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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

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

**KUSKOKWIM RIVER INTER-TRIBAL FISH COMMISSION'S
REPLY IN SUPPORT OF MOTION FOR ATTORNEY'S FEES**

KRITFC's Reply in Support of Motion for Attorney's Fees
United States v. State of Alaska, Case No. 1:22-cv-00054-SLG

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INTRODUCTION

The State of Alaska brought this litigation on itself by issuing illegal emergency orders that would have caused irreparable harm to the Kuskokwim River Inter-Tribal Fish Commission's ("Fish Commission") interests.¹ The State now faces the predictable consequences of its conduct. Despite the State's long history of paying attorney's fees under the Alaska National Interest Lands Conservation Act (ANILCA) Title VIII, it chose to pursue an aggressive litigation strategy, including an appeal to the Ninth Circuit and a petition for a writ of certiorari to the United States Supreme Court. While it is the State's right to choose how to litigate its defense, it cannot now complain that the Fish Commission had to spend significant resources in its successful effort to overcome that defense. The Fish Commission's Consolidated and Renewed Motion for Attorney's Fees at Docket 177 seeks reasonable fees and is not barred by the State's sovereign immunity, which the State waived long ago.

ARGUMENT

I. THE MOTION FOR ATTORNEY'S FEES IS NOT BARRED BY SOVEREIGN IMMUNITY.

For the first time in this litigation, or *any* litigation related to ANILCA Title VIII, the State raises a sovereign immunity defense. It did not raise the issue of sovereign immunity when it originally contested its liability for fees before this Court, nor in its

¹ Order Regarding Pl.'s Mot. for Prelim. Inj., Docket 35; Order Regarding Mot. and Cross-Mot. for Summ. J., Docket 129 at 18, 27–29.

answer to any intervenor's complaint in this litigation, nor in decades of previous litigation during which it paid attorney's fees pursuant to the exact same provision under which fees are sought here. Consequently, the State has waived any sovereign immunity defense it may have had, and attorney's fees are appropriate under 16 U.S.C. § 3117.

A. A State May Waive Sovereign Immunity Through Its Conduct.

The Eleventh Amendment generally bars actions for damages against a state.² However, this bar is subject to three exceptions: (1) "a state may waive its Eleventh Amendment defense"; (2) "Congress may abrogate [a state's] sovereign immunity by acting pursuant to a grant of constitutional authority";³ and (3) the *Ex Parte Young* doctrine, which allows suits for injunctive relief against a state official.⁴

Although a waiver of sovereign immunity must be unambiguous, "a state may waive its Eleventh Amendment immunity by conduct that is incompatible with an intent to preserve that immunity."⁵ The principle that a state may waive sovereign immunity through its conduct "rests upon the [Eleventh] Amendment's presumed recognition of the

² *Franceschi v. Schwartz*, 57 F.3d 828, 831 (9th Cir. 1995).

³ Congress may abrogate a state's sovereign immunity where "the source of Congress' authority to effect this intrusion upon state sovereignty" does "not contravene the norms [the Supreme] Court has understood the Eleventh Amendment to exemplify." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 375 (2006) (finding Congressional authority to abrogate state sovereign immunity in the Article I bankruptcy clause).

⁴ *Douglas v. Cal. Dep't of Youth Auth.*, 271 F.3d 812, 817 (9th Cir. 2001), *amended by* 271 F.3d 910 (9th Cir. 2001).

⁵ *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 758 (9th Cir. 1999), *reh'g denied and amended by* 201 F.3d 1186 (9th Cir. 1999).

judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State’s actual preference or desire.”⁶ “To allow a state to assert sovereign immunity after listening to a court’s substantive comments on the merits of a case would give the state an unfair advantage when litigating suits.”⁷

Sovereign immunity is an affirmative defense “that must be raised ‘early in the proceedings’ to provide ‘fair warning’ to the plaintiff.”⁸ Consequently, sovereign immunity “may be forfeited where the state fails to assert it.”⁹

“It is elementary that any jurisdictional defect must be raised while the case is pending.”¹⁰ Even jurisdictional defects that may be raised at any time during litigation must be raised while a case is pending;¹¹ therefore “[a] party that ‘had an opportunity to litigate the question of subject-matter jurisdiction’ in the original proceeding ‘may not . . . reopen that question in a collateral attack.’”¹² Further, “it must be accepted as settled that

⁶ *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002).

⁷ *In re Bliemeister*, 296 F.3d 858, 862 (9th Cir. 2002).

⁸ *Demshki v. Monteith*, 255 F.3d 986, 989 (9th Cir. 2001) (quoting *Hill*, 179 F.3d at 761); see also *Walden v. Nevada*, 945 F.3d 1088, 1095 (9th Cir. 2019) (sovereign immunity must be “raised early enough in the proceedings to provide fair notice to Plaintiffs”).

⁹ *In re Bliemeister*, 296 F.3d at 861.

¹⁰ *City of S. Pasadena v. Mineta*, 284 F.3d 1154, 1156 (9th Cir. 2002).

¹¹ See *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987) (a case is final, and not pending, where “a judgment . . . has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied”).

¹² *City of S. Pasadena*, 284 F.3d at 1156–57 (alteration in original) (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n. 9 (1982)).

an award of attorney’s fees ancillary to prospective relief is not subject to the strictures of the Eleventh Amendment.”¹³

B. The State Waived Any Sovereign Immunity It May Have Had.

The State of Alaska is subject to suit, and therefore attorney’s fees, because it has unequivocally waived any sovereign immunity defense through “conduct that is incompatible with an intent to preserve that immunity.”¹⁴

The State waived its sovereign immunity by failing to raise the affirmative defense not just early in the litigation, but at *any point* in the litigation. First, the State failed to raise the issue of sovereign immunity when it partially opposed the Fish Commission’s Motion to Intervene.¹⁵ After the Court granted intervention, the State again failed to raise the issue as an affirmative defense in its answer to the Fish Commission’s (or any other plaintiff’s) complaint, despite raising other affirmative defenses,¹⁶ and despite the fact

¹³ *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 279 (1989) (citing *Hutto v. Finney*, 437 U.S. 678, 696–97 (1978)).

¹⁴ *See Hill*, 179 F.3d at 758. The State is incorrect that Congress lacked the authority to abrogate the State’s sovereign immunity. *See* Defs.’ Opp’n to KRITFC Mot. for Att’y’s Fees, Docket 191 at 6. The Supreme Court has recognized that Congress can waive state sovereign immunity in legislation passed pursuant to powers other than the Fourteenth Amendment. *See Cent. Va. Cmty. Coll.*, 546 U.S. at 375. However, the Court need not reach this issue because the State of Alaska has clearly waived its sovereign immunity through its litigation conduct in this case.

¹⁵ Defs.’ Partial Opp’n to KRITFC’s Mot. to Intervene as Pl., Docket 23 (absence).

¹⁶ Answer to KRITFC’s Compl. in Intervention, Docket 40 (absence); Answer to the Ass’n of Vill. Council Presidents’ Compl. in Intervention, Docket 46 (absence); Answer to Ahtna Tene Nené & Ahtna, Inc.’s Compl. in Intervention, Docket 50 (absence).

that the complaints-in-intervention expressly requested attorney's fees.¹⁷ Instead, the State proceeded to litigate a preliminary injunction motion (which the Fish Commission joined) and a summary judgment motion (joined by all intervenors) to full resolution on the merits. All of this conduct is more than adequate to demonstrate that the State waived immunity as to ancillary attorney's fees, given that a fee award does not present a *separate* Eleventh Amendment issue when a state is already subject to suit.¹⁸

The State *again* failed to raise a sovereign immunity defense when the Intervenor-Plaintiffs first moved for attorney's fees in this Court.¹⁹ The State asserts it raised the immunity issue as soon as it had notice that § 3117 was at issue here, but that is plainly not so. The intervenors' original fee motions expressly argued that the State was liable for fees under § 3117,²⁰ and the State made no mention of immunity. This Court then ruled in favor of the intervenors.²¹ The State then continued litigating the merits through the Ninth Circuit and in a certiorari petition to the Supreme Court.²²

¹⁷ KRITFC's Compl. in Intervention, Docket 12-1 at 7; AVCP's Compl. in Intervention, Docket 19-2 at 5; Ahtna's Compl. in Intervention, Docket 38-1 at 7; AFN Compl. in Intervention, Docket 97 at 7.

¹⁸ *Missouri*, 491 U.S. at 279 (citing *Hutto*, 437 U.S. at 696–97).

¹⁹ Defs.' Opp'n to Intervenor-Pls.' Fee Mots., Docket 151 (absence).

²⁰ *See, e.g.*, KRITFC Mot. for Att'y's Fees, Docket 135 at 2.

²¹ Order Re Mots. for Att'y's Fees, Docket 154. The State suggests it is proper to address sovereign immunity now, "with the applicability of §3117 addressed" by the Court's prior order, as if the "applicability" question is somehow distinct from the question of whether fees may be assessed against the State. *See* Docket 191 at 5. It is not.

²² *Alaska v. United States*, No. 25-320, 2026 WL 79601, at *1 (U.S. Jan. 12, 2026).

Further, in past Title VIII litigation the State has paid fees under § 3117.²³ From that prior litigation, too, the State had ample notice that it could be liable for any fees the Fish Commission might seek in its complaint-in-intervention.²⁴ Yet despite that knowledge, the State never timely raised a sovereign immunity defense.

To allow the State to raise a sovereign immunity defense now, after its arguments on the merits have been rejected by this Court, the Ninth Circuit, and the Supreme Court—*and* after its arguments on fee liability have already been rejected by this Court—would contravene the principle of avoiding “inconsistency, anomaly, and unfairness.”²⁵ At no point in this litigation, let alone “early in the proceedings,” did the Fish Commission have “fair warning” of the State’s intention to raise sovereign immunity as an affirmative defense.²⁶ By litigating this matter on the merits and failing to raise immunity even when the intervenors moved for a fee award under § 3117, the State has waived any sovereign immunity it may have had.²⁷

²³ Order on Att’y’s Fees at 1, *John v. Alaska*, No. A85-698 (D. Alaska Jan. 15, 1992), Docket 147-1 (“There is no dispute that an award of attorney’s fees is appropriate in this case”); Order on Mot. for Award of Att’y’s Fees & Costs, *Native Vill. of Quinhagak v. United States*, No. A93-0023-CV-HRH (D. Alaska Oct. 24, 2000), Docket 147-2; Order on Renewed & Suppl. Appl. for Award of Costs & Att’y’s Fees, *John v. United States*, No. A90-0484-CV-HRH (D. Alaska Mar. 28, 2003), Docket 147-3.

²⁴ Docket 12-1 at 2, 7 (incorporating the United States’s Complaint at Docket 1, seeking declaratory judgment that the State violated ANILCA Title VIII, and requesting fees and costs); *see also* Docket 154 at 7–8.

²⁵ *See Lapidés*, 535 U.S. at 620; *In re Bliemeister*, 296 F.3d at 862.

²⁶ *See Demshki*, 255 F.3d at 989.

²⁷ *See City of S. Pasadena*, 284 F.3d at 1157.

C. The Fish Commission Is Entitled to Fees Under ANILCA Title VIII.

The State of Alaska also reiterates its argument that it is not liable for fees because the United States and the Intervenor- Plaintiffs did not expressly state that the suit was brought under Title VIII, specifically § 3117.²⁸ This Court has already rejected that argument, and that ruling is the law of the case.²⁹ ANILCA Title VIII provides that “[l]ocal residents and other persons and organizations aggrieved by a failure of the State or the Federal Government to provide for the priority for subsistence uses . . . who are prevailing parties in an action filed pursuant to this section shall be awarded their costs and attorney’s fees.”³⁰ As this Court recognized, the United States, the Fish Commission, and the other intervenors clearly invoked ANILCA Title VIII in their complaints, which was sufficient to provide the State with notice that § 3117 was at issue.³¹ Given the law of the case, the Court should reject the State’s attempt to retread this ground.³²

II. THE REQUESTED FEES ARE REASONABLE.

The fees requested by the Fish Commission are reasonable and proportional to the historic importance of this litigation and the State’s aggressive litigation conduct. Other

²⁸ Docket 191 at 7.

²⁹ Docket 154 at 7–8; *see Stacy v. Colvin*, 825 F.3d 563, 567 (9th Cir. 2016) (“The law of the case doctrine generally prohibits a court from considering an issue that has already been decided by that same court or a higher court in the same case.”).

³⁰ 16 U.S.C. § 3117.

³¹ Docket 154 at 7–8.

³² *See Stacy*, 825 F.3d at 567.

district courts in the Ninth Circuit have recognized that it is appropriate to consider the stakes of the litigation and the opposing party's litigation strategy when determining whether requested fees are reasonable.³³ Despite the State's attempts to diminish the amount of work required by this litigation, it is undeniable that this was a critical case of epic proportions, and one that required the Fish Commission's best efforts to stop the State's attempt to illegally regulate subsistence fishing in navigable waters running through federal lands. The Fish Commission diligently and successfully litigated this matter through this Court and the Ninth Circuit, participated in two oral arguments,³⁴ and successfully opposed the State's petition for a writ of certiorari supported by multiple

³³ See *Crow Indian Tribe v. United States*, No. CV 18-89-M-DLC, 2021 WL 3142155, at *10 (D. Mont. July 26, 2021) ("The hours they spent in pursuit of this goal were commensurate with the stakes of the litigation. Against this backdrop, the hours Plaintiffs spent on the case are imminently reasonable."); *In re Bofl Holding, Inc. Sec. Litig.*, Nos. 3:15-CV-02324-GPC-KSC, 3:15-CV-02486-GPC-KSC, 2022 WL 9497235, at *10 (S.D. Cal. Oct. 14, 2022) ("[I]t is clear Lead Counsel tirelessly litigated on behalf of the class. Lead Counsel drafted voluminous complaints, defeated two motions to dismiss, won on appeal before the Ninth Circuit, and successfully opposed a petition for writ of certiorari to the Supreme Court."); *Antoninetti v. Chipotle Mexican Grill, Inc.*, No. 05cv01660 BTM (WMc), 2012 WL 2923310, at *4 (S.D. Cal. July 17, 2012) ("Although the Court agrees that Plaintiff's requested pre-mandate hours represent a large amount, this case was litigated aggressively by *both parties*—through a full bench trial, appeal to the Ninth Circuit, and a petition for certiorari to the United States Supreme Court. The Court does not find any hours per se unreasonable and declines to reduce Plaintiff's requested hours based on Defendant's general allegation that they are excessive.").

³⁴ The State is flatly incorrect that there was only one oral argument held in this case. See Docket 191 at 2. Long before oral argument at the Ninth Circuit, the Fish Commission also participated in oral argument before this Court on the motion for a preliminary injunction. Minute Entry for Proceedings Held June 21, 2022, Docket 31.

amici. Now, the State attempts to reopen the already-decided issue of fee liability³⁵ and to bring a host of objections inconsistent with controlling precedent. While the State is entitled to vigorously litigate, these actions have only further increased the Fish Commission's litigation costs.³⁶

A. The Fish Commission's Hourly Rates are Reasonable.

The record shows that the Fish Commission's rates are reasonable. While the State faults the Commission's decision not to attach additional evidence regarding prevailing market rates,³⁷ the Commission very reasonably determined that to do so would be duplicative because those market rates were already established by the hourly rates charged by lead counsel for the other Plaintiff-Intervenors and the Declaration of James Torgerson in support of the Association of Village Council President's 2024 Motion for Attorney's Fees.³⁸ The partner and associate rates for the Fish Commission's

³⁵ See generally Docket 154.

³⁶ See *Golden Gate Audobon Soc., Inc. v. U.S. Army Corps of Eng'rs*, 732 F. Supp. 1014, 1022 (N.D. Cal. 1989) (“[B]y intensively litigating the fee application, defendants caused plaintiffs to expend significantly more time on fee issues Defendants are certainly entitled to litigate a fee petition with vigor, but they cannot be heard to complain if that vigorous advocacy requires plaintiffs to expend substantial amounts of time in response.”).

³⁷ Docket 191 at 8–9.

³⁸ See Decl. of Jahna Lindemuth, Docket 170 at ¶ 6; Decl. of John Sky Starkey, Docket 181-1 at ¶¶ 7–9; Decl. of Erin Dougherty Lynch, Docket 182-2 at ¶¶ 5–8; Decl. of James Torgerson, Docket 138-5 at ¶ 7.

lead counsel are consistent with, or lower than, the rates charged by counsel for the other Plaintiff-Intervenors and other attorneys in the Anchorage market.³⁹

Furthermore, the State itself contracted with Consovoy McCarthy, PLLC, in 2022 to litigate this case.⁴⁰ Even after receiving an “Alaska Discounted Rate,” Consovoy McCarthy charged the State of Alaska \$600 per hour for partners and \$450 per hour for associates.⁴¹ The Commission’s lead counsel rates are well below these rates. It strains credulity for the State to suggest that the Commission’s requested rates are unreasonable when the State itself paid a higher rate for outside counsel. And although the State objects to the use of partners over associates,⁴² the *partner* rate for the Commission’s lead counsel is less than the *associate* rate the State paid its outside counsel.

The attached Second Declaration of Tanner Amdur-Clark reports that the actual amount charged to the Fish Commission thus far for work on this matter is \$407,515.50 (as opposed to the \$442,780.00 requested for lead counsel’s work) because the matter was handled on a “low bono” discounted basis. Yet the Ninth Circuit has clarified that an award of attorney’s fees “is not cost-based, and . . . the award of prevailing market rates—regardless whether the claimant is represented by private counsel or a non-profit

³⁹ *See id.*

⁴⁰ 2022 Contract Between Consovoy McCarthy, PLLC, and the State of Alaska, Ex. A, available at <https://www.dermotcole.com/s/23-216-1368-Consovoy-McCarthy-1.pdf>.

⁴¹ *Id.* at 6.

⁴² Docket 191 at 17.

legal services organization—should not be viewed as an unjustified ‘windfall’ profit to the attorney.”⁴³ Here, the Court has ample evidence to confirm that the rates requested by the Fish Commission’s lead counsel are consistent with prevailing market rates, and an award at the requested rates is therefore appropriate.

The State also objects to the rates requested for the work of the Fish Commission’s Supreme Court specialists.⁴⁴ But other courts in this Circuit have recognized that higher, out-of-forum rates are appropriate where counsel has a particular expertise and substantially contributed to the prevailing party’s success.⁴⁵ As described in the attached Second Declaration of Carter Phillips, Supreme Court practice has specialized significantly in the last three decades and market rates have increased accordingly.⁴⁶

⁴³ *Nadarajah v. Holder*, 569 F.3d 906, 916 (9th Cir. 2009) (citing *Blum v. Stenson*, 465 U.S. 886, 892–95 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); *INS v. Jean*, 496 U.S. 154, 161 (1990)). Although this case law developed in the context of civil rights fee-shifting statutes, the same standards are presumptively “generally applicable” to all federal fee-shifting statutes. *Hensley*, 461 U.S. at 433 n.7.

⁴⁴ Docket 191 at 10.

⁴⁵ *F.V. v. Jeppesen*, No. 1:17-cv-00170-CWD, 2022 WL 2150052, at *8 (D. Idaho June 8, 2022) (“The specialized expertise and knowledge of these attorneys was apparent during the proceedings and essential to the Plaintiffs’ the favorable outcome at both phases”); *League of Wilderness Defs./Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, No. 3:10-cv-01397-SI, 2014 WL 3546858, at *15 (D. Or. July 15, 2014) (finding Equal Access to Justice Act enhanced rates appropriate for federal environmental litigation experts); *Site 2020 Inc. v. Superior Traffic Servs., LLC*, No. CV 21-63-M-DLC-KLD, 2024 WL 5399254, at *14 (D. Mont. Oct. 25, 2024), *report and recommendation adopted*, 2025 WL 1260994 (D. Mont. May 1, 2025) (finding rates for out-of-district counsel were reasonable where no in-district firms specialized in the practice area).

⁴⁶ Second Phillips Decl. at ¶ 3.

Owing to this increased specialization, it is now common for the primary counsel handling a case to hire Supreme Court counsel.⁴⁷ Here, the Fish Commission determined that its best litigation strategy was to hire highly experienced counsel with specialized Supreme Court expertise to oppose the State’s petition for certiorari. The State’s objections on this point ring hollow, as the State similarly hired specialized counsel. By choosing to file a certiorari petition, the State compelled the Commission to consider how to mount the best possible opposition. As for the Commission’s decision not to name Supreme Court counsel on its opposition brief, that is typical for litigants opposing a petition and is no reason to discount the extraordinary contributions of those attorneys.⁴⁸ All of these decisions ultimately contributed to the Commission’s success in the litigation and are therefore compensable.⁴⁹

B. The Fish Commission’s Billed Hours are Reasonable.

The Fish Commission spent a reasonable amount of time litigating this complex matter of extraordinary importance to the Fish Commission, Alaska Native villages along the Kuskokwim River, and all rural Alaskans. The State’s objections lack merit.⁵⁰ First, it is incorrect that the Commission’s work in the District Court and the Ninth Circuit was

⁴⁷ *Id.*

⁴⁸ *Id.* ¶ 4.

⁴⁹ See *Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1052 (9th Cir. 1991) (“[P]laintiffs are to be compensated for attorney’s fees incurred for services that contribute to the ultimate victory in the lawsuit.”).

⁵⁰ Docket 191 at 12–13, 16–18.

duplicative of the work done by the United States and the other Intervenors. The Ninth Circuit recognizes that “[i]t is not unreasonable to have several plaintiffs sue for the same relief[;] . . . the fact that each plaintiff hires her own counsel is not, in itself, double billing.”⁵¹ In other words, the fact that the Fish Commission at times shared goals with the United States and the other Intervenors does not diminish its right to diligently prosecute its own case.⁵² By nature of being an intervenor as of right, the Fish Commission’s interests were *not* adequately represented by the United States.⁵³ Further (and as noted in declarations filed by counsel for the Intervenors⁵⁴) the Fish Commission’s interests, strategies, and arguments at times varied from those of the other parties. Where the Fish Commission’s interests and strategies lined up with those of the United States and the other Intervenors, the Commission worked diligently to coordinate and reduce duplication—efforts that required commensurate attorney time. Ultimately, however, when there are multiple parties on the same side of a case “[o]ne certainly

⁵¹ *Ass’n of Cal. Water Agencies v. Evans*, 386 F.3d 879, 887 (9th Cir. 2004) (footnote omitted).

⁵² *See Bresgal v. Brock*, 637 F. Supp. 278, 279 (D. Or. 1985) (“Prevailing intervenors can be entitled to attorney fees where, as here, they contribute substantially to the outcome of the case.” (citing *Seattle Sch. Dist. v. Washington*, 633 F.2d 1338 (9th Cir. 1980)); *Crow Indian Tribe*, 2021 WL 3142155, at *7–8 (declining to “scrutinize and reduce Plaintiffs’ time devoted to overlapping arguments”).

⁵³ *See* Order Regarding KRITFC’s Mot. to Intervene, Docket 29 at 6.

⁵⁴ *See* Decl. of Nathaniel Amdur-Clark, Docket 178 at ¶ 15; Docket 170 at ¶ 15; Docket 181-1 at ¶ 6.

expects *some* degree of duplication as an inherent part of the process,” and the work is therefore compensable.⁵⁵

Second, the Fish Commission is entitled to fees for time spent on alternative arguments made in this Court and the Ninth Circuit. “Litigants 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.”⁵⁶ The Fish Commission in good faith raised alternative arguments to present its strongest case and preserve all issues for appeal. Its diligence in the litigation resulted in a complete victory, and the State may not now retroactively dictate what path the Fish Commission should have taken to achieve that same result.

Third, the amount of time spent preparing the Ninth Circuit brief and preparing for and attending oral argument is reasonable. As the Fish Commission explained in its motion for attorney’s fees, the importance and complexity involved in this case required a significant effort.⁵⁷ Its efforts produced “excellent results” in all stages of the litigation and therefore the Fish Commission “should recover a fully compensatory fee.”⁵⁸ Particularly at the Ninth Circuit, where the court has much wider latitude than this Court to reassess Circuit precedent, extreme diligence and care was imperative. Additionally,

⁵⁵ *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008).

⁵⁶ *Hensley*, 461 U.S. at 435.

⁵⁷ *See* Docket 177 at 6–8.

⁵⁸ *Hensley*, 461 U.S. at 435.

while the State objects to the amount of time Mr. Amdur-Clark spent attending and preparing for the appellate argument in Seattle,⁵⁹ the State’s own insistence on accelerating the case not only demanded that much more intensity; it also required the Commission and the other Intervenors to attend oral argument outside of the District, rather than wait for the Ninth Circuit to sit in Alaska.⁶⁰ As several courts in the Ninth Circuit have recognized, “[r]easonable attorneys’ fees include reasonable travel time compensated at the full hourly rate.”⁶¹

Fourth, the Fish Commission is entitled to determine who performs discrete tasks. The State asks this Court to reduce the Commission’s fees because the State believes some of the work performed by partners could have been performed by associates.⁶² But the Ninth Circuit has cautioned that a court “may not attempt to impose its own judgment regarding the best way to operate a law firm, nor to determine if different staffing decisions might have led to different fee requests.”⁶³ Indeed, “[t]he difficulty and skill

⁵⁹ Docket 191 at 17.

⁶⁰ *See Alaska v. United States*, No. 24-2251, State of Alaska’s Resp. to Status Report, Docket 79.1 at 3.

⁶¹ *Cnty. Ass’n for the Restoration of the Env’t v. Nelson Faria Dairy, Inc.*, No. CV-04-3060-LRS, 2012 WL 13018989, at *2 (E.D. Wash. Apr. 10, 2012) (cleaned up); *see also 11333, Inc. v. Certain Underwriters at Lloyd’s, London*, No. CV-14-02001-PHX-NVW, 2018 WL 2322783, at *2 (D. Ariz. May 22, 2018) (“It is customary and routine for commercial attorneys working on an hourly rate basis . . . to charge their clients for their time necessarily traveling on the matter.”); *Arnold v. Pfizer, Inc.*, No. 3:10-cv-01025-AC, 2015 WL 4603326, at *13 (D. Or. July 29, 2015) (similar).

⁶² Docket 191 at 17–18.

⁶³ *Moreno*, 534 F.3d at 1115.

level of the work performed, and the results achieved—not whether it would have been cheaper to delegate the work to other attorneys—must drive the district court’s decision.”⁶⁴ Because the partners litigating this matter have a deep knowledge of the facts and legal history of this case, in many instances it was simply most efficient for partners to conduct the billed tasks.

The Fish Commission’s work in opposing the State’s certiorari petition was also reasonable and not duplicative. Following the change in presidential administrations, the Commission and other Intervenors could not be sure that the United States would continue its prior litigation strategy. The Governor demanded that the incoming Administration reverse course in this litigation,⁶⁵ and follow-on executive orders indicated a change was coming in the United States’s position on subsistence issues.⁶⁶ At the same time, attorneys in the Solicitor General’s office do not share advance information about the federal government’s Supreme Court filings.⁶⁷ Accordingly, the Fish Commission was compelled to oppose the petition without relying on the United States in any respect. The need for this diligence was validated by the United States’

⁶⁴ *Id.*

⁶⁵ See Off. of Gov. Mike Dunleavy, *Alaska Priorities for Federal Transition* 19–20, available at <https://gov.alaska.gov/wp-content/uploads/Alaska-Federal-Transition-Plan.pdf>.

⁶⁶ See, e.g., Unleashing Alaska’s Extraordinary Resource Potential, Exec. Order No. 14153, 90 Fed. Reg. 8347 (Jan. 20, 2025).

⁶⁷ See Second Phillips Decl. at ¶ 8.

opposition, which relied primarily on the arguments that the *Katie John* precedent was not incompatible with subsequent caselaw and that the Supreme Court need not disturb the status quo, but neither defended the merits of the decisions below nor addressed other reasons why the case was a poor vehicle to consider the issues presented by the State.⁶⁸

The Fish Commission's interests were also served—as its success in the litigation demonstrates—by coordinating with the other Intervenors, even though this required more time. These efforts necessarily consisted of a collaborative process to ensure that the strategy and substance of the opposition best represented the diverse interests of the Intervenors.⁶⁹ As described in the Second Phillips declaration, it is the Fish Commission's counsel who produced the first draft of the opposition brief, and all that time should be fully compensated.⁷⁰ The State's suggestion that this time was unnecessary because a party is not technically required to file any opposition at all, is both irresponsible and contrary to Ninth Circuit precedent establishing that time spent opposing a certiorari petition is compensable.⁷¹

⁶⁸ Compare United States Opp. to Petition for Cert. at 16–24 (absence of argument regarding the merits) with Intervenors' Opp. to Petition for Cert. at 26–32 (arguing that the decisions below correctly interpreted ANILCA Title VIII).

⁶⁹ See Second Phillips Decl. at ¶¶ 10–11.

⁷⁰ *Id.* at ¶ 11.

⁷¹ *Friend v. Kolodziejczak*, 72 F.3d 1386, 1391 (9th Cir. 1995) (holding prevailing party is entitled to fees for time spent opposing a petition for a writ of certiorari, regardless of whether the opposition was even successful); *Cabrales*, 935 F.2d at 1053 (holding plaintiff entitled to fees for time spent on first unsuccessful opposition and second successful opposition). The Fish Commission's efforts in opposing the petition were

Finally, the Fish Commission’s time entries are sufficiently detailed to permit the Court to assess their reasonableness. A prevailing party’s counsel is “is not required to record in great detail how each minute of his time was expended,”⁷² and block billing is only impermissible when the Court lacks sufficient information to determine whether the time spent on the task was reasonable.⁷³ Here, the Court has sufficient detail to determine, based on the Court’s experience and discretion, that the Fish Commission’s entries and time spent were reasonable.

In total, the Fish Commission’s hours in this Court, the Ninth Circuit, and the Supreme Court represent a significant effort that is reasonable and commensurate with the “difficulty and skill level of the work performed[] and the result achieved.”⁷⁴ While the State insists that the Court should instead look at the combined efforts of all the

clearly necessary and led to its ultimate success in the litigation. *See* Second Phillips Decl. at ¶¶ 8–11.

⁷² *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000) (quoting *Hensley*, 461 U.S. at 437 n.12).

⁷³ *Garcia v. Ford Motor Co.*, No. 22-cv-1474-GPC, 2023 WL 3961090, at *3 (S.D. Cal. June 12, 2023) (“[B]lock billing is not prima facie objectionable.”); *Mathis v. County of Lyon*, No. 2:07-cv-00628-APG-GWF, 2017 WL 1430606, at *2 n.3 (D. Nev. Apr. 19, 2017), *aff’d*, 757 F. App’x 542 (9th Cir. 2018) (“I do not hold that block billing is *per se* objectionable. Sometimes, the descriptions of time in a block bill are sufficient for me to evaluate the reasonableness of the time spent.”); *Campbell v. Nat’l Passenger R.R. Corp.*, 718 F. Supp. 2d 1093, 1103 (N.D. Cal. 2010) (“The Court concludes that the entries Amtrak identifies as block-billed are detailed enough for the Court to assess the reasonableness of the hours billed. Therefore, a reduction for block billing is not necessary.”); *see also Cammarata v. Kelly Cap., LLC*, No.: 3:17-cv-00346-BEN-AGS, 2020 WL 4784745, at *4 (S.D. Cal. Aug. 18, 2020).

⁷⁴ *Moreno*, 534 F.3d at 1115.

Intervenors as if they were a single litigant, the appropriate standard is the reasonableness of *each* party's time.⁷⁵ If further evidence is necessary, the Court need look no further than the State's own assessment of the effort it believed would be necessary to litigate this case from start to finish: the State's contract with Consovoy McCarthy contemplates a not-to-exceed amount of \$750,000,⁷⁶ well beyond the fees the Fish Commission now seeks. The Fish Commission's rates and hours are reasonable, and the Court should award fees accordingly.

CONCLUSION

For the foregoing reasons, as well as the reasons articulated in the Consolidated and Renewed Motion for Attorney's Fees at Docket 177, the Fish Commission is entitled to an award of attorneys' fees in the amount of \$660,242.50.

RESPECTFULLY SUBMITTED this 15th day of April 2026.

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⁷⁵ See *Democratic Party of Wash. State v. Reed*, 388 F.3d 1281, 1287–88 (9th Cir. 2004) (rejecting argument that the court should compare the combined total hours of the prevailing parties to the hours of a single defendant).

⁷⁶ Ex. A at 1; see also State of Alaska Request For Proposals, at 3 (July 8, 2022), <https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=135422> (estimating \$250,000 for the trial court phase alone).

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Certificate of Service

I certify that on April 15, 2026, a copy of the foregoing document was served via ECF on all counsel of record.

/s/ Nathaniel Amdur-Clark

Nathaniel Amdur-Clark