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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, KUSKOKWIM RIVER INTER-TRIBAL FISH COMMISSION, *et al.*, Intervenor Plaintiffs, v. STATE OF ALASKA, *et al.*, Defendants.	Case No. 1:22-CV-00054-SLG

INTERVENOR-PLAINTIFF ALASKA FEDERATION OF NATIVES' REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

Intervenor-Plaintiff Alaska Federation of Natives ("AFN"), by and through counsel Cashion Gilmore & Lindemuth ("CGL"), hereby replies to the State's opposition to AFN's motion for attorneys' fees. The State concedes that this was an important case.[1] But the

[1] Dkt. 185 at 2.

importance of this case to AFN and the other intervenors cannot be overstated: The State sought nothing less than to undo the *Katie John* trilogy of cases and abrogate the very subsistence protections AFN fought hard to have Congress enshrine in Title VIII of ANILA more than 40 years ago. The State did so by arguing yet again that the State, and not the federal government, had complete power over navigable waters in Alaska under the equal footing doctrine. AFN has participated in some capacity (as an intervenor/party or amicus) in virtually every major lawsuit with potential statewide implications to subsistence, including as a party in all three *Katie John* cases.[2] Given its longstanding role advocating for the interests of all Alaska Native peoples in the state, AFN has a unique and vital perspective on ANCSA and Title VIII of ANILCA. Contrary to the State's conclusory arguments not based on evidence in the record, AFN meaningfully contributed to this case and did not just duplicate the efforts of other parties.

As this Court previously held, ANILCA Section 807 provides the "sole Federal judicial remedy" to enforce the subsistence priority in Title VIII of ANILCA, and in that statute Congress granted a right to a full fee award if a party prevails against the State in protecting the subsistence protections granted in Title VIII.[3] The State has waived any sovereign immunity defense by its litigation conduct in this case. And the State fails to meet its burden to rebut that AFN's fees and hours billed are reasonable. This Court should

[2] Dkt. 90 at ¶ 17.

[3] 16 U.S.C. § 3117(a), (c); Docket 154 at 4.

award AFN all of the fees it incurred in defending the rural subsistence priority to fish in this historic and important case: $494,423.17.[4]

I. The State Has Waived Any Sovereign Immunity Defense.

The State argues that sovereign immunity applies in this case and it has not waived the right to raise this issue.[5] "Sovereign immunity provides that an individual may not sue a state, a division of a state, or an instrumentality/arm of a state without the state's consent."[6] Even if the State could have raised this affirmative defense in this litigation, that time has long since passed and the State waived any sovereign immunity defense.[7] And when a State is not protected by sovereign immunity, it will be liable for awards of attorney's fees when applicable.[8]

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[4] Dkt. 169 at 5. AFN has incurred more than $15,000 in researching the newly raised sovereign immunity defense and drafting this brief. Although AFN is not technically requesting an increased award at this time, these additional fees support the reasonableness of the request for $494,423.17. If the State continues to fight this award on appeal, AFN will seek to supplement its fee award at a later date.

[5] Dkt. 185 at 6-8.

[6] *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016) (first citing *Frew v. Hawkins*, 540 U.S. 431, 437 (2004); then citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996); and then citing *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974).

[7] *See Tritchler v. Cnty. of Lake*, 358 F.3d 1150, 1153-54 (9th Cir. 2004) (holding that sovereign immunity "should be treated as an affirmative defense" (quoting *ITSI TV Prods., Inc. v. Agric. Ass'ns*, 3 F.3d 1289, 1291 (9th Cir. 1993)). *Cf. Miles v. California*, 320 F.3d 986, 988-89 (9th Cir. 2003) ("[D]ismissal based on Eleventh Amendment immunity is not a dismissal for lack of subject matter jurisdiction." (citing *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 762 (9th Cir. 1999) *amended by* 201 F.3d 1186 (9th Cir. 2000) (denial of reh'g en banc)); *Elwood v. Drescher*, 456 F.3d 943, 949 (9th Cir. 2006) (citing *Miles*, 320 F.3d at 988-89) (holding same).

[8] *See Hutto v. Finney*, 437 U.S. 678, 693-99 (1978) (holding that attorney's fees can be awarded against the State where sovereign immunity was abrogated) ("The Court has never viewed the Eleventh Amendment as barring such awards [of costs], even in suits between States and individual litigants.").

Congress clearly provided for a right for private parties to sue the State to enforce Title VIII of ANILCA, and seek full fees if that party prevails.[9] The State argues that Congress did not have the power to abrogate the State's sovereign immunity to authorize such claims, because Congress did not act under the Fourteenth Amendment, instead invoking constitutional powers under the Property Clause, Commerce Clause, and Indian Commerce Clause.[10] The State is wrong that Congress must rely only on the Fourteenth Amendment to abrogate a state's sovereign immunity.[11] Although AFN does not concede that Congress lacked the constitutional power to abrogate the State's sovereign immunity to enact Section 807, this Court need not reach this question of first impression because the State clearly waived sovereign immunity by not only participating in this case, but actively seeking to overturn the *Katie John* trilogy of cases and litigating its position all the way to the United States Supreme Court.

Sovereign immunity is an affirmative defense, waived unless timely invoked.[12] A State waives Eleventh Amendment immunity by "actively litigating [an] action on the

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[9] Section 807 of ANILCA, 16 U.S.C. § 3117(a); *see* Docket 154 at 9-10 ("Clearly, Congress intended to provide a comprehensive remedy in § 3117 for all claims by persons and organizations against the State or Federal governments arising under Title VIII of ANILCA.").

[10] Dkt. 185 at 7.

[11] *See, e.g., Cent. Va. Cmty College v. Katz*, 546 U.S. 356, 379 (2005) (holding that "Congress' determination that States should be amenable to [bankruptcy] proceedings is within the scope of its [constitutional] power to enact 'Laws on the subject of Bankruptcies.'")

[12] *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 763 (9th Cir. 1999) *amended by* 201 F.3d 1186 (9th Cir. 2000) (denial of reh'g en banc) (quoting *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 389 (1998)).

merits" before raising immunity.[13] "Eleventh Amendment immunity . . . must be raised 'early in the proceedings' to provide 'fair warning' to the plaintiff."[14] "The Eleventh Amendment was never intended to allow a state to appear in federal court and actively litigate the case on the merits, and only later belatedly assert its immunity from suit in order to avoid an adverse result."[15]

In response to the State's direct challenge in this case to the rural subsistence priority recognized by the *Katie John* trilogy of cases more than 30 years ago, AFN moved to intervene as a plaintiff in 2023.[16] The State opposed the motion on several grounds, never raising sovereign immunity.[17] The State then continued to argue the merits of its challenge and at every level of federal court available to it.[18] This litigation included opposing prior motions for attorneys' fees before this Court, wherein the State again did not raise

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13 *Id.* at 756.

14 *Demshki v. Monteith*, 255 F.3d 986, 989 (9th Cir. 2001) (first citing *ITSI TV Prods., Inc. v. Agric. Ass'ns*, 3 F.3d 1289, 1291 (9th Cir. 1993); and then quoting *Hill*, 179 F.3d at 761).

15 *Hill*, 179 F.3d at 763.

16 *See* Dkt. 89.

17 *See* Dkt. 94 at 9-17. The State did not file an answer to AFN's Complaint in Intervention. Dkt. 97. It did answer other Intervenor-Plaintiffs' complaints, never asserting sovereign immunity as a defense. *See e.g.*, Dkt. 40, State's Answer to Kuskokwim River Inter-Tribal Fish Commission's ("KRITFC's") Complaint, at 4.

18 *See, e.g.*, Dkt. 73 (State's combined motion for summary judgment, memorandum in support, and opposition to motions for summary judgment); Dkt. 165. *See Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1021-22 (9th Cir. 2010) (holding that sovereign immunity was waived when a community college district "engaged in extensive proceedings in the district court without seeking dismissal on sovereign immunity grounds" and "did not assert a sovereign immunity defense in the summary judgment briefing filed after the plaintiffs amended their complaint").

sovereign immunity as a defense.[19] The State has been on notice since at least this Court's June 6, 2024 order that it would have to pay fees to Intervenor-Plaintiffs under Section 807 of ANILCA if they prevailed in this case.[20] And yet the State pressed on, taking its attack on *Katie John* all the way to the United States Supreme Court, and costing AFN just under $500,000 to fight this battle.

During the long course of this litigation, the State "unequivocally evidenced its consent to the jurisdiction of the federal court."[21] It cannot "belatedly withdraw" after losing its arguments before this court, the Ninth Circuit, and the U.S. Supreme Court.[22] Put another way, the State cannot argue that AFN is not entitled to a fee award under ANILCA because it does not like the result. The Ninth Circuit has held that when a state "hedge[s]

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19 *See* Dkt. 151; *Compare Hill*, 179 F.3d at 756 (holding that sovereign immunity was waived by "participating in extensive pre-trial activities and waiting until the first day of trial before objecting to the federal court's jurisdiction on Eleventh Amendment grounds") *and L.A Terminals, Inc. v. City of L.A.*, No. CV-18-6754-MWF (PVC), 2023 U.S. Dist. LEXIS 35351, at *8 (C.D. Cal. Mar. 2, 2023) (holding that a city "waived its Eleventh Amendment affirmative defense by actively litigating [a] matter for four and half years and making the tactical decision to delay asserting the sovereign immunity defense") *with San Joaquin Cmty. Hosp. v. Lightbourne*, Nos. 21-16294, 21-16295, 2022 U.S. App. LEXIS 32650, at *6 (9th Cir. Nov. 28, 2022) (holding that *Hill* waiver did not apply where California Department of Health Care Services "reserved sovereign immunity as a defense in [a] removal notice, raised the defense in answers, and sought to dismiss on sovereign immunity in its motion for judgment on the pleadings") *and Aholelei v. Dep't of Pub. Safety*, 488 F.3d 1144, 1146-49 (9th Cir. 2007) (holding defense was not waived when State defendants asserted sovereign immunity as a defense to the complaint, filed a single third-party indemnity complaint, then moved for summary judgment on sovereign immunity grounds).

20 Dkt. 154 at 10. Pursuant to this Court's order granting AFN's motion to intervene, AFN filed a complaint against the State of Alaska, the Alaska Department of Fish and Game, and Commissioner Douglas Vincent Lang. *See* Dkt. 96 at 9; Dkt. 97 at 1-2. It sought relief including "[a]n award to AFN of its fees and costs in this action." Dkt. 97 at 7.

21 *Hill*, 179 F.3d at 759.

22 *Id.*

its bet on the . . . outcome" by litigating a case on the merits, any sovereign immunity available to the state is waived because it's "conduct undermines the integrity of the judicial system."[23]

The State does not contest that AFN is a prevailing party in this litigation. "Local residents and other persons and organizations who are prevailing parties in an action filed pursuant to [ANILCA Section 807] *shall* be awarded their costs and attorney's fees."[24] The only remaining question is the amount of fees to be awarded.

II. AFN's Request For Fees Is Reasonable And Should Not Be Adjusted.

A. AFN's hours billed are reasonable.

The State argues that AFN's hours billed on this case are excessive because AFN did not play a significant role in this litigation, AFN's efforts were duplicative with those of the other plaintiffs, and AFN's entries are not detailed enough to determine if they are reasonable.[25] The State fails to meet its burden to challenge the reasonableness of the hours billed. And more importantly, the State is incorrect.

Most of the State's arguments are based merely on the State incorrectly characterizing AFN's legal work in this case, without any citation to the actual record. "The party opposing the fee application has a burden of rebuttal that requires submission of *evidence* . . . challenging the accuracy and reasonableness of the hours charged or the facts

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23 *Arizona v. Bliemeister* (*In re Bliemeister*), 296 F.3d 858, 862 (9th Cir. 2002) (quoting *Hill*, 179 F.3d at 756).

24 16 U.S.C. § 3117(a) (emphasis added).

25 Dkt. 185 at 11-19.

asserted by the prevailing party in its submitted affidavits."[26] "If opposing counsel cannot come up with specific reasons for reducing the fee request that the . . . court finds persuasive, it should normally grant the award in full . . . ,"[27] "or with no more than a haircut."[28]

i. AFN played a significant and important role in this litigation.

Without providing the Ninth Circuit briefing to this Court,[29] the State primarily argues that AFN's hours billed to this case were excessive because its legal work was duplicative of other Intervenors and the United States and because AFN did not "play a significant role in the litigation."[30] The State is wrong on both fronts.

Determining "how much time an attorney can reasonably spend on a specific case . . . will always depend on case-specific factors including, among others, the complexity of the legal issues, the procedural history, the size of the record, and when counsel was retained."[31] "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on

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26 *Abbas v. Vertical Entm't, LLC*, Nos. 19-56248, 19-56279, 2022 U.S. App. LEXIS 37795, at *3 (9th Cir. Apr. 6, 2022) (quoting *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98 (9th Cir. 1992)) (emphasis added).

27 *Id.* (quoting *Moreno v. City of Sacramento*, 534 F.3d 1106, 1116 (9th Cir. 2008)).

28 *Moreno*, 534 F.3d at 1116.

29 The State cannot rely on conclusory allegations about arguments made by the various parties in Ninth Circuit briefs without actually citing to those briefs or providing them to this Court. If the Court would find the briefing helpful, AFN is happy to provide copies for this Court's review.

30 Dkt. 185 at 12 (quoting *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1535 (9th Cir. 1985)).

31 *Costa v. Comm'r of SSA*, 690 F.3d 1132, 1136 (9th Cir. 2012).

the litigation."[32] AFN's hours billed are clearly reasonable considering the complexity and importance of the case, as well as the significant role AFN played in the litigation.[33]

This was an extraordinarily important case. "It is impossible to overstate the importance of fish in the context of Alaska Native subsistence."[34] By seeking to overturn the Ninth Circuit's longstanding *Katie John* precedent, the State threatened Alaska Native food security and the "fragile equilibrium" that ended the subsistence wars of the 1980's and 90s.[35]

This was also an extraordinarily complicated case. It required interpreting a statute unique to Alaska which has been read differently by this Court and by Ninth Circuit judges over the last thirty years. It required grappling with two U.S. Supreme Court decisions in the *Sturgeon* litigation. And it required addressing complicated federal reserved water rights, congressional constitutional powers, the equal footing doctrine, questions of title under the Alaska Statehood Act, and procedural questions.

AFN played a significant, independent role in this important and complicated litigation. In addition to the briefs it drafted, including a significant portion of the brief filed to the United States Supreme Court, Ms. Lindemuth was one of two intervenor

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32 *United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv.*, No. 3:13-cv-00104-TMB, 2018 U.S. Dist. LEXIS 235241, at *12 (D. Alaska Sep. 10, 2018) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983)).

33 *See Wilder v. Bernstein*, 965 F.2d 1196, 1204 (2d Cir. 1992) (collecting cases where courts have held that intervenors are entitled to attorney's fees for making significant contributions) (citations omitted).

34 Dkt. 110 at 30.

35 Dkt. 110 at 30-32.

counsel to argue to the Ninth Circuit, having to prepare not only AFN's briefed arguments but those of other intervenors who were not arguing.

The State faults AFN for briefing, before this Court and the Ninth Circuit, alternative sources for federal power other than the reserved waters right doctrine that it asserts were not addressed by any court.[36] But this was an extraordinarily complex case because the State was arguing it both as a statutory interpretation case and a federal infringement on state powers case. And it was in response to AFN's arguments that the State made a critical concession in its Ninth Circuit reply brief that Congress had the power to enact Title VIII of ANILCA. In the State's words, "whether the United States has this power is irrelevant; what matters is whether Congress, in fact, imposed a subsistence priority on navigable waters under ANILCA."[37]

Ms. Lindemuth hammered this point home at the oral argument before the Ninth Circuit, and the Ninth Circuit relied on this concession it its opinion: "Alaska does not dispute that Congress has the power to regulate fishing on navigable waters where Alaska holds title to the submerged lands. Alaska argues only as a matter of statutory interpretation that Congress did not do so in Title VIII of ANILCA."[38] The same concession was then central to arguing that the State's Petition for Certiorari did not merit review because there

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[36] Dkt. 185 at 12-13. AFN briefed the argument before the Ninth Circuit that there were many sources of power to regulate the navigable waters at issue in this case, including the Property Clause, Commerce Clause, and Congress's constitutional authority over Native affairs.

[37] Appellants' Reply Brief at 67-68, *United States v. Alaska*, 151 F.4th 1124 (9th Cir. 2025) (No. 24-2251). If the State's Reply Brief before the Ninth Circuit is not available to this Court, AFN is happy to provide a copy.

[38] Dkt. 160 at 34 n.13.

was no powers or state sovereignty question, but only a statutory interpretation issue that impacted only Alaska.[39]

In any case, even if the State were correct that AFN's alternative arguments were unimportant to this case, "[l]itigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters."[40]

AFN's briefing was also unique and non-duplicative from the other Intervenors in how it addressed the *Sturgeon* precedent, a case in which Ms. Lindemuth had personally participated.[41] There are many other additive contributions AFN can point to in this litigation,[42] if this were the test.

But the State is also wrong that AFN's fees should be reduced for reasonableness of its hours even if efforts among Intervenors or between AFN and the United States were duplicative.[43] The state cites no binding precedent to support this assertion.[44] The intervenors are separate parties with their own counsel and approaches to this case. "The court may reduce the number of hours awarded because the lawyer performed **unnecessarily** duplicative work, but determining whether work is unnecessarily

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39 *See* Joint Brief in Opposition at 1, 3, 19, perma.cc/UZC2-9U5Q.

40 *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983).

41 *See e.g.*, AFN's Opposition to Defendants' Motion for Summary Judgment, Dkt. 110 at 33-43. A similar argument was carried through to AFN's Ninth Circuit brief.

42 Additionally, AFN's briefing before this court and the Ninth Circuit included a robust history of ANCSA, ANILCA, and subsistence rights which was unique and important. *See, e.g.*, Dkt. 110 at 13-20.

43 *See*, Dkt. 185 at 11-12.

44 Dkt. 185 at 12.

duplicative is no easy task."[45] Necessary duplication is inherent in the process of litigating.[46] "There is no reason why the lawyer should perform this necessary work for free."[47] "In an ordinary case," a court should "follow the general practice of taxing costs in favor of winning intervenors, without taking the time required to make a more defined determination of additional or incremental contribution."[48]

ii. AFN's Legal Work Before the United States Supreme Court Was Not Excessive.

The State also argues that AFN's fees before the United States Supreme Court were excessive.[49] AFN seeks $153,202.17 for this work, of which $45,607.17 is for its Supreme Court specialists.[50] The State does not dispute that each Intervenor-Plaintiff had the right to file its own brief in opposition to certiorari. Given that AFN drafted its own brief that was then merged into one brief filed on behalf of all Intervenor-Plaintiffs, and is still seeking a substantially similar fee award to two other intervenors who did not draft briefs, AFN's fee request is more than reasonable.[51]

The State's primary argument relies on an affidavit from 20 years ago about the average amount of time it takes to draft a brief to oppose certiorari.[52] As discussed above,

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45 *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) (emphasis added).

46 *Id.*

47 *Id.*

48 *Am. Pub. Gas Ass'n v. FERC*, 190 U.S. App. D.C. 192, 587 F.2d 1089, 1099 (1978).

49 Dkt. 185 at 13-16.

50 Dkt. 169 at 5; Dkt. 170 at 4.

51 Ahtna Tene Nené and Ahtna, Inc. seek $146,373 for its work at the Supreme Court, Dkt. 181 at 2. And Association of Village Council Presidents, Ivan M. Ivan, and Betty Magnuson seek $155,438.06. Dkt. 182 at 10.

52 *See* Dkt. 185 at 15-16.

because of the importance of subsistence to Alaska Natives and other rural residents, this is not a typical case. And a stale affidavit from 20 years ago has little evidentiary value, in any event. Notably, the State does not disclose the number of hours or fees incurred (using its own Supreme Court specialists) to litigate this case or file its Petition for Certiorari.

To argue that AFN did not meaningfully contribute to the joint brief, the State cites KRITFC's brief that broadly stated that its brief was "the foundation" of the joint brief.[53] But as set forth in the Declaration of Nathaniel Amdur-Clark, filed February 26, 2026, in support of KRITFC's fee application, the Intervenor-Plaintiffs' unique perspectives and arguments were merged into one joint brief:

> [I]ntervenors coordinated extensively to avoid repetition, advance judicial economy, and avoid over-papering the Court where at all possible. That coordination was necessarily time-consuming but was highly effective in serving those goals. At the certiorari stage, this coordination involved the drafting of two briefs representing the unique perspectives of the intervenors, as the intervenors attempted to determine whether it would be possible to file a single joint brief in opposition to the certiorari petition. These two drafts were then consolidated into a single brief.[54]

The State solicited and had four amici submit briefs in support of its Supreme Court petition. All of these amici argued that the federal government was infringing on state power over fish and game, as well as navigable waters. AFN does not have to justify its specific contributions to the merged brief or identify what sections it wrote to establish its fees were reasonable, but significant portions of AFN's brief were included in the merged

53 Dkt. 185 at 13.

54 Dkt. 178 at 6.

brief, including portions capitalizing on the State's concession before the Ninth Circuit that this case did not involve an issue of State power or a challenge to Congress's power to enact Title VIII of ANILCA, as well as the portion more fulsomely addressing *Sturgeon*. Both of these were unique contributions by AFN as discussed above, among others.

iii. AFN's hours billed are clear.

The State, through its arguments about block billing and vague entries, does not meet its burden of "challenging the accuracy and reasonableness of the hours charged."[55] The State does not challenge specific entries of time as unreasonable,[56] and instead makes conclusory assertions that this Court cannot discern from the entries whether the hours sought are reasonable. But AFN submitted not only invoices for time submitted for payment to AFN,[57] but also breakdowns of most of those fees to show what kind of legal work was performed for the time charged.[58]

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[55] *Abbas v. Vertical Entm't, LLC*, Nos. 19-56248, 19-56279, 2022 U.S. App. LEXIS 37795, at *3 (9th Cir. Apr. 6, 2022) (quoting *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98 (9th Cir. 1992)).

[56] *See* Dkt. 185 at 17-19. The State asserts that "all of AFN's time logs" included multiple tasks and points to seven out of several hundred entries as being vague or difficult to evaluate. Dkt. 185 at 17-19. *But see, e.g.*, Dkt. 170-1 at 1-2 (showing individual entries for the following: "Incorporate final edits to motion for attorneys' fees and declaration;" "Finalize fee application;" "Review State's motion for extension of time and motion for stay;" "Review and revise Opposition to Motion for Stay;" "Conduct legislative history research regarding 16 USC 3117 for attorney's fees briefing;" and more).

[57] The State also faults AFN for not identifying "'the amount charged to the client, if any,' as required by Local Rule 54.2." Dkt. 185 at 8. If it is not clear from the Declaration of Jahna Lindemuth, Dkt. 170, CGL invoiced AFN monthly for the legal work set forth in the master CGL invoices attached as Exhibits A through C. And Exhibit D includes the actual invoices Jenner & Block sent AFN.

[58] *See* Dkt. 170-5; Dkt. 162-4 at 16-27.

And in this kind of case, where the parties were primarily researching and drafting appellate level briefs on complex issues which required a significant investment of time, AFN's invoices and spreadsheets are more than clear to discern the reasonableness of the legal work AFN did to oppose the State's efforts to undermine Title VIII of ANILCA and the *Katie John* trilogy of cases. The State has not demonstrated that AFN's hours billed are opaque or otherwise unreasonable such that this Court should "significantly reduce[] fees" requested.[59]

In conclusion, all of AFN's hours spent defending the rural subsistence priority to fish in Title VIII of ANILCA are reasonable. "By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker."[60] All of the Intervenor-Plaintiffs worked hard to successfully box the State in on its attempted fourth bite at the apple to undo Title VIII, and Intervenor-Plaintiffs were successful. The State has not met its burden to seek a broad reduction in AFN's fees based on unreasonableness of hours incurred to fight this important battle.

B. AFN has established that the rates charged by its attorneys are reasonable.

Using outside counsel from Washington D.C. who are United States Supreme Court specialists, and without disclosing the rates charged by the Consovoy McCarthy PLLC

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59 Dkt. 185 at 18-19.

60 *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008). *See id.* at 1113 (holding that "spen[ding] twice as long on the appeal than on the summary judgment . . . does not mean the additional time spent on appeal was unjustified" particularly if the appeal is very successful).

firm, the State argues that AFN's requested rates are too high. It asserts that Cashion Gilmore & Lindemuth's rates are above market rate for Jahna Lindemuth and Scott Kendall.[61] And it argues that the fees for Supreme Court counsel should be tethered to the Alaska legal market rather than the market for U.S. Supreme Court specialists.[62] The State is wrong on all fronts.

i. CGL's rates are market for the Alaska market

If the fee applicant produces satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation" in addition to the applicant attorney's own affidavits, the rate is "normally deemed to be reasonable," and is referred to as the "prevailing market rate."[63]

The State has not met its burden to disprove the accuracy and reasonableness of the many affidavits supporting the reasonableness of AFN's attorneys' rates. "The party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the . . . facts asserted by the prevailing party in its submitted affidavits."[64] The State failed to submit any declaration or evidence about the rates it paid to litigate this case, or the what rates are normally charged in Alaska.

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61 Dkt. 185 at 9-10.

62 Dkt. 185 at 10-11.

63 *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984).

64 *Hamby v. Walker*, No. 3:14-cv-00089-TMB, 2015 U.S. Dist. LEXIS 49433, at *17 (D. Alaska Apr. 15, 2015) (quoting *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98 (9th Cir. 1992)).

Instead, the State cites only to inapplicable orders from this Court involving different, less complex issues.[65] And, while "District judges can certainly consider the fees awarded . . . in the same locality in similar cases," "adopting a court-wide policy--even an informal one--of 'holding the line' on fees at a certain level goes well beyond the discretion of the district court."[66]

Ignoring the evidence actually submitted by AFN, the State cites to one case to support the assertion that "courts regularly reduce the parties' requested fees" if affidavits of attorneys unrelated to the present proceedings are not provided.[67] But in that case, the plaintiffs were all represented by the same attorneys,[68] and there was no "corroborating evidence of the prevailing market rate for similar attorneys doing similar work in the Anchorage area."[69] Here AFN's fees are supported not only by Ms. Lindemuth's

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65 As set forth above, this case was an extraordinarily complicated and important case regarding the protection of Alaska Native subsistence fishing rights. The reasonableness of fees depends on an attorney's "years of experience and the subject matter." *See TD Ameritrade, Inc. v. Matthews*, No. 3:16-cv-00136-SLG, 2022 U.S. Dist. LEXIS 227302, at *16 (D. Alaska Dec. 19, 2022) (citations omitted). The cases cited by the state do not implicate the same concerns at issue in this case. Dkt. 185 at 9-10; *see,e.g., Johnson v. Barber & Assocs. LLC*, No. 3:24-cv-00214-SLG, 2025 LX 144998, at *1-2, 6 (D. Alaska Feb. 6, 2025) (regarding copyright infringement and recovering costs from service of process and fees incurred seeking said costs); *Sycks v. Transamerica Life Ins. Co.*, No. 3:22-cv-00010-SLG, 2024 LX 25742, at *2 (D. Alaska Dec. 12, 2024) (regarding alleged lapse of an insurance policy).

66 *Moreno v. City of Sacramento*, 534 F.3d 1106, 1115 (9th Cir. 2008).

67 *See* Dkt. 185 at 8 (citing *Hamby v. Walker*, No. 3:14-cv-00089-TMB, 2015 U.S. Dist. LEXIS 49433, at *4 (D. Alaska Apr. 15, 2015)).

68 *Hamby*, No. 3:14-cv-00089-TMB, 2015 U.S. Dist. LEXIS 49433, at *1, 11.

69 *Id.* at *15.

declaration but by declarations from the other Intervenors' attorneys,[70] as well as the Declaration of James Torgerson from Stoel Rives, who is not associated with this case.[71] He declares under penalty of perjury that "rates for senior litigation partners in the Anchorage market are often $700 per hour, sometimes more."[72] AFN has established that the rates charged by Cashion Gilmore & Lindemuth are reasonable for the Alaska market.

ii. AFN's Supreme Court specialists' rates are reasonable.

The State does not contest that the rates charged by the Supreme Court specialists are accurate to that market.[73] And the State is simply incorrect here that the only legal market to assess work before the U.S. Supreme Court for an award under federal law is Alaska. "Generally, when determining a reasonable hourly rate, the relevant community is

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70 *See, e.g.*, Dkt. 169 at 5 (providing that the Declaration of Jahna Lindemuth sets forth that rates charged are reasonable); Dkt. 170 at 4 (citing to the rates charged by other counsel in the declaration); Dkt. 137-1 at 7 (rates charged by Landye Bennett Blumstein LLP range between $375 and $525/hour for partners); Dkt. 162-1 at 62 (usual rates charged by counsel Sonosky, Chambers, Sachse, Miller & Monkman, LLP are $400 to $550/hour for partners, and higher for Indian law matters); Dkt. 138 at 10 (rates charged by staff attorneys from the Native American Rights Fund range between $300 and $600/hour); Dkt. 162-3 at 10-11 (demonstrating same).

71 Dkt. 138-5.

72 Dkt. 138-5.

73 *See* Dkt. 185 at 10-11. AFN has more than established that Jenner & Block's rates are within market for Supreme Court specialists, as they are less than the specialists engaged by other Intervenor-Plaintiffs. *See* Dkt. 170 at 4 (providing that the market rate for Supreme Court specialists will be shown by the fee applications in this case); Dkt 181-1 at 6 (rates charged by Clement & Murphy, PLLC range between $1,550-2,650/hour for partners and $950/hour for an associate); Dkt. 179 at 2 (rates charged by Sidley Austin LLP are well above $2,000/hour for a senior counsel and a partner).

the forum in which the district court sits."[74] But if expertise or a specific specialty is warranted, rates for that expertise should be considered.[75]

It was the State's decision to litigate this case at every level available to it, including the United States Supreme Court.[76] And it used its own Supreme Court specialists to do so. After the State filed it Petition for Certiorari, AFN "retained Jenner & Block LLP for their expertise practicing before the U.S. Supreme Court—particularly in Native American law cases."[77] AFN used this expertise sparingly—for consultation and editing on the brief drafted by Cashion Gilmore & Lindemuth. This level of experience, expertise, and specialization, particularly regarding best practices for responding to a petition for certiorari, is not available in Alaska and resulted in the successful opposition of the State's Petition.[78] Moreover, AFN is seeking fees for U.S. Supreme Court specialists for work

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74 *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008) (citing *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997)).

75 *Id.* (holding that "rates outside the forum may be used if local counsel was unavailable, either because they are unwilling or unable to perform because they lack the degree of experience, expertise, or specialization required to handle properly the case." (quoting *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997)).

76 Dkt. 131; Dkt. 161.

77 Dkt. 170 at 4.

78 *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, No. 2:13-cv-4022-NKL, 2018 U.S. Dist. LEXIS 190824, at *5 (W.D. Mo. Nov. 7, 2018) ("[W]here local community rates would 'not be "sufficient to attract experienced counsel" in a specialized legal field,' the appropriate rate may be determined by reference to 'a national market or a market for a particular legal specialization.'" (quoting *Little Rock Sch. Dist. v. State Ark. Dep't of Educ.*, 674 F.3d 990, 997 (8th Cir. 2012))) The State cites this case for the proposition that different rates should not apply to work performed before the U.S. Supreme Court. *See* Dkt. 185 at 11. But in *Trinity Lutheran* higher fees were sought for representation *by the same organization* before the Supreme Court only. *See Trinity Lutheran Church of Columbia, Inc.,* 2:13-cv-4022-NKL, 2018 U.S. Dist. LEXIS 190824, at *5, 7.

done before the U.S. Supreme Court. This Court should not reduce the rates charged by Jenner & Block in awarding fees to AFN.

III. CONCLUSION

For the forgoing reasons, AFN hereby respectfully requests that this Court grant AFN's request for fees in full, awarding $ 494,423.17. As stated previously, AFN asks that this Court award fees and enter the Amended Final Judgment for AFN by April 17, 2026, to allow time for it to be included in this year's legislative appropriation.

CASHION GILMORE & LINDEMUTH
Attorneys for Intervenor-Plaintiff
Alaska Federation of Natives

DATE: March 17, 2026

/s/ Jahna M. Lindemuth
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CERTIFICATE OF SERVICE

I certify that on March 17, 2026, a copy of the foregoing document was served via ECF on all counsel of record.

/s/ Jahna M. Lindemuth