No. 24-2251

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

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

v.

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

Appeal from the United States District Court for the District of Alaska
No. 1:22-cv-54 (Hon. Sharon L. Gleason)

ANSWERING BRIEF OF THE UNITED STATES

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GLOSSARY

ANILCA	Alaska National Interest Lands Conservation Act
ANCSA	Alaska Native Claims Settlement Act
SES	Senior Executive Service

INTRODUCTION

More than forty years ago, in the Alaska National Interest Lands Conservation Act ("ANILCA"), Congress set aside millions of acres of land and water in Alaska for federal conservation and the protection of subsistence uses. In Title VIII of ANILCA, Congress included a priority for the taking of fish and wildlife by rural Alaska residents for nonwasteful subsistence purposes. Although administration of this priority ordinarily would fall to the federal government, Congress afforded the state an opportunity to manage subsistence uses on federal lands by enacting state laws of general applicability consistent with Title VIII, subject to federal judicial supervision. Alaska adopted a program that the federal government certified as compliant in 1982, but in 1989, the state supreme court concluded that a rural priority violated the state constitution. The federal government therefore was required to implement the rural priority on public lands.

The Departments of the Interior and Agriculture established the Federal Subsistence Board to implement the Title VIII rural subsistence priority in 1990. Alaska quickly brought suit to challenge the Board's authority. Alaska argued that the Board lacks authority to regulate subsistence fishing on navigable waters in national wildlife refuges and other conservation units. In a series of decisions known as the *Katie John* trilogy, ranging from 1995 to 2013, this Court rejected those arguments and upheld the Board's authority. Notwithstanding the *Katie John*

trilogy, Alaska has in recent years issued its own orders that conflict with the Board's orders closing parts of the Kuskokwim River in the Yukon Delta National Wildlife Refuge to nonsubsistence fishing.

After efforts to resolve this dispute were unsuccessful, the United States brought this action to enjoin state interference with the federal subsistence priority, and the district court issued an injunction. Alaska has not disputed that its orders conflict with the Board's orders or that lawful Board orders would preempt conflicting state orders. Instead, Alaska once again challenges the Board's long-settled authority to regulate subsistence fishing on navigable waters under *Katie John*. For good measure, Alaska also now argues that the Board's structure has violated the Appointments Clause since the Board's inception.

The Court should reject Alaska's latest effort to accomplish through litigation what it failed to do through legislation. The *Katie John* trilogy remains binding precedent and confirms the Board's authority to regulate subsistence fishing on the Kuskokwim River within the Refuge. The Supreme Court's decision in *Sturgeon v. Frost* did not overrule *Katie John*, and Alaska is precluded from continuing to litigate the same challenge to the Board's authority. Alaska's newfound structural objection to the Board is equally unfounded. The Board is lawfully established, its members are properly appointed, and the Secretaries have final say on the Board's actions. The Court should affirm.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1345 because the United States is a plaintiff and its claim arises under federal law. The judgment was final because it disposed of all claims against all defendants. The judgment was entered on April 1, 2024, and Alaska filed its notice of appeal two days later. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether ANILCA authorizes the Federal Subsistence Board to regulate rural subsistence fishing on the portion of the Kuskokwim River within the Yukon Delta National Wildlife Refuge.

2. Whether the Federal Subsistence Board's structure complies with the Appointments Clause.

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are set forth in the Addendum following this brief.

STATEMENT OF THE CASE

A. Legal background

1. ANILCA and its predecessors

The United States acquired the 365 million acres of land that would become Alaska through an 1867 treaty with Russia. Treaty Concerning the Cession of the Russian Possessions in North America, Mar. 30, 1867, 15 Stat. 539. More than ninety years later, Congress admitted the state through the Alaska Statehood Act ("Statehood Act"), Pub. L. No. 85-508, 72 Stat. 339 (1958), which "permitted Alaska to select 103 million acres of 'vacant, unappropriated, and unreserved' federal land" as new state-owned land. *Sturgeon v. Frost*, 577 U.S. 424, 429 (2016) ("*Sturgeon I*") (quoting Statehood Act, § 6(a) and (b), 72 Stat. 340). Under the Statehood Act, Pub. L. No. 85-508, § 6(m), 72 Stat. 343, Alaska is covered by the Submerged Lands Act, Pub. L. No. 83-31, 67 Stat. 29 (1953), which generally grants states "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters," as well as "the right and power to manage, administer, lease, develop, and use the said lands and natural resources." 43 U.S.C. § 1311(a).

Alaska's attempts to select lands under the Statehood Act led to conflicts with Alaska Native groups. The treaty with Russia had not extinguished the land tenure of Alaska Natives, *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272

(1955), and the Statehood Act conveyance did not address aboriginal title. Some Alaska Native villages protested that lands selected by Alaska were not "vacant, unappropriated, and unreserved," *see* Robert T. Anderson, *The Katie John Litigation: A Continuing Search for Alaska Native Fishing Rights After ANCSA*, 51 Ariz. St. L.J. 845, 854-55 (2019), and Alaska Natives "asserted aboriginal title to much of the property the State was now taking." *Sturgeon v. Frost*, 587 U.S. 28, 35 (2019) ("*Sturgeon II*"). Congress intervened by enacting the Alaska Native Claims Settlement Act of 1971 ("ANCSA"), Pub. L. No. 92-903, 85 Stat. 688. ANCSA extinguished claims of aboriginal title, but "corporations organized by groups of Alaska Natives could select for themselves 40 million acres of federal land." *Sturgeon II*, 587 U.S. at 35.

ANCSA directed the Secretary of the Interior to withdraw up to 80 million additional acres that the Secretary deemed "suitable for addition to or creation as units of the National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems." 43 U.S.C. § 1616(d)(2)(A). ANCSA provided for those reservations to be approved by Congress within five years, *id.* § 1616(d)(2)(D), but Congress did not act. *Sturgeon II*, 587 U.S. at 35. President Carter thus invoked the Antiquities Act of 1906, Pub. L. No. 59-209, 34 Stat. 225, to "proclaim most of the lands (totaling 56 million acres) national monuments." *Sturgeon II*, 587 U.S. at 35. The

decision triggered an "uproar," and "Congress enacted a third major piece of legislation." *Id.* at 36.

Congress enacted ANILCA in 1980 to bring finality to the allocation of land in Alaska. Pub. L. No. 96-487, 94 Stat. 2371. Congress set aside approximately 105 million acres of additional "lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values." 16 U.S.C. § 3101(a). ANILCA placed those lands in "conservation system unit[s]," a term of art referring broadly to national parks, refuges, and other federal units. *Id.* § 3102(4). Congress made clear that the Secretary would be able to adopt rules for the conservation of "waters," "freeflowing rivers," and "fish" in these areas. *Id.* § 3101(a)-(c). Congress also aimed to "provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so," where "consistent with management of fish and wildlife" and other principles. *Id.* § 3101(c).

Title VIII of ANILCA addresses these rural subsistence uses. Pub. L. No. 96-487, §§ 801-16, 94 Stat. 2422-30. Title VIII's central objective is "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). To further that objective, Title VIII mandates that "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," *id.* § 3114. This provision is known as the rural subsistence priority. "Subsistence uses" means "the customary and traditional uses by rural Alaska residents of wild, renewable resources" for "direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation," the "making and selling of handicraft articles out of nonedible byproducts of fish and wildlife," for "barter, or sharing for personal or family consumption," and "for customary trade." *Id.* § 3113.

In recognition of Alaska's traditional authority over the fish and wildlife within its borders, Congress gave Alaska the option to enact its own laws, subject to federal judicial oversight, in place of a federal regulatory scheme. *See* 16 U.S.C. §§ 3115(d), 3117. To avoid federal regulation, Alaska needed to "enact[] and implement[] laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in" Title VIII. *Id.* Alaska also had to establish a "system of local advisory committees and regional advisory councils" and require the "State rulemaking authority" to consider the "recommendations of the regional councils concerning the taking of fish and wildlife populations on public lands within their respective regions for subsistence uses." *Id.* If Alaska did not implement a compliant program, Title VIII required the Secretary of the Interior and the Secretary of Agriculture to "step in and do the job." *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 316 (9th Cir. 1988).

2. Federal regulation of subsistence fishing

Alaska initially chose to implement its own subsistence program under Title VIII. *Kenaitze*, 860 F.2d at 314. By the time Congress completed ANILCA, Alaska already had "enacted the necessary statutes" conforming to ANILCA's general requirements. *Id.* In 1982, the Secretary of the Interior certified that Alaska's legislative program complied with ANILCA, and the state assumed responsibility for regulation of subsistence uses. *See id.* In 1985, however, the Alaska Supreme Court invalidated the state regulations governing eligibility for subsistence fishing. *Madison v. Alaska Dep't of Fish & Game*, 696 P.2d 168 (Alaska 1985). The Department of the Interior notified the state that it was out of compliance with ANILCA; Alaska enacted legislation consistent with ANILCA, and an assistant secretary at the Department of the Interior wrote a letter "purporting to certify that the state was once again in compliance." *Kenaitze*, 860 F.2d at 314.

The Alaska Supreme Court subsequently held that the newly-adopted state laws limiting eligibility for subsistence hunting to rural residents, as required, 16 U.S.C. § 3115(d), constituted "residential discrimination" in the use of renewable resources, in violation of the equal access provisions of the Alaska Constitution. *McDowell v. State*, 785 P.2d 1, 11 (Alaska 1989). The state supreme court stayed its decision to give the state legislature an opportunity to amend the constitution, but the legislature did not act. *See* 55 Fed. Reg. 27,114, 27,114 (June 29, 1990).

The Secretaries of the Interior and Agriculture thus assumed responsibility for Title VIII. The Secretaries issued temporary regulations in 1990, followed by final regulations in 1992. *Id.*; 57 Fed. Reg. 22,940 (May 29, 1992).

Through these rulemakings, the Secretaries established the Federal Subsistence Board to "administer[] the subsistence taking and uses of fish and wildlife on public lands." 50 C.F.R. § 100.10(a).[1] Under current regulations,[2] the Board is comprised of eleven voting members, including a chair and five members of the public appointed by the Secretary of the Interior with the concurrence of the Secretary of Agriculture, and five agency officials within the Departments of the Interior and Agriculture: the Alaska state or regional directors of the U.S. Fish and Wildlife Service, National Park Service, U.S. Forest Service, Bureau of Land Management, and Bureau of Indian Affairs. *Id.* § 100.10(b). The Secretaries have "the authority to remove public members from the Board" and "to replace agency personnel on the Board." 89 Fed. Reg. at 83,623. The Secretaries also have the authority to "stay, modify, or disapprove any action taken by the Board." 50 C.F.R. § 100.10(d)(11); *see also* 89 Fed. Reg. at 83,623.

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[1] This brief cites to the relevant Department of the Interior regulations located in 50 C.F.R. Part 100. The Department of Agriculture's parallel regulations are located in 36 C.F.R. Part 242.

[2] The Secretaries amended the regulations in October 2024. *See* 89 Fed. Reg. 83,622 (Oct. 17, 2024). Unless otherwise noted, this brief refers to the amended regulations, which take effect on November 18, 2024.

Subsistence hunting and fishing seasons on public lands are "closed unless opened by Federal regulation," 50 C.F.R. § 100.25(b), and the Board develops appropriate regulations addressing the subsistence uses of fish and game. *Id.* § 100.18. The Secretaries may "modify or disapprove" these actions "prior to publication in the Federal Register." *Id.* § 100.10(d)(12). Beyond general regulation of subsistence uses, the Board may approve "[e]mergency special actions" and [t]emporary special actions." *Id.* § 100.19(a)-(b). "In an emergency situation," the Board "may immediately open or close public lands for the taking of fish and wildlife for subsistence uses" if "necessary to ensure the continued viability of a fish or wildlife population, to continue subsistence uses . . . or for public safety reasons." *Id.* § 100.19(a). The Board must first consult with Alaska and with the appropriate regional advisory council, and the term of the emergency special action may not exceed 60 days. *Id.* § 100.19(a)(2).

Special actions "are not effective unless ratified by the Secretary of the Interior or the Secretary of Agriculture with respect to a unit of the National Forest System." 50 C.F.R. § 100.10(d)(12). "To allow an opportunity for the Secretaries to modify, disapprove, stay, or expressly ratify any emergency or temporary special action taken by the Board," the Board's actions generally do not "become effective until 10 calendar days after the date of the action." *Id.* If "no action is taken by the Secretary to modify, disapprove, stay or expressly ratify within 10

days," the "emergency or temporary special action will be deemed automatically ratified." *Id.* The Board may also specify a longer ratification period when taking action or a "shorter period" if the Board determines that a "situation calls for responsive action" on a shorter timeline. *Id.* In any case, the Secretaries "may revisit a prior ratification (express or automatic) of a Board action at any time." *Id.*

The regulations provide that Alaska may enact its own laws implementing ANILCA's rural subsistence priority and thereafter petition the Secretaries to repeal the federal subsistence management regulations. 50 C.F.R. § 100.14(d). But because Alaska has elected not to amend its constitution and enact compliant state legislation, the federal regulations remain in place.

3. The *Katie John* trilogy

The Board's regulation of subsistence uses under Title VIII was challenged before this Court in cases that resulted in the *Katie John* trilogy of decisions: *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995) ("*Katie John I*"); *John v. United States*, 247 F.3d 1032 (9th Cir. 2001) (en banc) (per curiam) ("*Katie John II*"); and *John v. United States*, 720 F.3d 1214 (9th Cir. 2013) ("*Katie John III*"). These challenges focused on the scope of the Board's authority to implement the rural subsistence priority on "public lands." 16 U.S.C. § 3114. Under ANILCA, the "term 'public lands' means land situated in Alaska which . . . are Federal lands." *Id.* § 3102(3). "The term 'Federal land,'" in turn, "means lands the title to which is

in the United States." *Id.*§ 3102(2). And the "term 'land' means lands, waters, and interests therein." *Id.* § 3102(1).

When the Secretaries published the temporary federal subsistence management regulations in 1990, the federal government initially construed "public lands" to exclude navigable waters. 55 Fed. Reg. at 27,155. The 1992 final regulations adopted essentially the same view, with a few express exceptions. 57 Fed. Reg. at 22,941 ("the regulatory language applies to all non-navigable waters located on all public lands and to navigable waters located on certain public lands"); *see also* 50 C.F.R. § 100.3(b) (1992) (application to "all public lands including all non-navigable waters located on these lands").

A group of Alaska Natives, including Katie John, challenged the regulations on the ground that "public lands" should include all waters in Alaska subject to the federal navigational servitude—in effect, all navigable waters in the state. *John v. United States*, No. 90-cv-484 (D. Alaska). Alaska filed its own suit arguing that ANILCA did not authorize federal management of the subsistence priority, *Alaska v. Lujan*, No. 92-cv-264 (D. Alaska), and intervened in the Alaska Natives' suit to assert that the regulations' interpretation of "public lands" was too broad. The district court consolidated the suits. At the outset, the United States defended the regulations excluding all navigable waters; later, the United States concluded that the regulatory interpretation was not correct and maintained that at least some

navigable waters—those that are subject to federal reserved water rights—are subject to federal subsistence management. *See Katie John I*, 72 F.3d at 701. The district court ruled that "public lands" included all navigable waters in Alaska, rejecting the government's original and revised interpretations. This Court granted interlocutory review.[3]

In *Katie John I*, this Court held that the narrower definition of "public lands" in the 1992 regulations was inconsistent with ANILCA but that the government's revised interpretation, which included certain waters where the United States holds reserved water rights, was reasonable. *Katie John I*, 72 F.3d at 704. The Court explained that there was "no doubt" that the priority was intended to be applied on *some* navigable waters but that ANILCA did not support the conclusion that "public lands" includes *all* navigable waters. *Id.* at 702. The Court remanded for further proceedings and declined to rehear the case en banc. The Supreme Court then denied Alaska's certiorari petition. *Alaska v. Babbitt*, 517 U.S. 1187 (1996) (mem.).

[3] The district court also rejected Alaska's claim that the regulations were unlawful because ANILCA did not authorize federal management of the subsistence priority. Alaska initially appealed that ruling, but ultimately stipulated to dismissal with prejudice, making the district court's ruling the last word on the matter as between Alaska and the United States. *Katie John I*, 72 F.3d at 700 n.2.

Following *Katie John I*, Congress temporarily paused implementation of the subsistence program on navigable waters through a series of appropriations acts.[4] Congress found that the Secretary of the Interior was "required" to manage the rural subsistence priority because Alaska "failed" to fix its laws, and that under *Katie John I*, this rural subsistence priority "applies to navigable waters in which the United States has reserved water rights." Pub. L. No. 105-83, § 316(b)(3)(B), 111 Stat. 50. Congress wanted Alaska to have another "opportunity to continue to manage" fish and wildlife resources "on all lands" and amended ANILCA to provide Alaska another chance. *Id.* But Alaska once again did not enact compliant legislation, and the amendments lapsed. Pub. L. No. 105-277, § 339(b)(2), 112 Stat. 2681-296; Pub. L. No. 105-83, § 316(b)(8), (d), 111 Stat. 52-53. Congress thus provided $11 million for post-*Katie John* federal implementation. Pub. L. No. 105-277, 112 Stat. 2681-251-52, 2681-271.

Meanwhile, the original suit remained pending on remand before the district court. During the pendency of this remand, the Secretaries published a proposed rule to revise the Title VIII regulations, 62 Fed. Reg. 66,216, 66,222-223 (Dec. 17,

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[4] Department of the Interior and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-134, Tit. I, sec. 1(d), § 336, 110 Stat. 1321-210; Department of the Interior and Related Agencies Appropriations Act, 1997, Pub. L. No. 104-208, Tit. I, sec. 101(d), § 317, 110 Stat. 3009-222; Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, § 316(a), 111 Stat. 1, 50; Department of the Interior and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, Div. A, sec. 101(e), § 339(a)(1), 112 Stat. 2681-295.

1997), and then adopted final regulations amending the definition of "public lands." 64 Fed. Reg. 1276 (Jan. 8, 1999). The 1999 revised regulations identified navigable waters that are "public lands" consistent with this Court's decision in *Katie John I*. *See id.* at 1287. The Secretaries first amended the regulatory definition of "public lands" to include navigable waters "where the Federal Government holds a reserved water right or holds title to the waters or submerged lands." *Id.* at 1279. The regulations then listed affected conservation system units and national forests in Alaska and provided that the regulations would apply on all public lands, including inland waters within and adjacent to the listed areas. *Id.* at 1286-87. After these regulations took effect, the district court entered a final judgment adopting this Court's decision in *Katie John I*.

Alaska appealed, leading to this Court's decision in *Katie John II*. The Court voted "to hear the appeal en banc rather than by a three-judge panel," and "determined that the judgment rendered by the prior panel, and adopted by the district court, should not be disturbed or altered by the en banc court." 247 F.3d at 1033. Three members of the Court would have adopted a broader reading of Title VIII as extending to *all* navigable waters. *Id.* at 1034 (Tallman, J., concurring in the judgment). Three other members of the Court would have held that Title VIII does not apply to *any* navigable waters. *See id.* at 1044 (Kozinski, J., dissenting).

But neither of these approaches garnered a majority. Thus, the Court reaffirmed *Katie John I* and the Secretaries' interpretation of "public lands."

In 2005, Alaska Native plaintiffs, including Katie John, filed a new suit challenging the 1999 regulations. *Katie John III*, 720 F.3d at 1223. Alaska also filed suit to challenge provisions of the 1999 regulations that identified particular bodies of water as subject to the Title VIII subsistence-use priority based on reserved water rights. *Id.* at 1223-24. The district court rejected both challenges; this Court affirmed in *Katie John III*. The Court explained that *Katie John I* was "controlling law" on the use of federal reserved water rights to identify navigable waters as public lands subject to Title VIII's rural subsistence priority. *Id.* at 1226. The Court had "the opportunity to revisit *Katie John I* in *Katie John II*" and left *Katie John I* undisturbed. *Id.* at 1226. The Court then rejected the challenges to the 1999 regulations, concluding that the Secretaries had "applied *Katie John I* and the federal reserved water rights doctrine in a principled manner." *Id.* at 1245.

Alaska did not seek rehearing en banc and petitioned the Supreme Court for a writ of certiorari. In its petition, Alaska asked the Supreme Court to review the underlying holding in *Katie John I* that Title VIII applies to navigable waters where the United States holds reserved water rights. *See* Petition, *Alaska v. Jewell*, No. 13-562, 2013 WL 5936539, at *25-33. The Supreme Court denied review. *Alaska v. Jewell*, 572 U.S. 1042 (2014).

B. Factual background

The Kuskokwim River runs more than 700 miles in southwest Alaska before entering the Bering Sea. 1-ER-6. About 180 miles of the river run through the Yukon Delta National Wildlife Refuge. *Id*. The river supports stocks of "several species of salmon, including Chinook and chum salmon." *Id.* The residents of villages along the Kuskokwim River and its tributaries are rural Alaskans who are "highly dependent on salmon as a source of food[,]" and "subsistence harvest of salmon is engrained with the culture and identity of these Kuskokwim area rural residents." 1-ER-6 (quoting 1-FedSER-103). In recent years, federal officials have grown concerned about the health of the Chinook and chum salmon populations. 1-FedSER-103.

Management of subsistence resources is a collaborative effort, and ahead of the 2021 fishing season, the federal refuge manager participated in a number of discussions with staff from the Alaska Department of Fish and Game and members of the Kuskokwim River Inter-Tribal Fish Commission, which is comprised of local residents with knowledge of salmon fisheries, among others. 1-FedSER-104. Along with members of the Commission, the refuge manager concluded that it was necessary to increase "escapement"—the number of fish that reach spawning grounds—through reduced harvests. 1-FedSER-102-04. The Board and agency officials subsequently determined that closing the 180-mile section of the

Kuskokwim River within the Refuge to non-subsistence uses "was necessary to conserve the fish population for continued subsistence uses of the Chinook salmon upon which rural residents of the area depend." 1-ER-11 (quoting 1-FedSER-169); *see also* 1-FedSER-104.

The Board and agency officials thus issued an emergency special action under Title VIII in May 2021 to close the section of the Kuskokwim River in the Refuge to non-subsistence uses beginning in June 2021. 1-ER-11. But consistent with Title VIII's rural subsistence priority, the emergency special action allowed "limited subsistence uses by local rural residents under narrowly prescribed terms and means of harvest." 1-ER-11 (1-FedSER-169). Shortly after the federal closure order, Alaska issued its own emergency closure orders. 1-ER-12. But unlike the federal order, Alaska allowed subsistence fishing "for *all* Alaskans"—without limitation to rural subsistence users—on the same dates. 1-ER-12. When federal officials opened additional dates for subsistence users, Alaska "followed suit for the same dates" but again authorized subsistence fishing for all Alaskans. 1-ER-13. Alaska also authorized subsistence fishing for all Alaskans on a date when federal officials had not authorized subsistence fishing. 1-ER-13. In short, Alaska issued orders that conflicted with the federal closures and frustrated implementation of the rural subsistence priority.

In May 2022, a similar pattern of conflicting orders emerged. The Board and agency officials issued another emergency special action implementing closures along the Kuskokwim River within the refuge, effective June 1, 2022. 1-ER-13-14. Consistent with Title VIII, this emergency action allowed limited subsistence fishing by qualified subsistence users on several dates. 1-ER-13-14. Soon after, Alaska issued its own emergency order closing parts of the Kuskokwim River, in line with the federal closure, but then once again authorized subsistence fishing by all Alaskans on three of the dates that the federal action had reserved for qualified subsistence users. 1-ER-14.

C. Proceedings below

The United States filed suit in May 2022, alleging that Alaska's orders conflicted with federal orders under Title VIII and were therefore preempted. 1-FedSER-185-90. The complaint sought an injunction barring Alaska from issuing orders that conflict with federal subsistence management under Title VIII to prevent further interference. 1-FedSER-189-90.

The United States sought a temporary restraining order and a preliminary injunction. Alaska did not contest that its orders conflicted with federal orders; instead, Alaska argued that the Board lacked authority to issue its orders because the river is not "public land" under ANILCA and because the Board's structure violates the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. The Court denied

the temporary restraining order but granted the preliminary injunction. *United States v. Alaska*, 608 F. Supp. 3d 802, 813 (D. Alaska 2022) ("*Kuskokwim II*"); *United States v. Alaska*, No. 22-cv-54, 2022 WL 1746844 at *7 (D. Alaska May 31, 2022) ("*Kuskokwim I*"). The preliminary injunction barred Alaska from implementing its orders and from "taking similar actions that authorize gillnet fishing by all Alaskans on the Kuskokwim River within the Yukon Delta National Wildlife Refuge when such action(s) would be contrary to federal orders issued pursuant to Title VIII of the ANILCA." *Kuskokwim II*, 608 F. Supp. 3d at 813.

During these proceedings, the Kuskokwim River Inter-Tribal Fish Commission, the Alaska Federation of Natives, the Association of Village Council Presidents, Ahtna Tene Nene, and Ahtna, Inc., among others, intervened in support of the United States' action against Alaska. The parties cross-moved for summary judgment. Once again, Alaska did not directly dispute a conflict between the federal and state orders, instead arguing only that the Board lacked authority to issue the federal orders under both ANILCA and the Appointments Clause.

The district court granted the United States' motion, denied Alaska's cross-motion, and entered an injunction. 1-ER-32. The court rejected Alaska's ANILCA argument, concluding that the court was "bound by the *Katie John* trilogy of cases to find that Title VIII's rural subsistence priority applies to 'navigable waters in which the United States has reserved water rights'" and that "the Secretaries

lawfully designated the Kuskokwim River in the Refuge as a navigable water subject to Title VIII of ANILCA." 1-ER-21 (quoting *Katie John III*, 720 F.3d at 1239, 1245). The court also concluded that the Secretaries lawfully established the Board and that its members were "properly appointed inferior officers" under the Appointments Clause. 1-ER-30.

After rejecting Alaska's arguments, the court observed that Alaska "failed to create a genuine dispute of material fact as to federal preemption." 1-ER-30. The court thus issued an injunction barring Alaska's from reinstating its 2021 and 2022 orders and "from taking similar actions interfering with or in contravention of federal orders addressing Title VIII of ANILCA and applicable regulations" on the Kuskokwim River within the Refuge. 1-ER-30-32. Alaska appealed.

SUMMARY OF ARGUMENT

1. A. Title VIII of ANILCA authorizes the Board to administer the rural subsistence priority on the portion of the Kuskokwim River within the Yukon Delta National Wildlife Refuge. Alaska argues that navigable waters like the Kuskokwim River are not "public lands" subject to Title VIII, but this Court rejected that argument in the *Katie John* trilogy. Alaska urges the Court to set aside the *Katie John* decisions as irreconcilable with the Supreme Court's 2019 decision in *Sturgeon v. Frost*, which interpreted the term "public lands" in Section 103(c) of ANILCA. But in *Sturgeon*, the Supreme Court declined to disturb the *Katie John*

decisions—at Alaska's own request, no less—which remain binding precedent. Alaska's efforts to enlist other recent Supreme Court decisions in its campaign against *Katie John* are equally meritless.

B. Res judicata bars Alaska from relitigating this issue. Alaska raised the same issues in the *Katie John* trilogy; this Court resolved Alaska's claims, and the Supreme Court denied review. Rules of preclusion prevent Alaska from continually challenging the Board's authority to administer Title VIII on navigable waters. The issue is settled as between the United States and Alaska.

C. Because *Katie John* controls and relitigation is barred, this Court need not revisit the question whether Title VIII authorizes the Board to implement the rural subsistence priority on navigable waters. But Alaska's arguments are also wrong. The United States holds reserved rights in navigable waters appurtenant to lands withdrawn from the public domain, including the Refuge, and those waters are therefore "public lands" for purposes of Title VIII. Even if reserved water rights do not establish "public lands" for other purposes, the specific context of Title VIII supports the application of the rural subsistence priority to navigable waters, where subsistence fishing traditionally occurs. Alaska's contrary reading cannot be squared with the purpose of Title VIII or Congress's ratification of the construction upheld in *Katie John*, including through the appropriation of funds to implement federal regulations codifying this interpretation.

2. The Federal Subsistence Board complies with the Appointments Clause.

A. The Board's members are properly appointed inferior officers. The Secretaries created the Board, and there are no statutory limitations on their oversight and review of the Board's actions. The Secretaries retain ultimate authority over the Board's decisions and its membership. The Court should reject Alaska's contention that the President must appoint members of a board that the Secretaries establish to exercise delegated authority.

B. There also is no defect in the Board's regulatory structure. The Secretaries properly exercised statutory authority from Congress to establish the Board through notice-and-comment rulemaking that Alaska previously challenged unsuccessfully. Alaska contends that Congress must expressly create the Board members' positions, but this Court and others have not taken that narrow view of the Appointments Clause. In any case, Alaska's argument is contingent on classifying Board members as principal officers, which they are not.

The judgment below should be affirmed.

STANDARD OF REVIEW

The Court reviews de novo a grant of summary judgment. *United States v. Washington*, 853 F.3d 946, 961-62 (9th Cir. 2017).

ARGUMENT

This Court should affirm the injunction barring Alaska from interfering with the Board's orders implementing the Title VIII rural subsistence priority on the Kuskokwim River within the Refuge. There is no dispute that the Board's lawful orders preempt conflicting state orders. U.S. Const. art. VI, cl. 2. Alaska contests only the Board's authority to issue those orders in the first instance. The Court should reject Alaska's perennial challenge to the Board's statutory authority and its newfound objection to the Board's structure.

I. Title VIII authorizes the Board to regulate subsistence fishing on the Kuskokwim River within the Refuge.

A. *Katie John* is controlling.

The *Katie John* trilogy forecloses Alaska's argument that the Board lacks authority under Title VIII of ANILCA to implement the rural subsistence priority for subsistence fishing on the Kuskokwim River within the Refuge. Alaska argues that navigable waters in which the United States holds reserved water rights are not "public lands" for purposes of the rural subsistence priority in Title VIII, 16 U.S.C. §§ 3102(3), 3114, but the *Katie John* trilogy holds otherwise. Where this Court already decided an issue, the matter is resolved. The "first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals," *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). There is no need to examine the Court's earlier reasoning: once an issue is

resolved in a precedential decision, "the matter is deemed resolved." *Id.* at 1171-72. *Katie John I* resolved the issue, *Katie John II* reaffirmed en banc, and *Katie John III* once again confirmed that *Katie John I* is controlling law.

Alaska does not dispute that this Court already rejected its challenge to the Board's authority to implement the rural subsistence priority on certain navigable waters; instead, Alaska contends that the Court should disregard binding precedent because of three intervening Supreme Court decisions. When "intervening Supreme Court authority is clearly irreconcilable with [the] prior circuit authority," the panel "should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). But "clearly irreconcilable" is "a high standard." *Rodriguez v. AT&T Mobility Servs. LLC*, 728 F.3d 975, 979 (9th Cir. 2013) (quoting *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012)). An intervening decision may be considered "clearly irreconcilable" only when a Supreme Court decision "undercut[s] the theory or reasoning underlying the prior circuit precedent." *Miller*, 335 F.3d at 900.

This inquiry requires the Court "to look at more than the surface conclusions of the competing authority." *Rodriguez*, 728 F.3d at 979. Although the decisions need not be "identical," *United States v. Lindsey*, 634 F.3d 541, 550 (9th Cir. 2011), it "is not enough for there to be some tension between the intervening

higher authority and prior circuit precedent, or for the intervening higher authority to cast doubt on the prior circuit precedent." *Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1073 (9th Cir. 2018) (internal quotation marks omitted). The Court "must examine the particular facts of each case." *United States v. Stephens Inst.*, 909 F.3d 1012, 1020 (9th Cir. 2018). "So long as the court can apply [its] prior circuit precedent without running afoul of the intervening authority, it must do so." *Close*, 894 F.3d at 1073 (internal quotation marks omitted). And the Court can easily apply its *Katie John* precedent without contravening any of the three decisions cited by Alaska.

2. Alaska principally relies on *Sturgeon v. Frost*, 587 U.S. 28 (2019) ("*Sturgeon II*"), where the Supreme Court addressed the meaning of "public lands" as that term is used in Section 103(c) of ANILCA, 16 U.S.C. § 3103(c). The plaintiff in the case, John Sturgeon, sought to use a hovercraft on the Nation River within a national preserve and challenged the National Park Service's authority to prohibit hovercrafts on rivers within a national preserve or park. *Id.* at 32. The question of the National Park Service's authority turned on Section 103(c), which provides that lands conveyed to Alaska are not "subject to the regulations applicable solely to public lands" even when located within national preserves. 16 U.S.C. § 3103(c). Sturgeon contended that the Nation River was not "public land" according to the definition of "public lands" found in ANILCA's general

definitional provisions, which also govern Title VIII. 16 U.S.C. § 3102(3). The federal government argued that the Nation River was "public land" because the United States held "title" to reserved water rights, and ANILCA defines "public lands" to include waters and "interests" to which the United States holds title. *Id.*

The Supreme Court held that the Nation River was not "public lands" for purposes of Sturgeon's challenge to the National Park Service's authority to apply its general regulations under Section 103(c). *Sturgeon II*, 587 U.S. at 44-45. But the resolution of this issue was narrow. Sturgeon had argued that the United States cannot hold "title" to an "interest" in reserved water rights for purposes of ANILCA's definitions, but the Supreme Court did not conclusively resolve that point, instead "assuming" the issue. *Id.* at 44. Rather, the Supreme Court concluded that "the 'public land' at issue would consist only of the Federal Government's specific 'interest' in the River—that is, its reserved water right." *Id.* Because a "reserved right, by its nature, is limited," that interest would not confer on the federal government "plenary authority" over the waterway, instead limiting the government's authority to the purpose of its reservation. *Id.* (citing *Cappaert v. United States*, 426 U.S. 128, 138 (1976)). And ultimately, the reserved right "could not justify applying the hovercraft rule" because use of a hovercraft would not implicate the government's interest in the water. *Id.* at 45-46.

The Supreme Court expressly declined to extend this ruling on "public lands" to Title VIII. *Sturgeon II*, 587 U.S. at 45 n.2. In the decision on review, this Court had held that *Katie John* resolved the meaning of "public lands" for purposes of ANILCA generally and thus controlled the question whether Section 103(c) prohibited application of the hovercraft regulation. *Id.* at 42; *see also Sturgeon v. Frost*, 872 F.3d 927, 936 (9th Cir. 2017). The Supreme Court rejected that conclusion, essentially holding that this Court's reasoning in the *Katie John* trilogy did not control the reading of Section 103(c). And in the course of explaining why the Nation River was not "public land" for purposes of Section 103(c), the Supreme Court expressly stated that its decision did not "disturb" this Court's holdings in the *Katie John* trilogy that the federal government "may regulate subsistence fishing on navigable waters" under Title VIII. *Sturgeon II*, 587 U.S. at 45 n.2. The Supreme Court observed that Title VIII was "not at issue" in *Sturgeon II* and cited Alaska's own amicus brief "arguing that [*Sturgeon II*] does not implicate those decisions." *Id.*

In these circumstances, the Supreme Court did not find it necessary to elaborate, but the Court's express renunciation of any intent to disturb (much less overrule) the *Katie John* trilogy in *Sturgeon II* requires the conclusion that these decisions remain binding in this Court—and a fortiori are not clearly irreconcilable. Of course, the Supreme Court did not resolve *how* the decisions can

be reconciled, but the Court's determination is predicated on the possibility that they *could* be. *Sturgeon II* thus did not disturb the prospect that the term "public lands" can have a different meaning, relevance, or application in Title VIII than in Section 103(c). No matter how strongly Alaska believes that *Sturgeon II* "cast[s] doubt" on *Katie John* or creates "tension," these decisions are not so "clearly" irreconcilable that a panel of this Court is no longer bound by controlling precedent. *Close*, 894 F.3d at 1073. Put simply, this Court can apply *Katie John* without "running afoul" of *Sturgeon II* because the Supreme Court said so, and this Court therefore must do so.

And for good reason. As Alaska explained in its *Sturgeon II* brief, "Title VIII stands apart from the rest of ANILCA with its own findings, its own statement of policy, and—unlike any other part of the legislation—specific invocations of congressional authority under the Commerce Clause, the Property Clause, and Congress's 'constitutional authority over Native affairs.'" Brief of Amicus Curiae State of Alaska at 30, *Sturgeon II*, 2018 WL 4063284 at *30 (quoting 16 U.S.C. § 3111(4)). For that reason, Alaska told the Supreme Court that it "need not and should not disturb the *Katie John* circuit precedents." *Id.* at *29 (cleaned up). Given this successful argument, Alaska's current position is inconsistent with principles of judicial estoppel. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). Alaska persuaded the Supreme Court to avoid the Title VIII issue in

Sturgeon II and now seeks to take advantage of that outcome by urging this Court to hold that *Sturgeon II* is binding as to Title VIII.

Alaska's rejoinder is that the United States also took a different position in *Sturgeon II*. But the United States' position in *Sturgeon II*—that "public lands" should be construed to encompass navigable waters, Brief for the Respondents, *Sturgeon II*, 2018 WL 4356629, at *48-49—is consistent with its position here. Although the United States advocated that this interpretation should govern throughout ANILCA, citing points specific to Title VIII as contextual support, the Supreme Court rejected that argument with respect to Section 103(c) only. Even if the Supreme Court foreclosed that reading of "public lands" as to Section 103(c), the United States is not foreclosed from maintaining that position with respect to other parts of ANILCA, particularly given the Supreme Court's express carve-out for Title VIII. And as explained below (at 36-44), the federal government correctly interprets the term "public lands" to encompass navigable waters for purposes of Title VIII—even if not for purposes of Section 103(c).

3. Alaska also contends that *Katie John* is no longer good law after *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), but the Supreme Court's decision in that case forecloses Alaska's argument. In *Loper Bright*, the Supreme Court overruled *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and held that courts "must exercise their independent judgment in

deciding whether an agency has acted within its statutory authority," without *Chevron*'s two-step framework. *Id.* at 2273. In *Katie John I*, this Court employed the *Chevron* framework when reviewing the 1992 rule and upheld the Secretaries' construction of "public lands"—to encompass some navigable waters where the United States hold reserved water rights—as reasonable. In *Katie John III*, the Court reaffirmed that "*Chevron* deference applies to questions of ANILCA's interpretation" and gave "some deference" under *Chevron* to the Secretaries' application of "a judicially created doctrine"—reserved water rights—"to implement ANILCA." 720 F.3d at 1228-29.

Loper Bright is not clearly irreconcilable with the *Katie John* trilogy because the Supreme Court explained how this Court can apply *Katie John* without running afoul of *Loper Bright*. In overruling *Chevron*, the Supreme Court did not "call into question prior cases that relied on the *Chevron* framework." 144 S. Ct. at 2273. The "holdings of those cases that specific agency actions are lawful . . . are still subject to statutory *stare decisis* despite [the Supreme Court's] change in interpretive methodology." *Id.* A "change[] in interpretive approach" does not "justify reexamination of well-established prior law" because "[p]rinciples of *stare decisis* . . . demand respect for precedent whether judicial methods of interpretation change or stay the same." *CBOCS West, Inc. v. Humphries*, 533 U.S. 442, 457 (2008).

Regardless whether Alaska believes *Katie John I* was wrongly decided or erred in its application of the *Chevron* framework, *Loper Bright* confirms that this Court's interpretation of ANILCA is entitled to statutory stare decisis. And *Loper Bright* provides even less reason to disturb *Katie John III*, where the Court applied only "some deference" to issues involving judicially created doctrines that "[t]he courts have a strong role in defining the contours of." *Katie John III*, 720 F.3d at 1229. The *Katie John* trilogy has been the law of the land for decades, and Alaska's pursuit of en banc and certiorari review were unsuccessful. The Supreme Court's recent change in interpretive methodology does not justify revisiting the longstanding *Katie John* holdings that these regulations are lawful. That is all the more so given Congress's specific provision allowing the regulations to go into effect, thereby ratifying them. *See infra* 43-44.

4. Lastly, Alaska points to the Supreme Court's decision in *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023). In *Sackett*, the Supreme Court reiterated a general principle that Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *Id.* at 679 (quoting *U.S. Forest Serv. v. Cowpasture River Preservation Ass'n*, 140 S. Ct. 1837, 1849-50 (2020)). Alaska contends that Congress did not enact sufficiently clear language authorizing the federal government to administer the rural subsistence priority on navigable waters within a national wildlife refuge.

Alaska Brief 35-36. Alaska's argument is wrong—among other things, Congress paused federal regulation to give Alaska the opportunity to implement the subsistence program on navigable waters after *Katie John I*, and Alaska defaulted to federal regulation. *Supra* 14. But *Sackett* also is not "intervening" authority on this general principle. *Sackett* relied on a pair of earlier decisions that in turn relied on authority dating to the 1980s. *See Cowpasture*, 590 U.S. at 621-22 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)); *Bond v. United States*, 572 U.S. 844, 858 (2014) (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985)). Alaska also made this same type of clear-statement argument in its *Katie John II* briefing. *See, e.g.*, En Banc Reply Brief of Alaska, *Katie John II*, 2000 WL 33981053 at *4-*17. This Court's binding precedent cannot be undone by citation to general principles that have been established for decades.

B. Relitigation of *Katie John* is barred.

Alaska's challenge to *Katie John* should be rejected for another reason: Alaska already has been heard on the issue and had its day in court. It is well established "that 'the determination of a question directly involved in one action is conclusive as to that question in a second suit.'" *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 147 (2015) (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 354 (1877)). Alaska challenged the Board's authority to implement Title VIII on navigable waters in *Katie John I*, and this Court upheld the Board's authority.

72 F.3d at 704. The Supreme Court then denied a writ of a certiorari. *Alaska v. Babbitt*, 517 U.S. 1187 (1996) (mem.). Alaska subsequently sought "two bites at the same apple" by appealing "precisely the same issue" the Court already "heard and determined," *Katie John II*, 247 F.3d at 1050-51 (opinion of Rymer, J.), and the en banc court again denied relief. Years later, Alaska once again raised the issue in its challenge to the Secretaries' 1999 regulations, which codified the governing interpretation from *Katie John I*, and this Court once again upheld the Board's authority. 720 F.3d at 1225. The Supreme Court once again denied review. *Alaska v. Jewell*, 572 U.S. 1042 (2014).

Now, a decade later, Alaska is seeking yet another bite at the same apple. But issue preclusion "bars the relitigation of issues actually adjudicated in previous litigation." *Snoqualmie Indian Tribe v. Washington*, 8 F.4th 853, 864 (9th Cir. 2021) (citation omitted). This Court recognizes "four conditions" for issue preclusion to apply: the issue at stake must be identical; the issue must have been actually litigated and decided; there must have been a full and fair opportunity to litigate the issue; and the issue must have been necessary to decide the merits. *Id.* at 864. Here, all these conditions are met. The *Katie John* trilogy addressed and decided Alaska's argument that Title VIII of ANILCA does not authorize the federal government to administer the subsistence priority on navigable waters. *See, e.g.*, *Katie John I*, 72 F.3d at 703-04. Alaska does not dispute that the *Katie John*

trilogy is on all fours. *See, e.g.*, Alaska Brief 27-28. And Alaska had a full and fair opportunity to litigate the issue—more than one full and fair opportunity, actually—and in each case, deciding the merits required upholding the Secretaries' authority to adopt the challenged rules.

Unlike circumstances where a change in the broader legal context might warrant revisiting a legal determination, the issue here is narrowly confined to a specific and recurring dispute between the United States and Alaska about authority to administer Title VIII on navigable waters in Alaska, a dispute that already has gone through Congress and the courts. *Cf. Montana v. United States*, 440 U.S. 147, 162 (1979); *Segal v. Am. Tel. & Tel. Co.*, 606 F.2d 842, 845 (9th Cir. 1979). Alaska's argument for revisiting *Katie John* yet again is not rooted in a new or different application of Title VIII; Alaska simply thinks *Katie John* is wrong and wants another shot at the 1999 rule addressing navigable waters. And although *Sturgeon II* addressed the meaning of "public lands" in Section 103(c), that decision does not constitute a change in the legal context that warrants a departure from ordinary principles of preclusion, contrary to the district court's conclusion. 1-ER-18. Not only does *Sturgeon II* disclaim any application to *Katie John*, the Supreme Court's actual holding—essentially, that a hovercraft regulation does not sufficiently implicate the United States' reserved water rights—does not affect the distinct application of Title VIII or otherwise undermine *Katie John*.

Alaska may not relitigate this question indefinitely. Rules of preclusion are "central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions." *Montana*, 440 U.S. at 153. At some point, Alaska must abide by the courts' resolution of this question, particularly where the state may pursue legislative recourse. 50 C.F.R. § 100.14(d)

C. Title VIII authorizes the Board's actions regardless.

Because *Katie John* controls and Alaska's relitigation of the issue is barred, this Court need not revisit the question whether Title VIII authorizes the Board to implement the rural subsistence priority on navigable waters. But even if the Court reaches the issue, the long-settled holdings of the *Katie John* trilogy are correct. Title VIII authorizes federal regulation on navigable waters like the portion of the Kuskokwim River located within the Refuge because the United States holds reserved water rights. The Board's actions are thus consistent with ANILCA and preempt Alaska's conflicting orders.

Title VIII authorizes the Board to implement the rural subsistence priority on "public lands" in Alaska, 16 U.S.C. § 3114, and "public lands" are defined to mean "lands, waters, and interests therein" to which the United States holds "title," *Id.* § 3102(1)-(3). Neither the United States nor Alaska holds "title" to navigable waters per se, *see generally Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.10 (1954), and Alaska holds title only to the submerged

lands beneath those waters. 43 U.S.C. § 1311(a). But navigable waters like the Kuskokwim River may nonetheless be subject to regulation as "public lands" under Title VIII where the United States holds title to an "interest" in the waters. *Cf. Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 549 n.15 (1987).

In the context of this dispute, the United States holds an interest in the Kuskokwim River through its reserved water rights. When the federal government establishes a reservation of land, the government implicitly reserves rights to appurtenant waters necessary to accomplish the purposes of the reservation of land. *Winters v. United States*, 207 U.S. 564, 576-77 (1908); *see also Arizona v. Navajo Nation*, 599 U.S. 555, 560 (2023); *Cappaert v. United States*, 426 U.S. 128, 138 (1976). These water rights are usufructuary in nature; that is, the property right "consists not so much of the fluid itself as the advantage of its use." *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340, 1353 (Fed. Cir. 2013); *see also Niagara Mohawk*, 347 U.S. at 246; *Crow Creek Sioux Tribe v. United States*, 900 F.3d 1350, 1357 (Fed. Cir. 2018). Consequently, where the United States reserves lands for purposes that require water—including, for example, preservation of fish or subsistence fishing—the United States' reserved water rights render those navigable waters "public lands" for purposes of Title VIII. *Cf. Gambell*, 480 U.S. at 548 n.15.

In ANILCA, Congress set aside millions of acres of land in part to "provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so," and to preserve opportunities for "fishing" on "freeflowing rivers," among other purposes, 16 U.S.C. § 3101(b)-(c), along with federal lands set aside under other federal statutes. Congress also expressly provided protections for subsistence fishing, *id.* §§ 3111, 3114, which "has traditionally taken place in navigable waters." *Katie John I*, 72 F.3d at 702. And here, the United States reserved lands in the Yukon Delta National Wildlife Refuge for purposes that include ensuring "water quality and necessary water quantity within the refuge" to "conserve fish and wildlife populations and habitats in their natural diversity," including "salmon." Pub. L. No. 96-487, § 303(7)(B)(i), (iv), 94 Stat. 2392-93.

Thus, because the United States reserved these lands for purposes that encompass the protection of subsistence fishing, the United States' reserved water rights establish that the section of the Kuskokwim River within the Refuge is "public lands" subject to the Board's administration of Title VIII, as this Court held in *Katie John I*, 72 F.3d at 703-04.

2. Alaska disputes that the United States' reserved water rights can render navigable waters "public lands" for purposes of Title VIII in the wake of *Sturgeon II*. *See, e.g.*, Alaska Brief 30-33. Although ANILCA's definition of "public lands" applies throughout the statute, *Sturgeon II*'s construction of that term for purposes

of Section 103(c) does not resolve the best interpretation of Title VIII. Of course, statutory terms usually carry the same meaning across a statute. *Utility Air Reg. Grp. v. EPA*, 573 U.S. 302, 319 (2014). But sometimes a "given term in the same statute may take on distinct characters from association with distinct statutory objects." *Env't Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007); *see also, e.g.*, *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 984 n.9 (9th Cir. 2016). This principle holds true "even when the terms share a common statutory definition, if it is general enough." *Duke Energy*, 549 U.S. at 574. When a term "standing alone is necessarily ambiguous," then "each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997).

The term "public lands" in Title VIII has different application and significance from that term's use in Section 103(c) because of the unique features of Title VIII. Although both Section 103(c) and Title VIII are subject to the same definition of "public lands"—"waters" in which the United States holds "title" to "interests," 16 U.S.C. § 3102(1)-(3)—the United States' "interests" in navigable waters, and what it means to hold "title" to those interests, are informed by the particular context of Title VIII, which the Supreme Court declined to address.

Sturgeon II, 587 U.S. at 45 n.2.[5] Congress took a distinct approach to Title VIII, enacting specific findings and policies that do not apply directly to other parts of ANILCA. 16 U.S.C. §§ 3111-12. And unlike in other parts of ANILCA, Congress also specifically "invoke[d] its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause" to protect subsistence uses on "public lands." *Id.* § 3111(4).

In Title VIII, Congress declared that "the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands" is "*essential* to Native physical, economic, traditional, and cultural existence" and "to non-Native physical economic, traditional, and social existence." 16 U.S.C. § 3111(1) (emphasis added). That includes obtaining "food supplies and other items gathered from fish," which Congress concluded were "threatened" by "pressure on subsistence resources" from the "taking of fish." *Id.* § 3111(2)-(3). Congress accordingly provided for the protection of subsistence fishing throughout Title VIII, including by enacting the priority for nonwasteful subsistence uses "of *fish* and wildlife." *Id.* § 3114 (emphasis added); *see also, e.g.*, *id.* §§ 3111(5), 3112(1)-(2). Because subsistence

[5] Although *Sturgeon II* found "no evidence" that "title" could refer to something broader than traditional fee ownership (and some possessory interests) in the context of Section 103(c), the Court left that question open, and the context of Title VIII is different.

fishing "has traditionally taken place in navigable waters," *Katie John I*, 72 F.3d at 702, Congress's manifest desire to protect subsistence fishing supports the conclusion that "public lands," as used in Title VIII, is best read to include navigable waters in which the United States holds reserved water rights.

In urging this Court to hold that Congress prohibited implementation of the rural subsistence priority on all navigable waters as part of its effort to protect subsistence fishing, Alaska asks the Court to adopt a nonsensical reading. As Judge Tallman explained in *Katie John II*, "[g]iven the crucial role that navigable waters play in traditional subsistence fishing, it defies common sense to conclude that when Congress indicated an intent to protect traditional subsistence fishing, it meant only the limited subsistence fishing that occurs in non-navigable waters." 247 F.3d at 1036 (Tallman, J., concurring in the judgment). The circumstances of Title VIII thus differ vastly from Section 103(c), which provided an "Alaska-specific" *exception* to otherwise generally applicable regulations. *See Sturgeon II*, 587 U.S. at 32, 46 ("If Sturgeon lived in any other State, his suit would not have a prayer of success."). In contrast, Congress sought in Title VIII to enact broad, Alaska-specific *protections* for subsistence uses rooted in "customary and traditional uses by rural Alaska residents" of fish and wildlife resources, like subsistence fishing in navigable waters. 16 U.S.C. § 3113. And Congress has broad

authority to effectuate that purpose through the constitutional provisions Congress cited specifically in support of Title VIII. *Id.* § 3111(4).[6]

3. In addition to the unique context of Title VIII, the Board's authority to implement the subsistence priority on navigable waters draws support from Title III of ANILCA, which addresses national wildlife refuges in Alaska. Section 303(7) of Title III governs the Yukon Delta National Wildlife Refuge and provides that the Refuge "shall" be managed to provide "the opportunity for continued subsistence uses by local residents." Pub. L. No. 96-487, § 303(b)(7)(iii), 94 Stat. 2393. This independent statutory direction is not limited by the definition of "public lands" and complements Section 303(7)'s parallel instructions to conserve fish, including salmon, and ensure the water quality and quantity necessary for that purpose. *Id.* And Title VIII defines "subsistence uses" (for all of ANILCA, including Title III) to encompass "the customary and traditional uses by rural Alaska residents" of fish and wildlife resources. 16 U.S.C. § 3113. Congress plainly envisioned that conservation system units like the refuge would be managed to provide for subsistence fishing, including salmon fishing, in navigable waters and did not enact Alaska's narrow construction. This refuge-specific

[6] If the Court reaches the merits of the Title VIII issue and considers any alternative arguments for sustaining the Board's authority over navigable waters—like those presented in the *Katie John* trilogy—the United States would welcome an opportunity to provide its position on those issues.

authority bolsters the Board's administration of the subsistence priority on navigable waters in refuges and further provides an independent refuge-specific basis on which the Court could more narrowly affirm.

4. Lastly, Congress has ratified or acquiesced in the Board's administration of the subsistence priority on navigable waters under Title VIII. As explained (at pp. 7, 14), Congress provided Alaska with the opportunity to administer Title VIII, but Alaska defaulted to federal regulation. The Secretaries assumed responsibility for Title VIII in 1990 and adopted the regulations this Court upheld in *Katie John I*. Congress responded to *Katie John I* by pausing federal regulation and permitting Alaska another opportunity to enact laws compliant with Title VIII. But Congress also provided that the Secretaries' regulations—which applied Title VIII to navigable waters—would take effect if Alaska failed to do so. Pub. L. No. 105-277, § 339(b)(2), 112 Stat. 2681-296. And the legislation makes clear that Congress acted with the understanding that the Title VIII regulations "applie[d] to navigable waters in which the United States has reserved water rights as identified by the Secretary of the Interior," referencing this Court's decision in *Katie John I* by name. Pub. L. No. 105-83, § 316(b)(3)(B), 111 Stat. 50-51.

After Alaska failed to enact its own Title VIII program, Congress let the moratorium expire and permitted the Secretaries to implement Title VIII on navigable waters. Pub. L. No. 105-277, § 339(b)(2), 112 Stat. 2681-296. And

Congress provided $11 million to implement the Secretaries' regulations. Pub. L. No. 105-277, 112 Stat. 2681-251-52, 2681-271. Thus, the legislative record makes clear that Congress examined *Katie John I*, the Secretaries' regulations, and the question whether Title VIII applied to navigable waters before making a considered decision for those regulations take effect. These appropriations statutes support the conclusion that the Secretaries' regulations were "implementing congressional policy rather than embarking on a frolic of [their] own." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375 (1969).

* * *

The application of Title VIII to navigable waters in which the United States holds reserved water rights has been the status quo for decades. Alaska's challenges to the Board's authority were heard and resolved. Congress afforded Alaska multiple opportunities to administer Title VIII, and when Alaska failed to do so, let the federal regulations take effect. The matter is settled.

II. The Board's structure complies with the Appointments Clause.

Alaska contends more broadly that the Board's orders are unlawful because the Board's structure violates the Appointments Clause. Alaska Brief 40-53. The Appointments Clause, U.S. Const. art. II, § 2, cl. 2, "specifies the exclusive ways of appointing 'Officers of the United States.'" *Cody v. Kijakazi*, 48 F.4th 956, 960 (9th Cir. 2022). The most salient requirement is that "principal" officers must be

appointed by the President and confirmed by the Senate. *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. 237, 244 n.3 (2018). This procedure is the "default manner of appointment," *Edmond v. United States*, 520 U.S. 651, 660 (1997), but "inferior" officers may be appointed by "the Heads of Departments" where authorized by law. *Lucia*, 585 U.S. at 244 n.3 (2018); *Silver v. U.S. Postal Serv.*, 951 F.2d 1033, 1036-37 (9th Cir. 1991). Alaska contends that the Board's members are improperly appointed principal officers and that the Board's structure is unconstitutional. But the Board's members are, at most, properly appointed inferior officers, and Congress conferred statutory authority on the Secretaries to establish the Board to implement Title VIII in the absence of a compliant state program.

A. Claim preclusion applies because Alaska could have raised this claim decades ago.

Alaska could have raised this Appointments Clause challenge to the Board's authority in the *Katie John* litigation, where Alaska claimed that Title VIII did not "authorize[] the federal government to manage subsistence fishing and hunting on public lands." *Katie John I*, 72 F.3d at 700 n.2. But Alaska raised no such challenge and, in fact, stipulated to the dismissal of its challenge to the Board's general authority. *Id.* Alaska now challenges the same Board authority at issue in the *Katie John* trilogy, and "claim preclusion prevents parties from raising issues that could have been raised and decided in a prior action." *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp.*, 590 U.S. 405, 412 (2020). Alaska cannot

escape preclusion simply because a formerly available claim has now become a defense. *Id.* at 412-13.

B. The Board's members are properly appointed.

Members of the Board are not principal officers for purposes of the Appointments Clause. To qualify as an officer, a person must "occupy a 'continuing' position established by law" and exercise "significant authority pursuant to the laws of the United States." *Lucia*, 585 U.S. at 245 (cleaned up). If a person is an "officer," the determination whether that person is a principal or inferior officer "'depends on whether he has a superior' other than the President." *United States v. Arthrex, Inc.*, 594 U.S. 1, 13 (2021) (quoting *Edmond*, 520 U.S. at 662). "An inferior officer must be 'directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.'" *Id.* (quoting *Edmond*, 520 U.S. at 663). Assuming Board members are "officers," they are not principal officers.[7]

The Board is comprised of eleven voting members. Five of these members are the Alaska state or regional directors of the U.S. Fish and Wildlife Service, National Park Service, U.S. Forest Service, Bureau of Land Management, and Bureau of Indian Affairs. 50 C.F.R. § 100.10(b)(1). The six remaining members

[7] Alaska does not contend that the Board members are improperly appointed if they are inferior officers; the state's challenge is limited to the assertion that Board members are principal officers. *See* 1-ER-30.

are a chair and five members of the public appointed by the Secretary of the Interior with the concurrence of the Secretary of Agriculture. *Id.* A quorum of the Board consists of six members when there are ten or more Board members, and no action may be taken "unless a majority of voting members are in agreement." *Id.* § 100.10(d)(2)-(3). Through the Board, the Departments of the Interior and Agriculture perform specifically prescribed duties under Title VIII of ANILCA, confined to administering subsistence harvest of fish and wildlife on public lands in Alaska. *Id.* § 100.10(d)(4); *see also id.* §§ 100.15-.19.

The Secretaries oversee the Board and exercise administrative oversight. The Board was established by the Secretaries to assist with the implementation of their responsibilities to administer subsistence uses on public lands, 50 C.F.R. § 100.10(a), and Board members enjoy no statutory independence from the Secretaries. Any regulation of broad application is issued by the Secretaries, 50 C.F.R. § 100.18(b), and the Board's management rules operate within a narrow sphere, addressing issues like hunting and fishing seasons and harvest limits. *Id.* § 100.18(a); *see, e.g.*, 89 Fed. Reg. 14,746 (Feb. 29, 2024). The Secretaries may "modify or disapprove" Board rules, and special actions are subject to secretarial ratification, 50 C.F.R. § 100.10(d)(12), meaning that responsibility for the Board's actions ultimately lies with the Secretaries. And as the Departments of the Interior and Agriculture recently affirmed, the Secretaries may "remove public members

from the Board" and "replace agency personnel on the Board." 89 Fed. Reg. at 83,623.

Thus, Board members are subordinate to the Secretaries, who retain complete authority over the Board's implementation of delegated authority. The Secretaries exercise the requisite direction and supervision, unencumbered by any statutory limitation, through their authority to appoint and remove of members, modify or disapprove actions, and—more fundamentally—modify or rescind the delegation in its entirety.

2. Alaska's contrary arguments lack merit.

a. Alaska contends that the Secretaries do not exercise sufficient oversight to render the Board's members inferior officers. Alaska Brief 50-51. But Alaska misunderstands the Secretaries' relationship to the Board. The Secretaries established the Board; it has no authority beyond what the Secretaries delegate. Although the Secretaries delegated administration of the Title VIII rural subsistence priority, 50 C.F.R. § 100.10(a), the Secretaries have always made clear—from 1992 to 2024—that they retain final authority over the regulation of subsistence uses. *Compare* 57 Fed. Reg. at 22,947 ("the Secretaries remain responsible, as statutorily charged, for the proper administration of the program"), *with* 89 Fed. Reg. at 83,623. Unlike cases where statutory restrictions limit a

presidential appointee's supervision of a subordinate, there are no limitations on the Secretaries' authority over the Board.

The Board exercises that authority to oversee the Board by "prescribing rules of procedure and formulating policies." *Arthrex*, 594 U.S. at 13-14. The Secretaries prescribe the rules governing the Board's overall structure and set general policy related to the various determinations delegated to the Board. 50 C.F.R. §§ 100.10-100.20. For example, the Secretaries adopted a list of factors to guide the Board in "determin[ing] which fish stocks and wildlife populations have been customarily and traditionally used for subsistence." *Id.* § 100.16(a). The Board's delegated authority, in contrast, is in implementing that policy. *Compare* 50 C.F.R. § 100.18(a), *with id.* § 100.18(b). The Secretaries may modify the Board's delegated responsibilities at their discretion. *See, e.g.* 89 Fed. Reg. at 83,622-28 (amending Board regulations). Because the Secretaries may exercise oversight by rescinding these rules "at any time" and "abolishing" the Board, the Board is necessarily "inferior" to the Secretaries. *In re Grand Jury Investigation*, 916 F.3d 1047, 1052 (D.C. Cir. 2019) (quoting *In re Sealed Case*, 829 F.2d 50, 56 (D.C. Cir. 1987)).

And although the Secretaries have charged the Board with implementing the rural subsistence priority in the first instance, the Secretaries ensure that the Board's actions conform to the Secretaries' policymaking choices. The Secretaries

may "modify, disapprove, or stay any action taken by the Board." 89 Fed. Reg. at 83,623. The Board's rules are subject to secretarial modification or disapproval before publication, and the Board's special actions—the subject of this dispute, and the basis for the district court's injunction—are subject to a ratification period during which the Secretaries may "modify, disapprove, stay, or expressly ratify" the action. 50 C.F.R. § 100.10(d)(12). The Board's actions are entirely within the Secretaries' control both in practice and as a formal matter.

Even before the Secretaries reaffirmed their existing authority in their October 2024 rule, the Secretaries exercised their authority to ensure that the Board's actions conformed to the Secretaries' policymaking decisions. In 2020, for example, the Secretary of the Interior directed the Board to "pause or defer all Board actions regarding further openings or closures under the emergency and temporary special action processes, including any actions proposed to be taken pursuant to delegated authority from the Board." 1-FedSER-12-13. Alaska's argument suggests that Board members are necessarily principal officers unless the Secretaries regularly overrule Board decisions, but the Board's faithful implementation of the Secretaries' policies—informed, as the Secretaries intended, by its knowledge of the affected communities—does not render their appointments suspect. There is nothing unusual or surprising about a board comprised of the

Secretaries' appointees, including five members from within their agencies, acting consistently with Secretaries' policy choices.

b. Alaska next contends that the Board has the power to render final decisions without further review by a superior officer. Alaska Brief 51-52 (citing *Arthrex*, 594 U.S. at 14, 23). But Alaska's argument is once again rooted in a misunderstanding of the Secretaries' authority. Decisions about implementation of Title VIII "are, by statute, the [Secretaries'] to make" and are made by the Board only "as a matter of delegated authority." *In re Palo Alto Networks, Inc.*, 44 F.4th 1369, 1375 (Fed. Cir. 2022). There is no "structural impediment" to the Secretaries' "authority to review" the Board's decisions. *Id.* The Secretaries may, at their "election," "step in" to stay, modify, or disapprove any Board action. *Fleming v. U.S. Dep't of Agric.*, 987 F.3d 1093, 1103 (D.C. Cir. 2021).

Alaska protests that the "lines of accountability" are not sufficiently clear, Alaska Brief 52 (citing *Arthrex*, 594 U.S. at 16), but any confusion is Alaska's own creation. The Secretaries have consistently maintained ultimate decisionmaking authority over a Board that they created, regardless whether their own regulations outline an express mechanism for review and approval of Board actions. The district court found that the record substantiates the Secretaries' review of Board actions, 1-ER-29 (citing 1-FedSER-13), which Alaska derides as purportedly impermissible "behind-the-scenes oversight," relying on a passage from the

Supreme Court's decision in *Arthrex*. Alaska Brief 51-52. But in that passage of *Arthrex*, the Supreme Court was rejecting an argument that a principal officer could exercise the requisite oversight of a decision through indirect influence, notwithstanding "a statutory prohibition on review." 594 U.S. at 16. The circumstances are not comparable; there is no prohibition on the Secretaries' review, which is direct and evident in the record.

Alaska also objects to three regulations that supposedly limit the Secretaries' authority: 50 C.F.R. §§ 100.13(a)(2), 100.19(e), and 100.20. Even if these regulations could be construed to impose a constraint on the Secretaries' power, that limitation would be illusory—the Secretaries could simply repeal them. *See, e.g.*, *Rodriguez v. Soc. Sec. Admin*, No. 22-13602, 2024 WL 4352403, at *7 (11th Cir. Oct. 1, 2024) ("agency regulations are not the same as statutes, and delegated administrative authority is not the same as statutory restriction"). And the appropriate remedy for any violation would be limited to, at most, nullifying these specific regulations or permitting the Secretaries an opportunity to amend them. *Infra* 59-60. But in any case, these rules do not, in fact, confer "unreviewable authority" on the Board. Alaska Brief 51 (quoting *Arthrex*, 594 U.S. at 23).

First, in Section 100.13(a)(2), the Secretaries delegated "final administrative authority" to the Board to make certain determinations "relating to the subsistence taking of fish and wildlife on public lands." This delegation is limited to "subparts

C and D regulations" which are fact-bound applications of the general policy set by the Secretaries through the regulations codified in subparts A and B. *See* 50 C.F.R. Part 100. The Secretaries adopted this rule to "simplify and localize the process" but made clear that "[t]his delegation does not constitute a delegation of the Secretaries' final authority over these, or other subparts, of this rule." 57 Fed. Reg. at 22,946-47. Next, Section 100.19(e) provides that the "decision of the Board on any proposed special action will constitute its final administrative action." This provision does not purport to limit the Secretaries' review; the regulation states only that the Board's decision is final as to the Board. Lastly, Section 100.20 addresses requests to the Board for reconsideration of its own decisions. This provision similarly describes a procedure internal to the Board and does not purport to limit the Secretaries' oversight.

c. Lastly, Alaska contends that for-cause removal protections for Board members violate the Appointments Clause. Alaska Brief 52-53. The public members of the Board are not subject to for-cause removal protections; these members serve "at the will of the Secretaries" and may be removed at any time. 50 C.F.R. § 100.10(b)(2); *see, e.g.*, 1-FedSER-38-39. Thus, Alaska's objection is only to the five Alaska directors of federal agencies who serve as members of the Board ex officio and occupy positions in the federal government's Senior Executive Service (SES). *See generally Esparraguera v. Dep't of Army*, 981 F.3d 1328,

1330-31 (Fed. Cir. 2020) (discussing SES). Although these five members are subject to the normal rules governing federal employees, the Secretaries "maintain their authorities" to replace these members. 50 C.F.R. § 100.10(b)(2).

Alaska appears to acknowledge that, in their capacity as agency officials, these five Board members are at most properly appointed inferior officers who are supervised by principal officers. Alaska Brief 52-53. As the district court observed, these officials are all subordinate to officers appointed by the President. 1-ER-29; *see also, e.g.*, 2-ER-197, 2-ER-203, 2-ER-208 (illustrating appointments by principal officers). Alaska's argument that removal restrictions for these five officials violate the Appointments Clause rests on the faulty premise that the Secretaries do not adequately supervise them *only* in their capacity as Board members—despite exercising adequate supervision otherwise—rendering these members principal officers for this limited purpose. But as explained, Board members are at most inferior officers because the Secretaries exercise oversight over the Board and authority over its decisions. And regardless, these five Board members are subject to the direction of the Secretaries, just as any employee in their Departments would be.

In any case, the Secretaries can "meaningfully contro[l]" the five ex officio members in their capacity as Board members. *Seila Law v. CFPB*, 591 U.S. 197, 224-25 (2020). Although members of the SES are subject to removal for cause, 5

U.S.C. § 7543(a), an SES member also may be removed from a particular position through reassignment or transfer, *id.* § 3395; 5 C.F.R. § 317.901, or for unsuccessful performance, 5 U.S.C. § 3592. The Secretaries may thus "replace[]" these Board members. 50 C.F.R. § 100.10(b)(2). Consequently, even in their capacity as Board members, these five officials are "subject to removal by a higher officer." *Edmond*, 520 U.S. at 661. To the extent Alaska's challenge to the scope of these removal restrictions sounds in other parts of Article II rather than the Appointments Clause, Alaska has forfeited that argument, which would in any case fail. *See, e.g.*, *Rodriguez*, 2024 WL 4352403, at *8; *Duenas v. Garland*, 78 F.4th 1069, 1073-74 (9th Cir. 2023).

C. The Secretaries are vested with the authority to establish the Board members' positions.

Alaska further contends that the Board is unlawful even if its members are inferior officers because their positions on the Board were not "established by Law." Alaska Brief 43-48 (quoting U.S. Const. art. II, § 2, cl. 2). This argument rests on a mistaken premise and fails on its own terms.

1. The Secretaries exercised their authority under ANILCA to establish the Board by rule. 57 Fed. Reg. at 22,953-54; 55 Fed. Reg. at 27,123. Because the rule was "issued through the notice-and-comment process," the resulting regulations are "'legislative rules' [that] have the 'force and effect of law.'" *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (*Chrysler Corp. v. Brown*, 441 U.S. 281,

203-03 (1979)); *see also, e.g.*, *Hemp Indus. Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1087 (9th Cir. 2003). Accordingly, these rules are found in the Code of Federal Regulations. 50 C.F.R. Part 100. Congress let the rules establishing the Board take effect. *See, e.g.*, Pub. L. No. 105-277, § 339(a)-(b), 112 Stat. 2681-296.

2. Notwithstanding the Secretaries' exercise of statutory authority to establish the Board, Alaska contends that the Secretary does not have authority to establish the Board members' positions. Alaska Brief 44. Even if legislative rules are law, Alaska asserts, Congress must expressly create the Board's structure. Notably, Alaska's argument rests primarily on law reviews, not law; Alaska's brief is a survey of scholarship, accompanied by concurring opinions and a district court decision now on appeal.[8] Alaska Brief 43-49. But Alaska's argument is not rooted in the text of the Appointments Clause itself, which provides that Congress "may by Law *vest*" the appointment of inferior officers in the heads of Departments. U.S. Const. art. II, § 2, cl. 2 (emphasis added).

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[8] *United States v. Trump*, No. 23-cr-80101, 2024 WL 3404555, at *7 (S.D. Fla. July 15, 2024), *appeal docketed*, No. 24-12311 (11th Cir. July 18, 2024). Alaska suggests that the government agreed with its view in that case. Alaska Brief 44. That is not correct. The cited pleading describes statutory authority for an appointment and does not take Alaska's position. *See* Motion to Dismiss at 3-4, ECF No. 374, *id.* (Mar. 7, 2024).

Consistent with this procedure, Congress vested authority in the Secretaries by statute, and the Secretaries exercised that authority to establish the Board members' positions. The Reorganization Act of 1949 provides the Secretaries with general authority to establish offices and appoint officers. Pub. L. No. 81-109, §§ 3, 6(a), 63 Stat. 203, 203-205. Under section 2 of Reorganization Plan No. 3 of 1950, 64 Stat. 1262, the "Secretary of the Interior may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of the Interior of any function of the Secretary." Section 4(a) of Reorganization Plan No. 2 of 1953, 67 Stat. 633, conferred the same authority on the Secretary of Agriculture.

Courts have concluded that materially identical language in other reorganization plans confers authority to create offices and constitutionally appoint officers. In *Willy v. Administrative Review Board*, 423 F.3d 483 (5th Cir. 2005), the Fifth Circuit considered a challenge to a board established by the Secretary of Labor. No "specific federal statute" created the board, and the parties agreed that its members were inferior officers. *Id.* at 491. The Fifth Circuit concluded that the Secretary had "the requisite congressional authority to appoint members," citing "the broad language employed by Congress" in the Labor Department's 1950 reorganization plan. *Willy*, 423 F.3d at 491-92 (citing Reorganization Plan No. 6 of 1950, § 2, 54 Stat. 1263). The Sixth Circuit also upheld the Labor Department

board against an Appointments Clause challenge, *Varnadore v. Sec'y of Labor*, 141 F.3d 625, 631 (6th Cir. 1998), and the Third Circuit similarly relied on a broad delegation to conclude that Congress properly vested the Secretary of Health and Human Services with authority to establish an internal appeals board. *Pennsylvania v. U.S. Dep't of Health & Human Servs.*, 80 F.3d 796, 804-05 (3d Cir. 1996); *see also* 5 U.S.C. §§ 2104, 2105, 3101 (general authority for Executive agencies to employ officers and employees).

3. In addition to these authorities, ANILCA also provides the Secretaries with authority to implement Title VIII. Congress authorized the Secretaries to "prescribe such regulations as are necessary and appropriate to carry out [their] responsibilities" under Title VIII. 16 U.S.C. § 3124. Phrases like "necessary and appropriate" confer a "degree of discretion" on agencies, *Loper Bright*, 144 S. Ct. at 2263, through "capacious[]" language that "leaves agencies with flexibility," *Michigan v. EPA*, 576 U.S. 743, 752 (2015). The Secretaries are authorized to exercise that flexibility to implement Title VIII, and the Board is fulfilling that role by "carry[ing] out" the Secretaries' Title VIII responsibilities. 16 U.S.C. § 3124.

This kind of program-specific directive may properly vest a department head with the authority to create an administrative body. This Court recently illustrated this principle in *Duenas v. Garland*, 78 F.4th 1069 (9th Cir. 2023), where the Court rejected an Appointments Clause challenge to the Board of Immigration Appeals.

The appeals board is located in the Executive Office of Immigration Review, which Congress established by statute. 6 U.S.C. § 521. But Congress said nothing about the appeals board; as the Court explained, "[n]o statute specifically governs the appointment" of its members. *Duenas*, 78 F.4th at 1073 n.2. The Court nonetheless concluded that Congress "vested the power to appoint" the board's members "by extension" through the statute establishing the office where the board is "housed." *Id.* ANILCA is even clearer.

D. Any issue with the Board's structure can be remedied.

If the Court were to identify some Appointments Clause defect in the Board's structure, whether currently or at the time the Board issued the special actions underlying this action, the Secretaries may remedy those issues through rulemaking or ratification. Depending what defect the Court might identify, further rulemaking could address any issues related to secretarial oversight or the Board's authority. *See, e.g.*, 89 Fed. Reg. at 83,623. Similarly, if the Court identifies some defect in the regulations in effect at the time the Board issued the special actions underlying this suit—the Board issued the 2021 and 2022 special actions before the October 2024 rulemaking introduced a formal ratification period—the Secretaries may ratify the Board's actions underlying the injunction. *Guedes v. ATF*, 920 F.3d 1, 13 (D.C. Cir. 2019). Thus, if the Court finds an Appointments Clause error underlying the injunction on review, the proper course would be to

vacate and remand for further proceedings to enable ratification or rulemaking and avoid the prolongation of Alaska's campaign against the Board.

CONCLUSION

For these reasons, the judgment should be affirmed.

Respectfully submitted,

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Date October 25, 2024

ADDENDUM

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

(a) Establishment of units

In order to preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values, the units described in the following titles are hereby established.

(b) Preservation and protection of scenic, geological, etc., values

It is the intent of Congress in this Act to preserve unrivaled scenic and geological values associated with natural landscapes; to provide for the maintenance of sound populations of, and habitat for, wildlife species of inestimable value to the citizens of Alaska and the Nation, including those species dependent on vast relatively undeveloped areas; to preserve in their natural state extensive unaltered arctic tundra, boreal forest, and coastal rainforest ecosystems; to protect the resources related to subsistence needs; to protect and preserve historic and archeological sites, rivers, and lands, and to preserve wilderness resource values and related recreational opportunities including but not limited to hiking, canoeing, fishing, and sport hunting, within large arctic and subarctic wildlands and on freeflowing rivers; and to maintain opportunities for scientific research and undisturbed ecosystems.

(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 purposes 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.

(d) Need for future legislation obviated

This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent

a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.

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.

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

(5) The term "Alaska Native Claims Settlement Act" means "An Act to provide for the settlement of certain land claims of Alaska Natives, and for other purposes", approved December 18, 1971 (85 Stat. 688), as amended.

(6) The term "Native Corporation" means any Regional Corporation, any Village Corporation, any Urban Corporation, and any Native Group.

(7) The term "Regional Corporation" has the same meaning as such term has under section 3(g) of the Alaska Native Claims Settlement Act.

(8) The term "Village Corporation" has the same meaning as such term has under section 3(j) of the Alaska Native Claims Settlement Act.

(9) The term "Urban Corporation" means those Native entities which have incorporated pursuant to section 14(h)(3) of the Alaska Native Claims Settlement Act.

(10) The term "Native Group" has the same meaning as such term has under sections 3(d) and 14(h)(2) of the Alaska Native Claims Settlement Act.

(11) The term "Native land" means land owned by a Native Corporation or any Native Group and includes land which, as of December 2, 1980, had been selected under the Alaska Native Claims Settlement Act by a Native Corporation or Native Group and had not been conveyed by the Secretary (except to the extent such selection is determined to be invalid or has been relinquished) and land referred to in section 19(b) of the Alaska Native Claims Settlement Act.

(12) The term "Secretary" means the Secretary of the Interior, except that when such term is used with respect to any unit of the National Forest System, such term means the Secretary of Agriculture.

(13) The terms "wilderness" and "National Wilderness Preservation System" have the same meaning as when used in the Wilderness Act (78 Stat. 890).

(14) The term "Alaska Statehood Act" means the Act entitled "An Act to provide for the admission of the State of Alaska into the Union", approved July 7, 1958 (72 Stat. 339), as amended.

(15) The term "State" means the State of Alaska.

(16) The term "Alaska Native" or "Native" has the same meaning as the term "Native" has in section 3(b) of the Alaska Native Claims Settlement Act.

(17) The term "fish and wildlife" means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or part thereof.

(18) The term "take" or "taking" as used with respect to fish or wildlife, means to pursue, hunt, shoot, trap, net, capture, collect, kill, harm, or attempt to engage in any such conduct.

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. § 3113. Definitions

As used in this Act, the term "subsistence uses" means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade. For the purposes of this section, the term—

(1) "family" means all persons related by blood, marriage, or adoption, or any person living within the household on a permanent basis; and

(2) "barter" means the exchange of fish or wildlife or their parts, taken for subsistence uses—

(A) for other fish or game or their parts; or

(B) for other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature.

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

(a) Establishment of subsistence resources regions, local advisory committees, and regional advisory councils; membership, duties, and authority of regional advisory councils

Except as otherwise provided in subsection (d) of this section, the Secretary in consultation with the State shall establish—

> **(1)** at least six Alaska subsistence resource regions which, taken together, include all public lands. The number and boundaries of the regions shall be sufficient to assure that regional differences in subsistence uses are adequately accommodated;
>
> **(2)** such local advisory committees within each region as he finds necessary at such time as he may determine, after notice and hearing, that the existing State fish and game advisory committees do not adequately perform the functions of the local committee system set forth in paragraph (3)(D)(iv) of this subsection; and
>
> **(3)** a regional advisory council in each subsistence resource region.

Each regional advisory council shall be composed of residents of the region and shall have the following authority:

> **(A)** the review and evaluation of proposals for regulations, policies, management plans, and other matters relating to subsistence uses of fish and wildlife within the region;
>
> **(B)** the provision of a forum for the expression of opinions and recommendations by persons interested in any matter related to subsistence uses of fish and wildlife within the region;
>
> **(C)** the encouragement of local and regional participation pursuant to the provisions of this subchapter in the decisionmaking process affecting the taking of fish and wildlife on the public lands within the region for subsistence uses;
>
> **(D)** the preparation of an annual report to the Secretary which shall contain--

(i) an identification of current and anticipated subsistence uses of fish and wildlife populations within the region;

(ii) an evaluation of current and anticipated subsistence needs for fish and wildlife populations within the region;

(iii) a recommended strategy for the management of fish and wildlife populations within the region to accommodate such subsistence uses and needs; and

(iv) recommendations concerning policies, standards, guidelines, and regulations to implement the strategy. The State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of this subsection may provide advice to, and assist, the regional advisory councils in carrying out the functions set forth in this paragraph.

(b) Assignment of staff and distribution of data

The Secretary shall assign adequate qualified staff to the regional advisory councils and make timely distribution of all available relevant technical and scientific support data to the regional advisory councils and the State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of subsection (a).

(c) Consideration of reports and recommendations of regional advisory councils

The Secretary, in performing his monitoring responsibility pursuant to section 3116 of this title and in the exercise of his closure and other administrative authority over the public lands, shall consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses. The Secretary may choose not to follow any recommendation which he determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If a recommendation is not adopted by the Secretary, he shall set forth the factual basis and the reasons for his decision.

(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.

(e) Reimbursement to State; limitation; report to Congress

> **(1)** The Secretary shall reimburse the State, from funds appropriated to the Department of the Interior for such purposes, for reasonable costs relating to the establishment and operation of the regional advisory councils established by the State in accordance with subsection (d) and the operation of the State fish and game advisory committees so long as such committees are not superseded by the Secretary pursuant to paragraph (2) of subsection (a). Such reimbursement may not exceed 50 per centum of such costs in any fiscal year. Such costs shall be verified in a statement which the Secretary determines to be adequate and accurate. Sums paid under this subsection shall be in addition to any grants, payments, or other sums to which the State is entitled from appropriations to the Department of the Interior.

(2) Total payments to the State under this subsection shall not exceed the sum of $5,000,000 in any one fiscal year. The Secretary shall advise the Congress at least once in every five years as to whether or not the maximum payments specified in this subsection are adequate to ensure the effectiveness of the program established by the State to provide the preference for subsistence uses of fish and wildlife set forth in section 3114 of this title.

16 U.S.C. § 3124. Regulations

The Secretary shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this subchapter.

Department of the Interior and Related Agencies Appropriations Act, 1996
Pub. L. No. 104-134, 110 Stat. 1321

Sec. 336. None of the funds made available to the Department of the Interior or the Department of Agriculture by this or any other Act may be used to issue or implement final regulations, rules, or policies pursuant to Title VIII of the Alaska National Interest Lands Conservation Act to assert jurisdiction, management, or control over navigable waters transferred to the State of Alaska pursuant to the Submerged Lands Act of 1953 or the Alaska Statehood Act of 1959.

Department of the Interior and Related Agencies Appropriations Act, 1997
Pub. L. No. 104-208, 110 Stat. 3009

Sec. 317. None of the funds available to the Department of the Interior or the Department of Agriculture by this or any other Act may be used to prepare, promulgate, implement, or enforce any interim or final rule or regulation pursuant to Title VIII of the Alaska National Interest Lands Conservation Act to assert jurisdiction, management, or control over any waters (other than non-navigable waters on Federal lands), non-Federal lands, or lands selected by, but not conveyed to, the State of Alaska pursuant to the Submerged Lands Act of 1953 or the Alaska Statehood Act, or an Alaska Native Corporation pursuant to the Alaska Native Claims Settlement Act.

Department of the Interior and Related Agencies Appropriations Act, 1998
Pub. L. No. 105-83, 111 Stat. 1

Sec. 316. Subsistence Hunting and Fishing in Alaska.

(a) Moratorium on Federal Management.—None of the funds made available to the Department of the Interior or the Department of Agriculture by this or any other Act hereafter enacted may be used prior to December 1, 1998 to issue or implement final regulations, rules, or policies pursuant to title VIII of the Alaska National Interest Lands Conservation Act to assert jurisdiction, management, or control over the navigable waters transferred to the State of Alaska pursuant to the Submerged Lands Act of 1953 or the Alaska Statehood Act of 1959.

(b) Amendments to Alaska National Interest Lands Conservation Act.—

. . .

(3) Findings.—Section 801 (16 U.S.C. 3111) is amended—

(A) by inserting "(a)" immediately before "The Congress finds and declares"; and

(B) by inserting at the end the following new subsection:

"**(b)** The Congress finds and declares further that—

"**(1)** subsequent to the enactment of this Act in 1980, the subsistence law of the State of Alaska (AS 16.05) accomplished the goals of Congress and requirements of this Act in providing subsistence use opportunities for rural residents of Alaska, both Alaska Native and non-Alaska Native;

"**(2)** the Alaska subsistence law was challenged in Alaska courts, and the rural preference requirement in the law was found in 1989 by the Alaska Supreme Court in McDowell v. State of Alaska (785 P.2d 1, 1989) to violate the Alaska Constitution;

"**(3)** since that time, repeated attempts to restore the validity of the State law through an amendment to the Alaska Constitution have failed, and the people of Alaska have not been given the opportunity to vote on such an amendment;

"**(4)** in accordance with title VIII of this Act, the Secretary of the Interior is required to manage fish and wildlife for subsistence uses on all public lands in Alaska because of the failure of State law to provide a rural preference;

"**(5)** the Ninth Circuit Court of Appeals determined in 1995 in State of Alaska v. Babbitt (73 F.3d 698) that the subsistence priority required on public lands under section 804 of this Act applies to navigable waters in which the United States has reserved water rights as identified by the Secretary of the Interior;

"**(6)** management of fish and wildlife resources by State governments has proven successful in all 50 States, including Alaska, and the State of Alaska should have the opportunity to continue to manage such resources on all lands, including public lands, in Alaska in accordance with this Act, as amended; and

"**(7)** it is necessary to amend portions of this Act to restore the original intent of Congress to protect and provide for the continued opportunity for subsistence uses on public lands for Alaska Native and non-Alaska Native rural residents through the management of the State of Alaska.".

. . .

(8) Regulations.—Section 814 (16 U.S.C. 3124) is amended—

(A) by inserting ", and the State at any time the State has complied with section 805(d)" after "Secretary"; and

(B) by adding at the end the following new sentence:
"During any time that the State has complied with section 805(d), the Secretary shall not make or enforce regulations implementing section 805(a), (b), or (c).".

. . .

(d) Effective Date.—Unless and until laws are adopted in the State of Alaska which provide for the definition, preference, and participation specified in sections 803, 804, and 805 of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3111 et seq.), the amendments made by subsection (b) of this section shall be effective only for the purposes of determining whether the State's laws provide for such definition, preference, and participation. The Secretary shall certify before December 1, 1998 if such laws have been adopted in the State of Alaska. Subsection (b) shall be repealed on such date if such laws have not been adopted.

Department of the Interior and Related Agencies Appropriations Act, 1999
Pub. L. No. 105-277, 112 Stat. 2681

Title I—Department of the Interior
[2681-232]

Management of Federal Lands for Subsistence Uses

Subsistence Management, Department of the Interior

For necessary expenses of bureaus and offices of the Department of the Interior to manage federal lands in Alaska for subsistence uses under the provisions of Title VIII of the Alaska National Interest Lands Conservation Act (Public Law 96-487 et seq.) except in areas described in section 339(a)(1)(A) and (B) of this Act, $8,000,000 to become available on September 30, 1999, and remain available until expended: *Provided*, That if prior to October 1, 1999, the Secretary of the Interior determines that the Alaska State Legislature has approved a bill or resolution to amend the Constitution of the State of Alaska that, if approved by the electorate, would enable the implementation of state laws of general applicability which are consistent with, and which provide for the definition, preference and participation specified in sections 803, 804, and 805 of the Alaska National Interest Lands Conservation Act, the Secretary of the Interior shall make an $8,000,000 grant to the State of Alaska for the purpose of assisting that State in fulfilling its responsibilities under sections 803, 804, and 805 of that Act: *Provided further*, That if, on June 1, 1999, the Secretary is unable to make a determination that the Alaska State Legislature has approved a bill or resolution to amend the Constitution of the State of Alaska that, if approved by the electorate, would enable the implementation of state laws of general applicability which are consistent with and which provide for the definition, preference and participation specified in sections 803, 804, and 805 of the Alaska National Interest Lands Conservation Act, $1,000,000 of these funds shall become available on June 1, 1999, and shall remain available until expended (with expended amounts to be subtracted from the amount that could be granted to the State), for the Secretary to conduct data gathering and research on subsistence uses, and formulate plans for operational aspects and in-season management, but not to implement and enforce subsistence use management beyond those public lands which as of October 1, 1998, were subject to federal management for subsistence uses pursuant to Title VIII of the Alaska National Interest Lands Conservation Act.

Title II—Related Agencies
[2681-268]

Management of National Forest Lands for Subsistence Uses

Subsistence Management, Forest Service

For necessary expenses of the Forest Service to manage federal lands in Alaska for subsistence uses under the provisions of Title VIII of the Alaska National Interest Lands Conservation Act (Public Law 96-487 et seq.) except in areas described in section 339(a)(1)(A) and (B) of this Act, $3,000,000 to become available on September 30, 1999, and remain available until expended: *Provided*, That if prior to October 1, 1999, the Secretary of the Interior determines that the Alaska State Legislature has approved a bill or resolution to amend the Constitution of the State of Alaska that, if approved by the electorate, would enable the implementation of state laws of general applicability which are consistent with, and which provide for the definition, preference and participation specified in sections 803, 804, and 805 of the Alaska National Interest Lands Conservation Act, the Secretary of Agriculture shall make a $3,000,000 grant to the State of Alaska for the purpose of assisting that State in fulfilling its responsibilities under sections 803, 804, and 805 of that Act.

Title III—General Provisions
[2681-286]

Sec. 339. (a) Restriction on Federal Management Under Title VIII of the Alaska National Interest Lands Conservation Act.—

> **(1)** Notwithstanding any other provision of law, hereafter neither the Secretary of the Interior nor the Secretary of Agriculture may, prior to December 1, 2000, implement or enforce any final rule, regulation, or policy pursuant to title VIII of the Alaska National Interest Lands Conservation Act to manage and to assert jurisdiction, authority, or control over land, water, and wild, renewable resources, including fish and wildlife, in Alaska for subsistence uses, except within—
>
> > **(A)** areas listed in 50 C.F.R. 100.3(b) (October 1, 1998) and
> >
> > **(B)** areas constituting "public land or public lands" under the definition of such term found at 50 C.F.R. 100.4 (October 1, 1998).

(2) The areas in subparagraphs (A) and (B) of paragraph shall only be construed to mean those public lands which as of October 1, 1998, were subject to federal management for subsistence uses pursuant to Title VIII of the Alaska National Interest Lands Conservation Act.

(b) Subsection (a) Repealed.—

(1) The Secretary of the Interior shall certify before October 1, 1999, if a bill or resolution has been passed by the Alaska State Legislature to amend the Constitution of the State of Alaska that, if approved by the electorate, would enable the implementation of state laws of general applicability consistent with, and which provide for the definition, preference, and participation specified in sections 803, 804, and 805 of the Alaska National Interest Lands Conservation Act.

(2) Subsection (a) shall be repealed on October 1, 1999, unless prior to that date the Secretary of the Interior makes such a certification described in paragraph (1).

Reorganization Plan No. 3 of 1950

64 Stat. 1262, available at
https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title5a-node35&saved=%7CZ3JhbnVsZWlkOlVTQy1wcmVsaW0tdGl0bGU1YS1ub2RlMzUtbGVhZjg2%7C%7C%7C0%7Cfalse%7Cprelim&edition=prelim

Sec. 2. Performance of functions of Secretary

The Secretary of the Interior may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of the Interior of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan.

Reorganization Plan No. 2 of 1953
67 Stat. 633, available at
https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title5a-node35-leaf86&num=0&edition=prelim

Sec. 4. Delegation of functions

(a) The Secretary of Agriculture may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of Agriculture of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan.

(b) To the extent that the carrying out of subsection (a) of this section involves the assignment of major functions or major groups of functions to major constituent organizational units of the Department of Agriculture, now or hereafter existing, or to the heads or other officers thereof, and to the extent deemed practicable by the Secretary, he shall give appropriate advance public notice of delegations of functions proposed to be made by him and shall afford appropriate opportunity for interested persons and groups to place before the Department of Agriculture their views with respect to such proposed delegations.

(c) In carrying out subsection (a) of this section the Secretary shall seek to simplify and make efficient the operation of the Department of Agriculture, to place the administration of farm programs close to the State and local levels, and to adapt the administration of the programs of the Department to regional, State, and local conditions.

50 C.F.R. § 100.10. Federal Subsistence Board (2020)
(effective through November 18, 2024)

(a) The Secretary of the Interior and Secretary of Agriculture hereby establish a Federal Subsistence Board, and assign it responsibility for administering the subsistence taking and uses of fish and wildlife on public lands, and the related promulgation and signature authority for regulations of subparts C and D of this part. The Secretaries, however, retain their existing authority to restrict or eliminate hunting, fishing, or trapping activities which occur on lands or waters in Alaska other than public lands when such activities interfere with subsistence hunting, fishing, or trapping on the public lands to such an extent as to result in a failure to provide the subsistence priority.

(b) Membership.

> **(1)** The voting members of the Board are: A Chair to be appointed by the Secretary of the Interior with the concurrence of the Secretary of Agriculture; two public members who possess personal knowledge of and direct experience with subsistence uses in rural Alaska to be appointed by the Secretary of the Interior with the concurrence of the Secretary of Agriculture; the Alaska Regional Director, U.S. Fish and Wildlife Service; Alaska Regional Director, National Park Service; Alaska Regional Forester, U.S. Forest Service; the Alaska State Director, Bureau of Land Management; and the Alaska Regional Director, Bureau of Indian Affairs. Each Federal agency member of the Board may appoint a designee.
>
> **(2)** [Reserved]

(c) Liaisons to the Board are: a State liaison, and the Chairman of each Regional Council. The State liaison and the Chairman of each Regional Council may attend public sessions of all Board meetings and be actively involved as consultants to the Board.

(d) Powers and duties.

> **(1)** The Board shall meet at least twice per year and at such other times as deemed necessary. Meetings shall occur at the call of the Chair, but any member may request a meeting.
>
> **(2)** A quorum consists of five members.

(3) No action may be taken unless a majority of voting members are in agreement.

(4) The Board is empowered, to the extent necessary, to implement Title VIII of ANILCA, to:

> **(i)** Issue regulations for the management of subsistence taking and uses of fish and wildlife on public lands;
>
> **(ii)** Determine which communities or areas of the State are rural or non-rural;
>
> **(iii)** Determine which rural Alaska areas or communities have customary and traditional subsistence uses of specific fish and wildlife populations;
>
> **(iv)** Allocate subsistence uses of fish and wildlife populations on public lands;
>
> **(v)** Ensure that 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;
>
> **(vi)** Restrict the taking of fish and wildlife on public lands for nonsubsistence uses or close public lands to the take of fish and wildlife for nonsubsistence uses when necessary for the conservation of healthy populations of fish or wildlife, to continue subsistence uses of fish or wildlife, or for reasons of public safety or administration. The Board may also reopen public lands to nonsubsistence uses if new information or changed conditions indicate that the closure is no longer warranted;
>
> **(vii)** Restrict the taking of a particular fish or wildlife population on public lands for subsistence uses, close public lands to the take of fish and wildlife for subsistence uses, or otherwise modify the requirements for take from a particular fish or wildlife population on public lands for subsistence uses when necessary to ensure the continued viability of a fish or wildlife population, or for reasons of public safety or administration. As soon as conditions warrant, the

Board may also reopen public lands to the taking of a fish and wildlife population for subsistence users to continue those uses;

(viii) Establish priorities for the subsistence taking of fish and wildlife on public lands among rural Alaska residents;

(ix) Restrict or eliminate taking of fish and wildlife on public lands;

(x) Determine what types and forms of trade of fish and wildlife taken for subsistence uses constitute allowable customary trade;

(xi) Authorize the Regional Councils to convene;

(xii) Establish a Regional Council in each subsistence resource region and recommend to the Secretaries, appointees to the Regional Councils, pursuant to the FACA;

(xiii) Establish Federal Advisory Committees within the subsistence resource regions, if necessary, and recommend to the Secretaries that members of the Federal Advisory Committees be appointed from the group of individuals nominated by rural Alaska residents;

(xiv) Establish rules and procedures for the operation of the Board, and the Regional Councils;

(xv) Review and respond to proposals for regulations, management plans, policies, and other matters related to subsistence taking and uses of fish and wildlife;

(xvi) Enter into cooperative agreements or otherwise cooperate with Federal agencies, the State, Native organizations, local governmental entities, and other persons and organizations, including international entities to effectuate the purposes and policies of the Federal subsistence management program;

(xvii) Develop alternative permitting processes relating to the subsistence taking of fish and wildlife to ensure continued opportunities for subsistence;

(xviii) Evaluate whether hunting, fishing, or trapping activities which occur on lands or waters in Alaska other than public lands interfere with subsistence hunting, fishing, or trapping on the public lands to such an extent as to result in a failure to provide the subsistence priority, and after appropriate consultation with the State of Alaska, the Regional Councils, and other Federal agencies, make a recommendation to the Secretaries for their action;

(xix) Identify, in appropriate specific instances, whether there exists additional Federal reservations, Federal reserved water rights or other Federal interests in lands or waters, including those in which the United States holds less than a fee ownership, to which the Federal subsistence priority attaches, and make appropriate recommendation to the Secretaries for inclusion of those interests within the Federal Subsistence Management Program; and

(xx) Take other actions authorized by the Secretaries to implement Title VIII of ANILCA.

(5) The Board may implement one or more of the following harvest and harvest reporting or permit systems:

(i) The fish and wildlife is taken by an individual who is required to obtain and possess pertinent State harvest permits, tickets, or tags, or Federal permit (Federal Subsistence Registration Permit);

(ii) A qualified subsistence user may designate another qualified subsistence user (by using the Federal Designated Harvester Permit) to take fish and wildlife on his or her behalf;

(iii) The fish and wildlife is taken by individuals or community representatives permitted (via a Federal Subsistence Registration Permit) a one-time or annual harvest for special purposes including ceremonies and potlatches; or

(iv) The fish and wildlife is taken by representatives of a community permitted to do so in a manner consistent with the community's customary and traditional practices.

(6) The Board may delegate to agency field officials the authority to set harvest and possession limits, define harvest areas, specify methods or means of harvest, specify permit requirements, and open or close specific fish or wildlife harvest seasons within frameworks established by the Board.

(7) The Board shall establish a Staff Committee for analytical and administrative assistance composed of members from the U.S. Fish and Wildlife Service, National Park Service, U.S. Bureau of Land Management, Bureau of Indian Affairs, and USDA Forest Service. A U.S. Fish and Wildlife Service representative shall serve as Chair of the Staff Committee.

(8) The Board may establish and dissolve additional committees as necessary for assistance.

(9) The U.S. Fish and Wildlife Service shall provide appropriate administrative support for the Board.

(10) The Board shall authorize at least two meetings per year for each Regional Council.

(e) Relationship to Regional Councils.

(1) The Board shall consider the reports and recommendations of the Regional Councils concerning the taking of fish and wildlife on public lands within their respective regions for subsistence uses. The Board may choose not to follow any Regional Council recommendation which it determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, would be detrimental to the satisfaction of subsistence needs, or in closure situations, for reasons of public safety or administration or to assure the continued viability of a particular fish or wildlife population. If a recommendation is not adopted, the Board shall set forth the factual basis and the reasons for the decision, in writing, in a timely fashion.

(2) The Board shall provide available and appropriate technical assistance to the Regional Councils.

50 C.F.R. § 100.10. Federal Subsistence Board (2024)

(a) Authority. The Secretary of the Interior and the Secretary of Agriculture hereby establish a Federal Subsistence Board (Board) and delegate to it the authority for administering the subsistence taking and uses of fish and wildlife on public lands and the related promulgation and signature authority for regulations of subparts C and D of this part. The Secretaries retain their existing authority to restrict or eliminate hunting, fishing, or trapping activities that occur on lands or waters in Alaska other than public lands when such activities interfere with subsistence hunting, fishing, or trapping on the public lands to such an extent as to result in a failure to provide the subsistence priority. The Secretaries also retain the ultimate responsibility for compliance with title VIII of ANILCA and other applicable laws and maintain oversight of the Board.

(b) Membership.

> **(1)** The voting members of the Board are: A Chair who possesses personal knowledge of and direct experience with subsistence uses in rural Alaska to be appointed by the Secretary of the Interior with the concurrence of the Secretary of Agriculture; five public members who possess personal knowledge of and direct experience with subsistence uses in rural Alaska, three of whom shall be nominated or recommended by federally recognized Tribal governments in Alaska and shall possess personal knowledge of and direct experience with subsistence uses in rural Alaska (including Alaska Native subsistence uses), to be appointed by the Secretary of the Interior with the concurrence of the Secretary of Agriculture; the Alaska Regional Director, U.S. Fish and Wildlife Service; the Alaska Regional Director, National Park Service; the Alaska Regional Forester, U.S. Forest Service; the Alaska State Director, Bureau of Land Management; and the Alaska Regional Director, Bureau of Indian Affairs. Each Federal agency member of the Board may appoint a designee.
>
> **(2)** Public Board members serve at the will of the Secretaries. The Secretaries maintain their authorities for replacement of Federal agency members, public Board members, or any designees.

(c) Liaisons to the Board are: a State liaison, and the Chairman of each Regional Council. The State liaison and the Chairman of each Regional Council may attend public sessions of all Board meetings and be actively involved as consultants to the Board.

(d) Powers and duties.

(1) The Board shall meet at least twice per year and at such other times as deemed necessary. Meetings shall occur at the call of the Chair, but any member may request a meeting.

(2) A quorum consists of five members when the total number of Board members is nine or fewer and six members when the total number of Board members is 10 or higher.

(3) No action may be taken unless a majority of voting members are in agreement.

(4) The Board is empowered, to the extent necessary, to implement Title VIII of ANILCA, to:

(i) Issue regulations for the management of subsistence taking and uses of fish and wildlife on public lands;

(ii) Determine which communities or areas of the State are rural or non-rural;

(iii) Determine which rural Alaska areas or communities have customary and traditional subsistence uses of specific fish and wildlife populations;

(iv) Allocate subsistence uses of fish and wildlife populations on public lands;

(v) Ensure that 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;

(vi) Restrict the taking of fish and wildlife on public lands for nonsubsistence uses or close public lands to the take of fish and wildlife for nonsubsistence uses when necessary for the conservation of healthy populations of fish or wildlife, to continue subsistence uses of fish or wildlife, or for reasons of public safety or administration. The Board may also reopen public lands to nonsubsistence uses if new

information or changed conditions indicate that the closure is no longer warranted;

(vii) Restrict the taking of a particular fish or wildlife population on public lands for subsistence uses, close public lands to the take of fish and wildlife for subsistence uses, or otherwise modify the requirements for take from a particular fish or wildlife population on public lands for subsistence uses when necessary to ensure the continued viability of a fish or wildlife population, or for reasons of public safety or administration. As soon as conditions warrant, the Board may also reopen public lands to the taking of a fish and wildlife population for subsistence users to continue those uses;

(viii) Establish priorities for the subsistence taking of fish and wildlife on public lands among rural Alaska residents;

(ix) Restrict or eliminate taking of fish and wildlife on public lands;

(x) Determine what types and forms of trade of fish and wildlife taken for subsistence uses constitute allowable customary trade;

(xi) Authorize the Regional Councils to convene;

(xii) Establish a Regional Council in each subsistence resource region and recommend to the Secretaries, appointees to the Regional Councils, pursuant to the FACA;

(xiii) Establish Federal Advisory Committees within the subsistence resource regions, if necessary, and recommend to the Secretaries that members of the Federal Advisory Committees be appointed from the group of individuals nominated by rural Alaska residents;

(xiv) Establish rules and procedures for the operation of the Board, and the Regional Councils;

(xv) Review and respond to proposals for regulations, management plans, policies, and other matters related to subsistence taking and uses of fish and wildlife;

(xvi) Enter into cooperative agreements or otherwise cooperate with Federal agencies, the State, Native organizations, local governmental entities, and other persons and organizations, including international entities to effectuate the purposes and policies of the Federal subsistence management program;

(xvii) Develop alternative permitting processes relating to the subsistence taking of fish and wildlife to ensure continued opportunities for subsistence;

(xviii) Evaluate whether hunting, fishing, or trapping activities which occur on lands or waters in Alaska other than public lands interfere with subsistence hunting, fishing, or trapping on the public lands to such an extent as to result in a failure to provide the subsistence priority, and after appropriate consultation with the State of Alaska, the Regional Councils, and other Federal agencies, make a recommendation to the Secretaries for their action;

(xix) Identify, in appropriate specific instances, whether there exists additional Federal reservations, Federal reserved water rights or other Federal interests in lands or waters, including those in which the United States holds less than a fee ownership, to which the Federal subsistence priority attaches, and make appropriate recommendation to the Secretaries for inclusion of those interests within the Federal Subsistence Management Program; and

(xx) Take other actions authorized by the Secretaries to implement Title VIII of ANILCA.

(5) The Board may implement one or more of the following harvest and harvest reporting or permit systems:

(i) The fish and wildlife is taken by an individual who is required to obtain and possess pertinent State harvest permits, tickets, or tags, or Federal permit (Federal Subsistence Registration Permit);

(ii) A qualified subsistence user may designate another qualified subsistence user (by using the Federal Designated Harvester Permit) to take fish and wildlife on his or her behalf;

(iii) The fish and wildlife is taken by individuals or community representatives permitted (via a Federal Subsistence Registration Permit) a one-time or annual harvest for special purposes including ceremonies and potlatches; or

(iv) The fish and wildlife is taken by representatives of a community permitted to do so in a manner consistent with the community's customary and traditional practices.

(6) The Board may delegate to agency field officials the authority to set harvest and possession limits, define harvest areas, specify methods or means of harvest, specify permit requirements, and open or close specific fish or wildlife harvest seasons within frameworks established by the Board.

(7) The Board shall establish a Staff Committee for analytical and administrative assistance composed of members from the U.S. Fish and Wildlife Service, National Park Service, U.S. Bureau of Land Management, Bureau of Indian Affairs, and USDA Forest Service. A U.S. Fish and Wildlife Service representative shall serve as Chair of the Staff Committee.

(8) The Board may establish and dissolve additional committees as necessary for assistance.

(9) The U.S. Fish and Wildlife Service shall provide appropriate administrative support for the Board.

(10) The Board shall authorize at least two meetings per year for each Regional Council.

(11) The Secretary of the Interior, or the Secretary of Agriculture with respect to a unit of the National Forest System, retains authority to (at any time) stay, modify, or disapprove any action taken by the Board.

(12) Special actions of the Board are not effective unless ratified by the Secretary of the Interior or the Secretary of Agriculture with respect to a unit of the National Forest System. To allow an opportunity for the Secretaries to modify, disapprove, stay, or expressly ratify any emergency or temporary special action taken by the Board, such Board actions generally will not become effective until 10 calendar days after the date of the action (or any longer period specified by the Board when taking the action), unless the

Board determines that the situation calls for responsive action within a shorter period of time. If no action is taken by the Secretary to modify, disapprove, stay, or expressly ratify within 10 days (or the longer or shorter period specified by the Board), the emergency or temporary special action will be deemed automatically ratified for purposes of this subpart. The Secretaries may revisit a prior ratification (express or automatic) of a Board action at any time. For other Board actions (i.e., actions that follow the regular adoption process in § 100.18), the Secretaries retain, and will exercise when appropriate, their authority to modify or disapprove actions prior to publication in the Federal Register, as is the current practice.

(13) For Board actions such as cyclic regulation revisions, customary and traditional use determinations, subsistence resource regions, rural determinations, and requests for reconsideration, when the Secretaries deem appropriate, they will exercise their authority to modify or disapprove the actions prior to publication of the actions in the Federal Register. The Board's special actions, both emergency and temporary, are often based on time-sensitive harvest opportunities for rural Alaskans or critical conservation concerns for a species and are valid upon decision by the Board. However, the Secretaries may at any time rescind, modify, disapprove, or stay a special action by the Board.

(14)[9]

(e) Relationship to Regional Councils.

(1) The Board shall consider the reports and recommendations of the Regional Councils concerning the taking of fish and wildlife on public lands within their respective regions for subsistence uses. The Board may choose not to follow any Regional Council recommendation which it determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, would be detrimental to the satisfaction of subsistence needs, or in closure situations, for reasons of public safety or administration or to assure the continued viability of a particular fish or

[9] In October 2024, the Secretaries promulgated a new § 100.10(d)(14), which provides: "The Secretaries may establish term limits for service of Board members in such circumstances as the Secretaries deem appropriate." 89 Fed. Reg. at 83,628. For the current codification status of this provision, see https://www.ecfr.gov/current/title-50/chapter-I/subchapter-H/part-100/subpart-B.

wildlife population. If a recommendation is not adopted, the Board shall set forth the factual basis and the reasons for the decision, in writing, in a timely fashion.

(2) The Board shall provide available and appropriate technical assistance to the Regional Councils.

50 C.F.R. § 100.14. Relationship to State procedures and regulations.

(a) State fish and game regulations apply to public lands and such laws are hereby adopted and made a part of the regulations in this part to the extent they are not inconsistent with, or superseded by, the regulations in this part.

(b) The Board may close public lands to hunting, trapping, or fishing, or take actions to restrict the taking of fish and wildlife when necessary to conserve healthy populations of fish and wildlife, continue subsistence uses of such populations, or pursuant to other applicable Federal law. The Board may review and adopt State openings, closures, or restrictions which serve to achieve the objectives of the regulations in this part.

(c) The Board may enter into agreements with the State in order to coordinate respective management responsibilities.

(d) Petition for repeal of subsistence rules and regulations.

> **(1)** The State of Alaska may petition the Secretaries for repeal of the subsistence rules and regulations in this part when the State has enacted and implemented subsistence management and use laws which:
>
> > **(i)** Are consistent with sections 803, 804, and 805 of ANILCA; and
> >
> > **(ii)** Provide for the subsistence definition, preference, and participation specified in sections 803, 804, and 805 of ANILCA.
>
> **(2)** The State's petition shall:
>
> > **(i)** Be submitted to the Secretary of the Interior, U.S. Department of the Interior, Washington, D.C. 20240, and the Secretary of Agriculture, U.S. Department of Agriculture, Washington, D.C. 20240;
> >
> > **(ii)** Include the entire text of applicable State legislation indicating compliance with sections 803, 804, and 805 of ANILCA; and
> >
> > **(iii)** Set forth all data and arguments available to the State in support of legislative compliance with sections 803, 804, and 805 of ANILCA.

(3) If the Secretaries find that the State's petition contains adequate justification, a rulemaking proceeding for repeal of the regulations in this part will be initiated. If the Secretaries find that the State's petition does not contain adequate justification, the petition will be denied by letter or other notice, with a statement of the ground for denial.

50 C.F.R. § 100.18. Regulation adoption process.

(a) The Board will accept proposals for changes to the Federal subsistence regulations in subparts C or D of this part according to a published schedule, except for proposals for emergency and temporary special actions, which the Board will accept according to procedures set forth in § 100.19. The Board may establish a rotating schedule for accepting proposals on various sections of subpart C or subpart D regulations over a period of years. The Board will develop and publish proposed regulations in the Federal Register, publish notice in local newspapers, and distribute comments on the proposed regulations in the form of proposals for public review.

(1) Proposals shall be made available for at least a thirty (30) day review by the Regional Councils. Regional Councils shall forward their recommendations on proposals to the Board. Such proposals with recommendations may be submitted in the time period as specified by the Board or as a part of the Regional Council's annual report described in § 100.11, whichever is earlier.

(2) The Board shall publish notice throughout Alaska of the availability of proposals received.

(3) The public shall have at least thirty (30) days to review and comment on proposals.

(4) After the comment period the Board shall meet to receive public testimony and consider the proposals. The Board shall consider traditional use patterns when establishing harvest levels and seasons, and methods and means. The Board may choose not to follow any recommendation which the Board determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If a recommendation approved by a Regional Council is not adopted by the Board, the Board shall set forth the factual basis and the reasons for its decision in writing to the Regional Council.

(5) Following consideration of the proposals the Board shall publish final regulations pertaining to subparts C and D of this part in the Federal Register.

(b) Proposals for changes to subparts A and B of this part shall be accepted by the Secretary of the Interior in accordance with 43 CFR part 14.