TODD KIM
Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division

PAUL A. TURCKE (Idaho Bar No. 4759)
Trial Attorney
Natural Resources Section
1290 West Myrtle Street, Suite 500
Boise, ID 83702
202-532-5994 || 202-305-0275 (fax)
paul.turcke@usdoj.gov

Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case involves subsistence harvest of salmon on the Kuskokwim River. The Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. §§ 3101-3233, mandates that subsistence fishing by rural Alaska residents be given priority over other uses, including when necessary to conserve resources. The State of Alaska, through its Department of Fish and Game ("ADF&G"), has in recent years authorized gillnet harvest of Kuskokwim salmon by all Alaskans through emergency orders that contradict federal orders. Federal agency personnel sought to resolve this conflict through outreach and dialogue, but when those efforts failed in 2021 and on the verge of the 2022 fishing season, the United States brought this action, contending that federal actions pursuant to Title VIII of ANILCA preempt contradictory state actions.

The State does not address preemption, perhaps because it has become necessary for the federal government to implement ANILCA's subsistence priority, and decades of litigation make clear that federal actions pursuant to Title VIII preempt contradictory state actions that might otherwise reflect the State's traditional wildlife management role. Instead, the State seeks to avoid the preemption analysis by arguing that ANILCA does not address subsistence fishing in navigable waters like the Kuskokwim River. And the State further contends that the Federal Subsistence Board ("FSB") that was created by the Secretaries of the Interior and Agriculture in 1990 has always been unconstitutional and cannot therefore properly administer the Title VIII subsistence priority.

There are significant flaws in the State's position. The ANILCA rural subsistence

priority has been found to extend to subsistence fishing in navigable waters under controlling Ninth Circuit precedent. And the State's challenge to the FSB and federal regulatory structure is likewise unavailing. The State's arguments are precluded because it has long acquiesced in the current regulatory structure, and its arguments would all fail on the merits even if not precluded. This Court should deny Defendants' motion for summary judgment and enter summary judgment for Plaintiff United States.

BACKGROUND

The Court is familiar with ANILCA Title VIII and this dispute. *See* Pl.'s Mot. for Summ. J. and Mem. in Supp. 2-6 ("U.S. Br."), ECF No. 70 (citing *United States v. Alaska* (*Kuskokwim I*), Case No. 1:22-cv-00054-SLG, 2022 WL 1746844 (D. Alaska May 31, 2022), *subsequent determination United States v. Alaska* (*Kuskokwim II*), 608 F. Supp. 3d 802 (D. Alaska 2022)). However, the State's cross-motion necessitates explanation about the history of ANILCA as it relates to creation of the FSB, and clarification of the parties' roles in managing subsistence fishing on the Kuskokwim River.

I. History of ANILCA and the FSB

ANILCA's primary purposes include preserving "the opportunity for rural residents [of Alaska] engaged in a subsistence way of life to continue to do so." 16 U.S.C. § 3101(c). In particular, Title VIII of ANILCA establishes a priority for "the taking on public lands of fish and wildlife for nonwasteful subsistence uses . . . over the taking on such lands of fish and wildlife for other purposes." 16 U.S.C. § 3114. ANILCA defines "public lands" to mean (with certain exceptions) lands situated within

Alaska that are "[f]ederal lands." 16 U.S.C. § 3102(3). It defines "[f]ederal land" to mean "lands the title to which is in the United States," 16 U.S.C. § 3102(2), and it defines "land" to mean "lands, waters, and interests therein," 16 U.S.C. § 3102(1).

The State emphasizes its traditional authority over management of fish and wildlife, including subsistence fishing on the Kuskokwim River. *See* Defs.' Combined Mot. for Summ. J., Mem. in Supp., and Opp'n to Mots. for Summ. J. ("Defs.' Br.") 10-16, ECF Nos. 72, 73.[1] And Title VIII, to some extent, contemplated the State occupying such a role in administering the ANILCA rural subsistence priority. It outlined a state regulatory structure to protect subsistence uses by rural Alaska residents, providing that if, within one year of ANILCA's enactment, the State "enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in" ANILCA for rural residents, then the Secretary shall not implement the provisions of ANILCA directing the establishment of regional advisory councils. 16 U.S.C. § 3115(d). And such state laws, "unless and until repealed, shall supersede such sections [of ANILCA] . . . for the taking of fish and wildlife on the public lands for subsistence uses." *Id.*

However, the State was unable to maintain this nonfederal means of implementing Title VIII. When ANILCA was enacted in 1980, an Alaska statute provided a priority for

[1] Defendants have filed a single, combined brief in support of their own motion (ECF No. 72) and in opposition to Plaintiff's and Intervenor-Plaintiffs' motions (ECF No. 73). Throughout this brief, the citations to Defendants' brief refer to the ECF-stamped page numbers from the docket rather than the page numbers of Defendants' brief.

nonwasteful subsistence use of wild, renewable resources, but it did not limit the priority to "rural Alaska residents," as required by ANILCA. *See Bobby v. Alaska,* 718 F. Supp. 764, 767, 788-791 (D. Alaska 1989). The State promulgated regulations recognizing that limitation and, after the federal government reviewed and approved the regulatory scheme, the State became responsible for overseeing implementation of Title VIII. *See id*. at 767. Then, in 1985, the Alaska Supreme Court struck down the State regulations' limitation of the subsistence priority to rural Alaska residents. *Madison v. Alaska Dep't of Fish & Game,* 696 P.2d 168 (Alaska 1985). Without that eligibility limitation, the State's subsistence priority no longer complied with ANILCA, and the Secretary of the Interior thereafter withdrew certification of the State's regulatory scheme, pending enactment of state subsistence-use legislation consistent with ANILCA. *See Bobby,* 718 F. Supp. at 768. The Alaska Legislature then amended the State's subsistence laws to remedy the inconsistency with ANILCA. *See id*.; *see also Kenaitze Indian Tribe v. Alaska,* 860 F.2d 312, 314 (9th Cir. 1988). But in 1989, the Alaska Supreme Court voided the amended state subsistence statute after finding that a rural priority violates Alaska's Constitution. *See McDowell v. State,* 785 P.2d 1 (Alaska 1989).

As a result of Alaska's inability to satisfy ANILCA's requirements for state management, the Secretaries of the Interior and Agriculture were obligated under ANILCA to effectuate the rural subsistence priority. *See* 16 U.S.C. § 3115; *see also* Decl. of Steven C. Begakis, Ex. D at 9-10, ECF No. 75-1, 30-31 ("Because the Alaska state constitution prevents the state from enacting a law to manage subsistence uses that

is consistent with Title VIII of ANILCA, the federal government has managed subsistence uses on federal lands in Alaska since Alaska changed its state law in 1990."). ANILCA authorizes the Secretaries to "prescribe such regulations as are necessary and appropriate to carry out [their] responsibilities" under Title VIII. 16 U.S.C. § 3124; *see* 16 U.S.C. § 3102(12). They first did so in 1990. *See* Temporary Subsistence Management Regulations for Public Lands in Alaska, 55 Fed. Reg. 27,114 (June 29, 1990). Those regulations established the FSB consisting of the Department of Agriculture Alaska Regional Forester, Alaska regional directors of four bureaus within the Department of the Interior, and a chair "appointed by the Secretary of the Interior with the concurrence of the Secretary of Agriculture." *See* Subsistence Management Regulations for Public Lands in Alaska, 57 Fed. Reg. 22,940, 22,954 (May 29, 1992). This was modified by 2011 regulations that added two additional "public" members to enhance the ability to "truly represent" and utilize knowledge of "active subsistence users," which remains the current configuration of the FSB.[2] *See* Subsistence Management Regulations for Public Lands in Alaska – Subpart B, Federal Subsistence Board, 76 Fed. Reg. 56,109, 56,110, 56,114 (Sept. 12, 2011).

II. Collaborative Management and Context of the Kuskokwim Dispute

The State describes the Kuskokwim River salmon fishery and management of subsistence salmon fishing in the 2021 and 2022 seasons. *See* Defs.' Br. 27-33. This

[2] The "public" members are hired and paid as Special Government Employees pursuant to 18 U.S.C. § 202.

account features several themes – that harmonious efforts at management ended following an abrupt "breaking point" in "the spring of 2021," that any conflict reflects the State's insistence on a more conservative management approach based solely in science, and that the State's efforts to open the river to gillnetting by all Alaskans are necessary to allow non-federally qualified users living in urban areas to return home to participate in family and cultural traditions centered on Kuskokwim subsistence fishing. These contentions are all contradicted by the record.

Kuskokwim subsistence fishery management – like that of other Alaska subsistence resources – is a collaborative undertaking. Federal officials obligated to implement the Title VIII subsistence priority "work closely with and routinely consult" biologists with the State, the Yukon Delta National Wildlife Refuge ("Refuge"), the Office of Subsistence Management, and the Kuskokwim River Inter-Tribal Fish Commission Management, as well as advisory groups such as the Title VIII Regional Advisory Council and the State's Kuskokwim River Salmon Management Working Group. Decl. of Boyd Blihovde ¶ 6, ECF No. 5-1. Representatives of the various governmental entities communicate frequently. *Id*. ¶ 9. These exchanges are professional and typically cordial. *See* AR 1110-18. Subsistence management is not "balkanized" in some dichotomous and hostile manner as the State suggests, Decl. of Douglas Vincent-Lang ¶ 45, ECF No. 74, but reflects interplay between tribal, state and federal governments, local subsistence users, the engaged public, and other stakeholders.[3]

[3] The federal government did not "assert[ ] regulatory authority under ANILCA

In fact, the State's own Working Group took the position – through a 6-1 vote – that ADF&G should de-escalate any perceived conflict and "not announce any further openings in waters that are under federal jurisdiction." *See* Notes from June 15, 2022, at 1, ECF No. 32-3.

The State's litigation position now not only emphasizes conflict, but also contends that this conflict flows from the federal government's repudiation of the State's attempts at more conservative management of Kuskokwim salmon subsistence harvest. This portrayal is belied by the record. The Refuge Manager's preference, to achieve escapement of no less than 110,000 Chinook, is on its face more conservative than the lower end of the State's escapement range that is met if Chinook escapement is at or above 65,000 fish.[4] Also, while the State implies that the Refuge Manager acted prematurely and without sufficient biological data in authorizing limited gillnet harvest opportunities on May 7, 2021, *see* Defs.' Br. 28; *see also* Vincent-Lang Decl. ¶¶ 50-52,

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over Alaska's navigable waters" in "response to the *Katie John* cases." Vincent-Lang Decl. ¶ 45. Since it began out of necessity in 1990, federal implementation of the Title VIII priority for subsistence fishing has primarily focused on Alaska's navigable waters, because that is where subsistence fishing primarily takes place. *See Native Vill. of Quinhagak v. United States*, 35 F.3d 388, 393 (9th Cir. 1994) ("[m]ost subsistence fishing (and most of the best fishing) is in the large navigable waterways rather than in the smaller non-navigable tributaries upstream").

[4] Commissioner Vincent-Lang's declaration describes the importance and process of setting escapement goals, but declines to specify what those goals are for Kuskokwim salmon. *See* Vincent-Lang Decl. ¶¶ 31-35. However, the State admitted that the Kuskokwim Chinook escapement goal is "a range of between 65,000 to 120,000 fish." *Compare* Compl. ¶ 23, ECF No. 1, *with* Answer ¶ 23 (admitted), ECF No. 33.

there is no meaningful difference in the timing of relevant federal and state orders. The State contends it withheld issuing its own orders "because it was waiting to receive and analyze in-season data to make an informed decision about openings." *Id*. ¶ 52. But the State's first order authorizing gillnetting by all Alaskans was issued on May 11, only a few days after the federal order. And it strains credulity to suggest that this short interval of time provided the State with meaningful in-season data on run timing or strength, because Chinook only "begin to enter the Kuskokwim River in *late* May and are most abundant in mid- to late June." *Id*. ¶ 26 (emphasis added). Furthermore, the State's suggestion that its decisions to authorize in-season harvest are more surgical or data-driven than federal managers' decisions cannot be reconciled with the fact that in 2021 the State authorized harvest opportunities for all Alaskans on the same dates as did the Refuge Manager for only federally qualified users. *See* Compl. ¶¶ 30-34 and Exs. 1, 2; *Kuskokwim I*, 2022 WL 1746844 at *2 (ADF&G orders authorized gillnet fishing for all Alaskans "on each of the same dates that the federal emergency actions had reserved for federally qualified subsistence users").[5]

Next, the State's assertion that Kuskokwim gillnet openings were "critical" to allow urban-living Alaskans to return and participate in family traditions similarly does not hold water. *See* Defs.' Br. 32; *see also* Letter dated Apr. 22, 2022, ECF No. 5-2 at

[5] As the Court noted, in 2021 the State not only mirrored each of the federal openings but also "authorized subsistence gillnet fishing for all Alaskans on dates when even federal subsistence gillnet fishing was not allowed." *Kuskokwim I*, 2022 WL 1746844 at *2.

10. The federal orders and regulatory scheme do not prohibit all Alaskans from returning to participate in subsistence salmon fishing traditions, or consuming the harvest therefrom. Any Alaskan, even invited non-Alaskans, can travel to Kuskokwim River communities, attend fish camps, assist with processing, and otherwise participate in subsistence activities other than actual harvest. The only practical restriction imposed by Title VIII is that the actual harvest, which here consists of setting/retrieving of gillnets and initial possession of harvested salmon, be conducted by federally qualified users. *See* Second Decl. of Boyd Blihovde, Ex. C (Letter dated July 1, 2015), ECF No. 101-1 at 8-9.

Lacking an objective biological rationale or need to facilitate traditional subsistence culture, the State's actions are reduced to what amounts to the assertion of state sovereignty and rejection of federal authority. In June 2020 Commissioner Vincent-Lang stressed that ADF&G's Kuskokwim actions reflect management of a "state fisher[y] . . . based on our escapement goals and projections. . . . We see no reason to restrict opportunity for state qualified users . . . The state will not enforce a federal only fishery." Email dated June 16, 2020, ECF No. 1-3 at 9. Correspondence early in the 2021 season reflected the State's similar intent to exercise its own discretion, with the Commissioner emphasizing "constitutional obligations" to open fishing to all Alaskans and proclaiming, "I will not rescind my emergency orders regarding subsistence fishing in the Kuskokwim River this season." Letter dated June 3, 2021, ECF No. 1-3 at 13. The FSB Chairman responded with a letter dated June 24 explaining that "this year's run will fall far short of being sufficient to provide for the subsistence needs of all Alaskans[,]"

noting the Title VIII subsistence priority, and inviting a "dialogue to reach a more productive status that will foster better state and federal coordination." Letter dated June 24, 2021, ECF No. 1-3 at 16-17. But, that same day, the State issued an emergency order authorizing gillnetting within the Refuge on June 28 by all Alaskans, despite federal orders that would prohibit all gillnetting on that date. *See* Emergency Order #3-S-WR-07-21 (dated June 25, replacing the order initially released on June 24), ECF No. 1-2 at 12; *see also Kuskokwim I*, 2022 WL 1746844 at *2.

Finally, the State implies that federal mismanagement in 2022 is responsible for insufficient subsistence harvest upstream of the Refuge boundary, and for insufficient escapement of certain salmon species. *See* Defs.' Br. 32-33; Vincent-Lang Decl. ¶¶ 71-72 ("poor" upstream escapement was "likely" related to June 12 and 16 openings, and "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 would have the Court believe that the only relevant actions in the 2022 season involved the Refuge Manager allowing gillnet harvest on June 1, 2, 4, 8, 12, and 16, with the State refusing to authorize harvest on June 12 and 16 because it was "warn[ing]" that such a mid-May authorization of harvest "was 'premature,' 'highly illogical and scientifically unsupportable,' and 'irresponsible management,' because 'run strength . . . [was] still highly uncertain.'" Vincent-Lang Decl. ¶ 69 (quoting Letter dated May 12, 2022, ECF No. 9-1 at 1-2). But the State again issued orders allowing gillnet harvest on most of these dates, and for all Alaskans. *See* Emergency Order #3-S-WR-02-

22, ECF No. 1-2 at 19-20 (opening gillnet harvest opportunities with the Refuge on June 1, 4, and 8). And on June 18, 2022, when the Refuge Manager announced openings for June 20 and 22, the State issued its own order for the same days authorizing gillnetting by all Alaskans. *See* ECF Nos. 32-1, 32-2. Prior to that, on June 9, the State indefinitely opened gillnetting starting June 12 in Subsistence Sections 4 and 5 of the Kuskokwim, upstream of the Refuge boundary. *See* Blihovde Second Decl., Ex. A (Emergency Order #3-S-WR-03-22), ECF No. 101-1 at 3-5. In other words, State-authorized gillnets reduced the likelihood that any fish leaving the Refuge after June 12 might reach their spawning grounds. And such action stands in sharp contradiction, without apparent explanation, to Commissioner Vincent-Lang's statement that "spawning escapement outside the refuge" is essential because "80% of the chinook salmon spawning occurs outside the refuge." Letter dated Apr. 22, 2022, ECF No. 5-2 at 11; *see also* Letter dated May 12, 2022, at 1-2, ECF No. 9-1. Gillnetting by all Alaskans was still open at the end of June above the Refuge boundary. *See* Blihovde Second Decl., Ex. B (Emergency Order #3-S-WR-05-22), ECF No. 101-1 at 6-7 (opening State subsistence fishing upstream of the Refuge boundary with fish wheels and beach seines, noting "as previously announced" that State subsistence fishing with gillnets remains open).

The State's account is, in short, a revisionist explanation for its actions that boils down to a simple rejection of federal authority. And these assertions of regulatory authority ignore the State's own abdication of its contemplated role in administering the Title VIII subsistence priority, when it failed to establish and maintain an ANILCA-

compliant regulatory structure under Alaska law.

ARGUMENT

The State's singular focus in the cross-motions for summary judgment is to argue that the federal orders issued pursuant to ANILCA Title VIII are invalid and therefore cannot have preemptive effect. The State raises two purported bases of invalidity – first, that the Title VIII subsistence priority does not extend to fishing in navigable waters, and second, that the FSB was created, and has always operated, in violation of the constitutional Appointments Clause. The Court can reject these arguments under res judicata and on the merits.

I. Defendants Have Waived Any Argument Against Preemption

Plaintiff United States has demonstrated that preemption prohibits State orders that contradict or interfere with federal orders issued pursuant to ANILCA Title VIII. *See* U.S. Br. 8-14; *see also Kuskokwim II*, 608 F. Supp. 3d at 808. At the preliminary injunction stage, the State declined to address preemption, instead arguing against Plaintiffs' likelihood of success only by suggesting the federal orders at issue were "constitutionally flawed" albeit with "implicitly acknowledge[d] . . . gaps in those arguments." *Id*. The State's cross-motion for summary judgment seemingly attempts to fill those gaps, but continues to forego any analysis of preemption. As a result, Defendants have waived any argument on preemption. *See Alaska Ctr. for Env't v. U.S. Forest Serv.*, 189 F.3d 851, 858 n.4 (9th Cir. 1999) ("Arguments not raised in opening brief are waived.").

II. Defendants' Arguments Must Fail Under the Doctrines of Issue Preclusion, Judicial Estoppel, and Claim Preclusion

The State has litigated multiple issues involving ANILCA Title VIII. The issues it now attempts to raise as defenses in this case were, or could have been, decided in multiple prior lawsuits. The State is precluded from relitigating these issues in this action.

"A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies[.]'" *Montana v. United States*, 440 U.S. 147, 153 (1979) (quoting *S. Pac. R.R. Co. v. United States*, 168 U.S. 1, 48-49 (1897)). To invoke res judicata one must show "(1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." *Crowley v. Boothe*, No. 3:13-CV-00106-TMB, 2014 WL 7272408, at *4 (D. Alaska Dec. 17, 2014) (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency,* 322 F.3d 1064, 1077 (9th Cir. 2003)).

Res judicata encompasses both claim preclusion and issue preclusion. *See Robi v. Five Platters, Inc.*, 838 F.2d 318, 321 (9th Cir. 1988). "Claim preclusion '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.'" *Id*. at 322 (quoting *Brown v. Felsen,* 442 U.S. 127, 131 (1979)) (emphasis added); *see also Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F.2d 1524, 1529 (9th Cir. 1985).

Issue preclusion "prevents relitigation of all 'issues of fact or law that were actually litigated and necessarily decided' in a prior proceeding." *Robi*, 838 F.2d at 322 (quoting *Segal v. Am. Tel. & Tel. Co.,* 606 F.2d 842, 845 (9th Cir. 1979)); *see also Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (using same terminology).[6]

The two arguments that the State now brings to challenge the validity of federal orders on the Kuskokwim are foreclosed through application of these principles.

A. *Katie John* – ANILCA Title VIII Applies to Certain Navigable Waters

1. Issue Preclusion

Issue preclusion prevents the State from relitigating whether ANILCA Title VIII applies to subsistence fishing in navigable waters that include the Kuskokwim River. This issue was squarely decided by the Ninth Circuit in the *Katie John* litigation in which Alaska was a plaintiff.[7] Those decisions compel rejection of the State's renewed argument here.

The State argues that ANILCA's rural subsistence priority extends only to "public lands," which does not include navigable waters. *See* Defs.' Br. 34-38. But in 1995, the

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[6] *Robi* clarifies that res judicata properly applies in a similar procedural context as this case – to a defense that is precluded by a party's unsuccessful presentation of the same argument as a claim in prior litigation. *See Robi*, 838 F.2d at 320-24 (finding that prior judgment on the same subject matter had preclusive effect in a later action where the party roles were reversed).

[7] The full cite to the *Katie John* litigation is *Alaska v. Babbitt* (*Katie John I*), 72 F.3d 698 (9th Cir. 1995), *cert. dismissed,* 516 U.S. 1036, and *cert. denied*, 517 U.S. 1187 (1996), *adhered to sub nom. John v. United States* (*Katie John II*), 247 F.3d 1032 (9th Cir. 2001) (en banc); *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).

Ninth Circuit rejected that position. *See Katie John I*, 72 F.3d at 703-04. Indeed, *Katie John I* addressed the "sole issue" of "whether navigable waters fall within the statutory definition of public lands and are thus subject to federal management to implement ANILCA's subsistence priority." *Id.* at 700.

That litigation arose from suits filed by Katie John, Doris Charles, and other rural Alaska Natives challenging temporary regulations that would have excluded navigable waters in the upper Copper River from federal subsistence management. *Id*. at 701. The State filed its own action, and the Ninth Circuit characterized the dispute as presenting, "[a]t one extreme," the State's position "that ANILCA's definition of public lands excludes all navigable waters because the federal government does not hold title to them by virtue of the navigational servitude or the reserved water rights doctrine," and "[a]t the other extreme," the Katie John plaintiffs' view "that all navigable waters are public lands." *Id*. at 702-03. The panel majority found that ANILCA's "language and legislative history . . . clearly indicate that subsistence uses include subsistence fishing" which "has traditionally taken place in navigable waters. Thus, we have no doubt that Congress intended that public lands include at least some navigable waters." *Id*. at 702. However, the majority disagreed with the district court's ruling that ANILCA extends to all waters under a navigational servitude, holding instead that "public lands" under ANILCA include "those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine." *Id*. at 704. The panel further held "that the federal agencies that administer the subsistence priority are responsible for identifying

those waters" and expressed "hope that the federal agencies will determine promptly which navigable waters are public lands subject to federal subsistence management." *Id*.

The federal agencies addressed *Katie John I* through a final rule issued in 1999. *See* Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, C, and D, Redefinition to Include Waters Subject to Subsistence Priority, 64 Fed. Reg. 1276 (Jan. 8, 1999). The regulations "identifie[d] Federal land units in which reserved water rights exist" so as to bring such interests within the *Katie John I* interpretation of ANILCA definition of "public lands," and to "also provide the [FSB] with clear authority to administer the subsistence priority in these waters." *Id*. Those regulations "apply on all public lands including all non-navigable waters located on these lands, on all navigable and non-navigable water within the exterior boundaries of the following areas, and on inland waters adjacent to the exterior boundaries of the following areas" including the Refuge. *Id*. at 1286-87 (amended regulation codified at 50 C.F.R. § 100.3(b), and at (b)(27) (identifying the Refuge)). The lower 180 miles of the Kuskokwim River are within the exterior boundaries of the Refuge, and farther upstream the river is adjacent to the Refuge boundary. *See* Defs.' Br. 14-15; Vincent-Lang Decl. ¶¶ 20-23.

Subsequent *Katie John* litigation involved the 1999 regulations, but reaffirmed the holding of *Katie John I* that "public lands" under ANILCA include navigable waters in which the United States holds a federal reserved water right. Following a district court ruling "readopting all of its [*Katie John I*] rulings on the merits," *Katie John III*, 720 F.3d at 1223, plaintiffs appealed and obtained initial review before an en banc court, which

through a per curiam opinion "determined that the judgment rendered by the prior panel, and adopted by the district court, should not be disturbed or altered by the en banc court." *Katie John II*, 247 F.3d at 1033.[8] *Katie John III* involved direct challenges to the 1999 regulations, brought again in consolidated actions by the Katie John plaintiffs and the State. *See Katie John III*, 720 F.3d at 1218. Judge Kleinfeld, writing for the panel, observed that while a majority of judges in *Katie John II* expressed concerns about *Katie John I*, they did so "for diverging reasons" and, in light of the en banc court's per curiam holding not to disturb or alter it, "*Katie John I* therefore remains controlling law[.]" *Id*. at 1226. The panel affirmed the district court and upheld the reasonableness of the Secretaries' regulatory decision that "the 'public lands' subject to ANILCA's rural subsistence priority include the waters within and adjacent to federal reservations[.]" *Id*. at 1245. In doing so, the panel acknowledged that "*Katie John I* remains the law of this circuit, and we, like the Secretaries, must apply it as best we can." *Id*.

The State's attempt to now reargue *Katie John* presents a classic instance of issue

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[8] The State notes that "a majority of the en banc court rejected the use of the reserved water rights doctrine to determine "public lands" under ANILCA," Defs.' Br. 22, but fails to clarify that three judges felt *Katie John I* did not go far enough in authorizing federal management of subsistence fishing. *See Katie John II*, 247 F.3d at 1034 (Tallman, J., concurring) ("we do not believe Congress intended the reserved water rights doctrine to limit the scope of ANILCA's subsistence priority"). Judge Reinhardt wrote a separate concurring opinion but only to advise that "we made an error in granting an initial en banc hearing[.]" *Id*. at 1033 (Reinhardt, J., concurring). And while the State focuses on the dissent, one of its three members, Judge Rymer, reached the merits only "reluctantly" because "Alaska has had two bites at the same apple" and should not have been able, had a party raised preclusion, to reassert the same argument it lost in *Katie John I*. *Id*. at 1050-51. (Rymer, J.).

preclusion. Whether ANILCA includes any navigable waters was the primary issue in *Katie John*, a final judgment resolved that issue, and the State itself seeks to relitigate the identical issue it unsuccessfully raised throughout *Katie John*. *See Crowley*, 2014 WL 7272408, at *4 (summarizing elements). The State is precluded from reasserting a defense that was squarely rejected in *Katie John*.

The State now suggests that this Court can rule that the Supreme Court "effectively overruled" *Katie John* in *Sturgeon v. Frost* (*Sturgeon*), 139 S. Ct. 1066 (2019). Defs.' Br. 38.[9] In doing so, the State relies solely on *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc), *overruled on other grounds*, *Sanchez v. Mayorkas*, 141 S. Ct. 1809 (2021). First, *Miller* (and subsequent Ninth Circuit decisions) do not address whether a district court can ignore controlling Ninth Circuit precedent, but only whether a three-judge Circuit panel may "reexamine" Ninth Circuit precedent without convening an en banc court. *Id*. at 899 (quoting *LeVick v. Skaggs Cos.,* 701 F.2d 777, 778 (9th Cir. 1983)). Second, even in the proper procedural context, *Miller*'s "'clearly irreconcilable' requirement 'is a high standard[,]'" and if a Circuit panel "can apply our precedent consistently with that of the higher authority, we must do so." *Fed. Trade Comm'n v. Consumer Def., LLC*, 926 F.3d 1208, 1213 (9th Cir. 2019) (quoting *Rodriguez v. AT & T*

[9] Sturgeon twice successfully petitioned the Supreme Court, resulting in two decisions in 2016 and 2019. The State's brief cites the first only once in discussing ANILCA's background, *see* Defs.' Br. 17 n.44 (quoting *Sturgeon v. Frost*, 577 U.S. 424, 431 (2016)), but otherwise refers only to the 2019 decision as "*Sturgeon*." The United States will adopt the same terminology and use "*Sturgeon*" to refer to the Supreme Court's 2019 decision.

Mobility Servs. LLC, 728 F.3d 975, 979 (9th Cir. 2013)). Third, it is plainly possible to apply *Katie John* consistently with *Sturgeon*, because that is precisely what the Supreme Court did. *See Sturgeon*, 139 S. Ct. at 1080 n.2 (finding Title VIII's provisions were "not at issue" in Sturgeon and leaving undisturbed "the Ninth Circuit's holdings that the Park Service may regulate subsistence fishing on navigable waters"). Put differently, the State offers no support for the illogical position that the Supreme Court's opinion in *Sturgeon* that explicitly declined to overrule *Katie John* could later be determined by a district court to be "clearly irreconcilable" with *Katie John*.

Katie John confirms that ANILCA governs management of subsistence fishing in certain navigable waters, including the Kuskokwim River. Issue preclusion prevents the State from seeking a different outcome in this litigation.

2. Judicial Estoppel

The State next suggests that this Court does not enjoy the same "luxury" as the Supreme Court when considering the interplay between *Sturgeon* and *Katie John*, because "[w]hether the *Katie John* cases are good law after *Sturgeon* is squarely presented here." Defs.' Br. 39. But this assertion illuminates a reversal of position by the State that not only violates any intuitive sense of fairness, but is foreclosed by the doctrine of judicial estoppel.

The State acknowledges the existence of the *Sturgeon* footnote leaving *Katie John*. *See id*. (citing *Sturgeon*, 139 S. Ct. 1080 n.2). But its carefully clipped quotations from the footnote, Defs.' Br. 39, ignore additional text explaining that the Court left *Katie John*

undisturbed at the request of the State of Alaska. *See Sturgeon*, 139 S. Ct. at 1080 n.2. And the State did not merely suggest, dispassionately, that *Katie John* was not at issue in *Sturgeon* – it instead urged the Supreme Court to leave *Katie John* intact because "Congress mandated the subsistence priority" and, "since the federal government assumed management of subsistence activities on federal lands in Alaska, rural Alaskans have depended on this subsistence priority to effectuate those values and preserve their way of life." Br. of Amicus Curiae State of Alaska (*Alaska Amicus Br*.), *Sturgeon v. Frost*, No. 17-949, 2018 WL 4063284, at *31-32 (U.S. Aug. 14, 2018).[10] The State acknowledged that *Katie John* sought to maintain "the rural subsistence preference over fishing, which the court believed needed to include the navigable waters containing the fish in order to fulfill Congressional intent." *Id*. at *30. The State further explained that the Title VIII subsistence provisions are "an express and discrete part of ANILCA" standing apart with their own findings, statement of policy, and "specific invocations of congressional authority" under the Commerce and Property Clauses and constitutional authority over Native affairs. *Id*. at *29-30. Thus, the State successfully advanced the view that "a complex statute's use of a term in different contexts is properly interpreted differently," that "Title VIII explicitly contemplates federal regulation if necessary to

[10] In its *Sturgeon* amicus brief the State explained that "to many Alaska Natives, subsistence is not a recreational or purely practical activity, but rather a way of life, the lifeblood of cultural, spiritual, economic, and physical well-being." *Id*. at *32. But in this case, the State found an allegation that coexistence with and harvest of salmon was "interwoven with [Kuskokwim area] communities' sociocultural identity and way of life" to be "too vague and ambiguous to permit a proper response[.]" *Compare* Compl. ¶ 25, ECF No. 1, *with* Answer ¶ 25, ECF No. 33.

ensure that rural Alaska residents can engage in traditional and customary subsistence fishing activities[,]" and that "*Katie John*'s resolution of the meaning of 'public lands' to incorporate a federal reserved water rights rationale was employed only to effectuate Congressional intent." *Id*. at *34-35.

Judicial estoppel should prevent the State from now contradicting the interpretation of Title VIII that it advanced before the Supreme Court. A litigant cannot successfully assert a position in a legal proceeding and then pursue an inconsistent position in a subsequent proceeding. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001); *see also Jensen v. Locke*, No. 3:08-CV-00286-TMB, 2009 WL 10676342, at *2-3 (D. Alaska Nov. 13, 2009). Judicial estoppel is an "equitable doctrine" that a court may invoke "not only to prevent a party from gaining an advantage by taking inconsistent positions, but also . . . to 'protect against a litigant playing fast and loose with the courts.'" *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) (quoting *Russell v. Rolfs,* 893 F.2d 1033, 1037 (9th Cir. 1990)).[11] It typically includes three factors: (1) whether "the party's later position [is] 'clearly inconsistent with its earlier position[;]'" (2) whether "the party succeed[ed] in persuading a court to accept its earlier position[;]" and (3) whether "the party seeking to assert an inconsistent position

[11] In some instances, courts have been less likely to apply judicial estoppel against a government litigant. *See*, *e.g.*, *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60 (1984). But government status is not dispositive, and the facts here justify invocation of the doctrine. *See United States v. Owens*, 54 F.3d 271, 275 (6th Cir. 1995) (applying judicial estoppel against the Postal Service).

[will] 'derive an unfair advantage or impose an unfair detriment on the opposing party[.]'" *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1133 (9th Cir. 2012) (quoting *New Hampshire*, 532 U.S. at 750-51).[12]

Each of these factors is plainly present here. First, in 2018 the State argued that the Supreme Court "need not and should not disturb the *Katie John* circuit precedents" because the definition of "public lands" in Title VIII is different than in *Sturgeon*, "[a]nd Title VIII explicitly contemplates federal regulation if necessary to ensure that rural Alaska residents can engage in traditional and customary subsistence fishing activities." *Alaska Amicus Br.*, 2018 WL 4063284, at *29-33. Second, the *Sturgeon* Court adopted the State's position almost verbatim, finding that "ANILCA's subsistence-fishing provisions . . . are not at issue in this case, and we therefore do not disturb the Ninth Circuit's [*Katie John*] holdings[.]" *Sturgeon*, 139 S. Ct. at 1080 n.2. And third, the State's different argument now – that *Sturgeon* not only addressed, but effectively

[12] The State did not have formal party status in *Sturgeon*, but participated as an amicus. That distinction does not foreclose application of judicial estoppel. The doctrine is not formulated in a rigid fashion, but to empower a court to determine when invocation of the doctrine is necessary to protect judicial integrity. *See New Hampshire*, 532 U.S. at 750-51. And "[t]he integrity of the judicial process is threatened when a *litigant* is permitted to gain an advantage by the manipulative assertion of inconsistent positions, factual or legal." *Helfand v. Gerson*, 105 F.3d 530, 535 (9th Cir. 1997) (emphasis added). Thus, judicial estoppel can apply in suitable circumstances to representations by a non-party participant in prior litigation. *See*, *e.g.*, *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 995-96 (9th Cir. 2012); *Righeimer v. Jones*, No. CIV. S-00-1522-DFL-PAN, 2000 WL 1346808, at *1-2 (E.D. Cal. Sept. 14, 2000).

overruled, the same *Katie John* precedents – would cause great prejudice to federal officials, stakeholders, and Alaska residents who have relied for decades on the current approach to implementing Title VIII. The outcome the State now advocates, which would remove federal management involving Alaska's navigable waters where the vast majority of subsistence fishing has always occurred, would starkly contradict Title VIII and long-recognized congressional intent. The Court should not allow the State to now reverse its position and contend that Title VIII excludes all navigable waters.

Katie John's three trips to the Ninth Circuit reflect unusual persistence by parties seeking to relitigate a previously decided issue. The Court should not encourage the State's continuing effort. In addition to issue preclusion, the doctrine of judicial estoppel precludes the arguments now made by the State.

B. Appointments Clause Issues Could Have Been Raised in Earlier Challenges

Claim preclusion prevents the State from now challenging the FSB under the Appointments Clause. *See* Defs.' Br. 40-50. These arguments could have long ago been raised in various challenges to FSB decisions brought by the State, but were not. As a result, the State is precluded from now bringing these facial challenges to the FSB's mere existence.

Again, the State should be "preclude[d] . . . from relitigating issues that were or could have been raised" in a prior proceeding that has resulted in a final judgment. *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 467 n.6 (1982); *see also Nevada v. United States,* 463 U.S. 110, 129 (1983). Asserting a constitutional theory does not spare a party

from the claim preclusive effect of a prior final judgment. *See Alaska Legislative Council v. Babbitt*, 15 F. Supp. 2d 19, 22-23 (D.D.C. 1998), *aff'd,* 181 F.3d 1333 (D.C. Cir. 1999).

The State has brought multiple lawsuits since the FSB has addressed federal implementation of Title VIII. The FSB was first created in 1990. *See* 55 Fed. Reg. at 27,123. The State declined to raise an Appointments Clause challenge at any point in *Katie John*. And certainly *Alaska v. Federal Subsistence Board*, 544 F.3d 1089 (9th Cir. 2008), provided the State with the opportunity to raise its Appointments Clause challenge to the FSB's existence. *See id.* at 1091-94 (contending that the FSB acted arbitrarily and capriciously in approving a "customary and traditional" proposal for moose harvest). The State failed in these cases to bring any of its now-asserted Appointments Clause challenges to the creation and existence of the FSB. The State is therefore precluded from raising those challenges here. *See Alaska Legislative Council*, 15 F. Supp. 2d at 22-23 (holding the State was precluded from asserting broader challenges to Secretarial authority under ANILCA because it had declined to pursue such claims in *Katie John*).

The State should not be allowed to avoid the preclusive effect of these earlier judgments. There is nothing here in which "controlling facts or legal principles have changed significantly," *Montana,* 440 U.S. at 155, because the State addresses the fundamental structure and existence of the Board first outlined in 1990 regulations.

III. Even if Properly Raised, Defendants' Arguments Would Fail

For the above reasons, the Court should not reach the merits of Defendants'

arguments. But even if the Court were to reach the merits, Defendants have failed to show that they are entitled to judgment as a matter of law.

A. Katie John

As explained above, the State improperly asks this Court to revisit *Katie John*. *See* Defs.' Br. 34-39. But even if this Court were able to oblige the State's request, *Katie John* was correctly decided and remains good law; the Court should reject the State's arguments on the merits. ANILCA's definition of "public lands" includes certain navigable waters, including the Kuskokwim River, and thus subsistence fishing falls within Title VIII protections.

Initially, it bears noting that the State overlooks ANILCA's Refuge-specific provisions. Congress directed that the Refuge "shall be managed . . . to provide . . . for *continued* subsistence uses by local residents[.]" ANILCA § 303(7)(B)(iii), Pub. L. No. 96-487, 94 Stat. 2371, 2391-92 (1980) (emphasis added).[13] The practical focus of this case is on management of subsistence fishing on that part of the Kuskokwim River within the Refuge. Congress spoke to that issue, and directed federal Refuge managers to provide for continuation of subsistence uses.

Ignoring this Refuge-specific direction, the State focuses on asking this Court to

[13] The definition of "subsistence uses" extends beyond Title VIII to "this Act," *i.e.*, ANILCA. 16 U.S.C. § 3113. So even if Title VIII's more specific subsistence use regulatory scheme were deemed inapplicable to navigable waters, federal Refuge managers would independently be required by Title III's command to provide for continued subsistence uses within the Refuge.

rule that *Katie John* is no longer good law after *Sturgeon*.[14] The simplest response to this argument is that the Sturgeon Court itself instructed that it was not "disturb[ing]" *Katie John*. *Sturgeon*, 139 S. Ct. at 1080 n.2. And beyond presenting what it considered to be a correct legal interpretation, the Court took the effort to explain that it affirmed the continuing validity of *Katie John* at the State's request. *Alaska Amicus Br*., 2018 WL 4063284, at *29-33. *Katie John* continues to be controlling precedent and makes clear that subsistence fishing in certain navigable waters is subject to federal management of the Title VIII subsistence priority. *See above* 17-19.

Even without the Supreme Court's recognition of *Katie John*'s validity, reasoned analysis confirms, in the context of Title VIII, that *Katie John* was properly decided. Title VIII establishes the rural subsistence priority on "public lands" in Alaska. 16 U.S.C. § 3114. Public lands are "lands" and "waters," and also "interests therein" to which the United States holds title. 16 U.S.C. § 3102(1)-(3). Federal authority thus extends over "public lands" to circumstances in which the United States holds "interests" in land or water. *See Amoco Prod. Co. v. Vill. of Gambell,* 480 U.S. 531, 549 n.15 (1987) (explaining that even if the United States did not hold title to submerged lands on the Outer Continental Shelf, those lands could be subject to regulation as "public lands" if the United States held an "interest[ ]" in those submerged lands).

The United States holds an interest in the navigable waters of the Kuskokwim

[14] Of the citations in this section of the State's brief, at notes 147-181, all but four refer, or are exclusively, to *Sturgeon*.

River within and adjacent to the Refuge. The State emphasizes that the United States does not have "title" to the Kuskokwim River, and that the State has title to submerged lands beneath the river. Defs.' Br. 35-36. But these observations are of little import, because this case involves fishing (in waters) and "[n]either sovereign nor subject can acquire anything more than a mere usufructuary right" in navigable waters. *Fed. Power Comm'n v. Niagara Mohawk Power Corp.,* 347 U.S. 239, 247 n.10 (1954). Thus, it is not possible to hold title to navigable waters, but only to hold "interests" in them. *Katie John* recognized, and the State does not appear to dispute, that the United States holds a federal reserved water right in the Kuskokwim River "to the extent needed to accomplish the purpose of the reservation." *Katie John I*, 72 F.3d at 703 (citing *Cappaert v. United States,* 426 U.S. 128, 138 (1976)).[15]

These federal reserved water rights bring the Kuskokwim River within Title VIII's contemplated application to "public lands" in Alaska. The State erroneously claims that a federal reserved water right is limited to maintaining the amount of water necessary to fulfill the purpose of the federal reservation, and that this limited "interest" does not encompass regulation of fishing under Title VIII. Defs.' Br. 36-37. But this argument makes little sense, because virtually any water right is primarily defined by amount, or volume. And, as a result, a legally defined interest in water would not refer to taking of

[15] The Refuge purposes include "to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i) [to conserve fish and wildlife populations, including salmon], water quality and necessary water quantity within the refuge." ANILCA, Pub. L. No. 96-487, § 303(7)(B) (iv), 94 Stat. 2371.

fish and wildlife for nonwasteful subsistence uses. The federal usufructuary interest in the Kuskokwim River – the only type of interest that it is *possible* to hold in navigable waters – falls within ANILCA's definition of "public lands" and makes the Title VIII subsistence priority applicable to the river.[16]

To conclude otherwise, as urged by the State's now-reversed position on this issue, would contradict congressional intent and have disastrous consequences for rural Alaskans. Congress declared in Title VIII that "*continuation* of the opportunity for subsistence uses" was "essential" to rural Alaskans, 16 U.S.C. § 3111(1) (emphasis added),[17] and that rural Alaskans depending on subsistence uses have "no practical alternative means . . . to replace the food supplies and other items gathered from fish and wildlife," *id*. (2), through subsistence uses. Congress therefore "invoke[d] its constitutional authority" to "provide the opportunity for *continued* subsistence uses on the public lands by Native and non-Native rural residents[.]" *Id*. (4) (emphasis added). ANILCA thus "clearly indicate[s] that subsistence uses include subsistence fishing[, and] subsistence fishing has traditionally taken place in navigable waters." *Katie John I*, 72

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[16] *Sturgeon* found that a federal reserved water right did not cause the Nation River to become "public land" under a different provision of ANILCA based on the "Federal Government's specific 'interest' in the [Nation] River[.]" 139 S. Ct. 1079. But the federal interest here reflects the federal reserved water right prescribed by congressionally-defined purposes of the Refuge, bringing that interest squarely within Title VIII.

[17] More specifically, Congress found continuation of subsistence uses was essential to rural Native "physical, economic, traditional, and cultural existence," and to rural non-Native "physical, economic, traditional, and social existence[.]" *Id*.

F.3d at 702. The State fails to explain how Congress could have intended to provide an opportunity for *continued* subsistence uses essential to rural Alaskans' physical and cultural existence while excluding navigable waters from any Title VIII priority for subsistence fishing. Put differently, "it defies common sense to conclude that, when Congress indicated an intent to protect traditional subsistence fishing, it meant only the limited subsistence fishing that occurs in non-navigable waters." *Katie John II*, 247 F.3d at 1036 (Tallman, J., concurring).[18]

Finally, Congress confirmed that navigable waters were included in Title VIII's definition of "public lands" when it ratified regulations addressing that question. The Secretary of the Interior, following *Katie John I* and in order to implement the Title VIII priority for subsistence fishing, identified federal reservations having associated federal reserved water rights. *See Katie John I*, 72 F.3d at 704 (holding "that the federal agencies that administer the subsistence priority are responsible for identifying those waters"); 64 Fed. Reg. 1276 (Jan. 8, 1999). Those regulations extend Title VIII's subsistence priority to "all public lands including . . . all navigable and non-navigable water within the exterior boundaries" of the Refuge. *Id*. 1286-87.

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[18] Additionally, Congress invoked its authority under the Property Clause and Commerce Clause in adopting Title VIII. *See* 16 U.S.C. § 3111(4). Rather than excluding title or interests not explicitly mentioned in ANILCA, a proper interpretation recognizes that Congress has the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. VI, sec. 3, cl. 2. Congress plainly viewed interests in water owned by the United States as "public lands" and its authority to regulate such lands under the Property Clause has been held to be "without limitations." *Kleppe v. New Mexico*, 426 U.S. 529, 540-541 (1976).

Congress closely considered these regulations and allowed them to take effect. Congress for several years withheld aspects of Interior's funding through annual appropriations bills, in order to create an opportunity for Alaska to enact an ANILCA-compliant subsistence priority that would obviate the need for additional federal subsistence regulations. *See* Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 105-83, Tit. III, § 316(a), 111 Stat. 1592 (1998) (preventing use of appropriated funds to issue regulations pursuant to Title VIII "to assert jurisdiction, management, or control over the navigable waters transferred to the State of Alaska"). But in 1999, Congress took a different tack, giving Alaska one last chance before allowing the federal regulations to take effect. *See* Department of the Interior and Related Agencies Appropriation Act, 1999, Pub. L. No. 105-277, Div. A, § 101(e) [tit. III, § 339(a)], 112 Stat. 2681-295; *see also* 64 Fed. Reg. 1276 (explaining that 1999 Final Rule identifying navigable waters subject to Title VIII would not take effect until October 1, 1999, as specified in "the Omnibus Appropriations Bill for FY99"). Congress specifically focused on the regulations clarifying Title VIII's applicability to specified navigable waters, and created a scenario whereby those regulations could, and did, attain force and effect of law.

That is dispositive here because "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 (1969). And when Congress "'has

ratified [the administrative construction] with positive legislation,'" [a court] cannot but deem that construction virtually conclusive." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quoting *Red Lion*, 395 U.S. at 381-82).

In sum, Congress's considerable effort through ANILCA (and subsequent legislation) to provide for continued subsistence harvest of fish and wildlife essential to rural Alaskans would be rendered ineffectual by the State's position. The Court should reject the State's arguments, acknowledge that *Katie John* remains controlling precedent, and find that ANILCA extends to subsistence fishing, including in navigable waters that include the Kuskokwim River.

B. Appointments Clause

The State's Appointments Clause challenge, if not precluded, is also flawed and should be rejected on the merits. The federal actions at issue here are within the scope of congressionally delegated authority and neither the existence nor operation of the FSB violates the Appointments Clause.

The Appointments Clause of the Constitution prescribes the method by which officers of the United States may be appointed. *See* U.S. Const. art. II, § 2, cl. 2. That provision specifies that so-called "principal" officers must be appointed by the President and confirmed by the Senate, but allows for subordinate officials, known as "inferior" officers, to be appointed by, among others, "the Heads of Departments" when authorized by law. *See id.*; *see also Edmond v. United States*, 520 U.S. 651, 659-60 (1997).

The State argues that the FSB is an Executive Branch creation that was never properly "established by Law" under the Appointments Clause. Defs.' Br. 44-45 (quoting U.S. Const. art. II, § 2, cl. 2).[19] Relatedly, the State asserts that only Congress can create an office, and that since "no statute creates the FSB" its members "were not properly appointed." *Id*. 46. The State does not rely on any precedent for this argument, but a series of law review articles. *See* Defs.' Br. notes 215-224. And the argument fails on multiple levels. The State ignores the text of the Appointments Clause itself: "Congress may by Law vest the Appointment" of inferior officers in Department Heads, and thus Congress may enact a statute to grant the Secretary appointment authority rather than being obliged to create the office itself. U.S. Const. art. II, § 2, cl. 2. Indeed, the Appointments Clause harmoniously indicates that offices "shall be established by Law," *id.*, without any reference to Congress – thus regulations with the force of law may properly create an office.

Next, the State fails to address the multiple sources of statutory authority for the Secretary to enact appropriate regulations, which the Ninth Circuit and other courts of appeals have held constitutionally vest Department Heads with authority to create inferior offices and appoint their members. Congress directed in Title VIII that "[t]he Secretary

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[19] The State first argues that FSB members are constitutional officers rather than non-officer employees, Defs.' Br. 42-44, then argues the FSB is not established "by Law," *id*. 44-46, and last argues that FSB members are principal rather than inferior officers, *id*. 46-50. The United States responds to the second argument first, because it challenges the existence of the FSB, while the other two arguments address the status of FSB members.

shall prescribe such regulations as are necessary and appropriate to carry out [the Secretary's] responsibilities under this subchapter." 16 U.S.C. § 3124. The Ninth Circuit recently relied on a similar statutory directive when rejecting an Appointments Clause challenge involving the Board of Immigration Appeals ("BIA"), in which "[n]o statute specifically governs the appointment of BIA members" but rather "Congress authorized the Attorney General to enact the regulations establishing the BIA." *Duenas v. Garland*, 78 F.4th 1069, 1073 n.2 (9th Cir. 2023).[20] Similarly, Congress provided that the "Secretary of Interior may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of the Interior of any function of the Secretary." Reorganization Plan No. 3 of 1950, 64 Stat. 1262. Both the Fifth and Sixth Circuits have held that materially identical language in the Reorganization Plan for the Department of Labor grants the Secretary of Labor authority to create offices and constitutionally appoint officers. *Willy v. Administrative Review Board*, 423 F.3d 483, 491-92 (5th Cir.

[20] Duenas "challenge[d] the constitutionality of the appointment and removal process for Immigration Judges and members of the [BIA]." *Id*. at 1072. And the relevant statute defines the term "immigration judge," 8 U.S.C. § 1101(b)(4), and contains a provision describing the proceedings to be conducted by immigration judges, *id*. § 1229a. But the statute does not direct formation of the BIA, acknowledging its existence only once. *See*, *id*., § 1101(a)(47)(B). Similar to the FSB, the BIA was created pursuant to the Attorney General's rulemaking authority. *See*, *id.*, § 1103(g)(2) ("The Attorney General shall establish such regulations . . .issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section.").

2005); *Varnadore v. Secretary of Labor*, 141 F.3d 625, 631 (6th Cir. 1998). Given that ample authority, the Court should reject the State's argument targeting the FSB's mere existence.[21]

The State next contends that FSB members are "officers" under the Appointments Clause. *See* Defs.' Br. 42. This argument is incorrect. The Appointments Clause requires that principal "officers" be appointed by, and ultimately responsible to, the President. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020). Conversely, if FSB members are "not officers at all, but instead non-officer employees . . . the Appointments Clause cares not a whit about who named them." *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018). An "officer" is one "exercising significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). The term "embraces the ideas of tenure, duration, emolument, and duties" and an officer exercises duties that are "continuing and permanent," not "occasional or temporary[.]" *United States v. Germaine*, 99 U.S. 508, 511-12 (1878). Conversely, "employees" are those officials with "lesser responsibilities" including the "broad swath of lesser functionaries" in the Government's workforce who are "subject to the control or direction of any other executive" and have duties that are "carefully circumscribed" or "specific in [their] objects[.]" *U.S. ex rel. New v. Rumsfeld*, 350 F. Supp. 2d 80, 98

[21] Congressional ratification provides an additional basis to reject the State's argument. Had Congress been offended at the existence of the FSB, it would not have passed the 1999 appropriations legislation allowing the subsistence regulations to take effect. *See above* 29-31.

(D.D.C. 2004); *see also Buckley*, 424 U.S. at 126 n.162.

Applying these principles, FSB members are not constitutional officers. The FSB performs specifically prescribed duties confined to administering subsistence harvest of fish and wildlife on public lands in Alaska. *See* 50 C.F.R. §§ 100.15 through 100.19. In doing so, it considers a range of input, *see id*. §§ 100.11 through 100.14, and the FSB's authority is statutorily limited because it must defer to the recommendations of the ten congressionally established regional advisory councils concerning the taking of fish and wildlife except under certain defined circumstances. 16 U.S.C. § 3115(c). Despite this factually limited role, the State emphasizes the FSB's ability to issue "regulations" and "rules." Defs.' Br. 43-44 (quoting 50 C.F.R. § 100.10(d)(4)(i)). But the "regulations" the State refers to are very narrow in scope, only "for the management of subsistence taking and uses of fish and wildlife on public lands" in Alaska, not regulations of broad applicability on significant national topics. Moreover, broader regulations published in the Federal Register implementing Title VIII are issued not by the FSB, but by the Secretaries. *See*, *e.g.*, 64 Fed. Reg. 1276, 1313 (Jan. 8, 1999). The FSB does not exercise significant authority in the Appointments Clause analysis, and FSB members are therefore not constitutional officers.

Recent Supreme Court cases in this area predominantly focus on adjudicatory functions and powers, which the FSB does not possess. *See, e.g.*, *Freytag v. CIR*, 501 U.S. 868 (1991) (Special Trial Judges); *Edmond*, 520 U.S. 651 (Court of Criminal Appeals Judges); *Lucia*, 138 S. Ct. 2044 (2018) (SEC Administrative Law Judges); *Seila*

Law, 140 S. Ct. 2183 (2020) (financial regulators "with extensive adjudicatory authority"); *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021) (Administrative Patent Judges). Thus, a finding that FSB members are "Inferior Officers" would not only extend application of the Appointments Clause beyond these cases but into novel territory where the Supreme Court itself had declined to tread. *See id*. at 1985-86 ("we do not attempt to 'set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes' . . . and we do not address supervision outside the context of adjudication") (quoting *Edmond*, 520 U.S. at 661).

Even assuming that any FSB member(s) were constitutional officers, they are not, as the State contends, "principal" officers that must be nominated by the President and confirmed by the Senate. Defs.' Br. 46. Rather, they are no more than "inferior" officers who can be properly appointed by the Secretaries.

"Inferior officers" are primarily distinguished by having a "'a superior' other than the President" and being "'directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.'" *Arthrex, Inc*., 141 S. Ct. at 1980 (quoting *Edmond*, 520 U.S. at 662-63); *see also Duenas*, 78 F.4th at 1073. And this is the case for FSB members, because they all report directly, or ultimately, to the Secretary of the Interior or the Secretary of Agriculture. *See above* 5. The State nonetheless argues that "FSB members are principal officers for at least three reasons" which the United States addresses in turn. Defs.' Br. 47.

First, the State erroneously contends that the Secretaries neither possess nor

exercise oversight – that "the FSB has complete, unilateral discretion" to act "as it sees fit" in implementing Title VIII. Defs.' Br. 47. That is wrong both factually and legally. The record demonstrates that the Secretary has, in fact, exercised oversight to review FSB actions. *See* AR 0245-46 (pausing "any further [FSB] actions" pending further Secretarial notice). ANILCA empowers the Secretaries to address any aspect of the FSB's operations, and can be properly interpreted to avoid any constitutional issue. The regulations themselves clarify express instances of Secretarial retention of authority and do not otherwise constitute a delegation of the Secretaries' final authority. *See*, *e.g.*, 50 C.F.R. § 100.10(a) (authority to restrict or eliminate activities outside public lands interfering with subsistence uses); *id*. § 100.18(b) (changes to regulatory subparts A and B); 57 Fed. Reg. 22,940, 22,947 (May 29, 1992) (addressing comments about Secretarial "abrogat[ion]" of authority and explaining, "[a]s with any such internal departmental delegation, the Secretaries remain responsible, and statutorily charged, for the proper administration of the program"). And all of the FSB's authority comes from regulations that the Secretaries "may rescind . . . at any time, thereby abolishing the" FSB and its authority. *In re Grand Jury Investigation*, 916 F.3d 1047, 1052 (D.C. Cir. 2019). That possibility renders the FSB "inferior" to the Secretaries. *Id.*

Second, the State claims that the FSB has "unreviewable authority" that "cannot be appealed to the Secretaries." Defs.' Br. 48. These characterizations are imprecise and justify closer scrutiny. *Id*. n.238. The first of the State's citations says the FSB "is the final administrative authority on the promulgation of subparts C and D regulations[.]" 50

C.F.R. §100.13(a)(2). Those concern administrative region boundaries, rural determinations, and customary and traditional use determinations, *id*. §§ 100.22-24 (subpart C), or details pertaining to harvest methods such prohibitions on "[s]hooting from, on, or across a highway," *id*. § 100.26(b)(1), or using a crossbow "in any area restricted to hunting by bow and arrow only," *id*. § 100.26(b)(12) (subpart D). The FSB's alleged usurpation of authority on such topics hardly seems an occasion for constitutional crisis. The second citation relates to FSB "special actions" and only says that "the decision of the [FSB] on any proposed special action will constitute *its* final administrative action," not the final action of the Departments. 50 C.F.R. § 100.19(e) (emphasis added). The last citation only prescribes the manner of submitting a request for reconsideration. *See* 50 C.F.R. § 100.20. More fundamentally, the absence of a specified (or mandatory) path for higher level review does not render FSB members principal officers, particularly when the Secretaries can "step in" to address (or suspend) FSB actions. *Fleming v. U.S. Dep't of Agric.*, 987 F.3d 1093, 1103 (D.C. Cir. 2021).[22]

[22] *Arthrex* is instructive, involving agency adjudicators who were *statutorily* protected from removal and were vested with *statutory* authority to issue final decisions of the agency which could not be unilaterally reviewed by the agency head. *See* 141 S. Ct. at 1982, 1986-87. Under those circumstances, which were without "historical precedent," 141 S. Ct. at 1985, the Supreme Court held that the Constitution forbids "enforcement of *statutory* restrictions on" a principal officer "that insulate the decisions of [inferior officers] from his direction and supervision." *Id.* at 1988 (emphasis added). But *Arthrex*'s reasoning does not extend to the entirely distinguishable circumstances of a FSB member whose authority is conferred by regulations and, thus, is entirely derivative of the Secretary. Rather, the FSB member falls comfortably within the historical precedents that *Arthrex* distinguished and approved, under which Congress had traditionally "left the structure of administrative adjudication up to agency heads, who prescribed internal procedures (and thus exercised direction and control) as they saw fit."

Third, the State contends that "for-cause removal protection" for the agency members of the FSB mandates a finding that they are principal officers. Defs.' Br. 49. But this argument too is deeply flawed. The State apparently concedes that the FSB public members have no such for-cause removal protection, and therefore serve at the pleasure of the Secretaries. *See*, *e.g.*, AR 0005 (Secretary's letter noting replacement and dismissal of FSB Chairman Fleagle as "perhaps marking a new direction by this Administration"). And it is not entirely accurate to say the agency officials can only be removed for-cause, because a career SES appointee may be removed after being "given one final rating of unsatisfactory," 5 C.F.R. § 359.501(c), and may also be reassigned, even involuntarily, *see* 8 U.S.C. § 3395; 5 C.F.R. § 317.901. *See also Esparraguera v. Dep't of the Army*, 981 F.3d 1328, 1330-31 (Fed. Cir. 2020). Even so, the State's premise that for-cause removal precludes meaningful control by the Secretaries is simply wrong. The Supreme Court has explained it is not "require[d] as a matter of constitutional law that the [officer] be terminable at will by the President" and "we cannot say that the imposition of a 'good cause' standard for removal by itself unduly trammels on executive authority." *Morrison v. Olson*, 487 U.S. 654, 691-92 (1988). And *Duenas* carries precedential weight on this point, because it explained that a "double layer of for-cause protection" violates the Appointments Clause where such a scheme

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141 S. Ct. at 1983; *see also In re Palo Alto Networks, Inc.*, 44 F.4th 1369, 1375-76 (Fed. Cir. 2022) (holding that delegation of review authority to inferior officers was compatible with *Arthrex*).

"insulate[s] an official from presidential oversight and removal." *Duenas*, 78 F.4th at 1074 (citing *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 495-96 (2010)). It is permissible that the Secretary have authority to remove an inferior officer "under the good-cause standard" and the President can remove the Secretary at will. *Free Enter. Fund*, 561 U.S. at 495. Thus, the Ninth Circuit has twice upheld the constitutionality of statutory schemes where an inferior officer has a "good cause" restriction on their removal by the Department Head, who in turn can be removed at will by the President. *See Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1133-36 (9th Cir. 2021); *Kauffman v. Kijakazi*, 32 F.4th 843 (9th Cir. 2022). The State's argument fails as a matter of law.

IV. A Permanent Injunction is Warranted

The Court should reject the State's two arguments and find that the Kuskokwim federal orders adopted pursuant to ANILCA preempt contrary or inconsistent state orders. And as for preemption, the State has waived any argument on the proper remedy. *See above* 12 (citing *Alaska Ctr. for Env't*, 189 F.3d at 858 n.4). For the reasons set forth in Plaintiff's motion and opening brief, the Court should enter a permanent injunction. *See* U.S. Br. 14-16; *Kuskokwim II*, 608 F. Supp. 3d at 809-13.

CONCLUSION

For the above reasons, and those presented in its opening brief, the United States respectfully requests that the Court grant its motion and enter judgment for Plaintiff United States.

Respectfully submitted,

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TODD KIM
Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division

/s/ Paul A. Turcke
PAUL A. TURCKE
Idaho Bar No. 4759
Trial Attorney, Natural Resources Section
1290 West Myrtle Street, Suite 500
Boise, ID 83702
202-532-5994 || 202-305-0275 (fax)
paul.turcke@usdoj.gov

Counsel for Plaintiff

Of Counsel:

KENNETH M. LORD
Office of the Regional Solicitor
U.S. Department of the Interior
4230 University Drive, Suite 300
Anchorage, AK 99508
907-271-4184
ken.lord@sol.doi.gov

CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.4(a)(3), I hereby certify that this memorandum complies with the type-volume limitation of Local Civil Rule 7.4(a)(1) as modified by applicable orders issued by or requested from the Court because this memorandum contains 11,235 words, excluding the parts exempted by Local Civil Rule 7.4(a)(4). This memorandum has been prepared in a proportionately spaced typeface, Times New Roman 13-point font, and I obtained the word count using Microsoft Word 365 Apps for enterprise (Version 2308 Build 16731.20316).

/s/ Paul A. Turcke
Paul A. Turcke

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2023, a copy of the foregoing was served by electronic means on all counsel of record by the Court's CM/ECF system.

/s/ Paul A. Turcke
Paul A. Turcke