 3-JSER-621.

Over 100 years ago, the Supreme Court recognized the centrality and interconnectedness of subsistence fishing to Native communities, regardless of land ownership: "The right to resort to the fishing places in controversy . . . w[as] not

much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905).

In Alaska, however, the fight over Alaska Native subsistence fishing rights has been "the most divisive issue in Alaska politics" since before statehood, ANC REPT., *supra* at 4, and has served as a proxy for the State's broader antagonism against federal supremacy. While the State has experienced massive political and social changes in the sixty-five years since statehood, two broad themes have remained consistent: the State's continued refusal to fully accept the terms of statehood to which its founders agreed as part of the compact with the United States for admission into the Union; and the State's unwavering hostility toward Alaska Native peoples, their communities, and their ways of life.

This case is, unfortunately, yet another example. In the version of history proffered by Appellants State of Alaska, Alaska Department of Fish and Game ("ADF&G"), and ADF&G Commissioner Doug Vincent-Lang (collectively, "the State"), only three events are relevant to the disposition of this case: (1) statehood in 1959; (2) the Supreme Court of the United States's 2019 decision in *Sturgeon v. Frost* ("*Sturgeon II*"), 587 U.S. 28 (2019); and (3) an alleged "breaking point" during the 2021 and 2022 subsistence fishing seasons on the Kuskokwim River. Doc. 13.1 at 31. There is notably little discussion or analysis of the major federal laws that have shaped subsistence management, the decades of litigation that preceded and

distinguish *Sturgeon II*, or of the subsistence rights of Alaska Native people that the State now seeks to erase.

These historical and legal omissions are the State's favorite sleights of hand, meant to obscure the fact that the State does not currently manage subsistence hunting and fishing on federal public lands because it has both failed and refused to do so in compliance with federal law. Rather than addressing these fundamental issues, the State attempts to re-litigate settled law and asks the courts to absolve it of its political failures. This Court should not be persuaded. *Katie John* remains good law and controls the outcome of this case. And even if it does not, the United States holds powers over and retains interests in navigable waters within Alaska, aside from reserved water rights, sufficient to make all navigable waters public lands under Title VIII of the Alaska National Interest Lands and Conservation Act ("ANILCA"). As set forth below, this Court should affirm the District Court.

## STATEMENT OF THE CASE

### I. Congress Has Exercised Authority Over Alaska Native Subsistence Activities Since 1867.

The question of who has the legal authority to fish—in particular, to fish for salmon—and who has legal authority to regulate that fishing has been a significant issue since the United States acquired Russia's interests in Alaska in 1867. Since that time, Alaska Natives' hunting and fishing rights have been affirmatively recognized and protected by the United States. *See* ROBERT ARNOLD, ALASKA NATIVE LAND

CLAIMS 84 (1976) (citing U.S. DEP'T OF INTERIOR, LEGAL STATUS OF ALASKA NATIVES (1932)) (Congress enacted laws to protect "special hunting, fishing and other particular privileges to enable" Alaska Native people "to support themselves"). Congress has repeatedly legislated to protect the fishing and hunting rights of Alaska Natives (as well as non-Native rural Alaska residents), usually by exempting them from generally applicable territorial fish and game laws, and international treaties.

For example, the first territorial fish and game regulation, enacted in 1902, imposed season and bag limits and other restrictions on the taking of game animals, but expressly exempted hunting for food or clothing by "native Indians or Eskimos or by miners, explorers, or travelers on a journey when in need to food." 32 Stat. 327, § 1, at 327 (1902), *as amended* 35 Stat. 102 (1908). Similarly, when the United States negotiated the Migratory Bird Treaty of 1916, it exempted Alaska Natives from the closed hunting seasons for certain bird species. *See* 39 Stat. 1702, 1703 (1916). Likewise, in 1924, Congress enacted legislation to protect certain fisheries within Alaska waters, but exempted from the law's methods and closed-season restrictions "the taking of fish for local food requirements." 43 Stat. 464, §§ 4–5, at 466 (1924). When Congress amended this law ten years later, it exempted the "Karluk, Ugashik, Yukon, and Kuskokwim Rivers" from the law's restrictions on fish fences, traps, and fishwheels, as well as other methods and means restrictions. 48 Stat. 594, § 1, at 595 (1934). Congress explained that these exceptions "shall be

solely for the purpose of enabling native Indians and bona fide permanent white inhabitants along the said river." *Id*.

Multiple other acts of Congress, passed during the years that Alaska was a territory, contained similar language protecting Alaska Native subsistence practices and rights from general regulation (again, sometimes with consideration for other individuals in rural areas). *See, e.g.*, 43 Stat. 739, § 10, at 744 (1925) (exempting "any Indian or Eskimo, prospector, or traveler to take animals and birds during the close season when he is in absolute need of food and other food is not available[]"); 55 Stat. 632, § 1, at 633 (1941) (prohibiting the taking of walruses, except "[t]hat walruses may be taken at any time by natives for food and clothing for themselves"); *see also* 50 Stat. 900 (1937); 57 Stat. 301, 306 (1943).

Alaska's admission to the Union in 1959 did not erase the federal government's overarching prerogative to protect Alaska Native subsistence. While the Alaska Statehood Act established a mechanism to transfer primary fish and game management from the federal government to the State, *see* Pub. L. No. 85-508, § 6(e), 72 Stat. 339, 340–41 (1958), Congress nevertheless protected the land claims and hunting and fishing rights of Alaska Native from State interference. *See id.* § 4, at 339 ("As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title . . . to any lands or other property (including fishing rights), the right of title to which may be held by any Indians,

Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives[.]"); ALASKA CONST. art. XII, § 12 ("disclaim[ing] all right and title to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof[]"). The State was required to disclaim this right and title because Congress recognized the "vital importance" of fishing rights "to Indians in Alaska." *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 66 (1962).

Alaska's admission to the Union, therefore, did not terminate Alaska Natives' land and subsistence rights or the federal government's duty to protect those rights. Instead, the United States retained ultimate control and jurisdiction and reserved the issue for later disposition. *See Metlakatla Indian Cmty. v. Egan*, 369 U.S. 45, 58 (1962) ("But legislative history makes clear that the transfer of jurisdiction over fishing was subject to rights reserved in [the Statehood Act]." (citation omitted)). Indeed, just seven years after statehood, Congress exercised its jurisdiction in a limited way in enacting the Fur Seal Act, which exempted from its prohibitions on the taking of fur seals "Indians, Aleuts, and Eskimos who dwell on the coasts of the North Pacific Ocean." 16 U.S.C. § 1152. It was not until 1971, however, when Congress enacted the Alaska Native Claims Settlement Act ("ANCSA"), that it confronted the broader lands, hunting, and fishing issues that it had reserved for over a century.

## II. Congress's Protection of Alaska Native Subsistence Practices and Rights Continued Through ANCSA and ANILCA.

ANCSA Section 4(b) explicitly extinguished the hunting and fishing rights of Alaska Natives that were based on aboriginal title. 16 U.S.C. § 1603(b).[2] Though Congress terminated aboriginal title-based hunting and fishing rights, it did not view this extinguishment as ending federal protections for Alaska Native subsistence users. *See Adams v. Vance*, 570 F.2d 950, 953 n.3 (D.C. Cir. 1978) ("Congressional intent was apparently to quiet title to land rather than to end the still-intact obligation of the United States as trustee to protect the subsistence of the Eskimos." (citations omitted)). Indeed, Congress expressed its belief that, post-ANCSA, the Secretary of the Interior ("the Secretary") would "exercise his existing withdrawal authority" to "protect Native subsistence needs and requirements." H.R. Rep. No. 92-746 (Conf. Rep.), 92d Cong., 1st Sess. 37 (1971). Congress "expect[ed] both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives." *Id*.

"[T]he Secretary and the state failed to heed Congress's admonition." *Vill. of Gambell v. Clark*, 746 F.2d 572, 580 (9th Cir. 1984) (citations omitted). This collective failure led directly to Congress's enactment of ANILCA, and specifically

[2] As Intervenor-Appellees Ahtna Tene Nené and Ahtna Inc. (together, "Ahtna") set forth in their answering brief, Argument, Section II.B, the Statehood Act reserved the United States's title to fishing rights in trust for Alaska Natives in all navigable waters in Alaska. This title has not been extinguished by Congress.

Title VIII, which includes protections for subsistence activities. *Id*. ANCSA and ANILCA, therefore, are "two chapters of the same congressional book of land and resource policy." ANC REPT., *supra* at 13. In 1977, Representative Morris K. Udall contextualized an early draft of what would become ANILCA by noting: "This is the end of a 20-year process, starting 20 years ago, when Alaska wanted to become a State. Statehood was granted, . . . [and] [e]ver since then we have been arguing" about what lands and resources would be under federal or State control. 1-JSER-190. Representative Udall noted that Congress had "big decisions to make" about "the future of Alaska," including "the land, water, and resources[.]" 1-JSER-190.

To address these issues, the House Subcommittee on General Oversight and Alaska Lands held a series of hearings around the State and the country. The Committee was particularly interested in the views of Alaska Natives on the management of subsistence resources. At one hearing in Bethel, Alaska, Representative Udall told attendees that Congress wanted "to make those decisions knowing what your needs are and what you think about what you believe." 1-JSER-190.

Alaska Natives throughout the State overwhelmingly urged Congress to protect their subsistence rights and to curtail the State's management of subsistence resources because of deep-seated mistrust in the State. These themes were strong in communities within the Yukon-Kuskokwim Delta, where participants in the hearings

testified about the failures of the State's subsistence management scheme and the State's criminalization of their traditional and subsistence hunting and fishing practices. For example, Charlie Kairaiuak testified that the proposed federal wildlife refuge in the region (which would become the Yukon Delta National Wildlife Refuge) contemplated by Congress "should be run by cooperative management between [the] Federal Government and the local people because we do not trust the State anymore." 1-JSER-209. Similarly, Harold Sparck testified about the failures of the State's subsistence management and its hostility towards Alaska Natives: "Right now, we have our people lock-stepped into a system of laws and regulations that prohibits them from being the way they are. We have laws that make people criminals and they are only practicing their lifestyle." 1-JSER-216. Likewise, when asked about the draft legislation's proposal for local subsistence management boards, Glen Fredericks testified in support of the boards, noting that "we have better relations with the federal government." 1-JSER-198. These themes were repeated in testimony at hearings around the State.[3]

[3] *See, e.g.*, 1-JSER-223 (testimony of Mrs. Amatunak, Togiak, Alaska, hearing: "I'm a widow. I have been told by the Department of Fish and Game, from the State of Alaska, that I cannot put out a subsistence net to put fish up for the winter without a permit. If that is the State's policy what will ever happen if the State ever gains control of all those natural resources that we eat? . . . I do not choose the State department of fish and game, but some managing agency that will handle subsistence priorities with perfect and sound management."); 1-JSER-227 (testimony of Anna Bolger, Dillingham, Alaska, hearing: "Although Udall's bill states that subsistence should be protected, there is one thing wrong with the Bill and that is the portion

This testimony left an impression on the Committee. At a hearing in Fort Yukon, Alaska, Representative Udall stated: "On this subsistence question, my bill gives priority to subsistence use. If there is one thing we have heard all over this State, it is the emphasis by the Native people on the importance of subsistence." 1-JSER-224. Likewise, Representative John F. Seiberling summarized that at all the hearings the Committee had held in Alaska, "the natives prefer to have the" the federal government manage subsistence "instead of the State because of their experience with State management has been that they allow sport hunting on the same basis as subsistence hunting or that they don't allow [subsistence hunting] on the same basis." 1-JSER-225.[4] Indeed, in testimony to Congress, Alaska Governor Jay Hammond candidly admitted that there was "some justification, I must admit[,]" for these criticisms. 1-JSER-181.

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where the management of the subsistence should be turned over to the state. This can prove harmful to the Natives of Bristol Bay[.]"); 1-JSER-235 (testimony of Rosita Worl, Anuktuvuk Pass, Alaska, hearing: "In spite of the liberal policy statement by the Commissioner of the Alaska Board of Fish and Game recognizing that subsistence use of the fish and game is necessary to preserve culture and traditions (Appendix C), Alaska Natives categorically contend that subsistence values are subordinate to commercial and recreational use. Under these conditions if subsistence is to be protected, it would appear necessary for the Secretary of the Interior to maintain jurisdiction in order to protect subsistence use.").

[4] This dynamic has persisted for decades. *See, e.g.*, NAT'L PARK SERV., ALASKA SUBSISTENCE: A NATIONAL PARK SERVICE MANAGEMENT HISTORY 262 (Sept. 2002) (referencing the "substantially different mandates" of the federal Office of Subsistence Management ("OSM") and the ADF&G, and 2001 testimony of OSM Director Tom Boyd: "I would say we've had some rough spots. . . . We've walked into a legacy of distrust in rural Alaska." (ellipses in original)).

In 1980, after nearly four years of consideration and over a dozen versions of the draft legislation, Congress finally enacted ANILCA. In Title VIII, Congress expressly recognized that subsistence is "essential for Native physical, economic, traditional, and cultural existence[.]" 16 U.S.C. § 3111(1). To ensure that these values were protected in perpetuity, Congress provided rural Alaska residents priority for customary and traditional subsistence uses above other uses on federal lands and waters during times of shortage. *See id*. §§ 3102(2)–(3), 3112, 3114.

While the State has previously described ANILCA as a "carefully crafted compromise," Alaska's Compl. in Intervention for Decl. J. & Inj. Relief at 6, *Sturgeon v. Salazar*, No. 3:11-cv-00183-HRH (D. Alaska Feb. 22, 2012) (Dkt. No. 33), Title VIII is properly understood as an *offer* and an *accommodation* that Congress provided to the State. Mindful of the State's desire to manage all hunting and fishing within its borders, Congress in ANILCA *offered* the State the choice of either enacting subsistence management laws that conformed to the requirements of Title VIII or surrendering subsistence management authority on federal public lands to the federal government. 16 U.S.C. § 3114(d). And as an *accommodation* to the State, Congress modified the language in ANILCA from earlier versions to establish the subsistence priority for *rural Alaska residents* and not only Alaska Natives. *Id*. § 3114. This amendment came at the State's express request. *See Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 313 n.1 (9th Cir. 1988) (quoting 126 Cong. Rec. 29,278–79

(1980) (statement of Representative Udall)) ("Early drafts of Title VIII protected only subsistence uses by Alaska Natives. When the state advised Congress that the Alaska Constitution might bar the enforcement of a preference extended only to Natives, Congress broadened the preference to include all 'rural residents.'" (internal citations omitted)). Congress made this offer and accommodation in good faith, on the assumption that the State would honor them and ensure "the opportunity for rural residents engaged in a subsistence way of life to continue to do so." 16 U.S.C. § 3101(c); *see* 1-JSER-5, 9 (describing the "many hours of discussion" directed at making sure Title VIII was written "as closely as possible to existing state law" and that "ANILCA was drafted to afford the State maximum opportunity" for unified management).

## III. The State's Consistent Failure to Uphold Its Obligations Under Title VIII Has Led to Federal Control of Subsistence on Federal Public Lands.

For nine years, between 1981 and 1989, "state compliance" with ANILCA was "confused and discontinuous." ANC REPT., *supra* at 15. While the Secretary certified the State's subsistence management program as being compliant with ANILCA Title VIII at various points throughout the 1980s, each iteration was eventually found to be deficient.

In 1978, in anticipation of the enactment of ANILCA, the Alaska Legislature "adopted a subsistence priority statute[.]" *Bobby v. Alaska*, 718 F. Supp. 764, 767 (D. Alaska 1989). This priority, however, was not limited to rural residents. *Id*. When

ANILCA was signed into law on December 2, 1980, the State was given one year to amend its subsistence priority statute to bring it into conformity with Title VIII. *See* 16 U.S.C. § 3115(d). The Alaska Legislature failed to amend the statute during its 1981 legislative session, so the State Boards of Fisheries and Game adopted joint regulations in 1982 that added a rural residency requirement to the State's subsistence priority. *Bobby*, 718 F. Supp. at 767; *see* 1-JSER-11–15, 21–22.

In May 1982, the Secretary certified the State's subsistence management program as compliant with Title VIII. 1-JSER-30. In a press release recognizing the Secretary's certification of the State's program, Governor Hammond noted that had the Secretary rejected the State's program as not compliant with Title VIII, "there was no doubt that the federal law would have required federal management." 1-JSER-31. The State's so-called "compliance," however, was short-lived.

After just three years of managing subsistence resources, hunting, and fishing on federal lands and waters, the State fell out of compliance with ANILCA. In February 1985, the Alaska Supreme Court vacated the State's subsistence priority regulations, holding that they "were inconsistent with the legislative intent" of the State's subsistence priority statute because they restricted the priority to rural residents. *Madison v. Alaska Dep't of Fish & Game*, 696 P.2d 168, 178 (Alaska 1985). Thereafter, the Secretary notified the State that it was out of compliance with Title VIII and had until July 1986 to bring its subsistence program into compliance.

1-JSER-33–38. Three months later, Katie John, Doris Charles, and the Mentasta Village Council initiated the *Katie John* litigation, suing the State in federal court over its restriction of subsistence fishing at the Batzulnetas, Alaska, fish camp along the Copper River, in violation of Title VIII's subsistence priority. *See* 1-JSER-39–49. In their litigation, the plaintiffs noted that the State's "failure to provide priority for subsistence ha[d] caused precisely the economic hardship and cultural trauma the law is intended to prevent." 1-JSER-53.

In 1986, the Alaska Legislature enacted amendments to the State's subsistence priority statute to bring it into compliance with ANILCA by limiting the definition of "subsistence users" to residents in "rural areas." *Bobby*, 718 F. Supp. at 768. In doing so, the State defined "rural area" as a community in "which the noncommercial, customary and traditional use of fish or game" is a "principal characteristic of the economy." *Id*. at 788, app. I. Although the Secretary subsequently restored the State's subsistence management authority on federal public lands, *see* 1-JSER-50, this authority was, yet again, short-lived.

In October 1988, this Court found that the State's subsistence management program was not compliant with ANILCA because the State's definition of rural was not consistent with ANILCA's definition. *See Kenaitze*, 860 F.2d at 318. This Court held that the State was therefore failing to enforce Title VIII's rural subsistence priority. *Id*. The very next year, the Alaska Supreme Court struck down the State's

rural subsistence priority statute, holding that a rural priority violated the Alaska Constitution's guarantee of "equal access" to natural resources for all residents. *McDowell v. Alaska*, 785 P.2d 1, 11 (Alaska 1989); *see* ALASKA CONST. art. VIII, §§ 3, 15, 17. *McDowell* effectively "repealed" the State's compliance with ANILCA entirely. *Kluti Kaah Native Vill. of Copper Ctr. v. Alaska*, No. A90-004, slip op. at 15 (D. Alaska Aug. 15, 1990).

The State obtained a stay of the *McDowell* decision's effect until July 1990, so that it could evaluate its options, including amending the Alaska Constitution, ANILCA, or both. ANC REPT., *supra* at 18. Several bills to amend the Alaska Constitution were introduced in the Alaska Legislature during the 1990 regular legislative session. *Id.* at 19. "Hearings were held, conflicting testimony received and alternative language debated. Newspapers urged legislative action to place a constitutional amendment on the general election ballot, as did the Governor, the Native community, the Congressional Delegation, and federal agency officials[,]" including Secretary Manuel Lujan, who repeatedly urged state legislators to resolve the issue. *Id*. at 20. The Legislature adjourned in May 1990 without taking any action but was called back into special session by Governor Stephan Cowper. *Id*.

With the July deadline looming, Secretary Lujan wrote to Governor Cowper stating that if the Alaska Legislature did not fix the problem, he would "be compelled to implement a federal program to ensure that subsistence uses are given preference

on the public lands." *Id*. at 21. Secretary Lujan warned Governor Cowper that "Federal authority may have to be extended, predicated on the Federal government's constitutional mandate to protect Native American interests and [its] fish, wildlife, and other natural resources." *Id*. While the Alaska Senate passed a constitutional amendment, the Alaska House failed to do so by a single vote. *Id*.

In the years that followed, the debate over subsistence and the rural priority "raged in the political, legislative and judicial arenas," COMMONWEALTH N., URBAN RURAL UNITY STUDY 7 (Sept. 2000), as did the now familiar pattern of the federal government's accommodations and the State's repeated failures to come into compliance with Title VIII. Despite public opinion surveys indicating Alaskans largely favored a rural subsistence priority constitutional amendment, efforts were "repeatedly stymied in the Legislature." *Id*. at 4, 7–8. Numerous committees, studies, commissions, draft bills, special legislative sessions, and favors from Alaska's congressional delegation all failed to bring the State into compliance. *See generally* ANC REPT., *supra* at 20–33.

Accordingly, in 1992, the federal government assumed full responsibility for implementing Title VIII on federal public lands. *See* 57 Fed. Reg. 22,940 (May 29, 1992). Following this Court's 1995 decision in *Katie John I*, and to clarify which waters were subject to the rural subsistence priority, the Secretaries of Agriculture and Interior initiated a rulemaking for permanent regulations explaining that the

United States holds reserved rights in the navigable waters within Alaska that pass through conservation system units, thereby making those waters public lands within the meaning of ANILCA and Title VIII. *See* 61 Fed. Reg. 15,014 (Apr. 4, 1996); 62 Fed. Reg. 66,216 (Dec. 17, 1997).

Still, the State was given additional opportunities to amend its laws and constitution and come into compliance with ANILCA: Congress delayed the implementation of the final regulations three times. *See* Pub. L. No. 104-134, § 336, 110 Stat. 1321, 1321-210 (1996); Pub. L. No. 104-208, § 317, 110 Stat. 3009, 3009-222 (1997); Pub. L. No. 105-83, § 316(a), 111 Stat. 1543, 1592 (1998). Yet again, the State failed to act, eventually acquiescing to the federal government's authority to regulate subsistence on federal public lands in Alaska.[5] As a result, in 1998, Congress finally directed the federal regulations to take effect. *See* Pub L. No. 105-277, § 339, 112 Stat. 2681, 2681-295 (1998).

[5] The State's failure—or, in reality, refusal—to come into compliance with ANILCA is unsurprising: the State continues to prioritize commercial and sport fishing interests over subsistence users. 1-JSER-107–09 (outlining some of the "beneficial" consequences of the State's refusal to comply with ANILCA's requirements); *c.f.* 1-JSER-102 ("[T]he fish and game regulatory structure that I and other members of the First Alaska Legislature created is fatally flawed" because it inevitably prioritizes commercial interests); DAVID CASE & DAVID VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 294 (3d ed. 2012) ("It is a fact of Alaska political life that [ADF&G] is dominated by non-native urban, sport, and commercial hunting and fishing interests.").

Soon thereafter, the Secretaries of Agriculture and Interior directed the Federal Subsistence Board to take over the day-to-day management of subsistence hunting and fishing on federal public lands. *See* 64 Fed. Reg. 1,276 (Jan. 8, 1999). As the State itself recognized in an early filing in the *Sturgeon* litigation, "[t]he Federal Subsistence Management Program regulates subsistence uses of fish and wildlife, including harvest on federal lands and certain waters with a federal reserved water right and provides a priority opportunity for qualified rural residents. *These federal regulations, at times, supersede state harvest regulations*." Alaska's Compl. in Intervention at 7 n.1, *Sturgeon*, No. 3:11-cv-00183-HRH (Dkt. No. 33) (emphasis added).

What has been true since 1980 remains true today: the State lacks the fundamental political will to comply with ANILCA and protect subsistence hunting and fishing for Alaska Natives and other rural residents. Instead of taking the steps necessary for it to assume regulatory control over hunting and fishing on federal public lands in Alaska, it has repeatedly engaged in attempts to wrest control away from the federal government through litigation. That it does so here under the guise of protecting Alaska Native ways of life, when ANILCA was enacted, in part, to protect those ways of life from State interference, adds insult to injury.

## IV. The State Is Largely Responsible for the Social, Economic, and Political Problems It Pretends to Solve Through This Litigation.

In its opening brief, the State claims:

> Many Alaskans have cultural ties to rural fisheries but have been displaced to urban areas of the state for health, education, economic, or other reasons. 2-ER-106; 3-ER-314–15, 325, 410. As of 2016, "more than 52.4 percent of Alaska native peoples [were] living in non-subsistence areas of Alaska." 3-ER-285. Alaska law thus provides greater subsistence fishing rights than federal law by enshrining that displaced individuals can return "home" to practice their culture and tradition.

Doc. 13.1 at 18 (brackets in original). While the State claims that it is the party seeking to protect the subsistence interests of urban Alaska Native people, it ignores its own role in insisting on a *rural* subsistence priority and in creating and exacerbating the social, economic, and political problems that have led to this "displace[ment]."

As discussed *supra*, Title VIII was originally drafted to provide a subsistence priority to all Alaska Natives. At the *State's* insistence, Title VIII was amended to provide the subsistence priority to both "Native and non-Native rural residents." 16 U.S.C. § 3111(4); *see Kenaitze*, 860 F.2d at 313 n.1. The rural priority that the State now asserts is harmful to Alaska Natives living in urban communities is precisely the rural priority that the *State* requested. Had the State not insisted Congress adopt a "rural" priority, instead of an Alaska Native priority, all Alaska Natives, irrespective of domicile, would have been eligible for the subsistence priority.

The State opines that "[m]any Alaskans have cultural ties to rural fisheries but have been displaced to urban areas of the state for health, education, economic, or other reasons." Doc. 13.1 at 18. The use of the passive voice here is telling—"displaced" implies that Alaska Native people moved involuntarily, but there is no indication of who or what caused this displacement. This is likely because it is the State that is, in large part, responsible for the inequities that have made life in rural Alaska substantially more difficult than in its urban areas.

The "urban/rural divide" has been a defining feature of Alaska law, politics, and social policy since before statehood. *See* COMMONWEALTH N., *supra* at 3 (describing "urban" as "shorthand" for a cash economy, "ready access to public services, competitive individualism" and non-Native, and "rural" as "a subsistence economy[,]" "inadequate access to public services," and Native). Rural Alaska has historically and continually received inferior State support and services, as compared to urban Alaska, while State services and programs are centralized in the few urban communities. *See* ALASKA COMM'N ON RURAL GOVERNANCE & EMPOWERMENT, FINAL REPORT TO THE GOVERNOR 13 (June 1999) [hereinafter 1999 RURAL GOVERNANCE REPT.], https://www.commerce.alaska.gov/web/portals/4/pub/RGC_Final_6_99.pdf. Indeed, the Indian Law and Order Commission, established by Congress in 2010, *see* 25 U.S.C. § 2812, has described the manner in which the State "tends to marginalize and frequently ignore" rural communities: "[T]he overall

organization of Alaska State government[] . . . is more centralized than any other U.S. state's. In Alaska, most State programs and functions operate from a designated hub or hubs, and less attention is paid in Alaska than in other States to developing local capacity." INDIAN LAW & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES 44–45 (Nov. 2013) [hereinafter LAW & ORDER REPT.], https://www.aisc.ucla.edu/iloc/report/ (footnote omitted).

The State's inequitable treatment of rural Alaska in "health, education, economic, and other" areas, Doc. 13.1 at 18, has been well documented, and the impetus for numerous Congressional and State commissions, court decisions, studies, reports, and roundtables spanning decades. *See, e.g.*, ALASKA ADVISORY COMM. TO U.S. COMM'N ON CIV. RIGHTS, RACISM'S FRONTIER: THE UNTOLD STORY OF DISCRIMINATION AND DIVISION IN ALASKA 51 (April 2002) [hereinafter RACISM'S FRONTIER], https://files.eric.ed.gov/fulltext/ED468839.pdf (identifying "a disparity in the financial and human resources for educational facilities between urban and rural districts[]").[6] So many reports have been written and so little has changed, that

[6] *See also Moore v. Alaska*, No. 3AN-04-9756, 2007 WL 8310251 (Alaska Super. Ct. 2007) (State violated its constitutional obligation to maintain a public school system by failing to provide adequate supervision and oversight in many rural schools); *Kasayulie v. Alaska*, No. 3AN-97-3782, 1999 WL 34793400 (Alaska Super. Ct. 1999) (State's method for funding schools violated the Alaska Constitution's Education and Equal Protection Clauses and Civil Rights Act by discriminating against Alaska Native students); Tr. of Partial Decision on Record at

twenty-three years ago, State Senator Georgianna Lincoln observed: "Frequently it seems as if these reports are filed away and quickly forgotten. Perhaps what lies at the heart of the matter is indifference." *Id*. at 49.

To be clear, while these reports often discuss "disparities found in rural Alaska," this translates to disparities for Alaska Natives "since they make up such a large proportion of the state's rural residents." 1999 RURAL GOVERNANCE REPORT, *supra* at 9. Alaska Natives make up 82% of rural Alaska residents. 2-JSER-540–41.

The State's decades-long fight against Alaska Natives' (and rural residents') subsistence rights is a key feature of the State's overall disregard for rural communities:

> The Urban/Rural divide is rooted in the unequal treatment accorded Native villages in terms of education, law enforcement, clean water and sanitation, and the double-digit unemployment in rural communities. It is also reflected in the legislature's systematic effort to undermine federal protections for hunting and fishing rights of rural Alaskans and

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15:8–20, *Toyukak v. Treadwell*, No. 3:13-cv-137-SLG (D. Alaska Sept. 3, 2014) (Dkt. No. 223) (State violated the Voting Rights Act by failing to provide substantially equivalent election information to Alaska Native language speakers as English speakers); RACISM'S FRONTIER, *supra* at 51 (identifying "a disparity in the law enforcement services[]"); LAW & ORDER REPT., *supra* at 45–49 (documenting the State's refusal to provide adequate law enforcement in Native communities and to support Tribal law enforcement); FIRST ALASKANS INST. & N. STAR GRP., REPORT ON THE RECONVENING OF THE ALASKA COMMISSION ON RURAL GOVERNANCE AND EMPOWERMENT, RURAL GOVERNANCE REMAINS UNFINISHED BUSINESS IN ALASKA—A CALL TO ACTION 1 (2014) [hereinafter 2014 RURAL GOVERNANCE REPORT], https://ruralgov.org/wp-content/uploads/2014/11/RGCReport2014.pdf ("Alaska has achieved little progress" and "nothing has significantly changed" in the fifteen years since the 1999 Rural Governance Report's findings and recommendations addressing "the disempowerment of Native and rural people[]").

> its refusal to allow Alaskans to vote on a constitutional amendment on subsistence. It ignores the huge subsidies the urban areas enjoy as a result of the wealth of resources located in rural Alaska.

RACISM'S FRONTIER, *supra* at 10 (citing ALASKA FEDERATION OF NATIVES, BRIEFING ON RECENT HATE CRIMES AGAINST ALASKA NATIVES AND OTHER ACTS OF DISCRIMINATION 16–17 (2001)).[7] The State itself has found that its "failure to resolve the subsistence issue divides rural and urban Alaskans and alienates rural Alaskans from State government." 1999 RURAL GOVERNANCE REP., *supra* at 69.

In 1992, acknowledging that State management had resulted in the loss of the chum salmon subsistence fishery and a corresponding food security crisis for Norton Sound communities, Alaska Superior Court Judge Richard H. Erlich observed: "[T]his Court wants to leave no doubt as to the harm suffered by the plaintiffs . . . . This irreparable harm described is ultimately one of cultural genocide." 1-JSER-119–20. Likewise, two years later, a joint federal-state commission recognized that "[s]ubsistence cannot be understood as a subset of fish and game management. It is a subset of social policy. What is at stake in it is the survival of human communities and cultures." ANC REPT., *supra* at 4 (internal quotations omitted). Where Commissioner Vincent-Lang sees the issue as being a "balkanized regulatory scheme" between federal and state subsistence management, 3-ER-321, others see

[7] *See also* RACISM'S FRONTIER, *supra* at 11–13; 2014 RURAL GOVERNANCE REPT., *supra* at 6–7, 17, 70, 83; COMMONWEALTH N., *supra* at 7–8.

"apartheid." *See* RACISM'S FRONTIER, *supra* at 9 ("Apartheid is a very real thing here in Alaska. It runs deep, it's covert, it's different than outright killing, but the net effects are the same. You manage to separate a people from their lands and from their resources. You manage to take away the customary rights of people that are very ancient rights.").

In sum, the State attempts to use *its* insistence on a rural preference in Title VIII and *its* chronic under- and disinvestment in rural Alaska, and the corresponding social and economic conditions those policies have caused, as justification for erasing a federally protected right and a key component of nutritional, social, cultural, and economic security in rural Alaska. The State's framing—that only it can save rural Alaska from the harms that it has caused—is unfortunately familiar. Indeed, states and entities that are hostile to Native interests frequently position themselves as acting in the best interests of Native communities.[8] Rather than

[8] Alaska is not unique in this approach. For example, in arguing that the Indian Child Welfare Act ("ICWA")—a statute meant to curtail the widespread removal of Native children from their families and communities—was unconstitutional, the State of Texas unabashedly asserted that ICWA "depriv[es] Indian children of the loving, stable homes that would be in their best interests[,]" a statement that assumes Native households are inherently not loving, stable, or in the best interest of Native children. Br. of Petr. Texas, *Haaland v. Brackeen*, No. 21-376 (May 26, 2022), 2022 WL 1785628, at *15. When President Andrew Jackson ordered the forced relocation of all Native Americans from the South to Oklahoma, he asserted that he was "adher[ing] to [a] just and humane policy towards the Indians" so "that they will be free from the mercenary influence of White men[.]" FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND AMERICAN INDIANS 72 (1984). Similarly, the reservation system was justified by federal officials as "the

bolstering its case, the State's argument illustrates precisely why Congress codified subsistence rights in Title VIII, regardless of State action.

## SUMMARY OF ARGUMENT

*Katie John* remains good law and controls the outcome of this case: the United States's reserved rights in navigable waters running through conservation system units are interests in water to which the United States holds title, making these waters public lands for the purpose of ANICLA Title VIII. The Supreme Court's decision in *Sturgeon II* is not clearly irreconcilable with *Katie John*; indeed, the Court specifically refused to disturb *Katie John*. The Supreme Court's recent decisions in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), and *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023), likewise have no bearing on the outcome of this case and do not undermine *Katie John*. Alternatively, should this Court find that *Katie John* no longer controls, the United States holds other powers and retains other interests in waters—primarily Congress's broad authority over Indian Affairs and the navigational servitude—that allow it to regulate

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best method yet devised for [Native Americans'] reclamation and advancement in civilization." 1862 COMMISSIONER OF INDIAN AFFAIRS ANNUAL REPORT, *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 95 (Francis Paul Prucha, ed., 2d ed. 1990). Likewise, the allotment system was justified "as necessary for the moral improvement of native people and the progress of civilization" by "[z]ealous humanitarian reformers, many of whom called themselves 'friends of the Indian.'" COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04, at 72 (Nell Jessup Newton ed., 2012 ed. & 2023 supp.).

subsistence fishing under Title VIII on *all* navigable waters in Alaska, not just those running through or appurtenant to federal lands. The District Court correctly rejected the State's arguments and should be affirmed.[9]

## ARGUMENT

### I. The United States's Reserved Water Rights are an Interest in Navigable Waters that Make Them Public Lands for the Purpose of Title VIII.

The reserved water rights doctrine continues to serve as a valid basis for the federal government's regulation of subsistence fishing on navigable waters within conservation system units under Title VIII. Contrary to the State's arguments, *Sturgeon II* and *Katie John* can be reconciled; the District Court correctly rejected the State's arguments on this issue. The State also argues that the Supreme Court's recent decisions in *Loper* and *Sackett* undermine *Katie John*. As set forth below, these arguments are likewise meritless.

#### A. *Katie John* remains good law and controls the outcome of this case.

*Katie John* and *Sturgeon II* are not clearly irreconcilable. In *Sturgeon II*, in which the Supreme Court held that the Nation River was not "public lands" for the purpose of National Park Service ("NPS") regulations under a different title of

[9] ACVP *et al.* adopts in whole and incorporates by reference the arguments set forth in the answering briefs of Appellee United States, Intervenor-Appellee Kuskokwim River Inter-Tribal Fish Commission ("KRITFC"), Intervenor-Appellee Alaska Federation of Natives ("AFN"), and Ahtna.

ANILCA, the Court specifically noted that "the so-called *Katie John* trilogy" and "the term 'public lands,' when used in ANILCA's subsistence-fishing provisions . . . are not at issue in this case[.]" 587 U.S. at 45 n.2 (citations omitted). Accordingly, the Court stated that its decision "do[es] not disturb the Ninth Circuit's holdings that the Park Service may regulate subsistence fishing on navigable waters." *Id*. (citations omitted). During the *Sturgeon II* litigation, the State agreed with this reasoning. In concluding that *Sturgeon II* did not disturb *Katie John*, the Supreme Court expressly referenced the State's *amicus curiae* brief, in which the State "argu[ed] that this case does not implicate [the *Katie John*] decisions[.]" *Id*. (discussing Br. of *Amicus Curiae* Alaska in Supp. of Pet., *Sturgeon v. Frost*, No. 17-949 (Aug. 14, 2018), 2018 WL 4063284, at *29–35).

The State now argues that the *Sturgeon II* decision can only be read as rejecting across the board the proposition that reserved water rights are interests in waters sufficient to make them public lands, despite the meaning of "public lands" for the purposes of Title VIII not being the subject of *Sturgeon II*. This argument ignores the Supreme Court's admonition in *Amoco Production Co. v. Village of Gambell* against the conclusion "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*." 480 U.S. 531, 548 n.15 (1987) (citing *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 114–16 (1949)) (emphasis added).

Nor is the reasoning underlying *Sturgeon II* irreconcilable with *Katie John*. In *Sturgeon II*, the Supreme Court held that the Nation River was not public lands for purposes of regulating Sturgeon as he "waft[ed] along the River's surface toward his preferred hunting ground." 587 U.S. at 45. Ultimately, the Court found that, even assuming the United States held a reserved right, it was irrelevant for regulating Sturgeon's use of a hovercraft because his activities took place "*above* the water" and not in the water. *Id*. at 45 (emphasis added).

Perhaps because *Sturgeon II* ultimately concerned the regulation of activities above waters, the Supreme Court did not examine its numerous decisions holding that interests in waters such as reserved waters, although usufructuary as opposed to possessory, nonetheless constitute real property interests. These interests can be assigned and mortgaged; they can be bought, leased, and sold; and they cannot be taken without just compensation. *See, e.g.*, *Dugan v. Rank*, 372 U.S. 609 (1963); *Fed. Power Comm'n v. Niagra Mohawk Power Corp.*, 347 U.S. 239 (1954); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1955). A state, absent specific congressional authority, cannot "destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its water, so far, at least, as may be necessary for the beneficial uses of the government property[.]" *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899). Likewise, the Supreme Court did not contend with its previous holdings that owners of state law

water rights possess a property interest for which the United States must pay compensation if it takes the water, except when exercising its navigational servitude.[10] *See Int'l Paper Co. v. United States*, 282 U.S. 399, 407 (1931); *see also Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 781 (1984) (noting "that for many purposes water rights are considered to be interests in lands[]"). In short, the reserved waters appurtenant to federal reservations in Alaska are property interests to which the United States holds title as that term is employed in the statutory definition and context.

Further, even the *Sturgeon II* Court's interpretation of the nature of reserved water rights does not foreclose federal management of subsistence fishing pursuant to Title VIII. That is because the *Sturgeon II* Court clearly linked the federal government's ability to regulate waters over which it holds reserved water rights to the specific purpose of the reservation itself. 587 U.S. at 44 (citing *Winters v. United States*, 207 U.S. 564, 576–77 (1908); *Cappaert v. United States*, 426 U.S. 128, 141 (1976)). Unlike the regulation of personal use hovercrafts, the protection of the "opportunity for continued subsistence uses by local residents[]" is one of the four express purposes for which the Yukon Delta National Wildlife Refuge ("the Refuge"), through which the Kuskokwim River flows, was established by Congress. Pub. L. No. 96-487, § 303(7)(B)(iii), 94 Stat. 2371, 2393 (1980). The Refuge was

[10] *See infra* Argument, Section II.B

also established for the express purpose of conserving fish and wildlife, including salmon, and fulfilling the United States's international treaty obligations with respect to fish, wildlife, and their habitats. *Id.* § 303(7)(B)(i)–(ii), 94 Stat. at 2392–93.

The Refuge was also established to ensure "water quality and necessary water quantity" within the refuge to achieve the Refuge's other purposes, including protecting subsistence. *Id*. § 303(7)(B)(iv), 94 Stat. at 2393. Applying the *Cappaert* analysis—when the federal government reserves land for a specific purpose, it impliedly reserves the appurtenant water needed to achieve that purpose—reaffirmed by the Supreme Court in *Sturgeon II*, it is clear that an unquantified amount of water appurtenant to the Refuge was reserved for the purposes of protecting fish, fish habitat, and continued subsistence uses of the fisheries. *See Sturgeon II*, 587 U.S. at 43; *see also United States v. Adair*, 723 F.2d 1394, 1410 (9th Cir. 1983) (Congress established the reservation, in part, "for the purpose of maintaining the Tribe's treaty right to hunt and fish on reservation lands."). It is clear "that without the water the purposes of the [Refuge] would be entirely defeated." *United States v. New Mexico*, 438 U.S. 696, 700 (1978). More to the point, the lack of appurtenant water would defeat the purposes of most conservation system units established by ANILCA in Alaska.

ANILCA's express purposes and provisions relating to subsistence uses within the various conservation system units in Alaska make no sense unless the

term public lands encompasses the navigable waters within the units' boundaries. Congress specifically sought to "provide for the opportunity for rural residents engaged in a subsistence way of life[,]" 16 U.S.C. § 3101(c), including subsistence fishing, on public lands within conservation system units. *See id.* § 3112. Recently, this Court affirmed that the reserved water rights doctrine requires courts "to infer rights that support a reservation's purpose." *Metlakatla Indian Cmty. v. Dunleavy*, 58 F.4th 1034, 1042 (9th Cir. 2023). In *Metlakatla*, this Court held that these implied rights include the right to fish, when the central purpose of the reservation is to support subsistence fishing. *Id*. at 1044; *see also Alaska Pac. Fisheries Co. v. United States*, 248 U.S. 78 (1918).

In the *Katie John* litigation, Alaska District Judge Holland found that it was unnecessary to quantify the minimum amount of water necessary for the fulfillment of Congress's purpose in reserving the lands at issue; it was simply enough that the interests *exist* to bring these waters within ANILCA's definition of public lands for the purpose of Title VIII. *See John v. United States*, No. 3:05-cv-0006-HRH, 2007 WL 9637058, at *10–11 (D. Alaska May 17, 2007).[11] This is because "[t]he identification of the existence of a reserved water rights claim is not the equivalent

[11] As set forth in KRITFC's answering brief, Argument, Section I.D, the State is barred by issue preclusion from refuting this argument.

of a conclusive determination of the validity of such claim for the purposes of establishing the priority of water use rights." *Id.* at *10. As Judge Holland explained:

> For the purposes of ANILCA public lands determinations, no adjudication of water rights is needed. A formal adjudication, whether it be in a state or federal court, is not the only means of identifying reserved water rights. Reserved water rights vest on the date of the reservation. They do not depend upon an adjudication for their existence.

*Id*. (internal citations omitted). This Court affirmed Judge Holland on this point in *Katie John III*. 720 F.3d at 1227 ("The State, however, fails to appreciate the distinction between the adjudication of the amount of federal reserved water rights and the identification of the geographic scope of those rights for purposes of administering ANILCA's subsistence priority.").

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. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000); *c.f. Amoco*, 480 U.S. at 548 n.15 (meaning of public land must be interpreted with reference to its context in the statute). Congress could not have achieved its express purpose of protecting the subsistence way of life in Alaska, which centrally depends upon subsistence fishing, without including navigable waters as part of ANILCA's definition of public lands. The importance of subsistence fishing to Alaska Native subsistence users cannot be overstated. A ruling that removes federally reserved waters from the definition of public lands would be

devastating for rural subsistence users, considering the importance of subsistence fishing as described above.

### B. *Loper* and *Sackett* have no bearing on the outcome of this case.

Failing to offer a compelling argument that *Sturgeon II* spelled the demise of *Katie John*, the State asserts that *Loper* and *Sackett* achieve what *Sturgeon II* does not. The State is fundamentally incorrect; *Loper* and *Sackett* have no bearing on the outcome of this case.

Turning first to *Loper*, the State notes that in *Katie John I*, this Court, adhering to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), found "reasonable the federal [government's] 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 doctrine." *Katie John I*, 72 F.3d at 703–04; *see* Doc. 13.1 at 42. The State argues that because the Supreme Court overturned *Chevron* in *Loper*, this Court's decision in *Katie John I* is necessarily wrongly decided. Doc. 13.1 at 42–44. The State misreads *Loper* and misunderstands *Chevron* and the *Katie John* decisions.

While the Supreme Court explicitly overturned *Chevron*, it also *expressly* limited the scope of its holding to prevent exactly what the State attempts to do here: the re-litigation of long-settled precedent. "By [overruling *Chevron*], however, we do not call into question prior cases that relied on the *Chevron* framework. The

holdings of those cases that specific agency actions are lawful[] . . . are still subject to *stare decisis* despite our change in interpretive methodology." *Loper*, 144 S. Ct. at 2273.

Even if *Loper*'s overturning of *Chevron* was an invitation to relitigate all cases decided under the then-applicable standard of review, the results in *Katie John I* would not change. This Court in *Katie John I* applied *Chevron* and found the United States's interpretation of the definition of public lands to be "reasonable," *Katie John I*, 72 F.3d at 703; *Loper* does not suddenly render that interpretation unreasonable or inconsistent with ANILCA. Even under *Chevron*, Courts could only defer to an agency's interpretation if it was reasonable; that is, it is not "arbitrary, capricious, *or manifestly contrary to the statute*." 467 U.S. at 844 (footnote omitted, emphasis added). The courts remained the final arbiters of what the law said and were required to reject agency interpretations that violated or ran counter to statutes. *See id*. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

The State's real argument is not that *Loper* overturns *Katie John*, but that *Katie John* was not correctly decided in the first instance. This argument has been rejected by every court to ever consider it. *Katie John I* was not the final word on the issue of whether the definition of public lands for purposes of Title VIII includes waters

to which the United States holds reserved water rights. This Court considered this issue twice more, once sitting en banc and therefore in a position to overturn *Katie John I*. *See Katie John II*, 247 F.3d at 1032. Moreover, the Supreme Court refused to grant certiorari in *Katie John* three separate times. *See Babbit*, 516 U.S. at 1036; *Alaska Fed'n of Natives*, 517 U.S. at 1187; *Jewell*, 572 U.S. at 1042. And in *Sturgeon II*, the Supreme Court went out of its way to confirm that it was not disturbing *Katie John*. *Sturgeon II*, 587 U.S. at 45 n.2. *Loper* and the demise of *Chevron* do not change this or breathe life into this old argument. The State's argument that *Loper* undermines *Katie John* is without merit and should be rejected by this Court.

Turning next to *Sackett*, the State argues "that Congress must 'enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power.'" Doc. 13.1 at 44–45 (quoting *Sackett*, 598 U.S. at 679). According to the State, *Katie John* is an "'overly broad interpretation' of ANILCA" and "thus plainly 'impinges on the State's traditional authority" because ANILCA never mentions navigable waters. Doc. 13.1 at 45 (quoting *Sackett*, 598 U.S. at 679–80) (brackets omitted). This argument is entirely without merit.[12]

The entire purpose of Title VIII was to protect Alaska Native subsistence hunting and fishing rights and access. *See* 16 U.S.C. § 3111; *supra* Statement of

[12] Indeed, this argument is so unserious that the District Court refused to address it, and the State devotes only six sentences to it in its sixty-six-page-long brief. *See* Doc. 13.1 at 44–45.

Case, Section II. As this Court recognized in *Katie John I*, subsistence fishing "has traditionally taken place in navigable waters." 72 F.3d at 702. In order for the rural priority—and, indeed, Title VIII more generally—to have any effect, it *must* include navigable waters. The State's argument would have the absurd result of stripping protections for subsistence fishing from ANILCA, despite Title VIII mentioning the word "fish" forty-five times.

Moreover, the regulation of Alaska Native subsistence activities, including fishing, has never been a traditional power of the State. Since before statehood, Congress has exercised authority over Alaska Native subsistence practices and rights to the exclusion of State regulation. *See supra* Statement of Case, Sections I–II. Indeed, with its admission to the Union, the State specifically disclaimed its authority to regulate Alaska Natives' subsistence practices. Pub. L. No. 85-508, § 4, 72 Stat. at 339; ALASKA CONST. art. XII, § 12. The State has always understood that its authority to regulate subsistence hunting and fishing is subservient to the federal government's authority. *See, e.g.*, 1-JSER-8, 31, 97–98. ANILCA did not change this. ANILCA offered the State the opportunity to assume management of subsistence on federal public lands and waters, *see* 16 U.S.C. § 3115(d), but the State has refused to meet the requirements to assume this authority. *See supra* Statement of Case, Section III.

## II. The United States Holds Other Powers and Retains Other Interests That Allow It to Regulate Subsistence Fishing on Navigable Waters Under Title VIII.

While *Katie John* remains good law, and the reserved water rights doctrine remains a valid basis for federal regulation of subsistence fishing on some navigable waters, the United States holds other authorities and retains other interests in navigable waters sufficient to bring all navigable waters within ANILCA's definition of public lands for purposes of Title VIII. Title VIII reflects Congress's broad constitutional authority over Indian Affairs. Additionally, the navigational servitude provides power over and an interest in navigable waters sufficient to justify federal regulation.

### A. Congress invoked its broad constitutional authority over Indian Affairs in enacting Title VIII to protect and provide for continued subsistence fishing on navigable waters.

Since at least 1867, both pre- and post-statehood, Congress has consistently exercised authority over Alaska Native subsistence, understanding the need to protect subsistence practices and rights from State interference. For example, when Congress was debating the Alaska Statehood Act, concern was expressed about how the territorial legislature had failed to provide adequately for "the rights and privileges of a large and important part of Alaska's population, our native people, which are safeguarded under existing [federal] legislation." 104 Cong. Rec. 9,488–89 (1958) (statement of Representative Alfred John Westland). Title VIII represents

a continuation of Congress's attempts to legislate for the benefit and protection of Alaska Native subsistence users.

Congress "wields significant constitutional authority when it comes to tribal relations[.]" *McGirt v. Oklahoma*, 591 U.S. 894, 903 (2020). This power is firmly rooted in the Indian Commerce and Treaty Clauses of the Constitution. *Haaland v. Brackeen*, 559 U.S. 255, 273–74 (2023). In *Brackeen*, the Supreme Court stated "that Congress's power in this field is muscular," and that it "supersed[es] . . . state authority." *Id*. at 273 (citations omitted); *see also Dick v. United States*, 208 U.S. 340, 353 (1908) ("[S]uch power is superior and paramount to the authority of any state within whose limits are Indian tribes."). That Congress retains this broad power is not an accident. The Drafters purposely vested Congress with this broad authority to ensure that the states would always be subordinate to Congress in the arena of Indian Affairs. *See* Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999 (2014). Further, Congress must act in the arena of Indian Affairs as a fiduciary. *See Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942) (The United States "has charged itself with moral obligations of the highest responsibility and trust. Its conduct[] . . . should therefore be judged by the most exacting fiduciary standards."); COHEN'S HANDBOOK, *supra* § 5.04[3][a], at 412 ("[T]he trust doctrine is one of the cornerstones of Indian law.").

In enacting Title VIII, Congress explicitly "invoke[d] its constitutional authority over Native affairs . . . to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents[,]" 16 U.S.C. § 3111(4), specifically differentiating Title VIII from the rest of ANILCA. As this Court has previously observed, "Title VIII was adopted to benefit the Natives." *Gambell*, 746 F.2d at 581. Specifically, Title VIII was meant to fulfill Congress's "fiduciary duties . . . to protect the subsistence resources of Indian communities and to preserve such communities and distinct cultural entities against interference by the State[]." *Togiak v. United States*, 470 F. Supp. 423, 428 (D. Alaska 1979) (citation omitted). Congress expressly recognized that while ANILCA "is not Indian legislation in its entirety, the subsistence title[—Title VIII—]and the other subsistence related provisions are." *Gambell*, 746 F.2d at 581 (quoting 126 Cong. Rec. 29,279 (1980)).

Since Title VIII is Indian legislation enacted to benefit Alaska Natives, the Indian canons require that Title VIII and the definition of public lands "must be liberally construed in favor of establishing Indian rights." *Confederated Tribes of Chehalis Indian Res. v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996) (citation omitted). Likewise, "[a]ny ambiguities in construction [of Title VIII and the definition of public lands] must be resolved in favor of the Indians." *Id.* (citation omitted). Indeed, this Court has already held that ambiguous terms within Title VIII

must be construed in favor of Alaska Natives. *See Gambell*, 746 F.2d at 581 ("Under a familiar rule of statutory construction doubtful language should be construed to further that purpose[,]" *i.e.*, "to benefit the Natives." (citation omitted)).[13] Here, the Court must interpret the definition of public land, as used in Title VIII, in favor of Alaska Natives and their federally protected subsistence rights. Because of the State's historic hostility to protecting subsistence rights, and the federal government's contrasting trust responsibility, this canon counsels in favor of upholding the federal government's authority to regulate subsistence activities on navigable waters.

[13] In *Hoonah Indian Association v. Morrison*, this Court held that Title VIII is *not* Indian legislation and should not be interpreted pursuant to the Indian canons. 170 F.3d 1223, 1229 (9th Cir. 1999). *Morrison* is not controlling; as a panel decision, it cannot overturn the earlier holding in *Gambell*. *See Koerner v. Grigas*, 328 F.3d 1039, 1050 (9th Cir. 2003). Moreover, *Morrison* mentions *Gambell* only once and does not actually address its holding that Title VIII is Indian legislation. *See Morrison*, 170 F.3d at 1229 n.3. *Morrison* is based on the false premise that "Congress expressly rejected the proposition that the subsistence provision was only for Natives[,]" noting that the priority applies to all rural residents, Native and non-Native alike. *Id.* at 1229. *Morrison* seemingly overlooks the fact that Congress expressly invoked its constitutional authority over Indian Affairs in enacting Title VIII, *see* 16 U.S.C. § 3111(4), and that the inclusion of non-Native rural residents was merely a concession to the State. *See Kenaitze*, 860 F.2d at 313 n.1. While non-Native rural residents may benefit from the rural priority, Congress's intent was always to protect *Native* subsistence rights first. *See supra* Statement of Case, Section III. That Title VIII's rural priority might provide some ancillary benefits to non-Native rural residents does not undermine the fact that Title VII was, first and foremost, enacted to benefit Alaska Natives, and is therefore Indian legislation.

Congress's authority over Native affairs reflects an intentional decision by the Framers to design a constitutional system wherein states cannot infringe upon or interfere with the federally protected rights of Native people. Congress has long exercised this authority in Alaska, consistently legislating for the protection of Alaska Native subsistence rights; Title VIII is just the most recent and comprehensive piece of legislation to do so. Its provisions must be interpreted in a manner that upholds Alaska Natives' subsistence fishing rights and effectuates the federal government's authority to regulate subsistence activities on navigable waters.

### B. The navigational servitude is both a power and property interest that supports the federal government's regulatory authority over subsistence fishing in navigable waters.

Should the Court be inclined to entertain the State's assertion that the reserved water rights doctrine no longer serves as a basis for the federal government's regulation of subsistence fishing on navigable waters, the navigational servitude provides an alternative basis for the federal government's authority.

#### 1. The navigational servitude is an interest in navigable waters, the title to which is held by the federal government.

The navigational servitude constitutes a paramount federal right to and power over navigable waters. This right and power is derived from the Commerce Clause of the Constitution. *See United States v. Rands*, 389 U.S. 121, 123 (1967) (quoting *Gilman v. Phila.*, 70 U.S 713, 724–25 (1865)) ("'The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the

navigable waters of the United States . . . . For this purpose they are *the public property of the nation*, and subject to all the requisite legislation by Congress.'" (emphasis added, ellipses in original)). In the so-called "Paramountcy Cases," the Supreme Court recognized that while the states held title to the submerged lands within their territorial waters, the federal government exercised "paramount rights in and power over" those waters as the superior sovereign. *United States v. California*, 332 U.S. 19, 36 (1947); *see also United States v. Texas*, 339 U.S. 707 (1950); *United States v. Louisiana*, 339 U.S. 699 (1950).

The states were concerned that the Paramountcy Cases purportedly cast a cloud over their title to the submerged lands *beneath* navigable waters and lobbied Congress to intervene. *See generally Submerged Lands: Hearings Before the S. Comm. on Interior & Insular Affs.*, 83d Cong., 1st Sess. (1953). In 1953, Congress enacted the Submerged Lands Act, which conveyed to the states "title to and ownership of the lands beneath navigable waters." 43 U.S.C. § 1311(c). But the Act also confirmed the principle made clear in the Paramountcy Cases, that the navigational servitude is an interest in water to which the United States holds title. The Submerged Lands Act expressly retained the United States's interests in the navigational servitude, inclusive of its "rights in and powers of regulation and control . . . for the constitutional purposes of commerce, navigation, defense, and

international affairs[.]" *Id.* § 1314(a).[14] The reservation of the navigational servitude expressly declared that the servitude "shall be paramount to, but shall not be deemed to include," the states' rights of ownership and control of those lands and resources conveyed by other sections of the Act. *Id.*

That the United States holds title to the navigational servitude is confirmed by the Supreme Court's treatment of the servitude in the context of Fifth Amendment takings cases. Notwithstanding the Fifth Amendment's prohibition on the taking of private property by the government without just compensation, the Court has held that the United States does not need to compensate private property owners when exercise of the navigational servitude results in the loss of riparian access, *see, e.g.*, *United States v. Commodore Park*, 324 U.S. 386, 805–06 (1945), the loss of use of submerged lands, *see, e.g.*, *United States v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 312 U.S. 592, 597 (1941), or the loss of structures blocking navigation. *See, e.g.*, *Rands*, 389 U.S. at 267.

Commentators have consistently observed that the Supreme Court's decisions—that the United States need not pay compensation to private landowners for exercising its navigational servitude—only make sense if the United States holds title to, or owns, the navigational servitude. *See, e.g.*, Richard W. Bartke, *The*

[14] The Statehood Act expressly incorporates the Submerged Land Act. Pub. L. No. 85-508, § 6(m), 72 Stat. at 343.

*Navigational Servitude and Just Compensation—Struggle for a Doctrine*, 48 OR. L. REV. 1, 41 (1968) (1-JSER-296) ("This unifying principle is a frank recognition of the fact that the federal navigational servitude is proprietary in nature."); James Munroe, *The Navigation Servitude and the Severance Doctrine*, 6 LAND & WATER L. REV. 491, 503 (1971) (1-JSER-248) ("It is in effect ownership of the entire stream-flow. Thus the navigation servitude is regarded as a property right under the administration of Congress."); *see also Florida Rock Inds., Inc. v. United States*, 8 Cl. Ct. 160, 169 (Cl. Ct. 1985), *aff'd in part, rev'd in part on other grounds* 791 F.2d 893 (Fed. Cir. 1986) ("In *Rands* and [*United States v.*] *Twin City Power Co.*, [350 U.S. 222 (1956),] the Court denied compensation for losses resulting from an exercise of the 'navigational servitude . . . [because] the action of the United States was taken in its proprietary, rather than its sovereign, capacity." (internal citations omitted)). Indeed, the Supreme Court has repeatedly characterized navigable waters subject to the navigational servitude as "'*the public property of the nation*[.]'" *Rands*, 389 U.S. at 123 (quoting *Gilman*, 70 U.S. at 725) (emphasis added); *see Chicago*, 312 U.S. at 596 (same); *Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979) (same).

In discussing the navigational servitude, this Court has observed that "the label, 'servitude,' implies a property interest." *Boone v. United States*, 944 F.2d 1489, 1494 n.9 (9th Cir. 1991); *Servitude*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("An

encumbrance consisting in a right to the limited use of a piece of land or other immovable property without the possession of it[.]"). Indeed, the navigational servitude is often referred to as an "easement." *See, e g.*, *Twin City*, 350 U.S. at 225 ("The power is a privilege which we have called 'a dominant servitude[,]' or 'a superior navigation easement.'" (internal citations omitted)); *Easement*, BLACK'S LAW DICTIONARY, *supra* ("An interest in land owned by another person, consisting in the right to use or control the land[] . . . . [T]he land burdened by an easement is called the *servient estate*. . . . The primary recognized easements [include] . . . a right to water[.]" (emphasis in original)). The use of the terms "servitude" and "easement" strongly suggests that the United States's power over navigable waters is best understood as deriving from a property interest in those waters. *See* Genevieve Pisarski, *Testing the Limits of the Federal Navigational Servitude*, 2 OCEAN & COASTAL L.J. 313, 315 (1997) ("The nature of the interest that the federal government holds in connection with the navigational servitude is generally described, either explicitly or impliedly, as an easement."). While "[t]he nature of this property right falls short of fee title[,]" *id*. (footnote omitted), an interest in real property that is less than full fee title is still a property interest. *See* RESTATEMENT (FOURTH) OF THE LAW—PROPERTY §1.1 cmt. f (2024) ("[E]asements . . . are a type of real property."); *id*. § 1.3 cmt. c ("A fee simple absolute (§ 2.1) is a legal interest.

A legal interest may also be a lesser interest, such as an easement[.]"). The navigational servitude is a property interest to which the United States holds title.

Reading Title VIII as applying the subsistence priority to all waters in Alaska subject to the navigational servitude does not conflict with the Supreme Court's holding in *Sturgeon II*. In her concurrence in *Sturgeon II*, Justice Sotomayor (joined by Justice Ginsburg) noted that the Court's majority opinion was actually quite limited, and that the federal government retained other powers to regulate activities on navigable waters within conservation system units.

> The Court holds only that the National Park Service may not regulate the Nation River as if it were within Alaska's federal park system, not that the Service lacks all authority over the Nation River. A reading of ANILCA § 103(c) that left the service with no power whatsoever over navigable rivers in Alaska's parks would be untenable in light of ANILCA's other provisions, which state Congress' intent that the Service protect those very same rivers. Congress would not have set out this aim and simultaneously deprived the Service of all means to carry out the task.

*Sturgeon II*, 587 U.S. at 59 (Sotomayor, J., concurring). Importantly, Justice Sotomayor noted that notwithstanding the majority's decision, the navigational servitude remains an important power that supports the federal government's regulation of subsistence fishing on navigable waters.

> Notably, the Park Service does not argue—*nor does the Court's opinion address*—whether navigable waters may qualify as "public lands" because the United States has title to some other interest other than an interest in reserved water rights. In particular, the United States did not press the argument that the Federal Government functionally holds title to the requisite interest because of the navigational servitude.

*Id*. at 63 n.3 (citing *Kaiser Aetna*, 444 U.S. at 177; *Rands*, 389 U.S. at 123; 43 U.S.C. § 1314) (internal citations omitted, emphasis added). Likewise, in her concurrence in this Court's underlying opinion, Judge Nguyen (joined by Judge Nelson) opined that if this Court was not bound by *Katie John*, treating the navigational servitude "as a property interest to which the United States holds title [would be] a reasonable interpretation of the statute." *Sturgeon v. Frost*, 872 F.3d 927, 937 (9th Cir. 2017) (Nguyen, J., concurring), *vac'd* 587 U.S. at 28.

**2. This Court's conclusion in *Katie John I* that the navigational servitude was insufficient to establish "public lands" was not well supported.**

In *Katie John I*, this Court declined to conclude that the navigational servitude was an interest in waters sufficient to support federal regulation of subsistence in navigable waters, relying on its earlier decision in *City of Angoon v. Hodel*, 803 F.2d 1016 (9th Cir. 1986). *Katie John I*, 72 F.3d at 702–03.[15] In *Hodel*, in a footnote, this Court concluded that the navigational "servitude is not public lands within the meaning of ANILCA[]" because the United States does not hold title to it. 803 F.2d

[15] The district court originally held that navigational servitude formed the basis of the federal government's regulation and protection of subsistence fishing on navigable waters. *See John v. United States*, No. A90-0484-CV (HRH), 1994 WL 487830, at *14–18 (D. Alaska Mar. 30, 1994). This Court rejected this argument in part, because on appeal, the United States "conced[ed] that its reserved water rights sufficed as an 'interest' in waters for purposes of ANILCA." *Native Vill. of Quinhagak v. United States*, 35 F.3d 388, 393 (9th Cir. 1994).

at 1027 n.6 (citation omitted). Instead, the Court characterized the navigational servitude as the "'power of government to control and regulate navigable waters in the interest of commerce[.]'" *Id.* (quoting *Commodore Park*, 324 U.S. at 390). But *Hodel* is inconsistent with the Supreme Court's jurisprudence on the servitude and later decisions by both this Court and the Supreme Court.

In *Katie John I*, this Court acknowledged that in *Amoco*, the Supreme Court "rejected the assertion that the Outer Continental Shelf [('OCS')] is not 'Federal land' because the United States does not hold title to it." *Katie John I*, 72 F.3d at 702–03 (citing *Amoco*, 480 U.S. 548 n.15). The *Katie John I* Court refused to give credence to the Supreme Court's discussion in *Amoco*, rejecting it as "dictum." *Id.* at 703.[16] Nevertheless, *Amoco* is instructive and undermines *Hodel*.

In *Amoco*, the Supreme Court noted that while "[t]he United States may not hold 'title' to the submerged lands of the OCS," it would not conclude that the United States did not hold "'title' to any 'interests therein.'" 480 U.S. 548 n.15. Instead, the Supreme Court concluded that it was "not clear that Congress intended to exclude the OCS by defining public lands as 'lands, waters, and interest therein' 'the title to which is in the United States.'" *Id.* The Supreme Court admonished that "public

[16] If the Supreme Court's discussion in *Amoco* of the United States's interest in the OSC is dictum, so too, then, is the *Hodel* Court's discussion of the navigation servitude, as it is also confined to a footnote and unnecessary for the disposition of the case. *See Best Life Assurance Co. of Cal. v. Comm'r*, 281 F.3d 828, 834 (9th Cir. 2002).

lands" does not have "a precise meaning[]" in ANILCA "without reference to a definitional section *or its context in the statute*." *Id*. (citing *Hynes*, 337 U.S. at 114–16) (emphasis added).

Importantly, the Court recognized that the United States can hold title to an *interest* in lands and waters less than full fee title, thus making those lands and waters public lands under ANICLA, even if the United States did not hold full title to those lands or waters. *See John*, 1994 WL 487830, at *17 ("Footnote 15 in *Amoco* is a clear signal that the term 'title' in Section 102 can refer to something less than technical fee title."). The *Katie John I* and *Hodel* Courts' rejection of the navigational servitude as an interest in which the United States can hold title are also inconsistent with the Supreme Court's and this Court's understanding of the servitude as a property interest, *see Boone*, 944 F.2d at 1494 n.9; Bartke, *supra* at 41 (1-JSER-296); Munroe, *supra* at 503 (1-JSER-248), and the Supreme Court's characterization of waters subject to the servitude as "'the public property of the nation[.]'" *Rands*, 389 U.S. at 123 (quoting *Gilman*, 70 U.S. at 725).

**3. Judges of this Court and Justices of the Supreme Court have suggested that the best reading of Title VIII is to define public lands as including waters subject to the United States's navigational servitude.**

The best interpretation Title VIII and the definition of public lands is that the navigational servitude is an interest in waters to which the United States holds title and therefore the rural subsistence priority applies to *all* navigable waters within

Alaska, not just those within and appurtenant to conservation system units. This conclusion is not without precedent.

In his concurrence in *Katie John II*, Judge Tallman (joined by Judges Tashima and Fletcher) stated: "The United States has exclusive possession and control of two interests in navigable waters in Alaska, its navigational servitude and its reserved water rights. All navigable waters are therefore 'public lands' upon which the rural subsistence priority applies." 247 F.3d at 1039–40 (Tallman, J. concurring); *see also Quinhagak*, 35 F.3d at 392 (recognizing "a serious question whether the navigational servitude held by the United States on navigable waters constitutes the necessary federal 'interest' in the waters in question[]" (citation omitted)); *John*, 1994 WL 487830, at *17 ("For purposes of ANILCA Title VIII, the navigational servitude is more properly characterized as an interest in waters."). Judge Tallman wrote separately in *Katie John II* because he did "not believe Congress intended the reserved water rights doctrine to limit the scope of ANILCA's subsistence priority." *Katie John II*, 247 F.3d at 1034 (Tallman, J., concurring). Rather, Judge Tallman found that "Congress involved its powers under the Commerce Clause to extend federal protection of traditional fishing to *all* navigable waters within the State of Alaska, not just to waters in which the United States has a reserved right." *Id.* (emphasis in original); *see also John v. United States*, No. 3:05-cv-006-HRH, 2009 WL 10659579, at *4 (D. Alaska. Sept. 29, 2009) ("[T]he congressional purpose of

preserving the subsistence way of life was not limited to those reserved lands—not limited to conservation system units. The preference for subsistence hunting and fishing expressly applies to all 'public lands,' not just CSUs created by ANILCA.").[17]

In her concurrence in *Sturgeon II*, Justice Sotomayor said that while the reserved water rights doctrine may not have supported the NPS's authority to regulate Surgeon's use of a hovercraft within the Yukon-Charley Rivers National Preserve, the NPS was not without *any* authority to act. Instead, that power rests in the navigational servitude. *Sturgeon II*, 587 U.S. at 59 (Sotomayor, J., concurring). To Justice Sotomayor, Congress would not have enacted ANILCA and charged the NPS with protecting rivers within conservation systems units while "simultaneously depriv[ing] the [agency] of all means to carry out the task." *Id.* That source of authority is the navigational servitude. *Id.* at 63 n.3. The same holds true for the rural priority; Congress would not have established the rural priority, authorized the Secretaries of Agriculture and Interior to manage that priority, and simultaneously deprived those agencies of all means to enforce it.

In establishing the rural priority, Congress invoked its Commerce Clause powers, along with its Property Clause powers and its powers over Indian Affairs.

[17] In her concurrence in *Sturgeon*, Judge Ngyuen stated that she would adopt Judge Tallman's "well-reasoned approach[.]" 872 F.3d at 938 (Nguyen, J., concurring).

*See* 16 U.S.C. § 3111(4). The navigational servitude is grounded in Congress's Commerce Clause powers. *See Rands*, 389 U.S. at 123.[18] Should this Court find that the reserved water rights doctrine no longer serves as a basis for upholding federal authority to regulate subsistence fishing on navigable waters, the navigational servitude is a sufficient basis to support Congress's intent to protect continued subsistence fishing on Alaska's navigable waters.

Alternatively, should this Court find that *Loper* does call into question the holding in *Katie John I*, the "single, best meaning[,]" *Loper*, 144 S. Ct. at 2266, of ANICLA, Title VIII, and the definition of public lands is that the navigational servitude is an interest in waters to which the United States holds title and therefore the rural subsistence priority applies to *all* navigable waters within Alaska, not just

[18] Congress's Commerce Clause powers are "exclusive and plenary." *Bd. of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 56 (1933). Similarly, Congress's authority over public lands is "without limitations." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (quotation marks, citations omitted). As more fully set forth in AFN's answering brief, Argument, Section II.A., Congress possesses all the authority it needs to regulate hunting and fishing on federal lands. *See United States v. Est. of Hage*, 810 F.3d 712, 716 (9th Cir. 2016) ("The United States can prohibit absolutely or fix the terms on which its property may be used." (citation omitted)). The State has acknowledged, at least privately, that under *Kleppe*, the federal government can control "the subsistence taking of fish on all federal lands in Alaska" and that federal regulations would "take precedence over any conflicting state fish and game regulations, and will establish a federal subsistence-priority management system which will supersede any state laws or regulations in conflict with it." 1-JSER-7; *see also* 1-JSER-97 (acknowledging that the federal government "probably has the constitutional authority to authorize the takeover of fish and wildlife management on federal lands").

those within and appurtenant to conservation system units. *Accord Sturgeon*, 872 F.3d at 938 (Nyguen, J., concurring) ("Rather than continuing to shove a square peg into a hole we acknowledge is round, we should embrace a Commerce Clause rationale for federal regulation of Alaska's navigable waters."); *Katie John II*, 247 F.3d at 1044 (Tallman, J. concurring) ("Congress clearly established a subsistence priority that applies to all navigable waters in the State of Alaska, not just those waters in which the United States has a reserved water right.").

## CONCLUSION

For the foregoing reasons, and the reasons set forth in the answering briefs of the United States, KRITFC, Ahtna, and AFN, the District Court should be affirmed.

RESPECTFULLY SUBMITTED this 25th day of October 2024.

*/s/ Erin C. Dougherty Lynch*
*/s/ Wesley James Furlong*
*/s/ Megan R. Condon*
*/s/ Sydney Tarzwell*
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NATIVE AMERICAN RIGHTS FUND

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## CERTIFICATE OF COMPLIANCE

I hereby certify that that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,943 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). Furthermore, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, 14 point, Times New Roman.

*/s/ Wesley James Furlong*
Wesley James Furlong
NATIVE AMERICAN RIGHTS FUND

## CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 2024, I electronically filed this document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF. I certify that all participants in the case are registered CM/ECF users.

*/s/ Wesley James Furlong*
Wesley James Furlong
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# ADDENDUM

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**Statutes**

**16 U.S.C. § 3101 – Congressional statement of purpose**

* * *

**(c) Subsistence way of life for rural residents**
It is further the intent and purpose of this Act consistent with management of fish and wildlife in accordance with recognized scientific principles and the purpose for which each conservation system unit is established, designated, or expanded by or pursuant to this Act, to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.

* * *

**16 U.S.C. § 3102 – Definitions**

As used in this Act (except that in titles IX and XIV the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act, and the Alaska Statehood Act)--

**(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;

**(B)** land selections of a Native Corporation made under the Alaska Native Claims Settlement Act which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

**(C)** lands referred to in section 19(b) of the Alaska Native Claims Settlement Act.

* * *

**16 U.S.C. § 3111 – Congressional declaration of findings**

The Congress finds and declares that--

**(1)** the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence;

**(2)** the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses;

**(3)** continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska, with resultant pressure on subsistence resources, by sudden decline in the populations of some wildlife species which are crucial subsistence resources, by increased accessibility of remote areas containing subsistence resources, and by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management;

**(4)** in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents; and

**(5)** the national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska require

> that an administrative structure be established for the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska.

**16 U.S.C. § 3112 – Congressional statement of policy**

It is hereby declared to be the policy of Congress that—

> (1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands; consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for each unit established, designated, or expanded by or pursuant to titles II through VII of this Act, the purpose of this subchapter is to provide the opportunity for rural residents engaged in a subsistence way of life to do so;
>
> (2) nonwasteful subsistence uses of fish and wildlife and other renewable resources shall be the priority consumptive uses of all such resources on the public lands of Alaska when it is necessary to restrict taking in order to assure the continued viability of a fish or wildlife population or the continuation of subsistence uses of such population, the taking of such population for nonwasteful subsistence uses shall be given preference on the public lands over other consumptive uses; and
>
> (3) except as otherwise provided by this Act or other Federal laws, Federal land managing agencies, in managing subsistence activities on the public lands and in protecting the continued viability of all wild renewable resources in Alaska, shall cooperate with adjacent landowners and land managers, including Native Corporations, appropriate State and Federal agencies, and other nations.

**16 U.S.C. § 3114 – Preference for subsistence uses**

Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority

over the taking on such lands of fish and wildlife for other purposes. Whenever it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in order to protect the continued viability of such populations, or to continue such uses, such priority shall be implemented through appropriate limitations based on the application of the following criteria:

> **(1)** customary and direct dependence upon the populations as the mainstay of livelihood;
>
> **(2)** local residency; and
>
> **(3)** the availability of alternative resources

**16 U.S.C. § 3115 – Local and regional participation**

* * *

**(d) Supersedure by enactment and implementation of State laws governing State responsibility; consideration of recommendations by State rulemaking authority**

The Secretary shall not implement subsections (a), (b), and (c) of this section if the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 3113, 3114, and 3115 of this title, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility pursuant to this subchapter for the taking of fish and wildlife on the public lands for subsistence uses. Laws establishing a system of local advisory committees and regional advisory councils consistent with this section shall provide that the State rulemaking authority shall consider the advice and recommendations of the regional councils concerning the taking of fish and wildlife populations on public lands within their respective regions for subsistence uses. The regional councils may present recommendations, and the evidence upon which such recommendations are based, to the State rulemaking authority during the course of the administrative proceedings of such authority. The State rulemaking authority may choose not to follow any recommendation which it determines is not supported by substantial evidence presented during the course of its administrative proceedings, violates recognized principles of fish and wildlife conservation or would be detrimental to the satisfaction of rural subsistence needs. If a recommendation is not adopted by

the State rulemaking authority, such authority shall set forth the factual basis and the reasons for its decision.