No. 24-179

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

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

v.

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

and

ORGANIZED VILLAGE OF KAKE,
Intervenor-Defendant - Appellee.

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

APPELLANT STATE OF ALASKA'S REPLY BRIEF

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INTRODUCTION

This appeal turns on whether Congress expressly granted the Secretaries authority to (1) open hunting seasons and (2) delegate hunting management decisions to tribes. Congress did neither. At best, the statute is silent. And congressional silence is insufficient to shift core state police powers to a federal agency. Likewise, silence is insufficient to authorize an agency to delegate federal powers outside the agency. The district court's decision should be reversed.

ARGUMENT

I. The Federal Subsistence Board exceeded its authority when it opened the Kake hunt.

The State agrees with the United States[1] that the Property Clause gives Congress authority to enact legislation about federal lands. U.S. Br. 20. The State agrees that Congress can authorize regulations on those federal lands that preempt conflicting state law. U.S. Br. 20. And the State agrees that Congress gave the Secretaries the authority to execute Title VIII of ANILCA, which, as discussed below, preempts conflicting state law. U.S. Br. 21, 37–40. This ends the agreement.

[1] For convenience, the State uses "United States" to describe the appellees' overlapping arguments. The brief refers to the Tribe when responding to the Village of Kake's additional arguments.

The parties disagree about the scope of Title VIII and thus the scope of the Secretaries' authority to preempt state law. Congress did not give the Secretaries authority to open hunting seasons the State closed. To do so would require an express authorization because determining when hunting is permissible is a core police power reserved to the State. Title VIII does not supply an express delegation of authority to open seasons.

Rather, Congress authorized the Secretaries to implement a preference for rural subsistence users only by adding restrictions to State hunting seasons, and only when necessary. The Secretaries cannot claim this authority by pointing to the prefatory findings in ANILCA, which are not operative. And the State's interpretation gives meaning to every part of Title VIII as well as its history of shifting limited control over wildlife from the State to the federal government.

A. ANILCA cannot implicitly preempt the State's traditional management of its wildlife.

Congress may not legislate in areas traditionally regulated by states unless it makes its intention "unmistakably clear." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Managing wildlife within a state's borders—including on federal land—is part of a state's historical police powers. *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976) (citing *Geer v. Connecticut*, 161 U.S. 519, 528 (1896) (explaining that the power to manage wildlife has lied with states since colonial times)). This does not mean that Congress lacks power to preempt traditional state authority. But it does

mean that when Congress chooses to displace a state's traditional authority to manage wildlife—irrespective of who owns the land—it must do so explicitly. U.S. Br. 20.

The Tenth Circuit has already made this clear: it "assum[es]" that federal law does not "supercede [the State's] historical police powers to manage wildlife on federal lands within its borders 'unless that was the clear and manifest purpose of Congress.'" *Wyoming v. United States*, 279 F.3d 1214, 1231 (10th Cir. 2002). That case focused on whether the authority Congress granted the Fish and Wildlife Service in the National Wildlife Refuge System Administration Act allowed the agency to preempt state law about how to treat diseased elk on federal lands. *Id.* at 1227–36. The State of Wyoming wanted to vaccinate elk on federal lands, but the Service did not. *Id.* at 1220–22. The Tenth Circuit looked at Congress's broad delegation to the Service to "ensure that the biological integrity, diversity, and environmental health of the System are maintained," and Congress's direction for the Service to use its "sound professional judgment" and regulatory authority to meet the statutory goals. *Id.* at 1228. The Court also looked at other provisions of the statute indicating that Congress wanted the Service and State to share concurrent authority over managing wildlife in refuges. *Id.* at 1227–35. From this, the Court held that Congress's delegation of authority was sufficiently clear to

include decision-making about how to manage diseased elk on federal lands, even if those federal decisions were at odds with the State's decisions. *Id.*

Such a broad delegation of authority is missing in Title VIII. True, Congress clearly intended the Secretaries' implementation of Title VIII to preempt conflicting state law. U.S. Br. 38; 16 U.S.C. § 3202(a) ("Nothing in this Act is intended to . . . diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the publics lands except as may be provided in [Title VIII]."). But the scope of Title VIII is not as broad as the United States asserts, and the scope of Title VIII is where the Secretaries' preemptive authority ends.

The United States argues that the presumption against preemption applies only to whether a statute is preemptive rather than the meaning of a statute. U.S. Br. 39. But here, the meaning of the statute defines the scope of preemption because Congress intended preemption to apply *only* when the Secretaries are validly implementing Title VIII. *See* 16 U.S.C. § 3202(a). Even when there is an express preemption clause, the canon against preemption applies to determine the scope of that preemption. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443–44, 449 (2005) (applying canon to determine scope of express preemption clause); *Ass'n des Éleveurs de Canards et d'Oies du Quebec v. Becerra*, 870 F.3d 1140, 1146 (9th Cir. 2017) (same).

The district court correctly found that ANILCA does not discuss whether the Secretaries may open hunting seasons. 1-ER-29 ("Title VIII does not explicitly authorize nor expressly prohibit the federal government from opening rural subsistence hunts . . . "); *see also* U.S. Br. 30. This Court should apply the presumption against preemption and the ordinary tools of statutory interpretation to analyze the scope of the Secretaries' preemptive authority.

B. The operative subsistence provision, § 3114, is effectuated only by restrictions and only when necessary.

Before getting to the text of § 3114, some context is helpful. Congress enacted ANILCA against the backdrop of Alaska's Constitution, which requires the State to open seasons so that people can hunt. *See* Alaska Const. art. 8 §§ 1, 4 ("It is the policy of the State to encourage the . . . development of its resources by making them available for maximum use consistent with the public interest." "[W]ildlife . . . belonging to the State shall be utilized, developed, and maintained on the sustained yield principle . . . ."). Because state law already requires the State to give people the opportunity to hunt (and therefore to open hunting seasons), the federal duty to effectuate the priority does not necessarily include the authority to open seasons. U.S. Br. 31.

Section 3114, the relevant operative provision, identifies which overall use should be prioritized (i.e., rural subsistence uses) and which criteria should be used to identify sub-priorities:

> 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. § 3114. It also provides that the priority be implemented through "limitations" "[w]henever it is necessary to restrict the taking" of wildlife. *Id.* When a restriction or limitation is no longer necessary, the Secretaries lift the restriction.[2]

The statutory policy statement, which elucidates the operative preference provision, further supports this interpretation. 16 U.S.C. § 3112(2). The United States' discussion that Congress, in this policy statement, inadvertently omitted an "and" between "Alaska" and "when" strengthens the State's argument. U.S. Br. 31–32. The addition of an "and" splits the policy into two independent clauses. The

[2] The State agrees that the Secretaries may end a restriction and thus "reopen" a federal season within the State's management framework, but this is different from opening a hunting season outside the State's seasons. Kake Br. 18–19; Alaska Op. Br. 27 n.8.

first clause in the policy statement identifies *which* uses are prioritized and the second clause identifies *how* and *when* those uses are prioritized:

> [(i)] 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 [; and (ii)] *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*;

16 U.S.C. § 3112(2) (italics and bracketed material added to distinguish clauses). The "which" clause identifies "nonwasteful subsistence uses" as the priority use rather than, for instance, commercial or recreational use. The "how-and-when" clause discusses how and when to implement that prioritized use. It must "be given preference on the public lands over other consumptive uses" "when it is necessary to restrict taking." *Id.* This non-operative policy statement mirrors the operative provision providing for a preference. *Compare* 16 U.S.C. § 3112(2), *with id.* § 3114. They both identify *which* uses shall be the prioritized uses, and they describe *when* a preference should be granted. *Id.* Neither contemplates expanding the State's hunting seasons.

The first four findings in § 3111 further explain why Congress required a preference for rural subsistence users when necessary to restrict other uses. Congress found that "the continuation of the opportunity for subsistence uses by rural residents" is "essential" to rural residents; subsistence resources are

irreplaceable; "the increasing population of Alaska," the "increased accessibility of remote areas" and the "decline in the populations of some wildlife species" is threatening subsistence living; and ANILCA intends "to protect and provide the opportunity for continued subsistence uses on the public lands." 16 U.S.C. § 3111(1)–(4).[3] The United States' focus on the "opportunity for subsistence uses" and "provid[ing] the opportunity for continued subsistence uses" misses the more holistic understanding of why Congress created a preference: to ensure continued opportunity to subsistence hunt *because* of a resource shortage. *Compare* citations to parts of § 3111(1), (4) in U.S. Br. 21, 27 & Kake Br. 17, 19, *with* 16 U.S.C. § 3111(1)–(4). In other words, the statute responds to specific causes of diminished subsistence opportunities and those drive when and how the preference can be implemented.

The United States acknowledges that the reports discuss that the preference should be implemented through restrictions, but argues the reports *also* envisioned that the preference be implemented in other ways. U.S. Br. 34. The United States points to the following sentence: "governmental action . . . shall . . . adequately provide[] for the preference on an ongoing basis and not only when critical allocation decisions may be necessary because a particular subsistence resource

[3] The fifth finding in § 3111 relates to local participation, *see* infra Section I.D.

may be threatened with depletion." U.S. Br. 34 (citing S. Rep. 96-413, at 269 (1979)). But that sentence, when read in context, contemplates two scenarios when restrictions should occur: (1) when a species is "threatened with depletion," and (2) when game is available but insufficient to support all hunters. Indeed, just a few sentences later, the report confirms: "If [1] the continued viability of a particular population *or* [2] the ability of rural subsistence-dependent residents to satisfy their subsistence needs would be threatened by a harvest by [all persons engaged in subsistence and other uses]," regulations must be established "which *restrict* the taking of such population" to rural subsistence users. S. Rep. 96-413, at 269–70 (46a–47a) (emphases and bracketed material added).

The United States next argues that because the report discussed local and regional councils advising the State on opening seasons while the State was still implementing § 3114, those councils can now advise the Board on opening seasons. U.S. Br. 34–35. But a closer reading of the report shows that Congress was not talking about the committee's influence over just federal requirements. Instead, the report discussed the State's own preexisting regulatory system, in which pre-existing local committees and to-be-established regional councils would advise on the "establishment of seasons" and "bag limits" (i.e., state law) and now would advise on "the provision of the preference for subsistence uses in their respective areas" (i.e., federal law). S. Rep. 96-413, at 270 (47a). The report did

not say that seasons and bag limits are part of the preference, but listed the three as separate topics of consideration. *Id.*

Nor does the judicial remedy provision mean the Secretaries have authority to open seasons. U.S. Br. 34–35. The report indicates that if the State was not "adequately restrict[ing] the harvest of a particular . . . wildlife population," the United States could seek a court order telling the State to close public lands to hunting, or less frequently, to open them to certain people. S. Rep. 96-413, at 272–73 (49a–50a). That essentially happened once when this Court opened the State's subsistence fishing season to a tribe because the State's definition of "rural" unlawfully excluded that tribe. *Kenaitze Indian Tribe v. State of Alaska*, 860 F.2d 312, 318 (9th Cir. 1988). But that remedy did not wholly open a new season the State had closed, and it came after a judicial determination that the State had violated ANILCA. Providing for limited judicial oversight is fundamentally different than delegating to the executive branch discretionary authority to open hunting seasons, especially because Congress contemplated giving the Secretaries that authority but struck that provision from the final version of the law. Alaska Op. Br. 29–30.

The United States argues that Congress's deleting from a bill the Secretaries' authority to open seasons while the State implemented Title VIII doesn't matter because the State no longer implements Title VIII. U.S. Br. 35–36. While the

Secretaries are now responsible for implementing Title VIII—in that they are responsible for effectuating the required definition (§ 3113), preference (§ 3114), and local and regional councils (§ 3115)—that does not mean Congress intended to give them authority to open seasons, an authority Congress previously rejected. The Secretaries have only the authority Congress delegated to them.

The United States points out that § 3114 does not explicitly limit how the preference is effectuated. U.S. Br. 23. And the United States contends that Congress's discussion of restricting uses is simply an example of how the Board can implement the subsistence preference, not a limitation on the Board's authority. U.S. Br. 27–28. But Congress did not say that. It said that the preference and sub-preferences are triggered "when it is necessary to restrict taking" for specific enumerated reasons. §§ 3112(2), 3114; *see also* §§ 3125, 3126. Congress did not say that the preference is triggered whenever the Secretary, in her discretion, determines. In this context, the Court should not read the absence of a prohibition on opening seasons as an implied authorization to open seasons. This is especially true because broadening the scope of federal authority siphons the State's traditional police powers.

The fact that the Board has, on occasion, previously acted outside the scope of its authority by opening emergency hunting seasons does not mean the action at issue here was lawful. U.S. Br. 7–8. It just means the State did not challenge the

prior actions for whatever reason. Likewise, the informal 1981 opinion from the Alaska Attorney General's Office that the United States cites is not particularly persuasive. U.S. Br. 25–26. Indeed, Alaska's own highest court has given "minimal persuasive weight" to informal AG Opinions from the 1980s issued shortly after a law's adoption, which cite no authority, and fail to provide persuasive reasoning. *See, e.g.*, *Greenpeace, Inc. v. State, Off. of Mgmt. and Budget, Div. of Gov't Coord.*, 79 P.3d 591, 596 n.26 (Alaska 2003). Nor are overreaching federal regulations particularly persuasive. U.S. Br. 26. More persuasive is ANILCA's text, and that text provides for a preference only when *restrictions* are necessary for certain enumerated reasons. This differs from authority to expand state hunting seasons. And an agency cannot delegate to itself authority Congress did not delegate.

C. The Board cannot use its regulatory authority to implement non-operative statutory findings.

The United States points to statutory findings in the preamble to Title VIII and seems to say that these findings, which recognize the essential nature of "the continuation of the opportunity for subsistence uses by rural residents of Alaska," plus the Secretaries' "capacious" regulatory authority to make rules "necessary and appropriate" to carry out the Secretaries' responsibilities, gives it the authority to open seasons. U.S. Br. 24–25; *see also* Kake Br. 16–17. But statements of findings, like statements of purpose are "in reality as well as in name *not* part of the

congressionally legislated or privately created set of rights and duties." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 217 (2012) (emphasis original). Although prefatory statements can elucidate operative provisions that follow, they are not themselves operative provisions or sources of authority. *Id.* at 218. And they cannot broaden operative provisions. *Id.* at 219; *see also Yazoo v. M.V.R. Co. v. Thomas*, 132 U.S. 174, 188 (1889) (saying the preamble "cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up.").

Accordingly, the statutory findings in preambular § 3111 can (and should) help interpret the operative provisions of Title VIII, but the findings are not themselves sources of authority. And the Board cannot use its regulatory authority to implement non-operative findings.

None of the cases the United States cites says that regulatory authority to implement a statute includes regulatory authority to implement non-operative findings. U.S. Br. 24–25. Rather, those cases stand for the proposition that an agency can use its regulatory authority to implement specific operative provisions of law. *See, e.g.*, *Michigan v. EPA*, 576 U.S. 743, 752 (2015) (discussing how Congress may give an agency flexibility, as the agency deems "appropriate," to

regulate specific types of pollution); *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2263 & n.6 (2024) (same); *id.* at 2263 (discussing how Congress may authorize an agency to prescribe rules to "'fill up the details' of a statutory scheme," such as when Congress instructed federal courts to borrow state-court procedural rules but allowed them to make certain alterations and additions); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 929 (9th Cir. 2008) (discussing how Congress mandated flood control and the transmission of some level of power, but granted agencies discretion to design flood control and decide how much power to transmit); *Safari Club Int'l v. Haaland*, 31 F.4th 1157, 1169 (9th Cir. 2022)'s citation to *Sturgeon v. Frost*, 587 U.S. 28, 57–58 (2019) (discussing how Congress, through ANILCA, granted the Park Service expansive regulatory authority, but noting that a "statement of purpose" cannot override the statute's "operative language").

Because the findings in § 3111 are not themselves sources of authority, the Board cannot use the Secretary's regulatory authority to legislate based on those findings. The question is whether the relevant operative provision, namely § 3114, gives the Secretaries the authority to open seasons. It does not.

D. The State's interpretation gives full effect to all the provisions of Title VIII.

The United States argues that if it lacks authority to open seasons, several operative provisions of Title VIII become non-operative. U.S. Br. 29–30. But those

provisions are fully operative without broadening the scope of the Secretaries' authority to include opening hunting seasons. The federal government fulfills §§ 3113, 3114, 3115, 3124, 3125, and 3126 by giving local and regional participants a meaningful role in helping the Secretaries define who is entitled to a priority for which stocks of wildlife, identify those people's uses and needs, and restrict other uses (when necessary) so that the prioritized uses receive a preference.

Regional councils help define who gets a priority. The statute makes "subsistence use" the priority use over other uses, and defines "subsistence use" as "the customary and traditional uses by rural Alaska residents . . ." 16 U.S.C. §§ 3113, 3114. The regional councils help refine what "rural" means. 50 C.F.R. §§ 100.11(c)(1)(ix), 100.15. They also help make determinations as to whether rural subsistence use of a specific wildlife population is a "customary and traditional use," and therefore entitled to be prioritized. 50 C.F.R. §§ 100.5(b), 100.11(c)(1)(viii), 100.16(c). And the Secretaries, by regulatory authority in § 3124, establish this process and identify these priorities. *See, e.g.*, 50 C.F.R. §§ 100.5(b), 100.11, 100.15, 100.16, 100.23, 100.24. This gives meaning to §§ 3113, 3114, 3115, and 3124.

Once the priorities are identified, the local and regional participants also quantify and evaluate current and anticipated subsistence uses and needs.

16 U.S.C. § 3115(a)(3)(D); 50 C.F.R. § 100.11(c)(1)(vi). For instance, if a council determines that despite a harvestable surplus of a population, the population cannot support hunters region-wide, it can recommend the Board close part of the season on federal lands to other users. This gives meaning to §§ 3114, 3115, 3124, 3125, and 3126. But the Secretaries cannot enact a recommendation broader than the power Congress granted. And ANILCA does not contemplate the Secretaries *open* seasons the State has closed, even if a council recommends it.

E. The State's interpretation accounts for both the change in jurisdictional structure when the Secretaries took over implementing Title VIII and ANILCA's amendment history.

The State acknowledges that the Secretaries have a greater role now that the State no longer implements Title VIII. U.S. Br. 29. Instead of simply supervising and reviewing the State's implementation of the preference, and closing seasons on a case-by-case basis after review (as contemplated in § 3116), the Secretaries are now themselves responsible for determining in the first instance—statewide—whether restrictions are necessary. They are responsible for determining which uses are prioritized. 16 U.S.C. §§ 3113, 3114, 3115(d). They are responsible for identifying and evaluating different communities' subsistence needs and uses of particular wildlife populations. 16 U.S.C. §§ 3115(a)(3)(D)(i),(ii), 3115(d). And the Secretaries are responsible for implementing restrictions if necessary. 16 U.S.C. §§ 3114, 3115(d).

But perhaps the most critical shift is the issue of jurisdiction over navigable waters. That issue is not directly relevant to this appeal, but it illustrates the sizeable change from State to federal control under the State's interpretation of Title VIII and contextualizes the contingent amendments. When the Secretaries gained authority to implement Title VIII, they also gained authority over waters that constitute "public lands." Just what waters in Alaska are "public lands" and subject to federal control under ANILCA has led to much litigation. *See, e.g.*, *John v. United States (Katie John III)*, 720 F.3d 1214 (9th Cir. 2013) (considering for the third time the geographical scope of Title VIII as applied to navigable waters); *cf. Sturgeon v. Frost (Sturgeon II)*, 587 U.S. 28 (2019) (considering for the second time whether ANILCA gave the Park Service regulatory control over certain waterways as "public land").

When Congress forestalled the Secretaries' implementation of Title VIII, it was because this Court had just ruled that ANILCA's preference applied to "navigable waters in which the United States has reserved rights as identified by the Secretary of the Interior." Pub. L. 105-83, 111 Stat. 1543, 1592 (Nov. 14, 1997) (noting *Katie John* litigation and delaying funding for the federal government to assert jurisdiction over navigable waters); *see also* Kake Br. 7–8. The State is particularly sensitive to ceding any control over its fisheries to the

federal government because in territorial days, fish stocks plummeted under federal control. *See* Ernest Gruening, *The State of Alaska* 400–05 (1968).

Congress's contingent amendments were not concerned with how, specifically, the Secretaries would implement the preference. Rather, they were concerned that the Secretaries would have any regulatory control to implement the preference, especially any control as to fisheries and as to defining jurisdiction over navigable waters.

Congress knew that if the State did not act, the Secretaries would "manage fish and wildlife for subsistence uses on all public lands in Alaska" "*in accordance with title VIII.*" Kake Br. 23 (citing findings in 1997 amendment; italics added). But that just begs the question: what is in accordance with Title VIII?

This history shows that in delaying the implementation of the Secretaries' new regulations under Title VIII, Congress did not intend to ratify that slew of regulations. Kake Br. 20–29. That might have happened if, for instance, the Secretaries for decades concluded that § 3114 gave it the authority to open seasons the State closed and habitually acted on that authority, and Congress repeatedly modified § 3114 but did not override the agency's consistent interpretation of that specific provision. *See Douglas v. Xerox Business Servs., LLC*, 875 F.3d 884, 887–89 (9th Cir. 2017) (inferring congressional intended to maintain agency approach to calculating minimum wage when Congress repeatedly tinkered with the

statutory minimum-wage provision but never disturbed the clear, longstanding agency and judicial approach to calculating minimum wage). But that did not happen here. Nor did Congress pass positive legislation affirming the Secretaries' authority to open seasons. *Cf. Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 846 (1986) (inferring congressional intent when the agency said it could adjudicate counterclaims, and then Congress amended the law to expressly allow the agency to make rules about the nature and scope of counterclaims).

Congress certainly understood that federal regulations would go into effect if Alaska did not implement Title VIII, but the Court should not infer that Congress ratified each of those many regulations. Consider the following: when the Secretaries promulgated regulations in 1992, they specified the seasons and harvest limits for a long list of wildlife species on public lands. Sub. Mgmt. Regs. for Fed'l Pub. Lands in Alaska, Subpart D, 57 Fed. Reg. 22,530, 22,535–67 (May 28, 1992). If a regional council provided evidence that restrictions were crucial to the preservation of a species, would this Court hold that Congress ratified the prior regulation, preventing the Secretaries from adopting a restriction? The same logic applies equally to all the regulations at issue. Congress did not ratify any one particular regulation in this lengthy management scheme when it twice sought to delay implementation of the scheme as a whole.

II. The Federal Subsistence Board unlawfully delegated management of the hunt outside the federal agency.

This Court can get to the merits of the State's private nondelegation claim because the mandate did not preclude the district court from reaching it and the State has standing to challenge all aspects of the hunt that displaced state management and made data collection more challenging. On the merits, the Board's delegation of authority outside the federal agency was neither administrative nor ministerial, and was therefore prohibited because Congress did not expressly authorize it.

A. The district court did not violate the mandate by resolving an issue it previously ruled was moot.

When a case has been decided by an appellate court and remanded to the district court, "whatever was before this court, and disposed of by its decree, is considered as finally settled." *United States v. Thrasher*, 483 F.3d 977, 981 (9th Cir. 2007). The district court must execute this Court's decree "according to the mandate." *Id.* "But the district court may consider and decide any matters left open by the mandate." *Id.* (brackets omitted). To "ascertain what was intended by [the] mandate," the district court may consult the appellate court's opinion, what was heard and decided by the appellate court with respect to the applicable substantive law, the procedural posture, and the mandate itself. *United States v. Kellington*, 217 F.3d 1084, 1093 (9th Cir. 2000).

The district court correctly concluded that this Court's mandate left open the nondelegation issue. The mandate reversed the district court's dismissal and "remand[ed] that claim to the district court for further proceedings consistent with this [Court's] opinion." *Dep't of Fish & Game v. Fed'l Sub. Bd.*, 62 F.4th 1177, 1185 (9th Cir. 2023). This Court did not clearly say that "further proceedings" could adjudicate *only* whether the Secretaries may open emergency hunting seasons. True, this Court noted that Alaska had not raised the nondelegation issue in the first appeal, so that issue was forfeited (in that appeal). *Id.* at 1179 n.1. But that does not mean the issue was necessarily forfeited on remand.

The cases the United States cites to support its argument are inapposite. U.S. Br. 42–45. One decision discusses that when a mandate is clear that the remand is for a "single purpose" and no additional claims, then a district court may not adjudicate other claims. *Thrasher*, 483 F.3d at 983. Unlike that case, the mandate here is not so narrow. Another case stands for the proposition that an appellant may not raise in a second appeal an argument not raised in the district court, even if the appellant raised the argument in the first appeal. *United States v. Real Property Located at 25445 Via Dona Christa, Valencia, Cal.*, 170 F.3d 1161 (9th Cir. 1999). But the State did raise the nondelegation argument before the district court. Finally, the United States' citation to a district court case saying that issues waived on appeal cannot be revived is not an aspect of the mandate rule, but

the law-of-the-case doctrine. *Magnesystems, Inc. v. Nikken, Inc.*, 933 F. Supp. 944, 949–50 (C.D. Cal. 1996). That doctrine is not jurisdictional. The district court did not abuse its discretion in revisiting the nondelegation argument because this Court's intervening decision made it clear that the subordinate nondelegation issue is also excepted from mootness. 1-ER-19.

The district court complied with the mandate.

B. The State has standing to challenge the delegation of asserted federal authority outside the federal agency because it displaces state law and makes data collection more difficult.

The United States argues that the State does not have standing to challenge the delegation because it does not have a cognizable injury. U.S. Br. 46. But the State suffered two injuries.

First, the State has an interest in managing wildlife through its own "sovereign lawmaking powers." *Alfred L. Snapp & Son, Inc., v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). All parts of a preemptive federal hunt—from the decision to open a hunt in the first place to the decision of who gets to hunt—displace the State's lawmaking powers and therefore injure the State's sovereignty. *See Washington v. U.S. Food & Drug Admin.*, 108 F.4th 1163, 1176 (9th Cir. 2024) (noting that states have a sovereign interest in challenging a federal statute that preempts state law); *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236,

1242 (10th Cir. 2008) ("Federal regulatory action that preempts state law creates a sufficient injury-in-fact . . . .").

Second, the State's concern with both opening new hunting seasons and delegating decision-making outside the federal government is the effect on state management of game. The State uses hunting data to make informed management decisions to ensure the sustainability of harvests and populations. Alaska Op. Br 37 (citing 2-ER-47). When the State chooses the hunter (and therefore knows her identity), it can collect data from her—including the size of the animal, the antler structure, where the hunt occurred, and whether the hunter spotted other animals. 2-ER-47–48. Indeed, when the State permits community hunts under state law, it does just that. Alaska Admin. Code tit. 5, § 92.072(c)(1). The State requires that each hunter collect "biological samples or other information as required by the department for management." Alaska Admin. Code tit. 5, § 92.072(c)(1)(B). When the State does not control who gets to hunt, the State is deprived of the ability to gather the necessary data for management. *See, e.g.*, FER-5–6.

The United States argues that the State cannot enforce the interests of any potentially harmed rural subsistence users as *parens patriae* against the federal government, because the federal government has a *parens patriae* role over those same citizens. U.S. Br. 47–48. But as explained above, the State asserts independent injuries to its own interests. As to the *parens patriae* theory of harm,

this illustrates the problem with delegating federal authority outside the federal agency. Title VIII sets priorities first to rural subsistence users, and then if further restrictions are necessary, to a sub-group based on certain statutory criteria. 16 U.S.C. § 3114. While the record indicates that the Tribe intended to and did provide meat to anyone in need in the community regardless of tribal affiliation, 2-ER-58 and Kake SER-8, it also indicates that the Tribe intended to prioritize tribal elders and households of tribal members, Alaska Op. Br. 18. But tribal membership is not a statutory criterion for determining priority. 16 U.S.C. § 3114. And it is not clear whether anyone could sue the Tribe for exercising delegated authority in a way that violates ANILCA. This underscores one of the rationales behind the nondelegation doctrine. But, as described above, the State's injury is independent of its *parens patriae* role.

C. The delegation to the Tribe was neither ministerial nor advisory, and was therefore unconstitutional.

As an initial matter, the United States does not challenge the State's assertion that Congress did not expressly grant the Secretaries the authority to delegate implementation of Title VIII to a tribe. U.S. Br. 48–51.[4] The United States

[4] Nor does Kake argue this. The Tribe does, however, argue that delegation to a tribe need not be express. Kake Br. 30 (citing *S. Pac. Transp. Co. v. Watt*, 700 F.2d 550, 556 (9th Cir. 1983)). But as described in the State's opening brief, *South Pacific* does not *hold* that delegation to a tribe need not be express. Alaska Op. Br. 41–42. True, the case comments that a subdelegation not need "rest on express statutory authority," but the holding does not hinge on that comment. And

does not concede (but also does not provide argument to challenge) that the private nondelegation doctrine applies. U.S. Br. 48 n.5. Rather, the United States argues that the delegation was not material enough to trigger the private nondelegation doctrine. U.S. Br. 48–52.

While it is true that no unlawful delegation occurs when the non-federal entity carries out "ministerial" or "administrative" functions, deciding who gets to hunt and who gets the meat of that hunt are not ministerial or administrative. They are critical to determining who gets a priority, and involve the discretionary application of sub-priorities identified by Congress, discretion that Congress granted to the Secretaries. 16 U.S.C. § 3114. Congress instructed that sub-priorities be identified based on three criteria: "customary and direct dependence upon the population as the mainstay of livelihood," "local residency," and "the availability of alternative resources." § 3114. Establishing the order of priority for those who get to hunt and who get the spoils of the hunt is a discretionary decision Congress granted to the Secretaries, *id.*, and something the Board, by regulation, "establish[es]." 50 C.F.R. § 100.17.

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that comment cites to precedent about delegation to a federal employee, not delegation outside the federal government. Moreover, this Court more recently confirmed that delegation of federal authority to a tribe over non-tribal members within a reservation must be express. *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1216 (9th Cir. 2001). It follows that, assuming such delegation is authorized off reservation, it must also be express. And Title VIII's preference applies to tribal and non-tribal members alike.

The State agrees with the United States that *Perot* is instructive, but for a different reason. U.S. Br. 49–50. In *Perot*, the federal agency had final authority, so there was no nondelegation issue. *Perot v. Fed'l Election Com'n*, 97 F.3d 553 (D.C. Cir. 1996). *Perot* concerned the Federal Election Campaign Act, which prohibited corporations from making contributions in connection with federal elections. *Id.* The agency administering the Act issued a regulation clarifying that funding nonpartisan debates does not fall into the statutory prohibition, so long as pre-established objective criteria determined which candidates may participate in the debate. *Id.* at 556. Ross Perot, who was not invited to a particular debate, argued that the federal agency unconstitutionally delegated authority to the organization running that debate because that organization got to select the criteria. *Id.* at 559. Importantly, the organization running the debate had to get an advisory opinion from the agency, or risk the agency subsequently determining that its criteria were not objective (and therefore violative of the statutory prohibition). *Id.* at 560. There was no nondelegation problem because the federal agency still had the final say. That is distinguishable from the case here where the federal agency ceded its discretion to the Tribe without retaining any final oversight authority.

Finally, that the State provides community hunts under State law is irrelevant to whether the Board violated the federal nondelegation doctrine. Kake Br. 30–31. This case is not about the State's community hunts. And the federal

nondelegation doctrine applies to federal law. That said, there is a practical and important difference between the two hunts, as described above in this brief's section on standing. *See* supra II.B. Moreover, when the State administers its community hunts, it does not delegate to the community discretionary decisions. *See* Informal Alaska Att'y Gen. Op. No. 663-91-0309, l991 WL 542011 (Apr. 12, 1991) ("To grant to the [Tribe], or any other group or entity, the discretionary authority to allocate hunting resources by determining who is eligible to receive hunting permits under the . . . Potlatch regulation would be an improper delegation of the discretionary function accorded the Department of Fish and Game."). Rather, it provides individual harvest tickets with individual bag limits to individuals within the community. *See generally* Alaska Admin. Code tit. 5, § 92.072(c).

This Court should hold that the Board violated the nondelegation doctrine.

CONCLUSION

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

Dated: October 2, 2024.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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