

IN THE
Supreme Court of the United States

STATE OF ALASKA, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Ninth Circuit

**BRIEF OF STATE OF IDAHO, 19
OTHER STATES, AND THE ARIZONA
LEGISLATURE AS *AMICI CURIAE* IN
SUPPORT OF PETITIONERS**

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INTEREST OF *AMICI CURIAE*¹

The States of Idaho, Alabama, Arkansas, Florida, Indiana, Iowa, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and the Arizona Legislature (“*Amici States*”) support granting Alaska’s petition for a writ of certiorari and reversing the Ninth Circuit’s decision holding that “public lands” under Title VIII of the Alaska National Interest Lands Conservation Act (“ANILCA”) includes federal water-reservation rights. In so holding, the Ninth Circuit divested a state of its traditional authority over its navigable waters based on an untenable expansion of the implied-reservation-of-water doctrine.

In the West, water is scarce, but federal land is not. Alaska itself is 61% federal lands, and Idaho is 62%.² Federal lands average approximately 46% of land within the eleven coterminous western states.³ “More than 60% of the average annual water yield in the [eleven] Western States is from federal reservations.” *United States v. New Mexico*, 438 U.S. 696, 699 n.3 (1978).

¹ No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amici’s* counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notification of the filing of this brief.

² Carol Hardy Vincent & Laura A. Hanson, Cong. Rsch. Serv., R42346, *Federal Land Ownership: Overview and Data* 7 (updated 2020), available at <https://tinyurl.com/yck9xejr>.

³ *Id.* at 19.

Although at first blush the Ninth Circuit appears to have addressed a limited question about Alaska and ANILCA, in reality the court blessed an application of the federal reserved-water-rights doctrine that threatens the longstanding deference to state law for governing water throughout the West.

In reaching that outcome, the Ninth Circuit not only contradicted this Court's 2019 decision in *Sturgeon v. Frost*, but also failed to heed the "clear-statement" rule that protects state sovereignty from questionable attempts to shift the balance of power towards the federal government over areas of traditional state regulation, including water management within a state's borders.

Amici States maintain a strong interest in narrow application of federal preemption, particularly in the water-law context. To this end, *Amici* States are interested in assuring that federal reserved water rights are properly interpreted and adjudicated.

Given the profound errors in and detrimental consequences flowing from the decision below, this Court should grant review and reverse.

SUMMARY OF THE ARGUMENT

The decision below rests on several profound errors worthy of review and correction by this Court.

First, the Ninth Circuit’s opinion squarely conflicts with this Court’s decision in *Sturgeon v. Frost*, 587 U.S. 28 (2019), which held that Alaska’s navigable waters are not “public lands” under ANILCA. *See* Part I, *infra*. To be sure, *Sturgeon* addressed ANILCA Title I, whereas this case involved ANILCA Title VIII, but Congress expressly dictated that the same definition applies to both Titles. The Ninth Circuit, however, claimed the meaning of “public lands” differs dramatically between Titles I and VIII, relying on an unpersuasive theory that Congress had ratified the Ninth Circuit’s pre-*Sturgeon* approach—despite there being no intervening change to the definition of “public lands.”

Second, even if there were some ambiguity in “public lands” in Title VIII (and, after *Sturgeon*, there is not), it would be resolved in Alaska’s favor under the clear-statement doctrine, which requires courts to presume that Congress did not intend to supersede state authority in areas traditionally regulated by states—like water management—unless such intent is clearly manifested in the relevant statute. *See* Part II, *infra*. But the Ninth Circuit oddly held that this long-standing rule did not apply here because it did not qualify as new, intervening authority.

Third, even if the United States could hold title in a reserved interest in water, it would be limited to the “amount of water necessary to fulfill the purpose of the reservation, no more.” *New Mexico*, 438 U.S. at 700. An actual adjudication must determine the

existence and scope of federal reserved water rights, rather than back-door federal regulations. But the Ninth Circuit never even addressed this requirement. *See* Part III, *infra*.

Although the discrete issue before the Court is the interpretation of “public lands” under Title VIII of ANILCA, whether a state-owned navigable river qualifies as “public land” touches “on vital issues of state sovereignty.” *Sturgeon v. Frost*, 577 U.S. 424, 441 (2016). Under the equal footing doctrine, each state enters the Union with the same rights as the other states. As part of equal footing, each state retains its sovereign control of navigable waters within its borders. The Ninth Circuit’s decision below threatens to deprive western states of their constitutionally guaranteed control of navigable waters.

Moreover, the Ninth Circuit’s interpretation is far-reaching, as the term “public lands” appears hundreds of times across similar provisions in Title 16. In these provisions, “public lands” is often defined using language like ANILCA’s definition. The decision risks throwing into chaos the entire realm of water law in the West.

The Court should grant Alaska’s petition for a writ of certiorari.

ARGUMENT

I. The Decision Below Is Irreconcilable with *Sturgeon* and Portends a Massive Shift in Power Away from States.

For something to qualify as “public lands” under ANILCA, the United States must have “title” in it, among other requirements. 16 U.S.C. § 3102(1)–(3). In

Sturgeon, this Court addressed whether the United States has “title” to an “interest” in the Nation River in Alaska. 587 U.S. at 43. The Court held that there was “no evidence that the Congress enacting ANILCA” intended to allow the United States “to hold ‘title’ ... to reserved water rights.” *Id.* at 43–44. Such rights are “usufructuary,” meaning available “for the Government to use” but “not own.” *Id.* at 43.

In other words, “reserved water rights are not the type of property interests to which title can be held.” *Id.* at 44. Because of that, “public lands” in Title I of ANILCA *cannot* include reserved water rights, as the United States cannot possess title in them. *See* 16 U.S.C. § 3102(1)–(3).

To be sure, *Sturgeon* addressed “public lands” as it appeared in Title I of ANILCA, *see* 587 U.S. at 45 n.2, while this case is about “public lands” as it appears in Title VIII of ANILCA. But Congress has expressly dictated that the same definition must apply for *all* of ANILCA (i.e., “[a]s used in this Act”), except “titles IX and XIV.” 16 U.S.C. § 3102.

This yields a simple syllogism: this Court has interpreted “public lands” as categorically excluding reserved-water rights, and by statute that same definition must apply to Title VIII of ANILCA, too. Accordingly, “public lands” in Title VIII cannot include reserved-water rights.

That obvious outcome should have resolved this case in Alaska’s favor. Nevertheless, the Ninth Circuit persisted in its pre-*Sturgeon* view that the term “public lands” in Title VIII includes reserved-water rights. The court offered several reasons, but respectfully, none is remotely persuasive.

The court claimed its prior interpretation of “public lands” in Title VIII had been ratified by Congress in the 1990s via “appropriations acts.” Pet.App.4a; *id.* at 33a–38a. That is a non-starter because Congress did not touch the definition of “public lands.” This Court has cautioned against relying on appropriations acts to conclude that Congress modified existing statutory text or ratified some then-extant judicial or executive interpretation of a statute. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978) (“The doctrine disfavoring repeals by implication applies with full vigor when the subsequent legislation is an appropriations measure.”) (cleaned up).

For example, the CDC’s sweeping eviction moratorium during COVID-19 was originally slated to expire on December 31, 2020, but “Congress extended it for one month as part of the second COVID-19 relief Act”—an appropriations act. *Ala. Ass’n of Realtors v. HHS*, 594 U.S. 758, 760 (2021). The government contended this showed congressional ratification of the CDC’s authority to issue such a moratorium, but this Court rejected that argument, holding that Congress had *not* “specifically authorized the action that the CDC has taken” and that the challengers were “virtually certain to succeed on the merits of their argument that the CDC has exceeded its authority.” *Id.* at 759–60.

The same logic applies here: appropriations acts did not change the meaning of “public lands” in ANILCA. But even if they did, *Sturgeon* post-dates that supposed ratification and thus inherently rejected it. The Ninth Circuit was required to follow

the 2019 *Sturgeon* decision, not tea leaves from 1990s appropriations acts.

The Ninth Circuit also claimed that statutory “context and objective[s]” could overcome *Sturgeon* and § 3102, Pet.App.32a, but *Sturgeon* itself rejected the argument that “statements of purpose” could somehow “override [the] statute’s operative language,” 587 U.S. at 57 (cleaned up). Also, to be clear, the Ninth Circuit’s interpretation of “public lands” in Title VIII is not just “different” or “distinct” from this Court’s interpretation in *Sturgeon*, Pet.App.25a–26a, but rather is directly contrary to it. This was not some slight interpretive nuance based on context—it was a polar-opposite interpretation.

Ironically, the Ninth Circuit’s view that “public lands” in Title VIII of ANILCA means something different than “public lands” in Title I is contrary to the Ninth Circuit’s own prior holding that “[i]t would be anomalous” to “employ[] a different construction of ‘public lands’ than applicable elsewhere in ANILCA.” *Sturgeon*, 872 F.3d 927, 934 (9th Cir. 2017). If the Ninth Circuit had followed that holding here, it would have held that *Sturgeon* dictated the meaning of “public lands” in Title VIII, too. However, the Ninth Circuit’s concern about differing definitions for the same term has apparently gone by the wayside.

Thus, far from “harmoniz[ing]” precedent, Pet.App.4a, the decision below made a hash of it. The Ninth Circuit chose to follow circuit precedent that is inconsistent with this Court’s opinion in *Sturgeon*, while discarding circuit precedent that would have yielded the outcome demanded by *Sturgeon*.

The effects of the decision below will extend far beyond Alaska. “Navigable waters uniquely implicate sovereign interests.” *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997). By insisting that the 200-plus uses of “public lands” in ANILCA might each have its own bespoke definition, perhaps directly contrary to the definition *Sturgeon* announced, the Ninth Circuit risks throwing the rules for state water management into chaos. And that is before accounting for the fact that numerous other statutes also use the term “public lands” and thus likewise—under the opinion below—could allow the federal government to usurp states’ water rights without statutory support. Pet.24 & n.3.

For example, the Federal Land Policy and Management Act (“FLPMA”), defines “public lands” as “*any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management.*” 43 U.S.C § 1702(e) (emphasis added). Throughout Title 16, this definition is incorporated into dozens of other statutes. *See, e.g.*, 16 U.S.C. §§ 6502(1)(B), 7911(1)(B). Because ownership is an even broader concept than title, the Ninth Circuit’s broad interpretation of “title” threatens to open the door to expansive readings of these other statutes.

In Idaho, the Bureau of Land Management already manages over 11 million acres of land.⁴ The specter of courts misinterpreting and expanding the scope of “public lands”—not just in ANILCA, but also other statutes like FLPMA—is an alarming threat to Idaho

⁴ Vincent & Hanson, *supra* note 2, at 9.

and other states' control over their land and navigable waters.

II. The Ninth Circuit Failed to Apply the Clear-Statement Doctrine, Which Protects State Sovereignty.

Even if there were lingering uncertainty about whether *Sturgeon* directly resolved the meaning of “public lands” in Title VIII of ANILCA, the clear-statement doctrine should have removed all doubt and dictated a ruling in Alaska’s favor. But the Ninth Circuit oddly held this long-standing doctrine was inapplicable because it did not qualify as new, intervening precedent. Pet.App.39a. That was error.

“Congress should make its intention ‘clear and manifest’ if it intends to pre-empt the historic powers of the States.” *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65 (1989). “In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” *Id.*; see also *Sackett v. EPA*, 598 U.S. 651, 679 (2023); *Solid Waste Agency of N. Cook Cnty. (“SWANCC”) v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172–74 (2001); *United States v. Bass*, 404 U.S. 336, 349 (1971).

Management over a state’s own water is forefront among such historic powers. “Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged.” *United States v. Oregon*, 295 U.S. 1, 14 (1935). “The

history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.” *California v. United States*, 438 U.S. 645, 653 (1978).

Indeed, state ownership of navigable water rights is “deeply rooted in history” and implicates the “equal footing doctrine.” *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987). Under English common law, the sovereign held “title” to all land under navigable waters. *Id.* This title to navigable waters “was considered an essential attribute of sovereignty.” *Id.* The original thirteen colonies claimed this sovereign title when they declared independence from Britain, and any state that subsequently joins the Union—including western states—enters with this same sovereign title over its navigable waters. *Id.* at 196; *see* Ch. 656, § 1, 26 Stat. 215, 215 (1890) (admitting Idaho “into the union on an equal footing with the original states in all respects whatever”). Because of its importance to the traditional sovereign power of states, this Court does not “lightly infer a congressional intent to defeat a State’s title to land under navigable waters.” *Utah Div. of State Lands*, 482 U.S. at 197.

Accordingly, Congress must speak clearly when its actions “would result in a significant impingement of the States’ traditional and primary power over land and water use.” *SWANCC*, 531 U.S. at 174 (emphasis added). And interpreting “public lands” to include navigable waters in which the United States owns an implied federally-reserved water right would result in

a significant impingement of the States' traditional authority over navigable waters within their borders.

Despite this, the Ninth Circuit's opinion below completely sidestepped the clear-statement doctrine. The rationale given was that the doctrine is so longstanding that it "does not constitute 'intervening' authority" for purposes of disregarding the Ninth Circuit's prior interpretation of "public lands" in Title VIII. Pet.App.39a. This created an odd Catch-22: intervening precedent like *Sturgeon* was disregarded in favor of old Ninth Circuit precedent, while longstanding Supreme Court precedent was held not to apply at all. In that sense, the opinion below was consistent about one thing: this Court's precedent, be it old or new, must fall to the Ninth Circuit's belief that its pre-*Sturgeon* opinions must be right.

That artful dodge let the court off the hook from identifying clear text in ANILCA supporting the United States's view of "public lands" in Article VIII. The court never claimed such clarity exists. The difficulty the court faced in distinguishing *Sturgeon* is itself proof there is no such clear language in ANILCA. If anything, the clear and consistent interpretation of "public lands" in ANILCA is directly contrary to the Ninth Circuit's interpretation.

* * *

The Ninth Circuit's interpretation of Title VIII of ANILCA portends a significant shift in power from the States to the federal government in the context of reserved-water rights. But nobody, not even the decision below, contends that Congress clearly authorized that shift.

III. Even if the United States Could Hold Title to an Implied Water Right, the Ninth Circuit’s Decision Was Still Wrong.

The arguments above should have resolved this case in favor of Alaska: the Ninth Circuit’s holding contradicts *Sturgeon*, § 3102, and the clear-statement doctrine. But even if the United States were somehow able to hold title in an implied federally-reserved water right for purposes of Title VIII of ANILCA, the decision below is still wrong because such a right must be limited only to the minimal amount of water necessary for the United States’s interest.

This Court held as much in *Sturgeon*, explaining that even if the United States could hold title, it would “merely enabl[e] the Government to take or maintain the specific amount of water—and no more—required to fulfill the purpose of [its land] reservation.” 587 U.S. at 44 (cleaned up). That tracked longstanding precedent. “Each time this Court has applied the implied-reservation-of-water doctrine it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.” *New Mexico*, 438 U.S. at 700 (cleaned up).

“This careful examination *is required* both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water.” *Id.* at 701–02 (emphasis added). Accordingly, the court can recognize only a reservation of a “minimal need” of water. *Cappaert v. United States*, 426 U.S. 128, 141 (1976).

Because of this need for careful examination, it is vital that the proper channels determine the extent of federal reserved water rights. Judicial adjudication must determine the existence and scope of federal reserved water rights, not back-door federal regulations. For example, Idaho has engaged in decades of litigation with the United States over water rights, with hard-fought negotiation and careful judicial determination of water rights in adjudications like the Snake River Basin Adjudication. The Snake River Basin Adjudication was a “27-year effort” that culminated in a Unified Decree, in which “the court decreed more than 158,600 water rights.” *United States v. Idaho*, 746 F. Supp. 3d 881, 894–95 (D. Idaho 2024). The careful balance that these negotiations and water right decrees struck would be upended if a federal reserved water right transforms from a mere right to use a specific quantity of water into the authority to control and regulate a state’s navigable waters.

It is therefore essential that the existence and scope of federal reserved water rights are determined by careful judicial inquiry in the context of an actual adjudication. But in its decision below, the Ninth Circuit failed to undertake this inquiry altogether.

* * *

The decision below pulled out all the stops to resurrect and save the Ninth Circuit’s pre-*Sturgeon* caselaw on the meaning of “public lands.” None of the rationales provided for doing so are persuasive, and they open the door to massive shifts in power from the states to the federal government, especially across the West, where federal land is abundant but water is scarce. The Court should grant review and reverse.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petition.

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