No. _____

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 U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEPHEN J. COX
Attorney General

MARGARET PATON-WALSH
AARON C. PETERSON
Assistant Attorneys General
DEPARTMENT OF LAW
1031 W. 4th Ave., Ste. 200
Anchorage, AK 99501
(907) 269-5100

J. MICHAEL CONNOLLY
Counsel of Record
TAYLOR A.R. MEEHAN
STEVEN C. BEGAKIS
ZACHARY P. GROUEV
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
mike@consovoymccarthy.com

Counsel for Petitioners

September 15, 2025

QUESTION PRESENTED

Whether the United States can regulate fishing on Alaska's navigable waters under the Alaska National Interest Lands Conservation Act, when its statutory authority is limited to "public lands" and that term is defined as "lands, waters, and interests therein … the title to which is in the United States."

PARTIES TO THE PROCEEDING

Petitioners are the State of Alaska; the Alaska Department of Fish and Game; and Doug Vincent-Lang, in his official capacity as Commissioner of the Alaska Department of Fish and Game. Petitioners were defendants below.

Respondent is the United States of America, which was the plaintiff below.

Respondents also are the Kuskokwim River Inter-Tribal Fish Commission; the Association of Village Council Presidents; Betty Magnuson; Ivan M. Ivan; Ahtna Tene Nene; Ahtna, Inc.; and the Alaska Federation of Natives. These parties were intervenor plaintiffs below.

RELATED PROCEEDINGS

United States District Court (D. Alaska):

United States v. Alaska, No. 22-cv-54-SLG (Mar. 29, 2024) (order granting summary judgment to plaintiff and intervenor plaintiffs)

United States v. Alaska, No. 22-cv-54-SLG (Apr. 1, 2024) (judgment for plaintiff and intervenor plaintiffs)

United States Court of Appeals (9th Cir.):

United States v. Alaska, No. 24-2251 (Aug. 20, 2025) (opinion)

TABLE OF CONTENTS

Appendix

TABLE OF CITED AUTHORITIES

Cases

Statutes, Rules and Regulations

Other Authorities

INTRODUCTION

This Court twice granted certiorari to settle an issue of exceptional importance: whether the federal government can regulate Alaska's navigable waters—specifically, by banning hovercrafts—when the waters flowed through a federal preserve. *See Sturgeon v. Frost*, 577 U.S. 424 (2016); *Sturgeon v. Frost*, 587 U.S. 28 (2019). In two unanimous opinions, the Court held that Congress gave the federal government no such power. Parsing the Alaska National Interest Lands Conservation Act, the Court concluded that Alaska's navigable waters are not "public lands," defined as "lands, waters, and interests therein … the title to which is in the United States." 16 U.S.C. §3102. The United States cannot have "title" to a reserved water right, and even if it could, that would let it only "take or maintain [a] specific 'amount of water,'" not assert "plenary authority" over the waters. *Sturgeon II*, 587 U.S. at 44-45.

Lurking in the background of *Sturgeon* was an even bigger issue. In a case known as *Katie John I*, the Ninth Circuit had held that Alaska's navigable waters were "public lands" under the reserved-water-rights doctrine, and so the United States could impose a subsistence fishing priority on those waters under Title VIII of ANILCA. If that interpretation of "public lands" sounds at odds with *Sturgeon*, that's because it is. But this Court avoided that irreconcilability in *Sturgeon* after parties urged the Court to reserve judgment on *Katie John* for another day.

That time has come. The United States has continued to issue orders regulating fishing on part of the

Kuskokwim River, a navigable river that runs through a federal refuge. Despite *Sturgeon*, the Ninth Circuit held in the decision below that ANILCA empowers the United States to do so. *Sturgeon* was no obstacle, according to the court, because *Sturgeon* interpreted "public lands" in *Title I* of ANILCA. That same term, "public lands," could have a different meaning in *Title VIII*, even though ANILCA's definition of "public lands" applies "[a]s used in this Act" "except [for] titles IX and XIV." 16 U.S.C. §3102.

The decision below squarely conflicts with *Sturgeon*. ANILCA carefully defines "public lands" and uses the term more than 200 times. It is inconceivable that Congress envisioned fluctuating meanings of this defined term. And the Ninth Circuit never explained how the United States could have "title" to a reserved water right. No different than in *Sturgeon*, Alaska's navigable waters "did not become subject to new regulation by the happenstance of ending up within a national park." *Sturgeon II*, 587 U.S. at 58.

Getting this right is critical for Alaska. Federal mismanagement of Alaska's fisheries was a key driver of Statehood nearly 70 years ago. Alaska's fisheries are among the most bountiful in the world. They sustain the livelihoods of tens of thousands of Alaskans, creating jobs through commercial fishing and food sources through subsistence fishing. To preserve these resources, Alaska must comprehensively regulate its waters. But the decision below deprives Alaska of this control, perpetuates a broken regulatory regime, and disregards the text that Congress enacted. The Court should grant certiorari and reverse.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 2025 WL 2406531, --- F.4th ---, and is reproduced in the Appendix at App.1a-40a. The district court's opinion is reported at 2024 WL 1348632 and is reproduced at App.41a-74a.

JURISDICTION

The Ninth Circuit's judgment was entered on August 20, 2025. App.1a. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set out in the appendix at App.103a-105a. *See* 16 U.S.C. §§3102, 3114.

STATEMENT OF THE CASE

A. The Alaska Statehood Act

The United States purchased Alaska from Russia in 1867. It thereby acquired in a "'single stroke' 365 million acres of land—an area more than twice the size of Texas." *Sturgeon II*, 587 U.S. at 33. For the next 90 years, the United States owned and regulated all of Alaska's lands and waters. *Id.* By the 1950s, Alaskans longed for statehood. *Id*. at 34. Among the major reasons why Alaskans sought statehood was the desire to gain control over their fisheries. For years, distant federal officials had mismanaged Alaska's fisheries. Most notably, the federal government had failed to stop outside interests from installing fish traps,

which had caused Alaska's fisheries to be "pitifully depleted." *Metlakatla Indian Cmty. v. Egan*, 362 P.2d 901, 915 (Alaska 1961).

The 1958 Alaska Statehood Act, 72 Stat. 339, made Alaska the country's 49th State. By incorporating the Submerged Lands Act, the Statehood Act gave Alaska "'title to and ownership of the lands beneath navigable waters.'" *Sturgeon II*, 587 U.S. at 34-35 (quoting 43 U.S.C. §1311). Alaska's ownership of these lands brought with it "regulatory authority over 'navigation, fishing, and other public uses' of those waters." *Id.* at 35.

One of those rivers was the Kuskokwim River. Running more than 700 miles, the Kuskokwim River is the longest free-flowing river in the United States that is contained entirely within one state. Because the entire Kuskokwim River is navigable, App.20a, 84a, the State owns the lands beneath the river and thus has "regulatory authority over 'navigation, fishing, and other public uses'" on the river, *Sturgeon II*, 587 U.S. at 34-35. Five types of salmon—Chinook, chum, sockeye, coho, and pink—return to the Kuskokwim every year. App.85a. Ever since statehood, the State has been managing and protecting fish in the Kuskokwim River and other navigable waters in Alaska. App.87a.

Alaskans have long engaged in subsistence fishing, essentially the customary and traditional practice of catching fish for personal or family consumption or for trade and sharing. *See* AS §16.05.940(34). Many Alaskans depend on subsistence fishing to feed their families, and they consider the practice an essential

element of their culture and heritage. CA9-ER-88, 242.[1] Alaska Natives have relied on subsistence practices "for thousands of years," and, in more recent history, non-Natives have "come to rely on natural resources for their social and economic livelihoods as well." CA9-ER-242. Subsistence fishing occurs along the entire Kuskokwim River. App.84a.

In 1978, Alaska adopted a law giving subsistence fishing a priority over other types of fishing (*e.g.*, commercial or sport fishing) in times of scarcity. *See* ch. 151 SLA 1978; *McDowell v. State*, 785 P.2d 1, 4 (Alaska 1989). Alaska's law protected subsistence fishing throughout the State, including on navigable waters. *See* ch. 151 SLA 1978. All Alaskans (both urban and rural) were eligible to engage in subsistence fishing if they met the requirements. *McDowell*, 785 P.2d at 4.

B. The Alaska National Interest Lands Conservation Act

In 1980, Congress passed the Alaska National Interest Lands Conservation Act. *See* Pub. L. 96-487, 94 Stat. 2371 (Dec. 2, 1980). ANILCA sought to "'balance' two goals, often thought conflicting." *Sturgeon II*, 587 U.S. at 36. (quoting 16 U.S.C. §3101(d)). The Act was designed to protect "the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska" while also providing

[1] "CA9.ER" refers to the Excerpts of Record filed with the Ninth Circuit. *See* CA9.Dkt.14.

an "adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. §3101(d).

ANILCA accomplishes these goals through fifteen titles. ANILCA, among other things, created and expanded national parks and wildlife refuges (Titles II and III), established new conservation and recreation areas (Title IV), expanded national forests and "wild and scenic" rivers (Titles V and VI), designated new national wildernesses (Title VII), created a rural hunting and subsistence priority on public lands (Title VIII), and designated places where the potential for oil, gas, and other minerals must be studied (Title X). The new preserves, refuges, and other areas created by ANILCA are called "conservation system units." §3102(4). One of these units is the Yukon Delta National Wildlife Refuge, through which part of the Kuskokwim River runs. Pub. L. 96-487, §303(7), 94 Stat. at 2392.

In Section 102, entitled "Definitions," Congress defined the term "public lands." 16 U.S.C. §3102. "Public lands" are "lands, waters, and interests therein … the title to which is in the United States." §3102(1)-(3); *see Sturgeon II*, 587 U.S. at 1076-77. Congress mandated that this definition applies in every title of ANILCA "except … in titles IX and XIV." 16 U.S.C. §3102.

In Title VIII, Congress established a subsistence hunting and fishing priority on "public lands" for rural Alaska residents. §3114. ANILCA instructs that "the

taking on public lands of fish and wildlife for non-wasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes." *Id.* Unlike the State's subsistence law, ANILCA gave a subsistence priority only to "rural" residents and applied the priority only to a subset of lands and waters in Alaska ("public lands"). *Id.*

Congress authorized Alaska (instead of the federal government) to implement ANILCA's subsistence priority if the State adopted laws consistent with ANILCA. §3115(d). To gain this power, the State amended its law to give a subsistence hunting and fishing priority only to "rural" residents. *See McDowell*, 785 P.2d at 4. But in 1989, the Alaska Supreme Court in *McDowell* held that this new provision of the law violated the Alaska Constitution's right of equal access to fish and game because it gave a subsistence preference to "rural" residents. *Id.* at 4-9; *see id.* at 10-11 (describing the "rural" distinction as an "extremely crude" delineation that excludes "substantial numbers of Alaskans … who have legitimate claims as subsistence users"). As a consequence, all Alaskans (not just "rural" Alaskans) were again eligible to engage in subsistence fishing under state law. *Id.* at 9. When Alaska declined to amend its constitution to override *McDowell*, implementation of ANILCA's subsistence priority transferred to the federal government in 1990. App.7a.

C. *Totemoff* and the *Katie John* Litigation

The federal government initially recognized that Alaska's navigable waters are not "public lands." That is because "public lands" include only those lands "the

title to which is in the United States," and the United States "does not generally own title to the submerged lands beneath navigable waters in Alaska." 57 Fed. Reg. 22940, 22942, 22952 (May 29, 1992). But the United States later reversed its position in litigation, asserting that it could regulate navigable waters "in which the federal government has an interest under the reserved water rights doctrine." *Alaska v. Babbitt* ("*Katie John I*"), 72 F.3d 698, 701 (9th Cir. 1995). Under the reserved-water-rights doctrine, "'[w]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.'" *Sturgeon II*, 587 U.S. at 43.

In 1995, the Alaska Supreme Court rejected the federal government's new interpretation, holding that ANILCA "does not give the federal government power to regulate hunting and fishing in navigable waters." *Totemoff v. State*, 905 P.2d 954, 965 (Alaska 1995). Because the Submerged Lands Act "gives Alaska ownership of, title to, and management power over … lands beneath the navigable waters of Alaska," these waters could never be "public lands." *Id.* at 964. The reserved-water-rights doctrine had no relevance because "reserved water rights are not the type of property interests to which title can be held." *Id.* at 965.

The Ninth Circuit saw it differently. In *Katie John I*, the Ninth Circuit deferred under *Chevron* to the federal government's new interpretation, holding that "public lands include those navigable waters in

which the federal government has an interest under the reserved water rights doctrine." 72 F.3d at 701, 703-04. The Ninth Circuit didn't claim to find the "best reading" of the statute, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024), only that the agencies' interpretation was "reasonable" and a "permissible construction of the statute," *Katie John I*, 72 F.3d at 702-04. Judge Hall dissented, concluding that navigable waters were not "public lands" because "*Alaska* has title to its navigable waters under the Submerged Lands Act." *Id.* at 706.

Four months after *Katie John I*, Congress adopted an appropriations act that included a provision prohibiting the federal government from using any funds to "assert jurisdiction, management, or control over [Alaska's] navigable waters." Pub. L. No. 104-134, §336, 110 Stat. 1321 (Apr. 26, 1996). Congress included similar provisions in three subsequent appropriations acts. *See* Pub. L. 104-208, §317, 110 Stat. 3009 (Sept. 30, 1996); Pub. L. 105-83, §316, 111 Stat. 1543 (Nov. 14, 1997); Pub. L. 105-277, Div. A, §339, 112 Stat. 2681 (Oct. 21, 1998). Congress sought to give Alaska time to amend its constitution so the State could continue to implement ANILCA. *See, e.g.*, 143 Cong. Rec. S11258, S11259 (Oct. 28, 1997) (Sen. F. Murkowski) (provisions would avoid the "disaster of Federal control" over "the management of [Alaska's] fish and game"). These appropriations acts did not "comprehensively revis[e]" ANILCA, *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001), and no legislator or committee ever suggested that the acts would codify *Katie John I*. When the State failed to amend its

constitution, the moratorium expired in October 1999. Pub. L. 105-277, Div. A, §339(b)(2).

Because *Katie John I* was an interlocutory decision, the case had returned to the district court for further litigation. On appeal, the Ninth Circuit voted to hear the case initially en banc. In a sharply divided opinion, the Ninth Circuit declined to reconsider *Katie John I*. Six judges rejected the earlier panel's reliance on the reserved-water-rights doctrine. *See John v. United States* ("*Katie John II*"), 247 F.3d 1032, 1038 (9th Cir. 2001) (Tallman, J., concurring in the judgment); *id.* at 1046-47 (Kozinski, J., dissenting). Reversing the State's long-held position, Alaska Governor Tony Knowles declined to seek certiorari. App.16a.[2]

Because ANILCA lets only "rural" residents engage in subsistence fishing, many non-rural individuals with "longstanding cultural ties" to particular waters could no longer engage in subsistence fishing on waters where the federal government asserted authority. *McDowell*, 785 P.2d at 5. *Katie John* also created a "balkanized" regulatory regime, where the State could regulate only parts of its navigable waters. App.92-93. This lack of control caused numerous management problems during times of scarcity. *E.g.,*

[2] In 2013, the Ninth Circuit upheld federal regulations identifying which navigable waters are "public lands" under the reserved-water-rights doctrine. *See John v. United States*, 720 F.3d 1214 (9th Cir. 2013). Known as *Katie John III*, the Ninth Circuit did not reconsider whether navigable waters could be "public lands." *Id.* at 1245.

App.102-03 (overfishing and fewer subsistence fishing opportunities).

D. *Sturgeon v. Frost*

Katie John II was not the last word on the meaning of "public lands." In 2019, this Court issued its opinion in *Sturgeon v. Frost*. There, an Alaskan hunter, John Sturgeon, was hunting moose along the Nation River in Alaska. To reach his favorite hunting ground, he would travel by hovercraft over part of the Nation River that flows through a federal preserve. On one of his trips, park rangers told him that a federal regulation prohibited the use of hovercrafts on rivers within any federal preserve or park. Sturgeon sued, arguing that the Park Service had "no power to regulate lands or waters that the Federal Government does not own" and the Nation River was not "public land." *Sturgeon II*, 587 U.S. at 32. The Park Service, in response, argued that the part of the Nation River that ran through a federal reserve was "public land" under *Katie John I* and the reserved-water-rights doctrine. The Ninth Circuit agreed, holding that it was "bound under [its] *Katie John* precedent" to find that the Nation River was "public land." *Sturgeon v. Frost*, 872 F.3d 927, 934 (9th Cir. 2017). Because "ANILCA's definition of 'public lands' applies throughout the statute," the Ninth Circuit explained, it would be "anomalous" if the definition of "public lands" in Title VIII of ANILCA "employ[ed] a different construction of 'public lands' than applicable elsewhere in ANILCA." *Id.* Judges Nguyen and Nelson concurred in the judgment, writing separately to explain why *Katie John I*'s interpretation of "public lands" was wrongly decided. *Id.* at 937-38.

This Court granted certiorari and unanimously reversed. To start, all agreed that the Nation River was not "land" or "waters" the "title to which is in the United States." 16 U.S.C. §3102(1)-(3). The United States does not have "title" to "the lands beneath" navigable waters because "the Submerged Lands Act gives each State 'title to and ownership of the lands beneath [its] navigable waters.'" *Sturgeon II*, 587 U.S. at 42 (quoting 43 U.S.C. §1311). And the United States does not have "title" to the river itself because "running waters cannot be owned—whether by a government or by a private party." *Id.*

That left the question of whether the United States has "title" to an "interest" in the Nation River under the reserved-water-rights doctrine. *Id.* at 43. The Court found "no evidence that the Congress enacting ANILCA" intended to allow the United States to "hold 'title' … to reserved water rights." *Id.* at 43-44. Reserved water rights instead are "'usufructuary' in nature, meaning that they are rights for the Government to use—whether by withdrawing or maintaining—certain waters it does not own." *Id.* at 43. Relying on the Alaska Supreme Court's decision in *Totemoff*, the Court emphasized the "common understanding" that "'reserved water rights are not the type of property interests to which title can be held.'" *Id.* at 44 (quoting *Totemoff*, 905 P.2d at 965).

Moreover, the Court explained, even if it were possible for the United States to hold "title" to reserved water rights, that interest 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.'" *Id.* But hovercrafts do not "deplete or divert any water," and the hovercraft rule was designed to address "concerns not related to safeguarding the water." *Id.* at 45 (cleaned up). So even if the United States could hold "title to a reserved water right," ANILCA still could not stop Sturgeon from using his hovercraft on the river. *Id.*

Whether *Sturgeon* would abrogate *Katie John I* was a major point of contention among the parties and amici. Before this Court, the United States repeatedly argued that Sturgeon's position was irreconcilable with *Katie John I*. Because ANILCA "contains a definitional section that sets out the meaning of 'public lands' throughout ANILCA," the United States explained, the statute "forecloses" the argument that the term "public lands" can be given "one meaning in the context of the subsistence-use-related sections of ANILCA and a different meaning" elsewhere. United States Br. 49, *Sturgeon II* (U.S. Sept. 11, 2018); *see* United States Br. in Opp. 17, *Sturgeon II* (U.S. May 7, 2018) (same). The United States' amici similarly argued that a ruling for Sturgeon would "undermine the foundation on which the *Katie John* rulings stand" because "there is no separate definition of 'public lands' for purposes of Title VIII" and so any "attempt to distinguish the definition of 'public lands' for subsistence and other purposes is not persuasive." Alaska Native Subsistence Users Amici Curiae Br. 22-23, *Sturgeon II* (U.S. Sept. 18, 2018); *see also Sturgeon II* Tr. 27-28 (Sotomayor, J.) ("I'm having a hard time accepting your position in this case with your position that the *Katie John* decisions should be retained. I don't know

how we can give different meaning to public lands in two provisions of the same Act.").

In response, both Sturgeon and the State of Alaska (under a prior administration) argued that there was "no need for th[e] Court to address the *Katie John* line of decisions" because it was "beyond the scope of the question presented." Reply Br. 20-21, *Sturgeon II* (U.S. Oct. 11, 2018); *see* Alaska Amicus Br. 29, *Sturgeon II* (U.S. Aug. 14, 2018) (same). The question presented "concern[ed] only Mr. Sturgeon's non-subsistence use of the Nation River," which did not "implicate Title VIII." Alaska Am. Br. 29. This Court agreed with Sturgeon and saw no need to address whether "public lands" had the same meaning in Title VIII. In a footnote, the Court said that ANILCA's subsistence-fishing provisions were "not at issue in this case" and so the Court was "not disturb[ing] the Ninth Circuit's holdings." *Sturgeon II*, 587 U.S. at 45 n.2.

E. Factual Background

Following *Sturgeon*, the United States continued to assert authority over Alaska's navigable waters, including the Kuskokwim River. App.93a. But the elephant in the room—whether *Katie John I* was still good law—never emerged because it was "[f]ederal policy to defer to State management … whenever possible." App.93a; CA9.ER-254. The State manages salmon stocks in a "'conservative manner'" to achieve three primary objectives: (1) maintain the salmon population by allowing salmon to "escape" upriver to spawn, (2) provide a subsistence priority for all Alaskans, and (3) offer commercial, sport, and personal-

use fishing opportunities when harvestable surpluses exist. App.82a, 87a-91a.

But then the federal government stopped deferring to the State's management of its fisheries in the spring of 2021. As the salmon season approached, the State projected a low supply of Chinook salmon in the Kuskokwim River. App.93a. The State issued emergency orders to restrict all fishing (except limited subsistence fishing) along the entire Kuskokwim River. App.94-95a; *e.g.*, CA9.ER-346–50. But a federal official in Alaska issued contradictory orders regulating fishing on the part of the Kuskokwim River within the Yukon Delta National Wildlife Refuge. App.94a; *e.g.*, CA9.ER-343–45.

The State and federal orders conflicted. Per its constitution, *see McDowell*, 785 P.2d at 9, the State authorized subsistence fishing for all Alaskans who met the criteria, but the federal government limited subsistence fishing to just "rural" Alaskans, App.94a-95a. The federal orders thus prohibited individuals with "cultural ties to the Kuskokwim fishery" from returning "'home'" to engage in subsistence fishing. App.94a-95a; CA9.ER-410. The State also took a more cautious approach, typically waiting for additional salmon-run data before issuing its orders. App.94a-95a; App.100a-101a (criticizing federal authorization of fishing as "'premature'" and "'irresponsible management'").

F. Proceedings Below

In May 2022, the United States sued the State of Alaska. It sought a declaration that the State's 2021

and 2022 orders were invalid and an injunction preventing the State from issuing orders "interfering with or in contravention of federal orders addressing ANILCA Title VIII and applicable regulations." Dist.Ct.Dkt.1 at 24; *see* App.54a (discussing the district court's jurisdiction). Given the importance of the issues at stake, four sets of plaintiffs were allowed to intervene, with each group filing its own complaint against the State. App.23a. The district court granted summary judgment to the United States and the intervenors, concluding that the Kuskokwim River was "public land" under ANILCA because *Katie John I* remained good law. App.60a-61a.

The Ninth Circuit affirmed. App.40a. The court agreed that navigable waters were not "public lands" if it interpreted "public lands" in Title VIII as this Court interpreted that same term in Title I of ANILCA. App.25a. And the court recognized that "public lands" is a defined term and that "a word 'is presumed to bear the same meaning throughout a text.'" *Id.* The court thus agreed that there was "some tension between the *Katie John* Trilogy and *Sturgeon II*." App.40a.

Yet the Ninth Circuit found that *Katie John I* was still good law because the State had not met the "high standard" of showing that the opinion was "clearly irreconcilable" with *Sturgeon*. App.39a-40a. According to the Ninth Circuit, *Katie John I* and *Sturgeon* could be "reasonably harmonized" by giving the term "public lands" a different meaning in Title VIII than in the other parts of the statute. App.4a. "Congress in-

tended," the Ninth Circuit believed, to apply a subsistence priority to waters "within conservation system units" where rural users have "traditionally fished." App.30a, 32a. The court also concluded that Congress had "'accepted and ratified' *Katie John I's* reserved water rights interpretation" through the appropriations acts that paused federal enforcement of ANILCA. App.35a, 38a. The court never identified "'exceedingly clear language'" in ANILCA authorizing the federal government to regulate fishing on the State's navigable waters. App.39a (quoting *Sackett v. EPA*, 598 U.S. 651, 679 (2023)).

REASONS FOR GRANTING THE PETITION

The Court should hear this case because the Ninth Circuit has "decided an important question of federal law … in a way that conflicts with relevant decisions of this Court" and "with a decision by a state court of last resort." S.Ct.R. 10(a), (c).

The question presented is undeniably important. Upon entering the Union, Alaska gained the sovereign right to regulate "'navigation, fishing, and other public uses'" on its navigable waters. *Sturgeon II*, 587 U.S. at 34-35. This right was critical for the new State, which had endured years of federal mismanagement of its fisheries. The decision below not only strips the State of this sovereignty, but it perpetuates an arbitrary and confusing regulatory regime that has wreaked havoc on Alaska's navigable waters. To effectively manage its fisheries, the State must regulate the *entire* river. But the decision below allows the federal government to override the State's authority on portions of the State's rivers running through federal

conservation system units. This segregated authority has led to overfishing, deprived rural residents upstream (both Native and non-Native) of an equal opportunity to participate in subsistence fishing, and prevented others from returning home to practice their culture and traditions.

The decision below also squarely conflicts with both this Court's and the Alaska Supreme Court's precedent. Though *Sturgeon* had no need to address Title VIII of ANILCA, its interpretation of "public lands" is irreconcilable with the decision below. If navigable waters are not "public lands" just because they run through a conservation system unit for purposes of Title I, as this Court has already unanimously held, they are not "public lands" for purposes of Title VIII either. The United States cannot hold "title" to reserved water rights and, even if it could, such rights would never give the United States "plenary authority" to regulate a State's navigable waters. 587 U.S. at 44-45. Vague notions of Congress's "purpose" cannot override the plain text, especially when there is no "'exceedingly clear language'" applying ANILCA to the State's navigable waters. *Sackett*, 598 U.S. at 679. The decision below also conflicts with the Alaska Supreme Court's decision in *Totemoff*, which—in a holding expressly adopted by this Court in *Sturgeon*—found that navigable waters are not "public lands" under ANILCA.

Finally, this Court will not get a better opportunity to resolve this issue. Though this issue has fes-

tered for decades, this Court has never had a clean petition to resolve it. This case squarely presents the issue. The Court should grant certiorari and reverse.

I. The petition raises a question of exceptional importance.

Certiorari is warranted because the decision below strips the State of Alaska of its sovereign right to regulate fishing on its navigable waters and perpetuates a flawed regulatory regime that has harmed the State's subsistence and conservation efforts.

1. The Court has long recognized that "[n]avigable waters uniquely implicate sovereign interests." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 284 (1997). Under English common law, the Crown "held sovereign title to all lands underlying navigable waters." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987). Because title to such land was critical to "the sovereign's ability to control navigation, fishing, and other commercial activity on rivers," this ownership was "considered an essential attribute of sovereignty." *Id.* When the Colonies became independent, they "claimed title to the lands under navigable waters within their boundaries as the sovereign successors to the English Crown." *Id.* at 196. Since then, all new States have entered the Union on an "equal footing" with the original 13 States and thus have gained "the right to control and regulate" those navigable waters. *Coyle v. Smith*, 221 U.S. 559, 573 (1911).

Nowhere is this sovereign power more important than in Alaska. Indeed, one of the main reasons Alaskans sought statehood was to gain regulatory control

of its fisheries. Before statehood, "[l]ax federal management" had led to an overexploitation of salmon, such that by "the 1950s Alaska salmon runs were declared a federal disaster." *Sustaining Alaska's Fisheries: Fifty Years of Statehood* 1, Alaska Dep't of Fish & Game (Jan. 2009), perma.cc/24FG-RJJA. The presence of fish traps throughout Alaska's navigable waters was a "despised symbol of outside control of the territory that inflamed Alaskans desire for statehood." *Id.* at 4; *see Metlakatla Indian Cmty. v. Egan*, 369 U.S. 45, 47 (1962). The "economy of the entire state [was] affected … by the plentitude of salmon in a given season," and so "preservation of [that] natural resource [was] vital to the state." *Metlakatla Indian Cmty.*, 362 P.2d at 915. For Alaskans, it was "inconceivable to think of a State being created without control of [fisheries]." Hearings on H.R. 331 & S. 2036, 81st Cong., 2d Sess., 486 (1950) (Gov. Ernest Gruening); *see also Statehood for Alaska: The Issues Involved and the Facts About the Issues*, Alaska Statehood Ass'n (Aug. 1946), perma.cc/6XXM-EYGH ("If Congress should attempt to withhold the fisheries, … Alaskans need not accept the gift of statehood, and undoubtedly would reject it at their election on ratification of the state constitution.").

The importance of this sovereign right hasn't lessened over time. Alaska is "one of the most bountiful fishing regions in the world," containing more than three million lakes, 12,000 rivers, and 6,640 miles of coastline. CA9.ER-41. Alaska's fisheries are one of the largest sources of private sector employment in Alaska, creating more than $5 billion in annual eco-

nomic activity and employing nearly 70,000 individuals. CA9.ER-41–43. Subsistence fishing also is critically important for tens of thousands of Alaskans. CA9.ER-65. For many Alaskans, subsistence fishing "is about more than food consumption and economics; it is directly tied to their history and central to their customs and traditions." *Id.* To preserve these benefits, Alaska's constitution requires that all fish be "utilized, developed, and maintained" for future generations. Alaska Const. art. VIII, §4.

This Court regularly grants certiorari to resolve disputes over a state's right to regulate its navigable waters. *E.g.*, *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614 (2013); *PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012); *Idaho v. United States*, 533 U.S. 262 (2001)*; Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997)*; Utah Div. of State Lands*, 482 U.S. 193; *Montana v. United States*, 450 U.S. 544 (1981). And the Court has paid special attention to Alaska. Shortly after Alaska became a state, this Court granted certiorari to review whether Alaska could tax commercial fishing in its waters "because of the importance of the ruling to the new State of Alaska." *Alaska v. Arctic Maid*, 366 U.S. 199, 202 (1961). Since then, the Court has repeatedly heard cases dealing with the State's authority to regulate and use its natural resources—especially its submerged lands—to benefit Alaska's citizens. *See Sturgeon II*, 587 U.S. 28; *Sturgeon I*, 577 U.S. 424; *Alaska v. United States*, 545 U.S. 75 (2005); *United States v. Alaska*, 521 U.S. 1 (1997); *United States v. Alaska*, 503 U.S. 569 (1992); *United States v. Alaska*, 422 U.S. 184 (1975).

2. The harms to Alaska from losing regulatory control over its navigable waters are not theoretical. *Katie John I* created a "balkanized regulatory regime," where the State manages all navigable waters until the federal government asserts authority over segments of them during times of scarcity. App.92a-93a. But this is no way to run a railroad. Fisheries management is a highly complex enterprise. Myriad factors affect the salmon population, including weather, predators, habitat changes, food supply, and disease. *Understanding the Factors that Limit Alaska Chinook Salmon Productivity* at 9-10, ADF&G (Oct. 2022), perma.cc/2JH5-2YJ7. The Alaska Department of Fish and Game, which has an operating budget of $240 million, employs the most sophisticated methods available for measuring the salmon population, including "telemetry, sonar, aerial studies, test fisheries, weirs, and computer modeling." App.80a, 89a. For the State to meet its goals—maintaining a sustainable fish population while providing subsistence and other fishing opportunities when available—the State must manage the *entire* river system, not just bits and pieces. App.87a-93a.

The conflict over the Kuskokwim River epitomizes these problems. Only part of the Kuskokwim (about one-fourth) lies within a conservation system unit, which is in the lower portion of the river near the Bering Sea. App.84a-85a, 92a. It is critical that salmon escape the system unit and travel upstream. Most of the salmon spawning (laying and fertilizing of eggs) occurs above the system unit, and many rural communities live upriver and depend on subsistence fishing. *Id.*; CA9.ER-388–89. When the salmon population in

the Kuskokwim is low, the State seeks to conserve salmon and provide fishing opportunities along the entire river, not just within the system unit. App.92a, 102a. But the federal government focuses only on providing subsistence opportunities for the slice of the Kuskokwim within the system unit. App.92a-93a. This "regulatory narrowness" has led to overfishing within the conservation system unit and has deprived communities living upstream of an equal "opportunity to share in the harvest." App.92a-93a, 101a-102a.

The *Katie John* regime also harms non-rural residents (often Alaska Natives) who have cultural connections to an area and wish to engage in subsistence fishing. *McDowell*, 785 P.2d at 4. The Alaska Constitution guarantees that all Alaskans (not just rural residents) may participate in subsistence fishing when they meet the requirements. *Id.* at 9. Many Alaska Natives have cultural ties to rural fisheries but have been displaced to urban areas of the state for health, education, economic, or other reasons. App.83a, 96a; CA9.ER-410. Indeed, more than half of Alaska Natives live in non-subsistence areas of Alaska and thus cannot engage in subsistence fishing where the federal government asserts authority. CA9.ER-285. Alaska law thus provides greater subsistence fishing rights than federal law by ensuring that these individuals can return "home" to practice their culture and traditions. App.83a, 94a-95a; *see* CA9.ER-410; *McDowell*, 785 P.2d at 4 (discussing the "substantial numbers" of non-rural residents who "have lived a subsistence lifestyle and desire to continue to do so").

Importantly, correctly interpreting ANILCA would not lessen the subsistence rights of rural communities. Rural Alaskans who currently engage in subsistence fishing on navigable waters would have the *same right* to engage in subsistence fishing because Alaska law provides a subsistence fishing priority on waters throughout the State, including on navigable waters. AS §16.05.258; *see also* App.95a-96a (opening subsistence fishing to all Alaskans had "no meaningful impact on subsistence fishing for rural residents"). A uniform system of regulation would better protect Alaska's fisheries for all subsistence users.

3. Certiorari would be warranted even if this case only affected Alaska. But it doesn't. ANILCA's definition of "land" is not unique. The same definition appears in numerous federal land statutes. For example, the boundaries of the Grand Canyon National Park include "all lands, waters, and interests therein" within a certain area. 16 U.S.C. §228b(a) And the Secretary of the Interior must "administer the lands, waters and interests therein" that makeup the Golden Gate National Recreation Area. §460bb-3(a). These are just a few examples.[3] *Sturgeon* made clear that a reserved water right could never "give the Government plenary authority over the waterway to which it attaches," but would be limited to "tak[ing] or maintain[ing] [a] specific 'amount of water.'" 587 U.S. at 44. Not so in the Ninth Circuit. As long as a broad "statutory objective" can be found (often an easy task),

[3] *See also* 16 U.S.C. §§45f(b)(1), 90, 110c(c)(3), 121, 230a(b), 272(a), 273, 398d(a), 410bb(b)(1), 410ff-1(a), 410gg, 410ii-3(a), 410j, 410jj-3(c), 410mm-2(b), 460q-2(a).(b), 410rr-7(c), 460z-6(a), 460aa-12, 460kk(c)(1).

App.4a, the federal government will be free to seize control of non-federal waters. Granting certiorari would preserve the limitations on the reserved-water-rights doctrine established in *Sturgeon*.

II. The decision below conflicts with decisions of this Court and the Alaska Supreme Court.

This Court's review is also warranted because the decision below conflicts with this Court's decisions—most obvious, *Sturgeon*—and the Alaska Supreme Court's precedent in *Totemoff*.

A. The decision below conflicts with this Court's precedent.

1. ANILCA is a comprehensive statute addressing how the United States will regulate "public lands" in Alaska. In Section 102, ANILCA carefully defines "public lands" as "lands, waters, and interests therein … the title to which is in the United States." 16 U.S.C. §3102(1)-(3). ANILCA expressly mandates that this definition will apply "[a]s used in this Act … except … in titles IX and XIV." *Id.*

In *Sturgeon*, this Court held that navigable waters running through a conservation system unit were not "public lands" under the reserved-water-rights doctrine. Because reserved water rights are "'usufructuary' in nature," they "'are not the type of property interests to which title can be held.'" 587 U.S. at 43-44 (quoting *Totemoff*, 905 P.2d at 965). The Court found "no evidence" that Congress intended "to use the term ['title'] in any less customary and more capacious

sense." *Id.* at 44. Moreover, even if the United States could hold "title" to a reserved water right, it still couldn't regulate the river under ANILCA. *Id.* at 44-45. Because a "reserved right, by its nature, is limited," the United States would not gain "plenary authority over the waterway to which it attaches." *Id.* at 44. This "interest" 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.'" *Id.*

After *Sturgeon*, this case should have been easy. The Kuskokwim River is not "public land" because the United States cannot hold "title" to an "interest" in a reserved water right in the river. *Id.* at 43-44. And, even if it had this title, it would at most "support a regulation preventing the 'depletion or diversion' of waters in the River." *Id.* at 44-45. But subsistence fishing regulations do "nothing of that kind." *Id.* at 45. That means that "ANILCA changed nothing" and Alaska—not the United States—continues to have sovereign authority to regulate the river. *Id.* at 58.

True, this Court declined to resolve this issue in *Sturgeon* because Title VIII was "not at issue in this case." 587 U.S. at 45 n.2. But this Court's unanimous interpretation of ANILCA's terms in *Sturgeon* cannot be reconciled with the Ninth Circuit's *Katie John* rule. The Ninth Circuit believed that the term "public lands" could be given a different meaning in Title VIII than in the rest of ANILCA. App.4a, 25a. But that is not the "best reading" of the statute. *Loper Bright*, 603 U.S. at 400. There is a "natural presumption that identical words used in different parts of the same act

are intended to have the same meaning." *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). And this presumption is at its apex where (as here) Congress explicitly defined a specialized term and expressly identified where it does and does not apply (all 15 titles, except titles IX and XIV). "'When a statute includes an explicit definition, [the Court] must follow that definition,' even if it varies from a term's ordinary meaning." *Tanzin v. Tanvir*, 592 U.S. 43, 47 (2020). As *Sturgeon* said, the statutory definition of "public lands" is "'virtually conclusive'" of the term's meaning. 587 U.S. at 56 (quoting Scalia & Garner, Reading Law: The Interpretation of Legal Texts 228 (2012)).

Here, ANILCA uses the term "public land" or "public lands" more than 200 times and the term appears in every title of the statute. It is used, among other ways, to determine the acreage and boundaries of parks, monuments, and preserves (Title II); establish and expand wildlife refuges (Title III); create conservation and recreation areas (Title IV); expand national forest lands (Title V); designate wilderness areas (Title VII); identify the lands where the subsistence priority applies (Title VIII); and pinpoint the places where the potential for oil, gas, and other minerals must be studied (Title X). Given the term's prevalence throughout the statute and its express (and detailed) definition, it is implausible that Congress wanted the term to have a loose and fluctuating meaning. As this Court has recognized, Congress was not "merely waving its hand in the general direction" of Alaskan lands and waters when it "defined the scope of ANILCA" to apply only to "public lands." *Amoco*

Prod. Co. v. Vill. of Gambell, AK, 480 U.S. 531, 548 (1987).

The Ninth Circuit thought this presumption could be overcome because the "context and objective of Title VIII" indicated that "Congress intended the rural subsistence priority to apply to the waters and to the fish populations that rural subsistence users have traditionally fished and depended upon within conservation system units." App.30a, 32a-33a (emphasis omitted). But this Court rejected a nearly identical argument in *Sturgeon*. Invoking "'the overall statutory scheme'" and "ANILCA's general statement of purpose," the federal government insisted "that ANILCA must at least allow it to regulate navigable waters." 587 U.S. at 55. This Court disagreed, stressing that ANILCA's "statements of purpose … cannot override [the] statute's operative language." *Id.* at 57 (cleaned up). This Court also rejected a similar purposive argument about Title VIII in *Amoco*. The Court found it "difficult to believe that Congress intended the subsistence protection provisions of Title VIII, alone among all the provisions in the Act, to apply to the [Outer Continental Shelf]," and this was "particularly implausible because the same definition of 'public lands' which defines the scope of Title VIII applies as well to the rest of the statute." 480 U.S. at 550-51.

The Ninth Circuit is wrong about ANILCA's "purpose" in any event. ANILCA balanced "conflicting" goals, *Sturgeon II*, 587 U.S. at 36, and the best way to give effect to the statute's purpose is to respect this "carefully drawn balance," *id.* at 52. Contra the Ninth

Circuit, Congress did not impose a subsistence priority on all waters where "rural subsistence users have traditionally fished … within conservation system units." App.32a. Congress created a subsistence priority *only* for "public lands." 16 U.S.C. §3114; *see also* §3111(4) (supporting "continued subsistence uses *on the public lands*") (emphasis added)); §3111(1) (supporting "the continuation of the opportunity for subsistence uses … *on the public lands*") (emphasis added)). "[I]f Congress wanted" to apply the subsistence priority to navigable waters, it "easily could have written" ANILCA to do that. *Burgess v. United States*, 553 U.S. 124, 130 (2008).

That ANILCA does not reach the State's navigable waters is not surprising given the regulatory regime in place when ANILCA was enacted. *Supra* p.5. Congress could limit ANILCA's reach to "public lands" because the State already provided a subsistence priority on navigable waters. *Id.* And ANILCA provided a meaningful complement to state law, even without covering navigable waters. The United States is the largest landowner in Alaska, owning an outstanding 60% of the State's total area (222 million acres). CA9.ER-169. ANILCA's subsistence priority includes not only hunting on federal lands but also subsistence fishing on non-navigable waters on federal lands and navigable waters running over land owned by the United States—countless lakes, rivers, ponds, streams, and the like that have long offered subsistence fishing opportunities. *See* 57 Fed. Reg. at 22941, 22951 (1992 regulations applying subsistence priority to "non-navigable waters located on all public lands" and "navigable waters located on certain public

lands"); *see also* Off. of Subsistence Mgmt., *Federal Subsistence Fisheries Regulations* at 60, 67, DOI (Apr. 1, 2021), perma.cc/J8DP-3Z5Z (discussing subsistence fishing opportunities for certain lakes and ponds). And if Congress missed any waters, *Sturgeon* pointed out the solution: ANILCA authorizes the United States "to buy from Alaska the submerged lands of navigable waters—and then administer them as public lands." 587 U.S. at 57.

Even assuming the Ninth Circuit correctly found the unspoken "purpose" of ANILCA, the court failed to provide a textual interpretation that makes sense. The Ninth Circuit never explained how navigable waters could be "lands, waters, and interests therein … *the title* to which is in the United States." 16 U.S.C. §3102(1)-(3) (emphasis added). *Sturgeon* says that reserved water rights are "usufructuary interests" and thus "'are not the type of property interests to which title can be held.'" 587 U.S. at 44. The panel below pointed back to *Katie John I*, but that opinion provides no help. The *Katie John I* court admitted that its decision was "inherently unsatisfactory" because it gave no "meaning to the term 'title' in the definition of the phrase 'public lands.'" 72 F.3d at 704. *Sturgeon* rejected this purposive approach to ANILCA and requires following the words Congress enacted.

2. Nor can the Ninth Circuit justify its atextual approach with speculation that Congress "ratified" *Katie John I* in the 1990s. App.33a-38a. Tellingly, this Court was presented with the same congressional ratification arguments in *Sturgeon* and declined to adopt

them. *See* United States Br. at 37-40, *Sturgeon II* (arguing that "Congress … ratified the Secretary's construction of 'public lands'" through the appropriations acts). They fare no better now.

When "Congress has not comprehensively revised a statutory scheme but has made only isolated amendments," this Court "ha[s] spoken … bluntly: It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of [a] [c]ourt's statutory interpretation." *Alexander*, 532 U.S. at 292 (cleaned up). "The mere failure of a legislature to correct extant lower-court … or agency interpretations is not … a sound basis for believing that the legislature has 'adopted' them." Scalia & Garner 326.

Here, the appropriations acts did not "comprehensively revise" ANILCA—the statute was the same in 2000 as it was in 1995. What the Ninth Circuit called "substantive amendments to ANILCA," App.38a n.16, were all *repealed* a year later when Alaska did not amend its constitution to allow the State to implement ANILCA's rural subsistence priority. *See* Pub. L. 105-83, §316(d); Pub. L. 105-277, Div. A, §339(b)(2). Giving the State time to amend its constitution was all that these appropriations act provisions were designed to do. As Alaska Senator Frank Murkowski explained:

> [A]voiding a Federal takeover of fish and game management is simply critical in my State. When Alaska became a State, Alaskans were united in our desire to take over the management of our fish and game. Many

> Alaskans still have vivid memories of the disaster of Federal control …. The State, not the elusive Federal bureaucrats with no accountability to Alaskans, should manage our fish and game.

143 Cong. Rec. at S11259.

Appropriation acts that avoided the "disaster of Federal control" were not silently endorsing sweeping federal power over the State's navigable waters. Indeed, the Ninth Circuit could not cite a single statement from any report, committee, or even member of Congress to support its ratification theory. That Congress never amended the definition of "public lands" to override *Katie John I* cannot be seen as an endorsement of the opinion. Given the "inertia" created by the Constitution's "'complicated check on legislation,'" this inaction could be due to any number of factors, including an "inability to agree upon how to alter the status quo" or simply "political cowardice." *Johnson v. Transp. Agency, Santa Clara Cty.*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting). And this Court has long held that the mere appropriation of funds cannot change substantive law. *TVA v. Hill*, 437 U.S. 153, 190-91 (1978). This Court would "walk on quicksand" if it tried to find a "controlling legal principle" from these appropriation acts. *Helvering v. Hallock*, 309 U.S. 106, 121 (1940).

Nor was *Katie John I* "'settled'" or "unquestioned" such that a court "must presume Congress … endorsed it." *Jama v. ICE*, 543 U.S. 335, 349 (2005).

When Congress adopted these acts, the *Katie John* litigation was still ongoing. *Katie John I* was an interlocutory decision, and the issue would be hotly debated in *Katie John II* just a few years after Congress passed the appropriations acts. And the fact that this Court denied certiorari in *Katie John I* is not, as the Ninth Circuit believed, App.34a n.14, a reason to regard the point as settled. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction," and so denying certiorari does not "preclude [a party] from raising the same issues in a later petition, after final judgment has been rendered." *VMI v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari); *see* Shapiro *et al.*, *Supreme Court Practice* §4.18 (11th ed. 2019).

In the end, what some unnamed members of Congress may have been thinking here is beside the point. The Court "cannot" rely on a theory of congressional ratification when "'the text and structure of the statute are to the contrary.'" *BP PLC v. Mayor & City Council of Baltimore*, 141 S.Ct. 1532, 1541 (2021). Especially so here given ANILCA's straightforward definition of "public lands."

3. If there were any doubt, the clear-statement canon resolves it. This Court does not interpret a statute to "alter the usual constitutional balance between the States and the Federal Government" unless Congress makes "its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (cleaned up). For example, in

Sackett, the Court rejected an "overly broad interpretation of the [Clean Water Act's] reach" that would have impinged on the "core of traditional state authority" to "[r]egulat[e] … land and water use." 598 U.S. at 679-80; *see also SWANCC v. USACE*, 531 U.S. 159, 169 n.5 (2001).

Here, the regulation of fishing on navigable waters is unquestionably a core function of state sovereignty. Yet there is no "'exceedingly clear language'" in ANILCA authorizing the federal government to deprive the State of this authority. *Sackett*, 598 U.S. at 679. Indeed, as *Katie John I* recognized, ANILCA "makes no reference to navigable waters" at all. 72 F.3d at 702. This lack of exceedingly clear language confirms that the Ninth Circuit's opinion has no basis in the text.

B. The decision below conflicts with Alaska Supreme Court precedent.

The Ninth Circuit's *Katie John* rule also conflicts with Alaska's highest court's interpretation of ANILCA. In *Totemoff*, the Alaska Supreme Court considered a subsistence hunter's use of artificial lighting—a portable spotlight—to hunt deer from his perch on a small river boat on Alaska's navigable waters. The State prosecuted the hunter for violating state law prohibiting hunting with an artificial light. The hunter argued that ANILCA prevented the State from prosecuting him because he shot the deer on navigable waters, which he reasoned were the federal government's to regulate. The Alaska Supreme Court rejected that defense, holding that navigable waters

owned by the State are not "public lands" under ANILCA. 905 P.2d at 968.

The Alaska Supreme Court held that navigable waters were not "public lands" under the reserved-water-rights doctrine. In reasoning that this Court would later adopt in *Sturgeon*, the Alaska Supreme Court explained that "reserved water rights are not the type of property interests to which title can be held." *Id.* at 965; *see Sturgeon II*, 587 U.S. at 44 (quoting *Totemoff*). Interpreting the statute to include navigable waters also "would conflict with the clear statement doctrine." *Totemoff*, 905 P.2d at 966. As the court noted, "[s]tates have traditionally had the power to govern hunting and fishing in their navigable waters," and in enacting ANILCA, "Congress has not expressed in unmistakably clear language a desire to alter this traditional allocation of state and federal power." *Id.* Resolving this clear split in authority between Alaska's high court and the Ninth Circuit is yet another reason to grant certiorari.

III. This case presents an excellent vehicle to resolve the question presented.

Though this issue has been debated by the lower courts since 1995, this Court has never been presented with a clean petition to resolve it. In *Katie John I*, the Court was asked to review a decision on interlocutory review, something it has long declined to do "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *Am. Constr. Co. v. Jacksonville T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893); *supra* p.33. In *Katie John II*, the case became final after a heavily divided

en banc decision, but Alaska Governor Knowles flipped the State's long-held position and declined to file a petition for certiorari. App.16a. In *Katie John III*, the Ninth Circuit addressed the legality of federal regulations, not the underlying reserved water rights holding. 720 F.3d at 1245. And in *Sturgeon*, ANILCA's subsistence-fishing provisions were "not at issue in th[e] case," so the Court "d[id] not disturb the Ninth Circuit's holdings." 587 U.S. at 45 n.2. The decision below, by contrast, squarely presents the meaning of "public lands" under Title VIII of ANILCA.

That the Ninth Circuit has applied its *Katie John* rule since the 1990s is no reason to deny certiorari. This Court has "no warrant to ignore clear statutory language on the ground that other courts have done so," even if they have done so for "'30 years.'" *Milner v. Dep't of Navy*, 562 U.S. 562, 575-76 (2011); *see BP PLC*, 141 S.Ct. at 1541. The Court thus does not hesitate to grant certiorari to consider statutory questions that have been misinterpreted by the lower courts for decades. *See, e.g.*, *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 436-37 (2019) (overturning the D.C. Circuit's 45-year-old interpretation of the Freedom of Information Act, which had been adopted by multiple courts of appeals and was "a relic from a 'bygone era of statutory construction'").

In the end, Respondents will no doubt argue that policy concerns warrant leaving the decision below in place. But the way to achieve policy goals is "'by legislation and not by court decision.'" *NCAA v. Alston*, 594 U.S. 69, 96 (2021). Courts "aren't free to rewrite clear

statutes under the banner of [their] own policy concerns." *Azar v. Allina Health Servs.*, 587 U.S. 566, 581 (2019). If Congress wants the federal government to take over the State's navigable waters, it should say so. Until it does, courts should follow the statute as written.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

STEPHEN J. COX
Attorney General

MARGARET PATON-WALSH
AARON C. PETERSON
Assistant Attorneys General
DEPARTMENT OF LAW
1031 W. 4th Ave., Ste. 200
Anchorage, AK 99501
(907) 269-5100

J. MICHAEL CONNOLLY
Counsel of Record
TAYLOR A.R. MEEHAN
STEVEN C. BEGAKIS
ZACHARY P. GROUEV
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
mike@consovoymccarthy.com

Counsel for Petitioners

September 15, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 20, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-2251
D.C. No. 1:22-cv-00054-SLG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

KUSKOKWIM RIVER INTER-TRIBAL FISH COMMISSION; ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS; BETTY MAGNUSON; IVAN M. IVAN; AHTNA TENE NENE; AHTNA, INC.; ALASKA FEDERATION OF NATIVES,

Intervenor-Plaintiffs-Appellees,

v.

STATE OF ALASKA; ALASKA DEPARTMENT OF FISH AND GAME; DOUG VINCENT-LANG, in his official capacity as Commissioner of the Alaska Department of Fish & Game,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Alaska
Sharon L. Gleason, Chief District Judge, Presiding

Appendix A

Argued and Submitted June 23, 2025
Seattle, Washington

Filed August 20, 2025

Before: Consuelo M. Callahan, Roopali H. Desai, and Ana de Alba, Circuit Judges.

Opinion by Judge Callahan

OPINION

CALLAHAN, Circuit Judge:

The Alaska National Interest Lands Conservation Act ("ANILCA"), Pub. L. No. 96-487, 94 Stat. 2371 (1980), has multiple purposes, including to "provide the opportunity for rural [Alaska] residents engaged in a subsistence way of life to continue to do so." 16 U.S.C. § 3101(c). To fulfill this purpose, Title VIII of ANILCA (codified at 16 U.S.C. §§ 3111-26) establishes the "rural subsistence priority," which generally provides that rural Alaska residents who fish and hunt for subsistence purposes are given priority over others in fishing and hunting on "public lands" whenever it is necessary to restrict fishing and hunting to protect the rural subsistence users' ability to continue their subsistence uses. *See id.* §§ 3111-15.

We resolved the meaning of the term "public lands" as used in Title VIII—and, therefore, the geographic scope of the rural subsistence priority—more than a decade ago in a series of decisions dubbed the *Katie John* Trilogy. In

Katie John I, we held that "public lands" includes navigable waters in which the United States holds reserved water rights. *Alaska v. Babbitt (Katie John I),* 72 F.3d 698, 704 (9th Cir. 1995), *cert. denied*, 517 U.S. 1187 (1996), *and cert. denied sub nom., Alaska Fed'n of Natives v. United States*, 517 U.S. 1187 (1996). Then, sitting en banc in *Katie John II*, we maintained the holding of *Katie John I*. *John v. United States (Katie John II)*, 247 F.3d 1032 (9th Cir. 2001) (en banc) (per curiam). Finally, in *Katie John III*, we upheld regulations identifying the navigable waters that constitute "public lands" because the United States holds reserved water rights in them. *John v. United States (Katie John III)*, 720 F.3d 1214, 1245 (9th Cir. 2013), *cert. denied sub nom., Alaska v. Jewell*, 572 U.S. 1042 (2014).

Recently, the Supreme Court considered the meaning of "public lands" as used in another part of ANILCA—Section 103(c) in Title I (codified at 16 U.S.C. § 3103(c))—and declined to interpret the term to include navigable waters in which the United States holds reserved water rights. *Sturgeon v. Frost (Sturgeon II),* 587 U.S. 28, 42-45 (2019). In *Sturgeon II*, Alaska changed its prior course and defended the *Katie John* Trilogy, arguing that "public lands" has a different meaning in 16 U.S.C. § 3103(c) than in Title VIII, that the *Katie John* Trilogy's reserved water rights interpretation is proper in the latter context, and that the *Katie John* Trilogy should be preserved because rural Alaskans rely on it. Br. of Amicus Curiae State of Alaska in Support of Pet'r at 29-35, *Sturgeon II*, 587 U.S. 28 (No. 17-949), 2018 WL 4063284, at *29-35. In response, the Supreme Court, citing Alaska's amicus brief, included a footnote in *Sturgeon II* stating that "[Title VIII's

subsistence-fishing] provisions are not at issue in this case, and we therefore do not disturb the Ninth Circuit's holdings [in the *Katie John* Trilogy] that the Park Service may regulate subsistence fishing on navigable waters." 587 U.S. at 45 n.2.

Alaska now claims that the *Katie John* Trilogy was wrongly decided and has been overruled by *Sturgeon II*. More specifically, because three-judge panels of this court are bound by circuit precedent unless it is "clearly irreconcilable" with intervening higher authority, *see Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc), Alaska argues that the *Katie John* Trilogy is clearly irreconcilable with *Sturgeon II*.

We hold that it is not. As explained below, the decisions can be reasonably harmonized on the ground that the distinct context and statutory objective of Title VIII call for an interpretation of "public lands" that includes navigable waters, where subsistence fishing "has traditionally taken place." *Katie John I*, 72 F.3d at 702. Additionally, immediately after *Katie John I*, Congress passed appropriations acts that signaled its approval of *Katie John I*'s interpretation of "public lands" for purposes of Title VIII. Although Katie John, the Ahtna woman who advocated for subsistence fishing rights on behalf of Alaska Natives, has since passed away, the precedent that bears her name lives on.

I.

To put it mildly, we do not write on a clean slate. Therefore, we begin with the relevant legal background.

Appendix A

A.

In 1980, Congress passed ANILCA, which "set aside 104 million acres of federally owned land in Alaska for preservation purposes." *Sturgeon II*, 587 U.S. at 36 (citation omitted). In doing so, Congress created or expanded a number of "conservation system units"—ANILCA's term for national parks, refuges, preserves, and the like. *Id.* at 37 (citations omitted); *see* 16 U.S.C. § 3102(4).

Title I of ANILCA includes three sections: one setting forth ANILCA's purposes, 16 U.S.C. § 3101; another providing its definitions, *id.* § 3102; and a third concerning the boundaries of its conservation system units and the application of regulations within them, *id.* § 3103. As previously noted, one of Act's purposes is "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so," "consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for which each conservation system unit is established, designated, or expanded by or pursuant to this Act." *Id.* § 3101(c).

This is the purpose of Title VIII, in particular, *id.* § 3112(1), which includes its own declaration of supporting Congressional findings, *id.* § 3111. Title VIII establishes the "rural subsistence priority," *Katie John III*, 720 F.3d at 1219, which provides that with respect to "the taking on public lands of fish and wildlife," "nonwasteful subsistence uses" by rural Alaska residents "shall be accorded priority over . . . other purposes" whenever "it

is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in order to protect the continued viability of such populations, or to continue such uses."[1] 16 U.S.C. § 3114; *see id.* §§ 3113-15. Such restrictions are to be implemented based on "(1) customary and direct dependence upon the populations as the mainstay of livelihood; (2) local residency; and (3) the availability of alternative resources." *Id.* § 3114.

Title VIII charges the Secretary of the Interior and the Secretary of Agriculture (collectively, "Secretaries") with implementing the rural subsistence priority. *Id.* § 3115; *see id.* § 3102(12). However, Title VIII also provides that if Alaska "enacts and implements laws of general applicability which are consistent with" ANILCA's rural subsistence priority, then the Secretaries "shall not" implement it. *Id.* § 3115(d). "In other words, ANILCA expresses a preference for state management of the rural subsistence priority . . . but provides that [the Secretaries] may step in where the State fails to act." *Katie John III*, 720 F.3d at 1219 (citing 16 U.S.C. § 3202(a)).

B.

In 1978, in anticipation of the enactment of ANILCA, the Alaska Legislature enacted a statutory subsistence

1. "[S]ubsistence uses" are "the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade." 16 U.S.C. § 3113.

priority. *Id.* State agencies subsequently adopted regulations to establish a preference for rural residents, and the Secretary of the Interior certified Alaska's law as consistent with ANILCA's rural subsistence priority. *Id.* But in 1985, the Alaska Supreme Court struck down the state regulations on the ground that their rural preference was inconsistent with the state statute. *Madison v. Alaska Dep't of Fish & Game*, 696 P.2d 168, 178 (Alaska 1985).

In response, the Alaska Legislature amended the state statute to limit its subsistence priority to rural residents. *See McDowell v. State*, 785 P.2d 1, 3 (Alaska 1989). But in 1989, the Alaska Supreme Court struck down the amended statute on the ground that the rural preference violated state constitutional provisions that protect equal access to fish and game. *Id.* at 5-9.

Although the Alaska Supreme Court temporarily stayed its decision to give the Alaska Legislature "an opportunity to amend the constitution or otherwise bring its program into compliance with ANILCA," the Alaska Legislature failed to do so. *Katie John I*, 72 F.3d at 701. "Implementation of ANILCA's rural subsistence priority accordingly fell back to the federal government in July 1990." *Katie John III*, 720 F.3d at 1221.

C.

In connection with the federal government assuming management of ANILCA's rural subsistence priority, the Secretaries promulgated temporary regulations in 1990 and then permanent regulations in 1992 ("1992 Rules").

Appendix A

See Temporary Subsistence Management Regulations for Public Lands in Alaska, 55 Fed. Reg. 27114 (June 29, 1990); Subsistence Management Regulations for Public Lands in Alaska, 57 Fed. Reg. 22940 (May 29, 1992). Among other things, the rules addressed the geographic scope of the rural subsistence priority by interpreting the term "public lands" as used in Title VIII. 57 Fed. Reg. at 22942, 22951; *see also* 55 Fed. Reg. at 27115, 27118.

ANILCA's definitions section defines "public lands" as follows:

> (1) The term "land" means lands, waters, and interests therein.
>
> (2) The term "Federal land" means lands the title to which is in the United States after December 2, 1980.
>
> (3) The term "public lands" means land situated in Alaska which, after December 2, 1980, are Federal lands, except—
>
> > (A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;

> (B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and
>
> (C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act.

16 U.S.C. § 3102. Thus, "public lands" generally includes "lands, waters, and interests therein" "situated in Alaska" "the title to which is in the United States." *Id.* § 3102(1)-(3).

The 1992 Rules interpreted "public lands" to generally exclude navigable waters because "the United States does not generally own title to the submerged lands beneath navigable waters in Alaska." 57 Fed. Reg. at 22942. For context, Alaska generally holds title to the submerged lands because the Alaska Statehood Act, Pub. L. No. 85-508, § 6(m), 72 Stat. 339, 343 (1958), incorporated the Submerged Lands Act, which granted states "title to and ownership of the lands beneath navigable waters within [their] boundaries," Pub. L. No. 83-31, § 3(a), 67 Stat. 29, 30 (1953) (codified at 43 U.S.C. § 1311(a)). Also, such title generally "brings with it regulatory authority over 'navigation, fishing, and other public uses.'" *Sturgeon II*, 587 U.S. at 35 (quoting *United States v. Alaska*, 521 U.S. 1, 5 (1997)).

The 1992 Rules led to the *Katie John I* litigation. "At one extreme," Alaska defended the rules' position

that "public lands" generally excludes navigable waters because the United States "does not hold title to them." *Katie John I*, 72 F.3d at 702. "At the other extreme," Alaska Natives took the position that "public lands" includes *all* navigable waters in Alaska because the United States holds an "interest" in those waters—its navigational servitude. *Id.* "[I]n the middle," the United States adopted a new position: that "public lands" includes *some* navigable waters—those in which the United States holds an "interest" pursuant to the reserved water rights doctrine. *Id.* at 701-02. That doctrine generally provides that "[w]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Sturgeon II*, 587 U.S. at 43 (quoting *Cappaert v. United States*, 426 U.S. 128, 138 (1976)).

In *Katie John I*, we rejected Alaska's interpretation. In doing so, we explained that we had "no doubt that Congress intended that public lands include at least some navigable waters," because "ANILCA's language and legislative history" "clearly indicate that subsistence uses include subsistence fishing," and "subsistence fishing has traditionally taken place in navigable waters." *Katie John I*, 72 F.3d at 702 (citing 16 U.S.C. § 3113). Thus, Alaska's interpretation would "undermine congressional intent to protect and provide the opportunity for subsistence fishing." *Id.* at 704. We also rejected the Alaska Natives' preferred interpretation, including on the ground that the navigational servitude is "'a concept of power, not

of property'" and not an "interest" to which the United States holds "title" in the relevant sense. *Id.* at 702-03 (quoting *United States v. Certain Parcels of Land*, 666 F.2d 1236, 1238 (9th Cir. 1982)); *see also City of Angoon v. Hodel*, 803 F.2d 1016, 1027 n.6 (9th Cir. 1986). We further concluded that ANILCA did "not support" a "complete assertion of federal control" over all navigable waters in Alaska. *Katie John I*, 72 F.3d at 704.

Finally, applying *Chevron*, we adopted the United States' reserved water rights interpretation. *Id.* at 703-04. We reasoned that the United States holds "interests in some navigable waters" because when the United States "reserved vast parcels of land in Alaska for federal purposes through a myriad of statutes" (including ANILCA), it "also implicitly reserved appurtenant waters, including appurtenant navigable waters, to the extent needed to accomplish the purposes of the reservations." *Id.* at 703. Given that the 1992 Rules included a different interpretation of "public lands," we expressed "hope" that the Secretaries would "determine promptly" the navigable waters in which the United States holds reserved water rights such that the waters are "public lands subject to federal subsistence management." *Id.* at 704.

D.

In April 1996, just months after the *Katie John I* decision was published, the Secretaries issued an advance notice of proposed rulemaking to identify the navigable waters in which the United States holds reserved water rights. Subsistence Management Regulations for Public

Lands in Alaska, 61 Fed. Reg. 15014, 15015, 15018 (proposed April 4, 1996). Meanwhile, Congress passed an appropriations act ("1996 Appropriations Act") that included a provision preventing the Secretaries from using appropriated funds to implement the rural subsistence priority on navigable waters where Alaska held title to the submerged lands. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 336, 110 Stat. 1321, 1321-210 (1996). Later that year, Congress passed another appropriations act ("1997 Appropriations Act") with a similar provision. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 317, 110 Stat. 3009, 3009-222 (1996). Thus, in effect, Congress temporarily delayed federal implementation of *Katie John I*'s holding that "public lands" includes navigable waters in which the United States holds reserved water rights, even where Alaska holds title to the submerged lands.

A year later, in November 1997, Congress passed another appropriations act ("1998 Appropriations Act") that did two things. Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, 111 Stat. 1543 (1997). First, like the previous acts, it prevented the Secretaries from using appropriated funds prior to December 1, 1998, to implement the rural subsistence priority on navigable waters where Alaska held title to the submerged lands. *Id.* § 316(a). Second, it made amendments to Title VIII, which would be repealed if Alaska failed to amend state law to bring it into compliance with the rural subsistence priority by December 1, 1998. *Id.* § 316(d).

Specifically, the 1998 Appropriations Act amended Title VIII's declaration of Congressional findings to read as follows:

> (b) The Congress finds and declares further that
> . . .
>
> (4) in accordance with title VIII of this Act, the Secretary of the Interior is required to manage fish and wildlife for subsistence uses on all public lands in Alaska because of the failure of State law to provide a rural preference;
>
> (5) the Ninth Circuit Court of Appeals determined in 1995 in *State of Alaska v. Babbitt* (73 F.3d 698) that the subsistence priority required on public lands under section 804 of this Act applies to navigable waters in which the United States has reserved water rights as identified by the Secretary of the Interior;
>
> (6) management of fish and wildlife resources by State governments has proven successful in all 50 States, including Alaska, and the State of Alaska should have the opportunity to continue to manage such resources on all lands, including public lands, in Alaska in accordance with this Act, as amended; and

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

Id. § 316(b)(3). Additionally, the act amended part of the definition of "public lands" by adding a second sentence to the definition of "Federal lands": "The term 'Federal land' means lands the title to which is in the United States after December 2, 1980. 'Federal land' does not include lands the title to which is in the State, an Alaska Native corporation, or other private ownership." *Id.* § 316(b)(2). Around the same time, the Secretaries issued a notice of proposed rulemaking consistent with the advance notice of proposed rulemaking they had previously published. Subsistence Management Regulations for Public Lands in Alaska, 62 Fed. Reg. 66216 (proposed Dec. 17, 1997).

The following year, in October 1998, Congress passed another appropriations act ("1999 Appropriations Act") that again delayed federal implementation of *Katie John I* and gave Alaska yet another chance to bring state law into compliance with ANICLA's rural subsistence priority. Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, Div. A, sec. 101(e), § 339, 112 Stat. 2681, 2681-251-52, 2681-271, 2681-295-96 (1998). The act appropriated a total of $11,000,000 for implementation of the rural subsistence priority and provided that the funds would go to Alaska if the

Alaska Legislature passed a proposal to amend the state constitution by October 1, 1999. *Id.* But if the Alaska Legislature failed to do so, the funds would go to the Secretaries, and the restriction on their ability to use the funds would be lifted. *Id.*

The Secretaries then published their final rule ("1999 Rules"), which interpreted "public lands" to include "all navigable and non-navigable water" within and appurtenant to more than 30 federal land units. Subsistence Management Regulations for Public Lands in Alaska, 64 Fed. Reg. 1276, 1287 (Jan. 8, 1999). Consistent with the 1999 Appropriations Act, the 1999 Rules provided that they would take effect on October 1, 1999, if the Alaska Legislature failed to pass the requisite constitutional proposal by then. *Id.* at 1276.

The Alaska Legislature failed to pass the proposal.[2] As a result, the 1999 Rules took effect, and the Secretaries were free to use the appropriated funds to implement *Katie John I*.

E.

The *Katie John I* district court, "which had retained jurisdiction over the consolidated challenges to the 1992 Rules on remand from *Katie John I*, concluded that the

2. Days before the deadline, the Alaska House of Representatives passed a proposal to amend the constitution. *See* H.R.J. Res. 202, 21st Leg., 2d Spec. Sess. (Alaska 1999); Alaska H.R.J., 21st Leg., 2d Spec. Sess., at 1854-55 (1999). But it fell just shy of the requisite two-thirds vote needed to pass the Senate. *See* Alaska S.J., 21st Leg., 2d Spec. Sess., at 1881-82 (1999).

action should not serve as the vehicle for challenges to the 1999 Rules." *Katie John III*, 720 F.3d at 1222. After the district court entered a final judgment, Alaska appealed, and we granted initial hearing en banc. *Id.* at 1223. In a decision known as *Katie John II*, we issued a short opinion holding that *Katie John I* "should not be disturbed or altered by the en banc court." *Katie John II*, 247 F.3d at 1033. This time, Alaska declined to file a petition for certiorari, with Alaska's Governor announcing that he had decided to "stop a losing legal strategy that threatens to make a permanent divide among Alaskans." *Alaska Governor Won't Fight Subsistence Fishing Ruling*, L.A TIMES (Aug. 28, 2001), https://perma.cc/YT9H-68BX.

But the litigation continued, with Alaska and Alaska Natives both challenging the 1999 Rules. *Katie John III*, 720 F.3d at 1223-24. Alaska argued that the rural subsistence priority should have narrower application, and the Alaska Natives argued that it should have broader application. *Id.* In *Katie John III*, we rejected both sides' challenges, concluding that "in the 1999 Rules, the Secretaries have applied *Katie John I* and the federal reserved water rights doctrine in a principled manner." *Id.* at 1245.

F.

Several years later, the Supreme Court was presented with a case concerning the meaning of "public lands" as the term is used in 16 U.S.C. § 3103(c), within Title I of ANILCA. As noted above, that section concerns the boundaries of ANILCA's conservation system units and the application of regulations within them. By way of

background, when Congress "sketch[ed]" the "boundary lines" of ANILCA's conservation system units, it "made an uncommon choice—to follow 'topographic or natural features,' rather than enclose only federally owned lands." *Sturgeon II*, 587 U.S. at 37 (quoting 16 U.S.C. § 3103(b)). This is in part because Congress's "prior cessions of property to the State and Alaska Natives had created a 'confusing patchwork of ownership'" that was "all but impossible to draw one's way around." *Id.* (citation omitted). As a result, "more than 18 million acres of state, Native, and private land"—known as "inholdings"—"wound up inside" the conservation system units. *Id.* at 38 (citation omitted). To limit the geographic scope of regulations "applicable solely to public lands within such units," 16 U.S.C. § 3103(c) provides that "[o]nly those lands within the boundaries" of a unit "which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit" and that State, Native, or private lands shall not be subject to such regulations.

John Sturgeon was a hunter who wished to use his hovercraft on a portion of the Nation River within a conservation system unit to reach remote areas to hunt moose. *Sturgeon II*, 587 U.S. at 31-32. But a National Park Service ("NPS") regulation banned hovercrafts on waters "located within the boundaries of the National Park System, including navigable waters . . . without regard to the ownership of submerged lands. . . ." 36 C.F.R. § 1.2(a). Relying on 16 U.S.C. § 3103(c), Sturgeon argued that NPS could not apply its regulatory hovercraft ban on the Nation River on the ground that the Nation River does not fall within the meaning of "public lands" as the term is used in that section.

The Supreme Court agreed with Sturgeon and rejected the United States' argument that, under the reserved water rights doctrine, it holds "title to" an "interest" in the relevant stretch of the Nation River. *Sturgeon II*, 587 U.S. at 42-45. First, the Court observed that reserved water rights "are 'usufructuary' in nature, meaning that they are rights for the [United States] to use—whether by withdrawing or maintaining—certain waters it does not own." *Id.* at 43 (citation omitted). Although the United States "ha[d] found a couple of old cases suggesting that a person can hold 'title' to such usufructuary interests," the Court explained that "the more common understanding . . . is that 'reserved water rights are not the type of property interests to which title can be held'; rather, 'the term "title" applies' to 'fee ownership of property' and (sometimes) to 'possessory interests' in property like those granted by a lease." *Id.* at 43-44 (citations omitted). The Court "[saw] no evidence that the Congress enacting ANILCA meant to use the term in any less customary and more capacious sense." *Id.* at 44.

Second, "even assuming" it was possible for the United States to hold "title to" a reserved water right, the Court declined to adopt the United States' reserved water rights interpretation. *Id.* As the Court explained, the term "public lands" only includes the United States' "specific 'interest'" in the relevant body of water. *Id.* (citations omitted). And a reserved water right "by its nature" "merely enables the Government to take or maintain the specific 'amount of water'—and 'no more'—required to 'fulfill the purpose of [its land] reservation.'" *Id.* (quoting

Cappaert, 426 U.S. at 141). Because the regulatory hovercraft ban was not intended to prevent "depletion or diversion" of the water or to otherwise "safeguard[] the water," it exceeded the United States' interest and therefore the river did not constitute "public lands" for purposes of 16 U.S.C. § 3103(c). *Id.* at 45.

Although Alaska had previously fought the *Katie John* Trilogy's reserved water rights interpretation of "public lands" for purposes of Title VIII, Alaska adopted a new position in *Sturgeon II*. In an amicus brief in support of Sturgeon, Alaska argued that while the Supreme Court should adopt Sturgeon's interpretation of "public lands" for purposes of 16 U.S.C. § 3103(c), the Court "need not and should not disturb the *Katie John* circuit precedents" interpreting "public lands" for purposes of Title VIII. Br. of Amicus Curiae State of Alaska at 29, 2018 WL 4063284, at *29 (citation modified). Alaska contended that "public lands" has a different meaning in Title VIII, *id.* at 34; that the *Katie John* Trilogy's interpretation of "public lands" is "proper[]" in that context, *id.*; and that the Court "should preserve the *Katie John* precedents" for "prudential and policy reasons," including because "in the nearly twenty years since the federal government assumed management of subsistence activities on federal lands in Alaska, rural Alaskans have depended on this subsistence priority to effectuate [the important values embodied by subsistence] and [to] preserve their way of life," *id.* at 31-32.

Citing Alaska's amicus brief, the Supreme Court included the following footnote 2 in its opinion:

> As noted earlier, the Ninth Circuit has held in three cases—the so-called *Katie John* trilogy—that the term "public lands," when used in ANILCA's subsistence-fishing provisions, encompasses navigable waters like the Nation River. See *Alaska v. Babbitt*, 72 F.3d 698 (1995); *John v. United States*, 247 F.3d 1032 (2001) (en banc); *John v. United States*, 720 F.3d 1214 (2013); *supra*, at 1078. Those provisions are not at issue in this case, and we therefore do not disturb the Ninth Circuit's holdings that the Park Service may regulate subsistence fishing on navigable waters. See generally Brief for State of Alaska as *Amicus Curiae* 29-35 (arguing that this case does not implicate those decisions); Brief for Ahtna, Inc., as *Amicus Curiae* 30-36 (same).

Sturgeon II, 587 U.S. at 45 n.2.

II.

That brings us to the present case. Before flowing into the Bering Sea, the Kuskokwim River ("River") runs for approximately 180 miles through the Yukon Delta National Wildlife Refuge ("Refuge"). Within the Refuge, the River is navigable, and Alaska holds title to the submerged lands.

Pursuant to the 1999 Rules upheld in *Katie John III*, the Secretaries have implemented ANILCA's rural subsistence priority on the stretch of the River within the Refuge. *See Katie John III*, 720 F.3d at 1232-33 & n.107;

see 36 C.F.R. § 242.3(b); 43 C.F.R. § 51.3(b). But in the wake of *Sturgeon II*, Alaska's Department of Fish & Game ("ADF&G")— apparently deciding that it was no longer bound by the *Katie John* Trilogy—asserted authority over the entire River, notwithstanding efforts by the Refuge Manager to implement the rural subsistence priority.[3]

The River is home to five types of salmon—Chinook, chum, sockeye, coho, and pink—all of which follow the same life cycle. The salmon hatch from fertilized eggs in freshwater, then migrate to the ocean to feed for several years, and later return to the freshwater to spawn. Upon their return, the females deposit eggs, the males fertilize them, and the cycle begins anew.

As the Refuge Manager has explained, the residents of the local villages within the Refuge along the River and its tributaries "are almost entirely federally qualified subsistence users, both native and nonnative, who are highly dependent on salmon as a source of food." Also, for these communities, subsistence fishing is more than a source of food; it is deeply engrained in their culture and identity.

In recent years, the populations of Chinook and chum have declined, causing concern among the federal and state authorities, as well as the Kuskokwim River Inter-Tribal Fish Commission. In response, the Refuge Manager issued emergency special actions for the

3. The Refuge Manager exercises authority delegated by the Federal Subsistence Board ("FSB"), which administers the rural subsistence priority. 36 C.F.R. § 242.10; 43 C.F.R. § 51.10.

2021 and 2022 fishing seasons to ensure that Chinook escapement targets[4] would be met, while also "allowing at least some opportunity for federally qualified local residents to address their subsistence needs."

In 2021, the Refuge Manager closed parts of the River to gillnet fishing starting on June 1 but provided exceptions for federally qualified rural subsistence users to use gillnets on specified days. ADF&G issued conflicting orders, including orders that purported to authorize gillnet fishing by all subsistence users (i.e., including non-rural subsistence users) on a different set of days. (Recall that Alaska's subsistence law, unlike ANILCA, does not provide preference for rural subsistence users. *See generally State v. Kenaitze Indian Tribe*, 894 P.2d 632 (Alaska 1995); *McDowell*, 785 P.2d at 1, 5-9.)

In 2022, the Refuge Manager once more closed parts of the River to gillnet fishing starting on June 1 but provided exceptions for federally qualified rural subsistence users to use gillnets on specified days. Again, ADF&G issued conflicting orders that purported to authorize fishing by all subsistence users.

III.

On May 17, 2022, the United States sued the State of Alaska, ADF&G, and the Commissioner of ADF&G

4. Per the Refuge Manager, "escapement" refers to "the number of fish that are allowed to reach the spawning grounds with the goal of ensuring the continuation of healthy populations into the future."

(collectively, "Alaska"), seeking declaratory and injunctive relief to preclude Alaska from taking actions that interfere with federal efforts to implement ANILCA's rural subsistence priority. The district court granted motions to intervene in support of the United States by the Kuskokwim River Inter-Tribal Fish Commission; the Association of Village Council Presidents; Betty Magnuson and Ivan Ivan; Ahtna Tene Nené and Ahtna, Inc.; and the Alaska Federation of Natives.

After initially granting a preliminary injunction in the summer of 2022, *United States v. Alaska*, 608 F. Supp. 3d 802 (D. Alaska 2022), the district court granted summary judgment to the United States and the Intervenors (collectively, "Plaintiffs") and entered a permanent injunction in the spring of 2024, *United States v. Alaska*, No. 1:22-cv-00054-SLG, 2024 WL 1348632 (D. Alaska Mar. 24, 2024). As is relevant here, the district court concluded that the *Katie John* Trilogy was not clearly irreconcilable with *Sturgeon II* and therefore remained binding law. *Alaska*, 2024 WL 1348632, at *8.

Alaska timely appealed.[5]

IV.

"[W]here the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or

5. In the proceedings below, Alaska also challenged the constitutionality of the FSB under the Appointments Clause. The district court rejected those arguments. *Alaska*, 2024 WL 1348632, at *8-12. Alaska initially raised them again on appeal, but it has since withdrawn them.

theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled." *Miller*, 335 F.3d at 893. However, "we are bound by our prior precedent if it can be reasonably harmonized with the intervening authority." *Lair v. Bullock*, 697 F.3d 1200, 1206 (9th Cir. 2012) (citation omitted). Clear irreconcilability is a "high standard." *Id.* at 1207 (citation omitted). "It is not enough for there to be 'some tension' between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to 'cast doubt' on the prior circuit precedent." *Id.* (citations omitted).

We review the district court's order de novo. *Zellmer v. Meta Platforms, Inc.*, 104 F.4th 1117, 1121 (9th Cir. 2024).

V.

Alaska's primary argument is that the *Katie John* Trilogy is clearly irreconcilable with *Sturgeon II*. Assuming that *Sturgeon II*'s footnote 2 does not resolve this argument[6] and that this argument is not barred by

6. Plaintiffs read *Sturgeon II*'s footnote broadly, arguing that because the Supreme Court apparently adopted the "do not disturb" language from the cited amicus briefs (including Alaska's), the Supreme Court agreed with the amici's argument that "public lands" has a different meaning in Title VIII than it does in 16 U.S.C. § 3103(c). *See* Br. of Amicus Curiae State of Alaska at 29, 2018 WL 4063284, at *29 (arguing that "[The Supreme] Court Need Not and Should Not Disturb the Katie John Circuit Precedents"); Amicus Curiae Br. for Ahtna, Inc.

judicial estoppel or issue preclusion, we conclude that the cases are not clearly irreconcilable.

A.

1.

To begin, the definition of "public lands" applies to both 16 U.S.C. § 3103(c) and to Title VIII. *See* 16 U.S.C. § 3102. Thus, the *Katie John* Trilogy and *Sturgeon II* may only be reconciled on the basis that the term as defined may be given different meanings in the two different parts of ANILCA. And, as Alaska stresses, according to the presumption of consistent usage, a word "is presumed to bear the same meaning throughout a text." *Meza-Carmona v. Garland*, 113 F.4th 1163, 1167 (9th Cir. 2024) (citations omitted).

However, this presumption "'readily yields' to context, and a statutory term—even one defined in the statute—'may take on distinct characters from association with distinct statutory objects calling for different

---

in Support of Neither Party at 30, *Sturgeon II*, 587 U.S. 28 (No. 17-949), 2018 WL 3952032, at *30 (arguing that "The Katie John Doctrine Effectuates the ANILCA Balance and Should Not Be Disturbed"). At a minimum, Plaintiffs contend, the footnote means that the *Katie John* Trilogy and *Sturgeon II* are not *clearly* irreconcilable. Alaska reads footnote 2 narrowly—as the Supreme Court merely clarifying that it was not expressing any view on whether the *Katie John* Trilogy's interpretation of "public lands" is correct for purposes of Title VIII. We assume without deciding that Alaska reads the footnote correctly.

implementation strategies.'" *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 320 (2014) (quoting *Env't Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007)). For example, the Supreme Court has given a defined term different meanings in different sections of a statute when "the term standing alone is necessarily ambiguous and each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997). The Court has also "declined to apply a statutory definition that ostensibly governed where doing so would have been 'incompatible with . . . Congress' regulatory scheme,' or would have 'destroy[ed] one of the [statute's] major purposes.'" *Digital Realty Tr., Inc. v. Somers*, 583 U.S. 149, 163-64 (2018) (first quoting *Util. Air Regul. Grp.*, 573 U.S. at 322; and then quoting *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949)). Here, Plaintiffs argue that the presumption against consistent usage is rebutted because the distinct context and objective of Title VIII call for an interpretation of "public lands" that is broader than *Sturgeon II*'s interpretation of the term in 16 U.S.C. § 3103(c).

Again, "public lands" is generally defined as "lands, waters, and interests therein" "situated in Alaska" "the title to which is in the United States." 16 U.S.C. § 3102(1)-(3). As *Sturgeon II* recognized, the words "title to" at times have been used broadly to apply to "usufructuary interests," which are rights to use property that one does not own, such as reserved water rights. 587 U.S. at 43-44 (citing *Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 246 (1954); *Crum v. Mt. Shasta Power*

Corp., 30 P.2d 30, 36 (Cal. 1934); *Radcliff's Ex'rs v. Mayor of Brooklyn*, 4 N.Y. 195, 196 (1850)). But "title to" is more commonly understood to apply only to fee interests and "possessory interests." *Id.* at 44 (citations omitted). Seeing "no evidence that the Congress enacting ANILCA meant to use" these words in the less common, broader sense, *id.* at 44, *Sturgeon II* did not find 16 U.S.C. § 3103(c) to be ambiguous, *id.* at 46 n.3.

But that is not the end of the matter. "[O]ftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.'" *King v. Burwell*, 576 U.S. 473, 486 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)); *accord Robinson*, 519 U.S. at 341. Accordingly, "when deciding whether the language is plain," we "must read the words 'in their context and with a view to their place in the overall statutory scheme.'" *King*, 576 U.S. at 486 (quoting *Brown & Williamson*, 529 U.S. at 133). Under *Sturgeon II*'s interpretation of "title to," the term "public lands" generally excludes navigable waters. That is because no one can own "running waters," *Sturgeon II*, 587 U.S. at 42 (citing *Niagara Mohawk Power*, 347 U.S. at 247, n.10), or "acquire anything more than a mere usufructuary right" in them, *Niagara Mohawk Power*, 347 U.S. at 247, n.10 (citation omitted). In *Sturgeon II*, that did not pose a problem, because the context of 16 U.S.C. § 3103(c)—which concerns the scope of "regulations applicable solely to public lands within [conservation system units]"—did not indicate that the term "public lands" as used in that section includes navigable waters. But *Sturgeon II* did not consider Title VIII. *Id.* at 45 n.2.

2.

Title VIII contains a number of contextual clues that "public lands"—and, therefore, "title to"—carries a broader meaning in Title VIII, and they are sufficient to rebut the presumption of consistent usage.

The Title begins with a declaration of Congressional findings, including that "the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands . . . is essential," 16 U.S.C. § 3111(1), and "threatened," including by the "taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management," *id.* § 3111(3). Congress also found that, "in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses," *id.* § 3111(2). "[I]nvok[ing] its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause," *id.* § 3111(4), Title VIII then establishes the rural subsistence priority, *id.* §§ 3113-15, the purpose of which "is to provide the opportunity for rural residents engaged in a subsistence way of life to do so," "in accordance with . . . the purposes for each unit established, designated, or expanded by or pursuant to titles II through VII of this Act," *id.* § 3112(1); *accord id.* § 3101(c) (emphasis added).

In turn, these cross-referenced titles provide that many of ANILCA's conservation system units shall

offer the opportunity for rural residents to continue to engage in subsistence uses. In particular, Title III, which established and added to 16 national wildlife refuges, provides that each "is established and shall be managed" "to conserve fish and wildlife populations" and "to provide . . . the opportunity for continued subsistence uses by local residents."[7] Additionally, Title II, which established and added to 13 national parks, provides that most of them either "shall be managed" "to protect the viability of subsistence resources"[8] or that "[s]ubsistence uses by local residents shall be permitted" within them "where such uses are traditional in accordance with the provisions of title VIII."[9]

---

7. ANILCA, §§ 302(1)(B)(i) & (iii) (Alaska Peninsula National Wildlife Refuge), (2)(B) (i) & (iii) (Becharof National Wildlife Refuge), (3)(B)(i) & (iii) (Innoko National Wildlife Refuge), (4)(B)(i) & (iii) (Kanuti National Wildlife Refuge), (5)(B)(i) & (iii) (Koyukuk National Wildlife Refuge), (6)(B)(i) & (iii) (Nowitna National Wildlife Refuge), (7)(B)(i) & (iii) (Selawik National Wildlife Refuge), (8)(B)(i) & (iii) (Tetlin National Wildlife Refuge), (9)(B)(i) & (iii) (Yukon Flats National Wildlife Refuge), 303(1)(B)(i) & (iii) (Alaska Maritime National Wildlife Refuge), (2)(B)(i), (iii) (Arctic National Wildlife Refuge), (3)(B)(i) & (iii) (Izembek National Wildlife Range), (4)(B)(i) & (iii) (Kenai National Wildlife Refuge), (5)(B)(i) & (iii) (Kodiak National Wildlife Refuge), (6)(B)(i) & (iii) (Togiak National Wildlife Refuge), (7)(B)(i) & (iii) (Yukon Delta National Wildlife Refuge).

8. ANILCA, § 201(2) (Bering Land Bridge National Preserve), (3) (Cape Krusenstern National Monument), (6) (Kobuk Valley National Park).

9. ANILCA, § 201(1) (Aniakchak National Monument), (3) (Cape Krusenstern National Monument), (4)(a) (Gates of the Arctic National Park), (6) (Kobuk Valley National Park), (7)(b) (Lake

Collectively, the foregoing provisions make clear that Congress intended the rural subsistence priority to apply to the waters and to the fish populations that rural subsistence users have *traditionally* fished and depended upon within conservation system units. In particular, the sections setting forth Title VIII's purpose and findings explain that the rural subsistence priority was established "to assure the *continued* viability of . . . fish population[s]" and "the *continuation* of subsistence uses of such population[s]," *id.* § 3112(2) (emphases added); *accord id.* §§ 3111(1), (3), (4), (5), and that it shall be managed with the input from rural subsistence users who have "personal knowledge of local conditions and requirements," *id.* § 3111(5); *accord* § 3115. And the section that establishes the rural subsistence priority states that it shall be applied to "populations of fish" based on rural subsistence users' "customary and direct dependence upon the [fish] populations as the mainstay of livelihood." *Id.* § 3114.

As *Katie John I* recognized, "subsistence fishing has traditionally taken place in navigable waters." 72 F.3d at 702; *see also, e.g., Native Village of Quinnagak v. United States*, 35 F.3d 388, 393 (9th Cir. 1994) ("Most subsistence fishing (and most of the best fishing) is in the large navigable waterways rather than in the smaller non-navigable tributaries upstream and lakes where [fishermen] have access to less fish."). Accordingly, it follows that Title VIII's provisions indicate that "public lands" includes navigable waters within conservation system units, as *Katie John I* held.

Clark National Park), (9) (Wrangell-Saint Elias National Park), ANILCA, § 202(3) (Mount McKinley National Park).

The facts of this case help illustrate why that is so. The rural subsistence communities here—like many others throughout Alaska—have long lived and fished on a navigable river. That is unsurprising because these communities depend on salmon.[10] And, as explained above, salmon run in navigable rivers in order to get from the ocean to their spawning grounds.[11] *See Katie John II*, 247 F.3d at 1036 (Tallman, J., concurring) ("Fishing Alaska's navigable, salmonid-bearing waters has sustained Alaska's native populations since time immemorial." (citations omitted)); *Metlakatla Indian Cmty. v. Egan*, 369 U.S. 45, 46 (1962) ("Long before the white man came to Alaska, the annual migrations of salmon from the sea into Alaska's rivers to spawn served as a food supply for the natives." (emphasis added)). Further, when fish populations are threatened, these communities draw on

10. *See* Kuskokwim River Inter-Tribal Fish Comm'n, *Kuskokwim River: Salmon Situation Report* 3 (2021), https://perma.cc/8SD3-23KC (by weight, fish comprises up to 85% and salmon up to 53% of subsistence harvests by village residents in the Kuskokwim region); *see also* Alaska Dep't of Fish and Game: Div. of Subsistence, *Food Production and Nutritional Values of Noncommercial Fish and Wildlife Harvests in Alaska* 3-4 (2019), https://perma.cc/G7GL-GF3F (by weight, fish comprises 56.8 percent and salmon 32.3% of wild food harvests by communities outside nonsubsistence areas).

11. It is also unsurprising that these communities live on a navigable river because they are unconnected to the road system, and the River therefore serves as their road. *See Sturgeon II*, 587 U.S. at 57 ("[R]ivers function as the roads of Alaska, to an extent unknown anyplace else in the country. Over three-quarters of Alaska's 300 communities live in regions unconnected to the State's road system." (citation omitted)).

their longstanding knowledge of local conditions to advise the federal authorities on implementation of the rural subsistence priority, including through the Kuskokwim River Inter-Tribal Fish Commission, an inter-tribal consortium that represents the interests of 33 federally recognized tribes in the Kuskokwim drainage area.

Alaska does not dispute that subsistence fishing has traditionally occurred on navigable waters. Instead, it insists that its interpretation of "public lands" would still include some non-navigable bodies of water to which the United States holds "title." But it has not shown that subsistence fishing traditionally occurred in those waters.[12] Therefore, it has failed to persuasively explain how its interpretation—which excludes the waters and fish populations that rural subsistence users have traditionally fished and depended upon—can be harmonized with Title VIII's provisions that establish a rural subsistence priority to protect subsistence fishing as traditionally practiced.

Accordingly, in light of Title VIII's subsistence fishing provisions, which *Sturgeon II* did not consider, Alaska has not shown that the presumption of consistent usage does not "yield to" the distinct context and objective of Title VIII, *Util. Air Regul. Grp.*, 573 U.S. at 320 (citation

12. At most, Alaska's citations merely indicate that the FSB currently manages subsistence fishing on "lakes and ponds" affiliated with the Kasilof River and the Kenai River. *See* Dep't of Interior: Off. of Subsistence Mgmt., *Management Regulations for the Harvest of Fish and Shellfish on Federal Public Lands and Waters in Alaska* 60, 67 (2021), https://perma.cc/BK3Z-KFDU.

modified), such that "public lands" may have a broader meaning within that title that includes navigable waters.

B.

Alaska additionally argues that the *Katie John* Trilogy's reserved water rights interpretation is clearly irreconcilable with the second part of *Sturgeon II*'s reasoning that "even assuming" the United States may hold "title to" a reserved water right, the term "public lands" only includes the United States' interest in the body of water, which is limited to preserving the volume or quality of water needed to fulfill the purposes of a land reservation. *See Sturgeon II*, 587 U.S. at 44. In Alaska's view, just as the river in *Sturgeon II* did not constitute "public lands" in 16 U.S.C. § 3103(c) because the regulation banning hovercrafts was "not related to" the United States' interest in "safeguarding the water," *id.* at 45 (citation omitted), so too the navigable waters within and appurtenant to conservation system units do not constitute "public lands" in Title VIII because the rural subsistence priority is not related to the United States' interest in safeguarding the water.[13] Plaintiffs counter that the *Katie John* Trilogy's reserved water rights interpretation is nevertheless reconcilable with *Sturgeon II* because Congress ratified that interpretation through the 1998 and 1999 Appropriations Acts. *See Katie John I*, 72 F.3d at 703-04.

13. To be clear, Alaska does not dispute that Congress has the power to regulate fishing on navigable waters where Alaska holds title to the submerged lands. Alaksa argues only as a matter of statutory interpretation that Congress did not do so in Title VIII of ANILCA.

According to the ratification canon, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)). Thus, we begin with the observation that Congress was aware of *Katie John I*'s reserved water rights interpretation when it passed the 1998 and 1999 Appropriations Acts.[14] Indeed, when amending Title VIII's declaration of Congressional findings in the 1998 Appropriations Acts, Congress expressly recognized that:

> [T]he Ninth Circuit Court of Appeals determined in 1995 in *State of Alaska v. Babbitt* (73 F.3d

14. Alaska claims that the 1998 and 1999 Appropriations Acts cannot shed any light on the meaning of "public lands" because *Katie John I*'s interpretation was not sufficiently "settled" at the time. As Alaska notes, the ratification canon does not apply when the "supposed judicial consensus" was not "so broad and unquestioned" that courts "must presume Congress knew of and endorsed it." *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 349 (2005). But here Congress was aware of *Katie John I*'s interpretation, and there is no evidence that Congress deemed the interpretation "unsettled." The 1998 and 1999 Appropriations Acts were passed after the Ninth Circuit—the only circuit likely to interpret the provision, given its geographic scope limited to Alaska—had issued a precedential opinion and after the Supreme Court had denied certiorari. *See Alaska*, 517 U.S. 1187; *Alaska Fed'n of Natives*, 517 U.S. 1187. In short, this is not an instance where Congress may have declined to act while waiting to see if a judicial interpretation would be overturned upon further judicial review.

> 698) that the subsistence priority required on public lands under section 804 of this Act applies to navigable waters in which the United States has reserved water rights as identified by the Secretary of the Interior . . . .

1998 Appropriations Act, § 316(b)(3). Additionally, the temporary restrictions on the use of appropriated funds in the 1996, 1997, 1998, and 1999 Appropriations Acts were undoubtedly responses to *Katie John I*, as those provisions temporarily prevented the Secretaries from implementing *Katie John I*'s holding. *See* 1996 Appropriations Act, § 336; 1997 Appropriations Act, § 317; 1998 Appropriations Act, § 316(a); 1999 Appropriations Act, § 339; *see also* H.R. REP. NO. 104-537, at 428 (1996) (Conf. Rep.).

The 1998 and 1999 Appropriations Acts also provide "convincing support for the conclusion that Congress accepted and ratified" *Katie John I*'s reserved water rights interpretation. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 536 (2015). In the 1998 Appropriations Act, Congress recognized *Katie John I*'s interpretation while amending Title VIII's subsistence fishing provisions and the definition of "public lands," but it left *Katie John I*'s interpretation in place. 1998 Appropriation Act, § 316(b). Subsequently, in the 1999 Appropriations Act, Congress appropriated $11 million to implement the rural subsistence priority and set a deadline by which the temporary restriction on using appropriated funds to carry out *Katie John I*'s holding would be lifted. 1999 Appropriations Act, Div.

A, sec. 101(e), § 339, 112 Stat. at 2681-251-52, 2681-271, 2681-295-96.[15]

Alaska contends that the 1998 and 1999 Appropriations Acts were intended to give Alaska time to amend state law, not to endorse *Katie John I*. But that poses a false dichotomy. Congress certainly hoped that Alaska would conform state law to ANILCA's rural subsistence priority in a timely manner. To this end, in the 1998 Appropriations Act, Congress extended the temporary restriction on the Secretaries' implementation of *Katie John I* through December 1, 1998, determining that Alaska "should have the opportunity" to resume management of the rural subsistence priority. *See* 1998 Appropriations Act § 316(a), (b). And in the 1999 Appropriations Act, Congress again extended the temporary restriction on the Secretaries' implementation of *Katie John I* to October 1, 1999. *See*

15. In light of the 1998 Appropriations Act's statutory amendments regarding the meaning of "public lands" and the 1999 Appropriations Act's provision lifting the restriction on the use of appropriated funds to implement *Katie John I*'s holding regarding the scope of "public lands," we are not persuaded by Alaska's reliance on cases where Congress passed legislation that did not include any provisions relevant to the interpretive issue, *e.g., AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 81-82 (2021); *Alexander v. Sandoval*, 532 U.S. 275, 291-92 (2001). *See Tex. Dep't of Hous. & Cmty. Affairs*, 576 U.S. at 521 (holding that amendments "that would have been superfluous" absent the prior judicial interpretation "signal[ed] that Congress ratified" the interpretation); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 244, n.11 (2009) ("When Congress amended [the Act] without altering the text of [the relevant provision], it implicitly adopted [the judicial] construction of the statute").

1999 Appropriations Act, § 339. Congress also provided that if Alaska took the necessary action to amend its law by that deadline, it would not only get to manage ANILCA's rural subsistence priority but also receive $11,000,000 to do so. *See id.* at Div. A, sec. 101(e), 112 Stat. at 2681-251-52, 2681-271. But if Alaska failed to take the necessary action, the funds would go to the Secretaries, and they could implement *Katie John I*. *See* Div. A, sec. 101(e), § 339, 112 Stat. at 2681-251-52, 2681-271, 2681-295-96. In sum, after four years of delaying implementation of *Katie John I*, Congress decided that enough was enough and that in either scenario—whether it be state management or federal management—the rural subsistence priority would be implemented as interpreted by *Katie John I* come October 1, 1999, including on navigable waters in which the United States holds reserved water rights.

Alaska also contends that the legislative history does not support this conclusion. But the legislative history indicates that the 1998 Appropriations Act was a compromise between Alaska, which opposed federal implementation of ANILCA's rural subsistence priority with respect to fishing, and President Clinton's Administration, which opposed any further delay in federal implementation. *See* 143 Cong. Rec. 23453 (1997) (statement of Sen. Slade Gorton); 143 Cong. Rec. 23459 (1997) (statement of Sen. Frank Murkowski). That compromise—which was extended in the 1999 Appropriations Act—gave Alaska additional time to amend its law, but it also decidedly left *Katie John I*'s interpretation regarding the scope of the rural subsistence priority in place. Further, the legislative history of the

1998 Appropriations Act specifically provides that its amendments of Title VIII did not "overturn[]" and shall not be "construed to overturn the decision of the Ninth Court of Appeals in *State of Alaska v. Babbitt* (73 F.3d 698) (commonly known as the *Katie John* case)." H.R. Rep. No. 105-337, at 94-95 (1997) (Conf. Rep.).[16]

In sum, because we find Plaintiffs' ratification argument persuasive, we conclude that the *Katie John* Trilogy is not clearly irreconcilable with the second part of *Sturgeon II*'s reasoning regarding the scope of any reserved water rights interpretation of "public lands" as used elsewhere in ANILCA. *See Sturgeon II*, 587 U.S. at 44-45.[17]

---

16. Alaska asserts that "the mere appropriation of funds cannot change substantive law," citing cases that concern whether appropriations acts may overcome the presumption against implied repeals. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 189-91 (1978); *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 574-75 (9th Cir. 2000). But this case does not concern the presumption against implied repeals. Rather than impliedly repealing any provision of ANILCA, the 1998 and 1999 Appropriations Acts signal Congressional approval of a judicial interpretation of ANILCA. Moreover, the 1998 Appropriations Act made substantive amendments to ANILCA, and we held that the same appropriations acts supported a Congressional ratification argument in *Alaska Department of Fish & Game v. Federal Subsistence Board*, 139 F.4th 773, 786-87 (9th Cir. 2025).

17. Alaska also contends that *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), supports the conclusion that the *Katie John* Trilogy "is no longer good law." In its reply brief, Alaska clarifies that it does not argue that *Katie John I* is clearly irreconcilable with Loper Bright; instead, it argues that the *Katie*

VI.

Finally, Alaska claims that the *Katie John* Trilogy is clearly irreconcilable with *Sackett v. Environmental Protection Agency*, 598 U.S. 651, 679 (2023), which applied the canon of statutory interpretation that Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *Id.* at 679 (citations omitted). But this canon predates *Katie John I*, and Alaska already unsuccessfully raised an argument based on it in *Katie John II*. *See Katie John II*, 247 F.3d at 1042-44 (Tallman, J., concurring); *id.* at 1044-50 (Kozinski, J., dissenting). Thus, *Sackett* does not constitute "intervening" authority sufficient for us to revisit the *Katie John* Trilogy. *See Silva v. Garland*, 993 F.3d 705, 717 (9th Cir. 2021) ("a three-judge panel must apply binding precedent even when" that precedent was "clearly wrong" in its application of the law at the time it was decided (citation omitted)), *abrogated on other grounds by Loper Bright*, 603 U.S. 369, *as recognized in Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024); *accord Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1189 (9th Cir. 2011) (per curiam) ("[*Miller*'s] rule makes sense because we cannot continually re-litigate issues that our court has already decided simply because a party puts forth a new argument about why we should rule differently.").

John Trilogy cannot be reconciled with *Sturgeon II* on the basis that *Katie John I* deferred to an agency interpretation under *Chevron*, while *Sturgeon II* did not. We do not reconcile the cases on this basis.

VII.

We acknowledge that there is some tension between the *Katie John* Trilogy and *Sturgeon II*.[18] But for purposes of *Miller*, "[n]othing short of 'clear irreconcilability' will do." *Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1074 (9th Cir. 2018). Because Alaska has not met this high standard, our precedent remains binding, and we affirm the judgment below.

AFFIRMED.

---

18. We also appreciate that judges of this court have expressed reservations about *Katie John*'s interpretation of "public lands," including by referring to it as "shov[ing] a square peg into a hole we acknowledge is round." *Sturgeon v Frost*, 872 F.3d 927, 938 (9th Cir. 2017) (Nguyen, J., concurring); *see also Katie John I*, 72 F.3d at 704; *id.* at 706 (Hall, J., dissenting); *Katie John II*, 247 F.3d at 1034, 1038-40 (Tallman, J., concurring); *id.* at 1044-50 (Kozinski, J., dissenting); *Katie John III*, 720 F.3d at 1245. But for purposes of Title VIII, Alaska's alternative interpretation has never been a round peg itself. *See supra* Section V(A)(2); *see also Katie John I*, 72 F.3d at 704; *Katie John II*, 247 F.3d at 1034-44 (Tallman, J., concurring); *see also Katie John I*, 72 F.3d at 706 (Hall, J., dissenting); *Sturgeon*, 872 F.3d at 938 (Nguyen, J., concurring).

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, FILED MARCH 29, 2024

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

Case No. 1:22-cv-00054-SLG

THE UNITED STATES OF AMERICA,

Plaintiff

and

KUSKOKWIM RIVER INTER-TRIBAL FISH COMMISSION, *et al.*,

Intervenor-Plaintiffs

v.

THE STATE OF ALASKA, *et al.*,

Defendants.

ORDER RE MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT

Before the Court at Docket 70 is the United States' Motion for Summary Judgment. The State of Alaska[1]

1. Defendants are the State of Alaska, the Alaska Department of Fish and Game ("ADF&G"), and Doug Vincent-

filed a Combined Motion for Summary Judgment and Opposition to the United States' Motion for Summary Judgment at Docket 72 and Docket 73.[2] The United States filed a Reply Memorandum in Support of Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment at Docket 101. Intervenor-Plaintiffs joined the United States' Motion for Summary Judgment.[3] Each filed a combined response in opposition to the State's motion for summary judgment and reply in support of the United States' motion for summary judgment.[4] The State filed a Reply in Support of Motion for Summary Judgment at Docket 122. While the Court previously indicated that oral argument could be held,[5] upon review of the parties' briefing, oral argument was not requested by any party and was not necessary to the Court's determination.[6]

Lang, Commissioner of ADF&G (collectively, "the State" or "Defendants"). Docket 1 at ¶¶ 9-11.

2. The documents are identical. For convenience, the Court refers only to Docket 73 in this order.

3. Docket 71 at 1-2; Docket 98 at 1. Intervenor-Plaintiffs are Kuskokwim River Inter-Tribal Fish Commission ("the Commission"), *see* Docket 29; the Association of Village Council Presidents, Betty Magnuson, and Ivan Ivan (collectively, "AVCP"), *see* Docket 37; Ahtna Tene Nené and Ahtna, Inc. (collectively, "Ahtna"), *see* Docket 47; and Alaska Federation of Natives ("AFN"), *see* Docket 96. The United States and Intervenor-Plaintiffs are collectively referred to as "Plaintiffs."

4. Docket 109 (the Commission); Docket 110 (AFN); Docket 113 (Ahtna); Docket 115 (AVCP).

5. Docket 68 at 2.

6. Docket 126.

Appendix B

BACKGROUND

The United States Supreme Court observed that Congress has "repeatedly recognize[d] that Alaska is different—from its 'unrivaled scenic and geological values,' to the 'unique' situation of its 'rural residents dependent on subsistence uses,' to 'the need for development and use of Arctic resources with appropriate recognition and consideration given to the unique nature of the Arctic environment.'"[7] The unique situation of rural Alaskans' dependence on subsistence uses is squarely implicated in this case.

The Kuskokwim River runs more than 700 miles in southwest Alaska before it ends in the Bering Sea. Approximately 180 miles of the Kuskokwim River runs within the Yukon Delta National Wildlife Refuge ("the Refuge") beginning at the mouth of the river.[8] The Kuskokwim River contains several species of salmon, including Chinook and chum salmon. "The residents of the local villages along the Kuskokwim River and its tributaries are almost entirely federally qualified subsistence users, both native and non-native, who are highly dependent on salmon as a source of food."[9] In addition, "subsistence harvest of salmon is engrained

7. *Sturgeon v. Frost (Sturgeon I)*, 577 U.S. 424, 438-39 (2016) (quoting Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101(b), 3111(2), 3147(b)(5)).

8. Docket 5-1 at ¶ 3 (Decl. of Boyd Blihovde). *See* Docket 101-1 at ¶ 3 (2d Decl. of Boyd Blihovde) (referencing first declaration).

9. Docket 5-1 at ¶ 8.

within the culture and identity of these Kuskokwim area rural residents."[10]

I. Alaska National Interest Lands Conservation Act

In 1980, Congress enacted the Alaska National Interest Lands Conservation Act ("ANILCA").[11] One of ANILCA's primary objectives is to protect and preserve the opportunity for rural residents to engage in a subsistence way of life.[12] Congress expressly found that "the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, . . . is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence."[13] The "Congressional statement of policy" in § 802 of ANILCA provides that "the purpose of this subchapter is to provide the opportunity for rural residents engaged in a subsistence way of life to do so."[14]

Section 804 of ANILCA, entitled "Preference for subsistence uses," provides that "the taking on public

---

10. Docket 5-1 at ¶ 8.

11. Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified at 16 U.S.C. § 3101 *et seq.*).

12. 16 U.S.C. § 3101. *See Alaska v. Fed. Subsistence Bd.*, 544 F.3d 1089, 1091 (9th Cir. 2008).

13. 16 U.S.C. § 3111(1).

14. *Id.* § 3112(1).

lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes."[15] ANILCA defines "subsistence uses" to mean "customary and traditional uses by rural Alaska residents of wild, renewable resources."[16] Thus, Title VIII of ANILCA[17] requires that "rural Alaska residents be accorded a priority for subsistence hunting and fishing on public lands."[18] In enacting Title VIII of ANILCA, Congress indicated it was "invok[ing] . . . its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents."[19]

Pursuant to § 805(d) of ANILCA, "Congress gave the state authority to implement the rural subsistence preference by enacting laws . . . consistent with ANILCA's operative provisions."[20] If Alaska "enforce[d] a rural

15. *Id.* § 3114. *See also id.* § 3102(1)-(3) (defining "land," "Federal land," and "public lands").

16. *Id.* § 3113 (emphasis added).

17. Title VIII of ANILCA is codified at 16 U.S.C. §§ 3111-3126.

18. *Alaska v. Babbitt (Katie John I)*, 72 F.3d 698, 700 (9th Cir. 1995) (citing 16 U.S.C. §§ 3113- 3114), *adhered to sub nom. John v. United States (Katie John II),* 247 F.3d 1032 (9th Cir. 2001) (en banc) (per curiam).

19. 16 U.S.C. § 3111(4).

20. *Katie John I*, 72 F.3d at 700 (citing 16 U.S.C. § 3115(d)).

subsistence priority through the exercise of its own sovereignty, Congress [would] return primary regulatory authority over [subsistence uses] to state stewardship," but if Alaska failed to do so, then "the federal government would step in to protect subsistence [uses] as traditionally practiced by rural Alaskans."[21] Promptly after ANILCA's enactment, the State enacted laws consistent with Title VIII's rural subsistence preference, and, in 1982, "the Secretary of the Interior certified the state to manage subsistence hunting and fishing on public lands" in Alaska.[22]

However, in 1989, the Alaska Supreme Court in *McDowell v. Alaska* "struck down the state act granting the rural subsistence preference as contrary to the Alaska state constitution."[23] The court "stayed its decision to give the [Alaska] legislature an opportunity to amend the constitution or otherwise bring its program into compliance with ANILCA," but the state legislature "failed to act."[24] Therefore, in 1990, "the federal government withdrew Alaska's certification and took over implementation of Title

21. *Katie John II*, 247 F.3d at 1037 (Tallman, J., concurring) (citing 16 U.S.C. § 3115(d)). The terms "rural subsistence priority" and "rural subsistence preference" are used interchangeably in this order.

22. *Katie John I*, 72 F.3d at 700-01.

23. *Katie John I*, 72 F.3d at 701 (citing *McDowell v. Alaska*, 785 P.2d 1 (Alaska 1989)).

24. *Katie John I*, 72 F.3d at 701.

VIII."[25] To this day, the relevant provisions of Alaska's Constitution remain the same, and so a rural subsistence preference remains unconstitutional under Alaska law.

In ANILCA, Congress directed the Secretaries of the Interior and Agriculture to promulgate regulations in furtherance of ANILCA's directives.[26] Following *McDowell*, the Secretaries enacted temporary emergency regulations in 1990 creating the Federal Subsistence Board ("FSB") to "administer[]" "[s]ubsistence taking and uses of fish and wildlife on public lands."[27] The regulations were made permanent in 1992, and they presently provide that the Secretaries of the Interior and Agriculture "assign [the FSB] responsibility for administering the

---

25. *Id. See also* Temporary Subsistence Management Regulations for Public Lands in Alaska, 55 Fed. Reg. 27114 (June 29, 1990).

26. 16 U.S.C. § 3124; *id.* § 3102(12) ("The term 'Secretary' means the Secretary of the Interior, except that when such term is used with respect to any unit of the National Forest System, such term means the Secretary of Agriculture."); *Fed. Subsistence Bd.*, 544 F.3d at 1092. "The Secretaries promulgated identical regulations, codified at 50 C.F.R., pt. 100, and 36 C.F.R., pt. 242." *Fed. Subsistence Bd.*, 544 F.3d at 1092 n.1. The Department of the Interior's regulations are codified at 50 C.F.R. Part 100, and the Department of Agriculture's regulations are codified at 36 C.F.R. Part 242. For the sake of simplicity, the Court cites to the regulations promulgated by the Secretary of the Interior at 50 C.F.R. Part 100 in this order.

27. Temporary Subsistence Management Regulations for Public Lands in Alaska, 55 Fed. Reg. at 27123; 50 C.F.R. § 100.10(a).

subsistence taking and uses of fish and wildlife on public lands."[28] The FSB is composed of:

> A Chair to be appointed by the Secretary of the Interior with the concurrence of the Secretary of Agriculture; two public members who possess personal knowledge of and direct experience with subsistence uses in rural Alaska to be appointed by the Secretary of the Interior with the concurrence of the Secretary of Agriculture; the Alaska Regional Director, U.S. Fish and Wildlife Service; Alaska Regional Director, National Park Service; Alaska Regional Forester, U.S. Forest Service; the Alaska State Director, Bureau of Land Management; and the Alaska Regional Director, Bureau of Indian Affairs.[29]

The FSB is "empowered . . . to implement Title VIII of ANILCA," and it is authorized to "[i]ssue regulations for the management of subsistence taking and uses of fish and wildlife on public lands"; "[a]llocate subsistence

---

28. 50 C.F.R. § 100.10(a); Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, and C, 57 Fed. Reg. 22940, 22953 (May 29, 1992) (to be codified at 36 C.F.R. pt. 242 and 50 C.F.R. pt. 100).

29. 50 C.F.R. § 100.10(b)(1). Initially, in 1990, FSB membership was narrower; it included the same members listed in the current regulation, but without "two public members who possess personal knowledge of and direct experience with subsistence uses in rural Alaska." *See* Temporary Subsistence Management Regulations for Public Lands in Alaska, 55 Fed. Reg. at 27123.

uses of fish and wildlife populations on public lands"; and "[r]estrict the taking of fish and wildlife on public lands for nonsubsistence uses or close public lands to the take of fish and wildlife for nonsubsistence uses when necessary for the conservation of healthy populations of fish and wildlife, to continue subsistence uses of fish and wildlife, or for reasons of public safety or administration."[30] The FSB can also entirely "[r]estrict or eliminate taking of fish and wildlife on public lands."[31] In addition, the FSB has the authority to adopt "special actions" to "open or close public lands for the taking of fish" "if necessary to ensure the continued viability of a fish . . . population" or "to continue subsistence uses of fish."[32]

II. Federal and State Closures of the Kuskokwim River

In 2021 and 2022, the FSB and federal field officials determined that closing the 180-mile section of the Kuskokwim River within the Refuge to non-subsistence uses was "necessary to conserve the fish population for continued subsistence uses of the Chinook salmon upon which rural residents of the area depend."[33] Accordingly,

---

30. 50 C.F.R. § 100.10(d)(4)(i), (iv), (vi).

31. *Id.* § 100.10(d)(4)(ix).

32. 50 C.F.R. § 100.19(a). *See* Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, and C, 57 Fed. Reg. at 22957.

33. Docket 1 at ¶ 4; *accord* Docket 1-1 at 4 ("The closure of Federal public waters to the harvest of salmon with gillnets beginning June 1 is based on conservation concerns and provisions

"the FSB and agency field officials exercised their authority under ANILCA to issue emergency special actions to close the 180-mile-long section of the Kuskokwim River within the Yukon Delta National Wildlife Refuge . . . to non-subsistence uses, while allowing limited subsistence uses by local rural residents under narrowly prescribed terms and means of harvest."[34] In both 2021 and 2022, the Alaska Department of Fish and Game ("ADF&G") subsequently issued its own emergency orders that overlapped with, and to some degree were inconsistent with, the FSB's emergency actions.[35]

a. 2021 Closures

In May 2021, federal authorities, in an emergency special action, closed the Kuskokwim River located within the Refuge to all gillnet fishing of salmon, beginning on June 1, 2021. However, the closure action provided five dates during which federally qualified subsistence users could use gillnets to fish.[36] Federal authorities later added

---

of opportunity for subsistence uses."); Docket 5-1 at ¶ 11 ("[I]n 2021 and 2022, the underlying basis for my decisions relating to harvest of salmon has been to reach an escapement of at least 110,000 Chinook while allowing at least some opportunity for federally qualified local residents to address their subsistence needs.") (Decl. of Boyd Blihovde).

34. Docket 1 at ¶ 4.

35. *See* Docket 1 at ¶ 5.

36. Docket 1-1 at 2-3 (Federal Emergency Special Action ("ESA") #3-KS-01-21). The emergency actions set different dates for federally qualified users to harvest salmon using set gillnets

additional days and locations during which federally qualified subsistence users could use gillnets within the Refuge.[37] At no time during the federal closure were non-federally qualified users allowed by federal emergency special actions to gillnet fish on the Kuskokwim River within the Refuge.

Several days after the first federal closure order was issued in May 2021, ADF&G issued an emergency order closing parts of the Kuskokwim River to gillnet fishing, which was consistent with the federal closure action.[38] At the same time, however, ADF&G issued a second emergency order that allowed subsistence gillnet fishing along the Kuskokwim River for *all* Alaskans—that was not limited to federally qualified subsistence users—on each of the same dates that the federal emergency actions had reserved for federally qualified subsistence users.[39] When two federal emergency actions opened additional dates for federally qualified subsistence gillnet fishing, the State followed suit for the same dates, but authorized

---

and using drift gillnets. For the purposes of this order, the Court groups the set gillnet dates and the drift gillnet dates together.

37. Docket 1-1 at 5 (Federal ESA #3-KS-02-21); Docket 1-1 at 7-8 (Federal ESA #3-KS-03-21).

38. Docket 1-2 at 2-4 (State Emergency Order ("EO") #3-S-WR-01-21).

39. Docket 1-2 at 5-6 (State EO #3-S-WR-02-21), 7 (State EO #3-S-WR-04-21). *See also* Docket 73 at 29 ("Unlike [the federal] orders, the State's orders authorized subsistence fishing for all Alaskans that qualified for subsistence fishing, not just rural Alaskans, as required by the Alaska Constitution.").

subsistence gillnet fishing for all Alaskans.[40] In one state emergency order in 2021, the State authorized subsistence gillnet fishing for all Alaskans on a date when federal subsistence gillnet fishing was not allowed.[41]

b. 2022 Closures

On May 2, 2022, federal authorities issued an emergency special action closing the main stem of the Kuskokwim River within the Refuge to gillnet fishing for all salmon and closing river tributaries to all gillnet fishing and to the harvest of Chinook and chum salmon, effective June 1, 2022.[42] However, the emergency action allowed federally qualified subsistence users to use gillnets to harvest salmon on June 1, 4, 8, 12, and 16, 2022.[43]

On May 13, 2022, ADF&G issued an emergency order closing parts of the Kuskokwim River to gillnet fishing, which was consistent with the federal emergency action taken earlier that month.[44]However, at the same time, ADF&G issued a second emergency order that authorized subsistence gillnet fishing by all Alaskans—not just

40. *Compare* Docket 1-1 at 5 (Federal ESA #3-KS-02-21), 7-8 (Federal ESA #3-KS-03-21), *with* Docket 1-2 at 9 (State EO #3-S-WR-06-21), 15 (State EO #3-S-WR-08-21).

41. *Compare* Docket 1-2 at 12-13 (State EO #3-S-WR-07-21), *with* Docket 1-1 at 2-9 (2021 Federal ESAs).

42. Docket 1-1 at 10 (Federal ESA #3-KS-01-22).

43. Docket 1-1 at 11-12 (Federal ESA #3-KS-01-22).

44. Docket 1-2 at 17-18 (State EO #3-S-WR-01-22).

federally qualified subsistence users—on three of the dates that the federal emergency action had reserved for federally qualified subsistence users: June 1, 4, and 8, 2022.[45] The State explained that it intended this opportunity to "allow those individuals who have been displaced to the urban areas of Alaska for educational, social, health or other reasons to practice their traditional and cultural subsistence way of life that is closely tied to the Kuskokwim River."[46]

Plaintiffs sought—and the Court granted—a preliminary injunction enjoining ADF&G from implementing its order authorizing subsistence gillnet fishing on three dates in June 2022 by all Alaskans for the duration of this case.[47] ADF&G was further prohibited "from taking similar actions that authorize gillnet fishing by all Alaskans on the Kuskokwim River within the Yukon Delta National Wildlife Refuge when such action(s) would be contrary to federal orders issued pursuant to Title VIII of the ANILCA."[48]

Now before the Court are the parties' motions for summary judgment on whether the FSB's orders pursuant to Title VIII of ANILCA preempt ADF&G's emergency orders authorizing subsistence gillnet fishing on the

---

45. Docket 1-2 at 19-20 (State EO #3-S-WR-02-22).

46. Docket 1-2 at 19 (State EO #3-S-WR-02-22).

47. *United States v. Alaska (Kuskokwim I)*, 608 F. Supp. 3d 802, 813 (D. Alaska 2022).

48. *Id.*

Kuskokwim River for all Alaskans.[49] The State maintains that its actions are not preempted by federal law because ANILCA does not apply to the Kuskokwim River and the FSB violates the Appointments Clause of the United States Constitution.[50]

JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1345 because the United States commenced this civil action, and pursuant to 28 U.S.C. § 1331 because this is a civil action with claims arising under federal law, namely ANILCA, 16 U.S.C. § 3101 *et seq*., and the Appointments Clause of the United States Constitution. Whether a federal law preempts a state law is a question of federal law.[51]

LEGAL STANDARD

Federal Rule of Civil Procedure 56(a) directs a court to "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The burden of showing the absence of a genuine dispute of material fact lies with the movant.[52] In reviewing cross-

49. *See* Docket 70 at 2; Docket 73 at 8-9.

50. Docket 73 at 8-9.

51. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 214 (1985).

52. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

motions for summary judgment, a court "review[s] each separately, giving the non-movant for each motion the benefit of all reasonable inferences."[53]

DISCUSSION

I. Waiver

The United States contends that the State has "waived any argument on preemption."[54] The State counters that the State "briefed the issue extensively" in its motion for summary judgment by asserting that "[t]he State's orders are not preempted because the Kuskokwim River is not 'public land' under ANILCA," and "because the FSB members were not properly appointed."[55] In essence, the State claims that federal preemption does not apply to the State's conduct here because the portion of the Kuskokwim River at issue is outside ANILCA's purview, and any potentially preemptive federal action by the FSB was conducted by unconstitutionally selected federal officers. The Court therefore finds that the State has not waived its argument against federal preemption and proceeds to address the State's challenges to preemption below.

---

53. *Flores v. City of San Gabriel*, 824 F.3d 890, 897 (9th Cir. 2016) (citing *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 533 F.3d 780, 786 (9th Cir. 2008)).

54. Docket 101 at 20.

55. Docket 122 at 22 (quoting Docket 73 at 34-50).

II. ANILCA and the Kuskokwim River Within the Refuge

As a threshold issue, Plaintiffs maintain that the State is "precluded from relitigating" its "defenses" because they were, or could have been, decided in prior litigation.[56] The United States contends that issue preclusion bars the State from "relitigating whether ANILCA Title VIII applies to subsistence fishing in navigable waters that include the Kuskokwim River."[57] The United States maintains that "[t]his issue was squarely decided by the Ninth Circuit in the *Katie John* litigation in which Alaska was a plaintiff."[58] The State counters that issue preclusion does not apply because, among other reasons, *Sturgeon v. Frost* constitutes a "change in the applicable legal context."[59]

---

56. Docket 101 at 21. *See* Docket 109 at 21-26. In its response brief, the Commission also contends that 28 U.S.C. § 2401(a), which contains a six-year statute of limitations on claims against the federal government, bars the State's defenses. Docket 109 at 27-31. However, as the State notes, that limitation applies to "civil action[s] commenced against the United States" and the State did not commence this action but rather is the defendant. Docket 122 at 45.

57. Docket 101 at 22-31.

58. Docket 101 at 22 (first citing *Katie John I*, 72 F.3d 698; then citing *Katie John II*, 247 F.3d 1032; and then citing *John v. United States (Katie John III)*, 720 F.3d 1214 (9th Cir. 2013), *cert. denied sub nom. Alaska v. Jewell*, 572 U.S. 1042 (2014)).

59. Docket 122 at 27-29 (citing *Sturgeon v. Frost (Sturgeon II)*, 587 U.S. 28 (2019)).

Appendix B

Issue preclusion, or collateral estoppel, applies "where (1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding."[60] "Offensive collateral estoppel refers to the situation where the plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party."[61] Issue preclusion does not "foreclose[] . . . relitigation of [an] issue in [a] second action between the parties" if "[t]he issue is one of law and . . . a new determination is warranted in order to take account of an intervening change in the applicable legal context."[62]

Here, all three prerequisites for issue preclusion are present. Nonetheless, the Court finds that *Sturgeon* constitutes a "change in the legal context," as it addressed the definition of public lands in ANILCA—albeit in the

---

60. *Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1086 (9th Cir. 2007) (quoting *Kourtis v. Cameron*, 419 F.3d 989, 994 (9th Cir. 2005)).

61. *Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 689 (9th Cir. 2004) (internal quotation marks omitted) (quoting *Nat'l Med. Enters., Inc. v. Sullivan*, 916 F.2d 542, 545 n.2 (9th Cir. 1990)).

62. *Segal v. Am. Tel. & Tel. Co.*, 606 F.2d 842, 845 (9th Cir. 1979) (citation omitted).

application of Title I and not Title VIII—such that issue preclusion should not apply.[63]

Further, Plaintiffs maintain that judicial estoppel prevents the State from arguing that *Sturgeon* undermines the *Katie John* trilogy because the State asserted, in an amicus brief before the Supreme Court in *Sturgeon*, that *Katie John* was not at issue in that case.[64] The State maintains that judicial estoppel is inapposite because the State was not a party in *Sturgeon*; rather, it participated only as an amicus curiae.[65]

Judicial estoppel applies when (1) a party takes a position that is clearly inconsistent with its earlier position; (2) the earlier position was judicially accepted; and (3) the party asserting the inconsistent position would derive an unfair advantage if not estopped.[66] The Court finds that judicial estoppel does not apply because the State was not a party in *Sturgeon* and, while judicial estoppel might apply to non-parties in privity with a party, the State is not in privity with either party involved in *Sturgeon*.[67]

---

63. *Sturgeon II*, 587 U.S. at 38-53.

64. Docket 101 at 27-31; Docket 109 at 13-21.

65. Docket 122 at 39-40.

66. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (citations omitted).

67. The United States maintains that participation as an "amicus . . . does not foreclose application of judicial estoppel" and "judicial estoppel can apply in suitable circumstances to representations by a non-party participant in prior litigation."

The Court now turns to the State's contention that "*Sturgeon* 'undercut[s] the theory [and] reasoning underlying' *Katie John*, the two decisions are 'clearly irreconcilable' and so this Court should not follow *Katie John*."[68] Instead, the State maintains, "the Court should follow *Sturgeon* and hold that the Kuskokwim River is not 'public land' under ANILCA and so the United States cannot impose a subsistence priority on the river under ANILCA."[69]

The Court declines to do so. To disregard the binding nature of *Katie John*, the Court would have to find that *Katie John* and *Sturgeon* are "clearly irreconcilable."[70] This "high standard"[71] is only met when the prior precedent

---

Docket 101 at 30 n.12 (citing *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 995-96 (9th Cir. 2012)). However, in *Milton H. Greene Archives, Inc.*, the Ninth Circuit held that an executor and the beneficiary of an estate were in privity and applied judicial estoppel to prevent a beneficiary from asserting that the decedent was domiciled in California when the executors had previously and consistently represented that the decedent was domiciled in New York. As noted, there is no privity between the State and the parties in *Sturgeon*. Plaintiffs have not otherwise persuaded the Court that judicial estoppel is appropriate in this case.

68. Docket 73 at 39 (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003)).

69. Docket 73 at 39.

70. *Miller*, 335 F.3d at 900.

71. *Rodriguez v. AT&T Mobility Servs. LLC*, 728 F.3d 975, 979 (9th Cir. 2013) (citation omitted).

has been "effectively overruled" by the intervening higher authority, although "the issues decided by the higher court need not be identical in order to be controlling."[72] "For [a court] to hold that an intervening Supreme Court decision has 'effectively overruled' circuit precedent, the intervening decision must do more than simply 'cast doubt' on our precedent. Rather, it must 'undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.'"[73]

As the Commission and other Plaintiffs observe, in *Sturgeon*, the Supreme Court expressly acknowledged that in *Katie John*, the Ninth Circuit defined "'public lands,' when used in ANILCA's subsistence-fishing provisions, [to] encompass[] navigable waters," and the Supreme Court noted that "[t]hose provisions are not at issue" in *Sturgeon*.[74] The Supreme Court expressly stated that its ruling in *Sturgeon* does "not disturb the Ninth Circuit's holdings that the Park Service may regulate subsistence fishing on navigable waters."[75] As such, *Sturgeon* did not effectively overrule the Ninth Circuit's holding in *Katie John*, and the two cases are not clearly irreconcilable.

---

72. *Miller*, 335 F.3d at 893, 900.

73. *United States v. Delgado-Ramos*, 635 F.3d 1237, 1239 (9th Cir. 2011) (quoting *Miller*, 335 F.3d at 900).

74. *See Sturgeon II*, 587 U.S. at 45 n.2; Docket 109 at 31-32; Docket 101 at 34; Docket 110 at 32-33; Docket 113 at 32-35; Docket 115 at 37-43.

75. *Sturgeon II*, 587 U.S. at 45 n.2.

The Court therefore is bound by the *Katie John* trilogy of cases to find that Title VIII's rural subsistence priority applies to "navigable waters in which the United States has reserved water rights,"[76] and that the Secretaries lawfully designated the Kuskokwim River in the Refuge as a navigable water subject to Title VIII of ANILCA.[77] Therefore, the State is not entitled to summary judgment on that basis.[78]

III. Appointments Clause

Plaintiffs contend that claim preclusion bars the State from challenging the creation of the FSB and the appointment of its members because it could have raised such a challenge in *Katie John* or other litigation involving the FSB, including *Alaska v. Federal Subsistence Board*.[79] The State maintains that claim preclusion does not bar its Appointments Clause challenge to the FSB because there is an exception to claim preclusion "where between the time of the first judgment and the second there has been

76. *Katie John III*, 720 F.3d at 1239 (quoting *Katie John I*, 72 F.3d at 700).

77. *Id.* at 1245; 50 C.F.R. § 100.3(b)(4).

78. Because the Court is bound by *Katie John*, the Court does not reach AFN's argument that, irrespective of *Katie John*, pursuant to the Commerce and Property Clauses of the Constitution "the federal government's authority to regulate pursuant to ANILCA's subsistence priority extends to fish in navigable waters in Alaska." Docket 110 at 44.

79. Docket 101 at 31-32 (citing *Fed. Subsistence Bd.*, 544 F.3d 1089); Docket 109 at 26-27.

an intervening decision or a change in the law creating an altered situation."[80] The State asserts that there "have been intervening decisions on the Appointments Clause" since the prior litigation involving the FSB.[81]

"[C]laim preclusion prevents parties from raising issues that could have been raised and decided in a prior action—even if they were not actually litigated."[82] In other words, "[i]f a later suit advances the same claim as an earlier suit between the same parties, the earlier suit's judgment 'prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.'"[83] "Suits involve the same claim (or 'cause of action') when they 'aris[e] from the same transaction,' or involve a 'common nucleus of operative facts.'"[84]

---

80. Docket 122 at 38-39 (quoting *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 162 (1945)).

81. Docket 122 at 38 (first citing *Lucia v. SEC*, 585 U.S. 237 (2018); then citing *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020); and then citing *United States v. Arthrex*, Inc., 594 U.S. 1 (2021)).

82. *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp.*, Inc., 140 S. Ct. 1589, 1594 (2020).

83. *Id.* (quoting *Brown v. Felsen*, 442 U.S. 127, 131 (1979)).

84. *Id.* at 1595 (first quoting *United States v. Tohono O'odham Nation*, 563 U.S. 307, 316 (2011); and then quoting Restatement (Second) of Judgments § 24 cmt. b (1982)).

Appendix B

Plaintiffs present a compelling case that claim preclusion applies to the State's Appointment Clause defense, as the federal regulations establishing the FSB were the very same regulations at issue in *Katie John III*, and the State could have invoked the Appointments Clause in that litigation to challenge the constitutionality of the FSB.

However, even if claim preclusion does not apply, the Court finds that the State's challenges pursuant to the Appointments Clause fail. "The Appointments Clause specifies the exclusive ways of appointing 'Officers of the United States.'"[85] The Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."[86] The Clause further provides that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[87] As such, "[t]he Appointments Clause applies only to 'Officers of the United States'—not simple employees. Unlike employees, officers, whether principal or inferior, exercise 'significant authority pursuant to the laws of the United States,' and their duties are 'continuing and permanent,' rather than

85. *Cody v. Kijakazi*, 48 F.4th 956, 960 (9th Cir. 2022) (quoting U.S. Const. art. II, § 2, cl. 2).

86. U.S. Const. art. II, § 2, cl. 2.

87. *Id*.

'occasional or temporary.'"[88]For example, Administrative Law Judges at the Securities and Exchange Commission[89] and Immigration Judges and Board of Immigration Appeals ("BIA") Officers are constitutional officers because their "responsibilities are legally defined and continuous" and they "wield substantial authority."[90]

The State advances two challenges to the FSB: (1) that it is unconstitutional because the Appointments Clause provides that "Officers of the United States . . . shall be established by Law" and the FSB was created by regulation and not by statute;[91] and (2) that the FSB's members are principal officers and therefore they must be appointed by the President with the consent of the United States Senate.[92] As to the State's first contention, Plaintiffs counter that the FSB was created by law through regulation, and "Congress directed in Title VIII that '[t]he Secretary shall prescribe such regulations as are necessary and appropriate to carry out [the Secretary's] responsibilities under this subchapter.'"[93] Regarding the State's second challenge, Plaintiffs maintain that the

88. *Duenas v. Garland*, 78 F.4th 1069, 1072 (9th Cir. 2023) (quoting *Lucia*, 585 U.S. at 241, 245).

89. *Lucia*, 585 U.S. at 244-48.

90. *Duenas*, 78 F.4th at 1073.

91. Docket 73 at 44-46; U.S. Const. art. II, § 2, cl. 2.

92. Docket 73 at 46-50.

93. Docket 101 at 40-41 (quoting 16 U.S.C. § 3124); Docket 109 at 46-47; Docket 110 at 58.

FSB's members are employees, not officers at all, but, at most, FSB members are inferior officers and do not require appointment by the President and confirmation by the Senate.[94]

First, the Court finds that the FSB was established by law. The Appointments Clause provides that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the . . . Heads of Departments."[95] ANILCA accords to the Secretaries the authority to "prescribe such regulations as are necessary and appropriate to carry out his responsibilities under" ANILCA.[96] And so, in ANILCA, Congress, by law, vested the appointment of inferior officers necessary to carry out ANILCA in the Secretaries of the Interior and Agriculture. And there is nothing improper about the Secretaries creating the FSB by promulgating federal regulations, as it is a "black-letter principle that properly enacted regulations have the force of law."[97]

The State relies on *Office of Personnel Management v. Richmond* for the proposition that because the Appointments Clause provides that "Congress may by Law" vest the appointment of inferior officers in the

94. Docket 101 at 42-48.

95. U.S. Const. art. II, § 2, cl. 2.

96. 16 U.S.C. § 3124. *See id.* at § 3102(12) (defining "Secretary" as the Secretary of the Interior, but when the National Forest System is implicated, as the Secretary of Agriculture).

97. *Flores v. Bowen*, 790 F.2d 740, 742 (9th Cir. 1986).

Secretaries, inferior office positions must be created by law, meaning only by statute.[98] However, that case concerned Congress's sole authority to appropriate funds from the Treasury under a different constitutional clause—the Appropriations Clause.[99] And while language in the Appointments Clause suggests that principal officers "shall be established by Law," with respect to inferior officers, the Appointments Clause requires only that Congress, by law, vest the appointment of inferior officers in the head of a department.[100] Because Congress did so here in ANILCA, the Court finds that the FSB was lawfully created.

Next, the Court finds that members of the FSB are constitutional officers, not employees. The responsibilities of the FSB's members are "legally defined" by federal regulations, the FSB's responsibilities are "continuous" in that they have a continuing obligation to ensure a rural subsistence priority in Alaska under ANILCA, and federal regulations do not provide for a term limit for members of the FSB.[101] Further, FSB members exercise "significant authority pursuant to the laws of the United States,"[102] in

98. Docket 122 at 71 (citing *OPM v. Richmond*, 496 U.S. 414, 424 (1990)); Docket 73 at 45.

99. *Richmond*, 496 U.S. at 424 (quoting U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.")).

100. U.S. Const. art. II, § 2, cl. 2.

101. *See* 50 C.F.R. § 100.10; *Duenas*, 78 F.4th at 1073.

102. *Lucia*, 585 U.S. at 245 (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

that they are empowered to issue regulations pursuant to subparts C and D of the regulations implementing ANILCA, allocate subsistence uses of fish and wildlife, and restrict or eliminate the taking of fish and wildlife on public lands in Alaska.[103]

The question is therefore whether the FSB's members are principal or inferior officers. "When distinguishing between these types of officers, [courts] mainly look at whether the officer's work is 'directed and supervised at some level' by other officers appointed by the President with the Senate's consent."[104] In *Duenas v. Garland*, the Ninth Circuit held that immigration judges and BIA members are inferior officers because "[t]he Attorney General—who is appointed by the President with the consent of the Senate—ultimately directs and supervises the work of both officials."[105]

Here, the Court finds that the members of the FSB are inferior officers, as their work is directed by the Secretaries, they are ultimately supervised by either the Secretary of the Interior or the Secretary of Agriculture, and Presidentially- appointed and Senate-approved officers

---

103. 50 C.F.R. § 100.10(d)(4)(i), (iv), (vi), (ix).

104. *Duenas*, 78 F.4th at 1073 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 510 (2010)). *See Arthrex, Inc.*, 594 U.S. at 13.

105. *Duenas*, 78 F.4th at 1073 (citing 8 C.F.R. § 1003.1(a)(1) ("[Members of the BIA] shall . . . act as the Attorney General's delegates in the cases that come before them.")) (additional citations omitted).

also supervise the five *ex officio* members of the FSB.[106] The federal regulations promulgated by the Secretaries direct FSB members as to the FSB's responsibilities, the scope of its authority, and the objectives of the FSB's actions. For example, the FSB is tasked with determining which communities in the State qualify as rural and which rural communities have customary and traditional uses of specific fish or wildlife, and establishing priorities for the subsistence taking of fish and wildlife on public lands;[107] the Secretaries have provided the FSB with factors and criteria to consider when making customary and traditional use determinations and when prioritizing subsistence uses among rural Alaskans.[108]

Additionally, members of the FSB are "supervised at some level" by the Secretaries. In the final rule establishing the FSB, the Secretaries responded to a comment regarding what is now 50 C.F.R. § 100.13, noting that

> [t]o simplify and localize the process for promulgating rural determinations, customary and traditional use determinations, seasons and bag limits, and methods and means provisions, the Secretaries have delegated administrative and signature authority for subparts C and D to the Board. As with any such internal

106. *See* Docket 101 at 44-45.

107. 50 C.F.R. § 100.10(d)(4)(ii), (iii), (viii).

108. *Id.* §§ 100.16, 100.17.

> departmental delegation, the Secretaries remain responsible, as statutorily charged, for the proper administration of the program.[109]

More explicitly, the Secretaries also acknowledged that the rule "delegated promulgation and signature authority for regulations of Subparts C and D to the Board," but that "[t]his delegation does not constitute a delegation of the Secretaries' final authority over these, or other subparts, of this rule."[110]

The Court agrees with the United States that "the absence of a specified (or mandatory) path for higher level review does not render FSB members principal officers,"[111] and that while "[t]he Board is the final administrative authority on the promulgation of subparts C and D regulations relating to the subsistence taking of fish and wildlife on public lands," the Secretaries are not precluded from reviewing the FSB's actions or supervising the FSB's conduct.[112]

---

109. Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, and C, 57 Fed. Reg. at 22947.

110. *Id.* at 22946.

111. Docket 101 at 46 (citing *Fleming v. U.S. Dep't of Agric.*, 987 F.3d 1093, 1103 (D.C. Cir. 2021)).

112. 50 C.F.R. § 100.13(a)(2). The State maintains that "*Arthrex* makes clear that any behind-the- scenes oversight is irrelevant." Docket 122 at 77 (citing 594 U.S. 1). However, the record indicates that the Department of the Interior routinely reviews—and, in fact, approves— proposed regulatory changes approved by the FSB, demonstrating that the Secretary of the

Additionally, five of the FSB's members are the Alaska Regional Director, U.S. Fish and Wildlife Service; Alaska Regional Director, National Park Service; Alaska Regional Forester, U.S. Forest Service; the Alaska State Director, Bureau of Land Management; and the Alaska Regional Director, Bureau of Indian Affairs.[113] Each of these positions is supervised "at some level" by other officers appointed by the President with the Senate's consent.[114] The remaining members are appointed by

---

Interior in fact provides final review of the FSB's regulatory actions pursuant to subparts C and D. *See* Docket 53-1 at 17 (email from Assistant Regional Director, Subsistence, U.S. Fish and Wildlife Service, Alaska Region, to Senior Advisor for Alaskan Affairs, Department of the Interior, noting that "the final rule for 2020-2022 wildlife regulations is still waiting for Dept approval before it can be published in the FR. In the interim, to enact these regulatory changes in time for the upcoming hunts (many of which begin Sept 1), the Board can act under its authority for temporary special actions to enact these while waiting for the Dept. to sign the final rule."). The Court finds such supervision by the Secretary of the Interior highly relevant to the inquiry as to whether FSB members are principal or inferior officers.

113. 50 C.F.R. § 100.10(b)(1).

114. *See* 16 U.S.C. § 742b(b) (establishing office of Director of U.S. Fish and Wildlife Service and providing for the appointment of the Director by the President with the advice and consent of the Senate); 54 U.S.C. § 100302(a)(1) (providing for the appointment of the Director of the National Park Service by the President with the advice and consent of the Senate); 36 C.F.R. § 200.1(b) (noting that "[t]he Chief of the Forest Service, under the direction of the Secretary of Agriculture, administers the formulation, direction, and execution of Forest Service policies, programs, and activities); 43 U.S.C. § 1731(a) (establishing office of Director of the Bureau

the Secretary of the Interior, with the consent of the Secretary of Agriculture, and as such they are directly accountable to the Secretary.[115]

In sum, the Court finds that the FSB was created by law and the members of the FSB are properly appointed inferior officers.[116] As such, no violation of the Appointments Clause has occurred.

* * *

As the State's arguments against federal preemption of ADF&G's orders pursuant to *Sturgeon* and the Appointments Clause fail, the State is not entitled to

---

of Land Management and providing for the appointment of the Director by the President with the advice and consent of the Senate); 43 U.S.C. § 1453 (creating two Assistant Secretaries of the Interior and providing for their appointment by the President with the advice and consent of the Senate). One of the Assistant Secretaries of the Interior is the Assistant Secretary for Indian Affairs. *See* U.S. Department of the Interior, Indian Affairs, *Office of the Assistant Secretary for Indian Affairs*, https://www.bia.gov/as-ia (last visited Mar. 29, 2024).

115. *See* Docket 101 at 47 (citing Docket 52-4 at 5 (Secretary's letter noting dismissal of FSB Chairman as "perhaps marking a new direction by this Administration")); Docket 52-4 at 7 (terms and conditions of appointment of public FSB member noting that "[s]upervision and guidance on terms of employment for the position shall be assigned to the Alaska Affairs Office of the Secretary's Office").

116. The State did not assert that, if the FSB members are inferior officers, that their appointment is unconstitutional.

summary judgment. And because the State has failed to create a genuine dispute of material fact as to federal preemption, the Court grants summary judgment to the United States. The United States can impose a rural subsistence priority on the Kuskokwim River under ANILCA.

IV. Permanent Injunction

Plaintiffs seek a permanent injunction preventing the State "from reinstating Defendants' 2021 orders, from proceeding under Defendants' 2022 orders, or from taking similar actions interfering with or in contravention of federal orders addressing ANILCA Title VIII and applicable regulations."[117]

An injunction is an "extraordinary remedy never awarded as of right."[118] "To be entitled to a permanent injunction, a plaintiff must demonstrate: (1) actual success on the merits; (2) that it has suffered an irreparable injury; (3) that remedies available at law are inadequate; (4) that the balance of hardships justify a remedy in equity; and (5) that the public interest would not be disserved by a permanent injunction."[119]

---

117. Docket 1 at 24. *See* Docket 12-1 at 7; Docket 38-1 at 7; Docket 41 at 5; Docket 97 at 7.

118. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).

119. *Edmo v. Corizon, Inc.*, 935 F.3d 757, 784 (9th Cir. 2019) (quoting *Indep. Training & Apprenticeship Program v. Cal. Dep't of Indus. Rels.*, 730 F.3d 1024, 1032 (9th Cir. 2013)).

As explained above, Plaintiffs have succeeded on the merits in this case. And, for the reasons outlined in the Court's prior order granting a preliminary injunction, Plaintiffs have satisfied the remaining factors and are therefore entitled to a permanent injunction.[120] They have shown irreparable harm to the United States' ability to enforce ANILCA's rural subsistence priority and to federally qualified subsistence users caused by the State's issuance of conflicting emergency orders. And they have shown that the balance of the equities and the public interest support a permanent injunction, as allowing a state to enforce a regulation that is preempted by federal law in violation of the Supremacy Clause is neither equitable nor in the public interest.[121]

CONCLUSION

In light of the foregoing, the Court **DENIES** the State's Cross-Motion for Summary Judgment at Docket 73 and **GRANTS** the United States' Motion for Summary Judgment at Docket 70.

---

120. *See Kuskokwim I*, 608 F. Supp. 3d at 809-13. The only argument offered by the State as to a permanent injunction is one sentence, that "because the United States and the Intervenors cannot succeed on the merits, their requests for a permanent injunction should likewise be denied." Docket 73 at 34.

121. *Valle Del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) ("[I]t is clear that it would not be equitable or in the public's interest to allow the state . . . to violate the requirements of federal law, especially when there are no adequate remedies available." (citation omitted)).

The State is **ENJOINED** from reinstating ADF&G's 2021 or 2022 orders and from taking similar actions interfering with or in contravention of federal orders addressing Title VIII of ANILCA and applicable regulations on the Kuskokwim River within the Yukon Delta National Wildlife Refuge.

The Clerk of Court shall enter a final judgment accordingly.

DATED this 29th day of March, 2024, at Anchorage, Alaska.

/s/ *Sharon L. Gleason*
UNITED STATES DISTRICT JUDGE

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, FILED APRIL 1, 2024

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

Case No. 1:22-cv-00054-SLG

THE UNITED STATES OF AMERICA,

Plaintiff,

and

KUSKOKWIM RIVER INTER-TRIBAL FISH COMMISSION, *et al.*,

Intervenor-Plaintiffs

v.

THE STATE OF ALASKA, *et al.*,

Defendants.

JUDGMENT IN A CIVIL ACTION

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Appendix C

☒ **DECISION BY COURT.** This action came to trial or decision before the Court. The issues have been tried or determined and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

THAT Judgment is entered for the Plaintiff and Intervenor-Plaintiffs. The State is **ENJOINED** from reinstating ADF&G's 2021 or 2022 orders and from taking similar actions interfering with or in contravention of federal orders addressing Title VIII of ANILCA and applicable regulations on the Kuskokwim River within the Yukon Delta National Wildlife Refuge.

APPROVED:

s/ Sharon L. Gleason	Candice M. Duncan
Sharon L. Gleason	Candice M. Duncan
United States District Judge	Clerk of Court

Date: April 1, 2024

Note: Award of prejudgment interest, costs and attorney's fees are governed by D.Ak. LR 54.1, 54.2, and 58.1.

APPENDIX D — DECLARATION OF DOUGLAS VINCENT-LANG FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, FILED SEPTEMBER 1, 2023

IIN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

Case No.: 1:22-cv-54 (SLG)

UNITED STATES OF AMERICA,

Plaintiff,

KUSKOKWIM RIVER INTER-TRIBAL FISH COMMISSION, ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS, BETTY MAGNUSON, IVAN M IVAN AHTNA TENE NENE, AND AHTNA, INC.,

Intervenor Plaintiffs,

v.

STATE OF ALASKA, ALASKA DEPARTMENT OF FISH & GAME, AND DOUG VINCENT-LANG IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE ALASKA DEPARTMENT OF FISH & GAME,

Defendants.

DECLARATION OF DOUGLAS VINCENT-LANG

Appendix D

I, Douglas Vincent-Lang, pursuant to 28 U.S.C. §1746, declare as follows under penalty of perjury:

I. BACKGROUND

1. I submit this declaration in support of the State of Alaska's Combined Motion for Summary Judgment and Opposition to Plaintiffs' Motions for Summary Judgment. If called as a witness, I have personal knowledge of the matters set forth herein and could and would competently testify thereto if called upon to do so.

2. For more than 34 years, I have worked in public service at the Alaska Department of Fish and Game ("ADF&G"). Since January 2019, I have served as the Commissioner of ADF&G. I also currently serve as U.S. Commissioner from the State of Alaska to the Pacific Salmon Commission, which establishes fishery regimes for Pacific Salmon stocks pursuant to the terms of the 2019 Pacific Salmon Treaty Agreement.

3. Before I became Commissioner of ADF&G, I served in various positions at ADF&G, including, among others, as the Director of the ADF&G Division of Wildlife Conservation, the Endangered Species Act Coordinator for the State of Alaska, and a research and management biologist and Assistant Director for the ADF&G Division of Sport and Fish.

4. I hold a B.S. degree in Biology/Population dynamics from the University of Wisconsin-Green Bay and an M.S. degree in Biological Oceanography from the University of Alaska Fairbanks.

5. As Commissioner of ADF&G, I am responsible for upholding the Department's mission: To protect, maintain, and improve the fish, game, and aquatic plant resources of the state, and to manage their use and development in the best interest of the economy and the well-being of the people of Alaska, consistent with the sustained yield principle.

6. Protecting Alaska's fish and game resources is also important to me on a personal level. I learned to fish and hunt at an early age with my grandfather. I now have three children, and one of my pastimes is teaching my children and grandchildren to fish, hunt, and enjoy Alaska's outdoors. It is important to me that the State conserve its natural treasures for my children, their children, and all future generations of Alaskans and to allow the passing of traditions to future generations. I am proud to have dedicated most of my professional career, spanning three decades, to the prudent management and preservation of Alaska's fish and game resources.

Appendix D

II. THE STATE'S REGULATION OF FISH AND WILDLIFE

7. ADF&G maintains active and comprehensive management and research programs to ensure fish and wildlife populations are "utilized, developed, and maintained on the sustained yield principle," as required by Alaska's Constitution.

8. ADF&G manages and conducts research on fish and wildlife through four divisions and three sections: the Divisions of Commercial Fisheries, Sport Fish, Wildlife Conservation, and Administrative Services, and the Sections on Subsistence, Habitat, and Boards Support. ADF&G manages about 750 active fisheries, 26 game management units, and 32 special areas. The agency's annual operating budget is approximately $240 million.

9. ADF&G also partners with Alaska tribes, with state, federal, and municipal agencies, and with other organizations to, among other things, conduct research, monitor fish and wildlife, and regulate the permitting process.

10. In particular, ADF&G partners with the Alaska Board of Fisheries ("Board") to develop and enforce the State's fishery conservation and implement the state subsistence priority. The Board's main role is to conserve and develop the State's fishery resources in the best interest

of the economy and the well-being of the people of Alaska, consistent with the sustained yield principle. The Board has authority to adopt regulations to fulfill its mission, such as establishing open and closed seasons and areas for taking fish; setting quotas, bag limits, and harvest levels and limitations for taking fish; and establishing the methods and means for the taking of fish. The Department implements Board adopted management plans and ensures for conservation of fish stocks using its emergency order authorities.

11. In addition to partnering with the Board, ADF&G also works with various "working groups" that include federal, native, and local participants. These working groups assist ADF&G in its regulatory duties. The Department also manages the Board local Fish and Game Advisory Committees that are formed to provide the Board with local insights and positions on Board proposals impacting their areas.

12. Relevant here, ADF&G works directly with the Kuskokwim River Salmon Management Working Group (Kuskokwim Working Group), a 14-member advisory board formed in 1988 by the Alaska Board of Fisheries. The Kuskokwim Working Group includes elders, subsistence fishermen, processors, commercial fishermen, sport fishermen, the Kuskokwim River Inter-Tribal Fish Commission, a member at large,

federal subsistence regional advisory committees, and ADF&G.

13. The Kuskokwim Working Group provides ADF&G with input on management decisions through weekly meetings during the fishing season. The Working Group operates as the forum for stakeholders to exchange information and discuss inseason management decisions regarding fishing in the Kuskokwim River.

14. As required by Alaska's constitution and state law, the State seeks to achieve three primary goals when managing its waters: (1) sustain its fish for future generations (maintaining "sustained yield"); (2) ensure a priority for subsistence fishing for all Alaskans; and (3) provide sustainable commercial, sport, and personal-use fishing opportunities.

15. Protecting fish for future generations is one of the State's highest priorities. Under Alaska's constitution, all fish must be "utilized, developed, and maintained on the sustained yield principle." Alaska's fisheries are recognized as some of the best managed and most sustainable in the world. Alaska's fisheries are certified by the Marine Stewardship Council as sustainable.

16. In addition, subsistence fishing of salmon is incredibly important for the economies and cultures of many families and communities

in Alaska. Under Alaska's constitution, all Alaskans (not just rural residents) may engage in subsistence fishing.

17. While much subsistence fishing is done by rural residents, some non-rural Alaskans do it too. Many Alaskans have cultural ties to rural fisheries but have been displaced to urban areas of the state for education, health, economic or other reasons. The State's laws and regulations protecting subsistence fishing for all Alaskans ensure that individuals can return "home" to practice their culture and traditions.

III. THE STATE'S REGULATION OF THE KUSKOKWIM RIVER

18. ADF&G, working together with the Board and the Kuskokwim Working Group, regulates fishing in the Kuskokwim River to ensure the conservation of fish, to implement the subsistence fishing priority, and to offer commercial, sport and personal- use fishing opportunities if there are harvestable surpluses available.

A. Subsistence Fishing in the Kuskokwim River

19. Located in southwestern Alaska, the Kuskokwim River is the second largest river in Alaska,

draining an area approximately 50,200 square miles, which is 11% of Alaska's total area.[1]

20. The Kuskokwim is a navigable river. It begins at the confluence of its North and South Forks (near the village of Medfra) and flows for more than 700 miles before it ends in the Bering Sea.

21. The primary subsistence fishers in the main stem of the Kuskokwim River are the residents of 38 rural communities along the Kuskokwim, which collectively contain more than 4,600 households. These communities belong to one of three distinct areas commonly referred to by residents as the lower, middle, and upper river areas.

22. The lower Kuskokwim River includes the communities of Eek and Tuntutuliak and extends upstream approximately 125 miles to the community of Tuluksak. From there, the middle Kuskokwim River extends roughly 260 miles upstream and includes all communities from Lower Kalskag to Stony River (including Lime Village). The upper Kuskokwim River begins near the community of Stony River and extends upstream approximately 233 miles to the community of Nikolai.

23. About 180 miles of the Kuskokwim River runs within the Yukon Delta National Wildlife

1. *See* Alaska Dept. of Fish & Game, *Kuskokwim River*, bit.ly/3VisQgx.

Refuge. The refuge is contained mostly within the lower Kuskokwim River. The remainder of the Kuskokwim River is not within the federal refuge.

24. The Kuskokwim River subsistence salmon fishery is one of the largest in the State in terms of the number of participating residents and salmon harvested. Residents harvest five species of Pacific salmon for subsistence purposes: Chinook, chum, sockeye, coho, and pink. The Kuskokwim River also supports commercial and sport fisheries when there are harvestable surpluses available. These fisheries provide opportunities for income in an area where the per-capital income is low.

25. Alaska's salmon all follow the same life cycle. They begin their life as a fertilized egg in freshwater. After they hatch, they remain in freshwater for various lengths of time before migrating to the sea. Adult salmon remain in the ocean to feed for several years, before returning to the freshwater in which they were born. Once salmon find their natal stream, they begin the migration upriver to reach their spawning ground. When the salmon reach their spawning grounds, the female deposits her eggs in the gravel and the male fertilizes them. After spawning, all species of Pacific salmon die, completing their lifecycle.

26. Chinook salmon (Oncorhynchus tshawytscha, also known as king salmon) begin to enter the

Kuskokwim River in late May and are most abundant in mid- to late June. Sockeye (O. nerka) and chum (O. keta) salmon begin to enter in early- to mid-June. Chinook and sockeye salmon runs diminish in mid-July, and chum salmon runs diminish in late July, when the coho salmon (O. kisutch) run begins. Coho salmon entry into the Kuskokwim River diminishes in late August to early September although some continue to trickle in small numbers through October.

27. Each summer, families relocate to, or make frequent short trips to, seasonal fish camps situated along tributaries, sloughs, and the main stem of the Kuskokwim River. Fish camps are bases for fishing excursions as well as centralized harvest processing sites. Salmon harvests typically begin in June and continue through October throughout the drainage.

28. State law requires individuals to be Alaska residents for the preceding 12 months before harvesting salmon for subsistence uses. Under state law, all Alaskans are eligible to participate in state managed subsistence fisheries. Salmon utilized for subsistence can be harvested by set and drift gillnets, dip nets, beach seines, fish wheels, and rod and reel. Spears can be used only in the Holitna, Kanektok, Arolik, and Goodnews river drainages. The State sometimes assigns bag limits to rod and reel harvests in certain locations and imposes restrictions on net mesh size and depth.

29. Some salmon populations have decreased in recent years. In 2010, the number of Kuskokwim River chinook salmon sharply declined for unknown reasons. The 2012-2014 Kuskokwim River chinook salmon runs were the lowest estimated total runs on record. Chinook salmon runs from 2015-2018 showed improvement, but they were still below the historical average. The 2019 chinook salmon total run was near average and was the largest run since 2009. Between 2020 and 2022, chinook runs again declined to 2015-2018 levels. Chum salmon runs have also recently been low. The 2020 chum salmon run was below average, the 2021 run was the lowest on record, and the 2022 run was the second lowest on record. In contrast, sockeye salmon runs have increased.

30. Due to these poor run sizes, the State has limited commercial harvesting of both chinook and chum salmon in the Kuskokwim River. The State also has needed to impose restrictions on subsistence fisheries and delay chum and sockeye salmon fishing to avoid incidental catch of chinook salmon.

B. State Management of the Kuskokwim River

31. The State has been providing for sustained yield and subsistence uses of salmon in the Kuskokwim River since statehood.

32. To ensure long-term sustainable salmon populations, ADF&G and the Board collaborate

to establish "escapement goals" for Kuskokwim salmon. The "escapement" level is the number of salmon that escape Kuskokwim River fisheries to spawn.

33. Imposing a certain escapement level through regulation is necessary to maintain sustainable salmon populations. The State's fishing restrictions have ensured that escapements generally fall within the State's established sustainable escapement goals, which are calculated to meet future escapement and harvest needs.

34. In 2018, after performing its regular review of Kuskokwim salmon escapement goals, ADF&G released its new escapement goal recommendations for Kuskokwim salmon stocks. ADF&G reviews these goals about every three years, timing its reviews to align with regularly scheduled Board of Fisheries meetings to facilitate public input.[2]

35. ADF&G and the Board regulate and manage fishing on the Kuskokwim River through the Kuskokwim River Salmon Management Plan ("Management Plan").[3] The Management Plan provides guidelines for managing the Kuskokwim River salmon fisheries in a "conservative manner"

---

2. The State's next review and set of escapement goals was delayed due to COVID-19 disruptions.

3. 5 AAC 07.365; *see also* 5 AAC 39.222.

that "result[s] in the sustained yield of salmon stocks large enough to meet escapement goals, amounts reasonably necessary for subsistence uses [ANS], and for nonsubsistence fisheries."[4] Under the Management Plan, ADF&G must manage the river using "the best available data, including preseason and inseason run projections, test fishing indices, age and sex composition, harvest reports, passage escapement estimates, and recognized uncertainty, to assess run abundance."[5]

36. The Management Plan provides detailed instructions for managing salmon fisheries inseason, including automatic emergency shutdowns of fisheries when escapement levels fall short of the State's goals.[6] Per the Plan, ADF&G employs a sophisticated combination of methods for gathering yearly data on salmon run strength, including telemetry, sonar, aerial studies, test fisheries, weirs, and computer modeling.[7] ADF&G also works with rural fishermen to collect local observational data about salmon runs.[8]

---

4. *Id.*

5. *Id.*

6. 5 AAC 07.365.

7. ADF&G, *Chinook Salmon Research Initiative*, bit.ly/3V0CCDK.

8. *Id.*

37. ADF&G routinely collects and archives the most up-to-date and comprehensive data set on Kuskokwim salmon. Salmon assessment on the Kuskokwim River consists of a wide range of projects that monitor in-season run abundance, timing, harvest, demographics, and escapement. Since 2020, there have been 15 projects operated annually within the Kuskokwim River to assess the salmon populations. Of those projects, nine have been directly operated by ADF&G or have had ADF&G as an operations partner.

38. ADF&G employs expert staff to analyze and interpret the data it gathers.[9] ADF&G then uses this data and analysis to develop annual preseason forecasts and strategies for reaching the State's escapement goals.

39. ADF&G works year-round to develop and enforce Kuskokwim River salmon policies, and it implements the State's escapement goals and management plan during the salmon in-river migration, which is when fishermen harvest salmon.

40. As the salmon migration season begins, ADF&G makes decisions regarding in-season management according to the Management Plan, considering input from the Kuskokwim Working Group, the

9. AR 1029; see ADF&G, *Our Structure & Staff*, bit.ly/44062pA.

preseason forecast for chinook salmon, and the assessed in-season run strengths of the salmon returns.

41. The Kuskokwim River chinook salmon migration begins in late May every year. Pursuant to the Management Plan, if preseason run strengths are forecasted to be poor, ADF&G will typically announce in early May, before the chinook salmon season begins, a closure of the Kuskokwim River to chinook salmon fishing, including subsistence fishing.

42. During the harvest season ADF&G meets at least once a week with the Kuskokwim Working Group to review and discuss in-season run assessments and harvest levels and to make recommendations on in-season management actions.

IV. FEDERAL INVOLVEMENT AND COOPERATION

43. The federal government, when making its own management decisions, largely relies upon State-collected and analyzed data. While the federal government operates some data-collection projects on the Kuskokwim River, such as weirs and harvest surveys, and performs its own scientific analysis of the data it collects, it otherwise relies on ADF&G's data, analysis, preseason forecasts, and management goals.

44. The federal government does not go through a formal process to set its own escapement or

subsistence goals. The federal government also does not formally develop its own management plan.

45. In response to the *Katie John* cases, the federal government asserted regulatory authority under ANILCA over Alaska's navigable waters. This approach led to a balkanized regulatory regime over Alaska's navigable waters. For example, the federal government has claimed authority to regulate a significant portion of the Kuskokwim River, from the river mouth to the rural village of Aniak at the edge of the Yukon Delta National Wildlife Refuge. But the State remains responsible for sustaining yield and protecting subsistence uses for the *entire* Kuskokwim River, including those portions that are outside of the federal refuge.

46. These conflicting regulatory regimes create a serious conflict when salmon populations are low and the State is forced to implement restrictions. During periods of weak runs in the Kuskokwim, the State must limit early fishing opportunities for lower Kuskokwim subsistence fishers while run strength and timing are still uncertain to prevent overfishing to ensure for escapement and to preserve subsistence fishing opportunities for those residents living in the upper Kuskokwim above the refuge. But the federal government does not have to take those factors into consideration. This regulatory

narrowness has led to overfishing within federal preserves and corresponding harms to those living upstream.

47. Since *Sturgeon v. Frost* was issued in 2019, the federal government has continued to aggressively assert regulatory authority over Alaska's navigable waters, including the Kuskokwim River. Until recently, this legal issue never reached a breaking point because the federal government typically deferred to the State's management decisions within the Kuskokwim. Indeed, before 2021, fisheries on the Kuskokwim River were successfully managed for decades with little conflict between the State and the federal government.

V. THE 2021 AND 2022 SEASONS

48. The federal government's cooperation with the State began to erode in the spring of 2021.

49. In May 2021, as the salmon season approached, the State was projecting that the Chinook salmon run in the Kuskokwim would be in the range of 94,000- 155,000.[10] Consistent with its management plan, the State was preparing to restrict fishing in the Kuskokwim River drainage to protect the Chinook population while also providing subsistence fishing opportunities for all Alaskans.

10. AR 512.

50. On May 7, before the State issued its orders, Boyd Blihovde (the federal Refuge Manager) issued an "emergency special action" ordering that "Federal public waters of the Kuskokwim River within and adjacent to the exterior boundaries of the Yukon Delta National Wildlife Refuge" would be "closed to the harvest of all salmon by using gillnets by all users effective June 01, 2021."[11] The emergency special action created an exception for "Federally qualified subsistence users," authorizing them to use gillnets in "the main stem in the Kuskokwim River" on June 2, 5, 9, 12, and 15.[12]

51. The State took a more conservative approach and waited for additional inseason salmon-run data before issuing its emergency orders. On May 11, the State issued emergency orders that prohibited subsistence fishing with gillnets throughout the Kuskokwim River starting on June 1, 2021.[13] But the State authorized subsistence fishing on various dates and locations along the Kuskokwim, including "[s]ubsistence fishing with set gillnets" in parts of the river within the Yukon Delta Refuge on June 2, 5, and 9.[14] Unlike Blihovde's orders, the State's orders authorized

11. AR 506.

12. AR 507.

13. AR 512-14

14. AR 512-16.

subsistence fishing for all Alaskans that qualified for subsistence fishing, not just rural Alaskans, allowing locally displaced residents to travel "home" to practice their culture and traditions.

52. The State issued its orders after the Refuge Manager's because it was waiting to receive and analyze in-season data to make an informed decision about openings. The State did not want to preemptively announce openings for subsistence uses before the data supported that decision.

53. On May 27, the Federal Subsistence Board ("FSB") wrote a letter to me asserting that the State's orders put "non-federally qualified fishers at legal risk" because Blihovde's orders "tak[e] precedence" over the State's.[15]

54. On June 3, I responded to the FSB's letter, explaining that I had a legal obligation "to provide for the subsistence needs of Alaskans when harvestable surpluses allow," and that, based on the State's data and assessments, "there [were] sufficient resources to provide subsistence opportunities for all Alaskans while still managing Chinook salmon stocks conservatively."[16]

55. I never received any evidence from the federal government showing that our orders had any

15. AR 544-45.

16. AR 568.

meaningful impact on subsistence fishing for rural residents. Nor is it likely that any such evidence exists.

56. As a logistical matter, it is not easy for those living far from the Kuskokwim to engage in subsistence fishing. There is no road access to the Kuskokwim River, and the subsistence fishing the State authorized requires a boat and a specialized gillnet, which may be up to 300 feet long (50 fathoms). So non-rural Alaskans typically do not engage in subsistence fishing unless (1) they fly by plane to the Kuskokwim, (2) the boat and gear are already available to them at the river when they arrive, and (3) they have family members living locally.

57. Publicly available data also supports the State's conclusion that our orders opening subsistence fishing to all Alaskans had no meaningful impact on subsistence fishing for rural residents. The State has measured salmon harvest numbers on days when subsistence fishing was allowed for all Alaskans and on similar days when subsistence fishing was allowed only for federally qualified users. There is no meaningful difference in harvest numbers between the two days.

58. In my experience, the individuals who return to the Kuskokwim to engage in subsistence fishing already have significant ties to the community but were displaced to other areas of the State.

59. On June 10, after receiving additional inseason data, the State issued another executive order authorizing "subsistence fishing with gillnets" on parts of the Kuskokwim River within the Yukon Delta Refuge on June 12 and 15.[17]

60. On June 17, Blihovde issued another emergency action authorizing "federally qualified subsistence users" to use gillnets in "[f]ederal public waters in the main stem of the Kuskokwim River" on June 19.[18] The State did not support Blihovde's actions, which contradicted the State's closures and were unsupported by the State's scientific data and analysis. The State opened fishing on June 19 only in the middle Kuskokwim, not in the lower Kuskokwim River.[19]

61. On June 24, after receiving data showing a salmon surplus, the State issued an emergency order authorizing subsistence fishing with gillnets along parts of the Kuskokwim River within the Yukon Delta Refuge on June 28.[20] We believed that this opening was warranted based on in-season assessments indicating the chinook salmon run abundance was adequate to provide additional harvest. We determined that there

17. AR 634.

18. AR 738-39.

19. AR 772-74.

20. AR 859, 919-20.

was no biological justification to further delay this fishing period.

62. The next day, the FSB wrote a letter to me, asserting that the State's order was unlawful because Blihovde had "closed the mainstem and several tributaries of [the] Kuskokwim River within the exterior boundaries of the [federal] refuge to gillnet fishing" and his order "supersedes [the] State's authority."[21]

63. On June 30, I wrote a letter in response, explaining that we had concluded, based on the State's "up-to-date science, biology, and experience," that there were "sufficient fish available to allow Alaskans an opportunity to subsistence fish to feed their families and practice their cultural way of life."[22] I noted that Blihovde had not "provided any scientific or biologic data to [the State] that would call [its] information and science into question."[23] Without "credible evidence" contradicting our approach, the State would "continue to manage the river and fishery based on its assessment of run strength."[24]

64. On July 1, after receiving additional inseason data, the State issued another emergency order

21. AR 911

22. AR 1029.

23. AR 1030.

24. Id.

permitting subsistence fishing with gillnets along parts of the Kuskokwim River within the Yukon Delta Refuge on five dates in July.[25] We concluded that these limited fishing opportunities would "conserve chum and king salmon while providing subsistence harvest opportunity for other species."[26] The same day, Blihovde issued another emergency special action, which purported to authorize subsistence fishing with gillnets on the same five dates, but only for "Federally qualified subsistence users."[27]

65. On April 6, 2022, in advance of the 2022 salmon season, the United States sent a letter to the State of Alaska threatening legal action if the State continued to "authorize subsistence harvest by all Alaskans on a day when no comparable federal opening exist[s]" or issued any other orders "authoriz[ing] harvest of Kuskokwim salmon within the [Yukon Delta National Wildlife] Refuge in a manner contrary to the Board's actions."[28]

66. In my letter in response, I noted that as recently as 2020 the State and the federal government had "agreed to scheduling concurrent subsistence

25. AR 1112-13.

26. AR 1112.

27. AR 1042-43.

28. AR 2422-23.

fishing openers" and I again emphasized that the State was legally required "to provide a subsistence opportunity for [these] users when a harvestable surplus exists."[29]

67. The following month, we were preparing to issue new orders restricting gillnet fishing due to the historically low levels of chum salmon escapements the prior year. Yet on May 2, Blihovde issued an emergency special action inexplicably authorizing federally qualified subsistence users to fish using gillnets on June 1, 4, 8, 12 and 16.[30]

68. The State strongly opposed Blihovde's order. Under principles of sound management, it was premature for Blihovde to make these early fishing opportunity announcements while run strength and timing was still so highly uncertain.

69. In a May 12 letter to Blihovde, I warned that opening fishing on June 12 and 16 "prior to any inseason assessment" was "premature," "highly illogical and scientifically unsupportable," and "irresponsible management," because "run strength … [was] still highly uncertain."[31] I asked

29. Dkt. 5-2 at 8; AR 2453-54.

30. AR 2487-88.

31. Dkt. 9-1 at 1.

the FSB to provide a "biological justification" for its actions.[32] The FSB never responded.

70. On May 13, consistent with these concerns, the State issued emergency orders that prohibited subsistence fishing with gillnets in the Kuskokwim River beginning on June 1, but opened subsistence fishing on parts of the river within the Yukon National Refuge for all subsistence users only on June 1, 4, and 8.[33] Unlike Blihovde's order, the State did not permit gillnet fishing on June 12 and 16.[34]

71. By the end of the 2022 season the State had met all assessed escapement goals for chinook and sockeye salmon. But while the State's goals were met or exceeded in the lower and middle Kuskokwim River, escapement farther upstream to the headwaters region was poor. If the Kuskokwim River had remained closed to subsistence fishing on June 12 and June 16, as the State's orders provided, it is likely that the upriver headwater communities would have had more opportunity to share in the harvest and escapement would have been larger. For example, escapement to the Salmon (Pitka Fork) River—a project located upstream of the federal reserve

32. *Id*. at 2.

33. AR 2516-20.

34. *Id*.

in the headwaters region—was the lowest on record and only 23% of its historical average. Similarly, while there were 9.9 Chinook salmon per household within the Yukon Delta National Wildlife Refuge, the headwater communities upriver were left with only 1.7 Chinook salmon per household.

72. ADF&G had repeatedly warned the Refuge Manager about this possible outcome and had urged the Refuge Manager to take a more cautious management approach, as the State did. The State seeks to ensure that adequate numbers of Chinook salmon pass through the Refuge to provide for escapement needs and for subsistence harvest stocks for rural Alaskans living along the *entire* river—including upriver and outside the Refuge. The Refuge Manager was aware of the impact of his orders to the Kuskokwim fisheries above the Refuge, yet he disregarded the State's concerns.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on September l, 2023.

s/_____
Douglas Vincent Lang

APPENDIX E — RELEVANT STATUTORY PROVISIONS

16 U.S.C.A. § 3102. Definitions

As used in this Act (except that in titles IX and XIV the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act, and the Alaska Statehood Act)—

(1) The term "land" means lands, waters, and interests therein.

(2) The term "Federal land" means lands the title to which is in the United States after December 2, 1980.

(3) The term "public lands" means land situated in Alaska which, after December 2, 1980, are Federal lands, except—

(A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;

(B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act which have not been conveyed to a Native

Corporation, unless any such selection is determined to be invalid or is relinquished; and

(C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act.

* * *

Appendix E

16 U.S.C.A. § 3114. Preference for subsistence uses

Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes. Whenever it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in order to protect the continued viability of such populations, or to continue such uses, such priority shall be implemented through appropriate limitations based on the application of the following criteria:

(1) customary and direct dependence upon the populations as the mainstay of livelihood;

(2) local residency; and

(3) the availability of alternative resources.