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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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

INTERVENOR-PLAINTIFF ALASKA FEDERATION OF NATIVES' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

"As it has for thousands of years, the subsistence way of life remains today the foundation of [Alaska] Native culture, the predominant focus of village activity and the mainstay of the rural economy."[1] Sadly, disturbing this foundation has also been a predominant focus of the State of Alaska ("State") since it joined the union in 1959.

For the past six and a half decades the State has systematically sought to erode Alaska Native subsistence rights using dog-whistles of "equality" and "federal overreach." To this end, the State has closed traditional Alaska Native hunting and fishing grounds; prosecuted Alaska Natives for engaging in subsistence practices; allowed urban, non-Native hunters and fishers to harvest limited resources before allowing rural, Native peoples to do so (even though they rely on them for their continued existence); issued hunting and fishing orders that conflict with federal management directives thereby causing confusion among users; and repeatedly, but unsuccessfully, attempted to diminish Title VIII of the Alaska National Interest Lands Conservation Act ("ANILCA") via the courts. In the few instances the State has acted in good faith—including taking the position that *Katie John* is not implicated by *Sturgeon* in its amicus brief before the U.S. Supreme Court—it has always backtracked later.

[1] Alaska National Interest Lands-Part I: Hearings on H.R. 39 and H.R. 2219 Before the H. Subcomm. on Fisheries and Wildlife Conservation and the Env't of the Comm. on Merch. Marine and Fisheries, 96th Cong. 670 (1979) (Testimony of Morris Thompson, President of AFN).

Now the State, in cross-moving for summary judgment, has the audacity to complain of "a balkanized regulatory regime over Alaska's navigable waters," while shamelessly making the paternalistic argument that its "all Alaskans" policy is best for Alaska Natives. But make no mistake—accepting the State's argument would void the rural subsistence priority to fish in Title VIII of ANILCA. The State asks this Court to overrule *Katie John* and to conclude either that Congress lacked the power to enact Title VIII or, astonishingly, never intended to grant a rural subsistence priority to fish in waters running through federal lands despite express provisions in Title VIII doing exactly that. Despite repeatedly losing the same argument across three decades of litigation, which long ago settled these issues, the State now tries for a fourth bite at the apple.

There are several insurmountable procedural hurdles that the State cannot overcome. These matters have been finally resolved and the U.S. Supreme Court relied on the State's representations in *Sturgeon* that the *Katie John* trilogy would remain undisturbed, precluding the State's challenge as a matter of collateral estoppel, res judicata and judicial estoppel, as outlined in the briefs of the federal government and the Kuskokwim River Inter-Tribal Fish Commission, which the Alaska Federation of Natives ("AFN") adopt in full herein.[2]

[2] Pl.'s Reply Mem. in Support of Mot. for Summ. J./Opp'n to Defs.' Mot. for Summ. J., ECF No. 101, at 21-32; Kuskokwim River Inter-Tribal Fish Commission Reply in Supp. Summ. J./Opp'n to Defs.' Mot. Summ. J., Arguments I.A & I.B; *see also Rock Island A. & L. R. Co. v. United States*, 254 U.S. 141, 143 (1920) ("Men must turn square corners when they deal with the Government."). This brief is supported by the Declaration of Marlee

And on the merits, the State's arguments once again fail as a matter of law. As the Ninth Circuit held in the *Katie John* cases—which are binding precedent for this Court—Congress both intended and had the power to enact Title VIII under the federal reserved waters right doctrine. The U.S. Supreme Court in *Sturgeon* did not hold otherwise. And if not under the reserved water rights doctrine, Congress otherwise had the constitutional authority to enact the rural subsistence priority in Title VIII. Summary judgment must be granted against the State and in favor of Plaintiff and Intervenor-Plaintiffs.

BACKGROUND

I. ANCSA, ANILCA, and Congress' Intent to Protect Traditional Alaska Native Subsistence

Title VIII of ANILCA[3] "did not emerge from a vacuum."[4] Alaska Natives, as the original occupants, held aboriginal title to all of the lands that are now Alaska, and with that ownership classification came the right to hunt, fish, and gather on the lands and waters.[5] Those rights were largely left intact by Russia, which originally claimed Alaska

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Goska, herein referred to as the "Goska Decl." And throughout this brief, where possible, citations refer to ECF-stamped page numbers from the Docket rather than the page numbers of briefs.

[3] Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980) (Title VIII codified at 16 U.S.C. §§ 3111-3126).

[4] *Haaland v. Brackeen*, 143 S. Ct. 1609, 1641 (2023) (Gorsuch, J., concurring).

[5] *E.g.*, *Edwardsen v. Morton*, 369 F. Supp. 1359, 1373 (D.D.C. 1973) (recognizing Alaska Native "rights to undisturbed use and occupancy" based on "aboriginal title"); *Johnson v. M'Intosh*, 21 U.S. 543, 592 (1823) (affirming exclusive authority of the federal government to convey title to aboriginal lands, subject only to aboriginal title).

as a territory and later sold its interests to the United States.[6] The federal government recognized the existence of tribes in Alaska in 1936.[7] Soon after entering the union in 1959,[8] the State of Alaska's land selection efforts began intruding on traditional Alaska Native hunting and fishing grounds.[9] The State also began asserting management over hunting and fishing, quickly closing many traditional Alaska Native subsistence fisheries.[10] In 1968, the discovery of vast oil reserves at Prudhoe Bay further intensified the State's demands to select and receive land pending the settlement of Native claims.[11]

Disturbed by these developments, Alaska Natives from across the state gathered to pursue a fair and just land claim settlement. After years of negotiation between Alaska Natives, the State, and the federal government, a grand compromise was reached and

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[6] Treaty Concerning the Cession of the Russian Possessions in North America, Mar. 30, 1867, 15 Stat. 539.

[7] 25 U.S.C. § 5119 (Act of May 1, 1936, amending the Indian Reorganization Act of 1934 to extend that statute's provisions to the then-territory of Alaska, recognizing "groups of Indians in Alaska not heretofore recognized as bands or tribes").

[8] Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958).

[9] *See, e.g., Sturgeon v. Frost*, 139 S. Ct. 1066, 1074 (2019); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.07[3][b], at 329 (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK]. The 1884 Alaska Organic Act had provided that Alaska Natives should "not be disturbed in the possession of any lands actually in their use or occupation." Act of May 17, 1884, 23 Stat. 24, 26. Later statutes contained similar provisions. *See, e.g.*, *Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272, 278 n.11 (citing the Act of June 6, 1900, 31 Stat. 231).

[10] *Alaska v. Babbitt (Katie John I)*, 72 F.3d 698, 700 (9th Cir. 1995).

[11] Congress needed to ensure the right-of-way for the pipeline that would transport oil from Prudhoe Bay to the south coast of Alaska could be free of any "cloud" on its title, such as aboriginal land claims. COHEN'S HANDBOOK § 4.07[3][b], at 329.

Congress enacted the Alaska Native Claims Settlement Act ("ANCSA") in 1971.[12] Although the 227 federally recognized tribes in Alaska[13] are on the same legal footing as Native American tribes in the lower-48,[14] ANCSA was "a novel and experimental approach in the settlement of Native claims."[15] ANCSA was "[u]nlike prior United States aboriginal claims settlements [because] the lands and other assets conveyed to [Alaska Natives] under ANCSA were not initially held in trust or subject to any other form of permanent protection."[16] Instead, ANCSA provided for the creation of state-chartered Alaska Native Corporations ("ANCs"), which received a total of 40 million acres of land and $962.5 million, with stock issued to individual Alaska Natives.[17] Furthermore, ANCSA extinguished all existing reservations in Alaska except the Annette Islands Reserve of the Metlakatla Indian Community.[18]

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[12] 43 U.S.C. § 1601 et seq.

[13] Although not all of Alaska's now-227 federally recognized tribes received recognition until after the passage of ANCSA. Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 88 Fed. Reg. 54,654, 54,657 (Aug. 11, 2023).

[14] *See, e.g., id.*; COHEN'S HANDBOOK § 4.07[3][a], at 326 ("Alaska Natives . . . have the same legal status as members of Indian tribes singled out as political entities in the commerce clause of the United States Constitution.").

[15] D. CASE & D. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 179 (3d ed. 2012) [hereinafter CASE & VOLUCK].

[16] *Id.* at 170.

[17] *U.S. v. Atlantic Richfield Co.*, 612 F.2d 1132, 1134 (9th Cir. 1980); 43 U.S.C. §§ 1605 (Alaska Native Fund), 1606-07 (ANCs), 1613 (land selections).

[18] 43 U.S.C. § 1618(a).

When Congress in ANCSA extinguished aboriginal title, there were discussions of expressly including Alaska Native subsistence provisions.[19] "[A]fter careful consideration," however, the conference committee stated its belief "that all Native interest in subsistence resource lands can and will be protected" by the Secretary of the Interior and State.[20] In doing so, Congress made clear that it "expected both the Secretary and the State to take any action necessary to protect the subsistence needs of [Alaska] Natives."[21] The recognition of that responsibility "to protect Alaska Native subsistence activities is consistent with the historic trust responsibility of the Federal government to the Alaska Native people, a responsibility which transcends the termination of aboriginal hunting and fishing rights by [ANCSA]" and which is "consistent with [Congress'] well recognized constitutional authority to manage Indian affairs."[22]

"Unfortunately . . . neither the Secretary nor the State [took] completely adequate or timely steps to meet th[ose] responsibilities" and "[t]he reluctance of the State to act

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[19] 43 U.S.C. § 1603(b); Goska Decl., Ex. H at 26 (discussing hunting and fishing rights after ANCSA).

[20] *See* H. CONF. REP. NO. 92-746, at 37 (1971), *as reprinted in* 1971 U.S.C.C.A.N. 2247, 2250; *see also* Goska Decl., Ex. A at 3-4 & Ex. H at 26 (discussing conference report).

[21] *Id.*

[22] 126 CONG. REC. 29,278 (Nov. 12, 1980) (extended remarks of Rep. Morris Udall). *Katie John I* notes, in the context of examining ANILCA's legislative history, that Representative Udall's statement came "after the Senate had passed ANILCA, after the House had finished debating it, and shortly before the House voted on it" and concluded that therefore "[h]is views deserve little weight." 72 F.3d at 703. Representative Udall's statements, however, did not occur in a vacuum, and as a principal author of ANILCA and as the Congressman who introduced H.R. 39, he was well-suited to summarize both the circumstances necessitating Title VIII and Congressional hearings leading up to ANILCA's passage.

aggressively to protect the economy and culture of rural residents, the majority of whom are Native people, [was] compounded by Alaska's rapid population growth."[23] Simultaneously, the State once again began restricting the subsistence hunting and fishing activities of Alaska Natives—further compromising their food security—for the benefit of the urban non-Native majority who wished to hunt and fish, primarily for sport.[24]

Congress, reacting to the State's treatment of Alaska Native subsistence users, recognized that it needed to "fulfill the policies and purposes of [ANCSA]"[25] and "ma[k]e good on [its] promise" to protect Alaska Native subsistence.[26] In 1980, Congress fulfilled its promise through Title VIII of ANILCA, which gives a *user priority* to customary and traditional subsistence uses by *rural residents* on *federal* public lands (and waters) in times of *shortage*.[27] Notably, "[e]arly drafts of Title VIII protected only subsistence uses by [Alaska Natives]. When the State advised Congress that the Alaska Constitution might bar

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[23] 125 CONG. REC. 9904 (May 4, 1979). Between the enactments of ANCSA and ANILCA, the State's population grew by 36%. Goska Decl., Ex. B at 6.

[24] Goska Decl., Ex. B at 6; *see also* 125 CONG. REC. 9904 (1979) ("Both the State and the Secretary have been reluctant . . . to take timely steps to protect subsistence resources and uses from overpowering competition from the urban population centers. In several instances this reluctance already has led to overharvest of crucial subsistence resources with resulting hardship upon rural communities which are dependent upon those resources.").

[25] 16 U.S.C. § 3111(4).

[26] 126 CONG. REC. 29, 278 (Nov. 12, 1980) (extended remarks of Rep. Morris Udall).

[27] 16 U.S.C. §§ 3111-3126 (Title VIII), § 3114 (rural subsistence priority).

the enforcement of a preference extended only to Natives, Congress broadened the preference to include all 'rural residents'" at the State's behest.[28]

Although the subsistence priority was expanded to include all rural residents at the State's request, the economic and cultural survival of Alaska Natives was the principal reason why Congress enacted Title VIII.[29] Congress recognized that because the "continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska . . . [and] by increased accessibility of remote areas containing subsistence resources,"[30] it was necessary "to protect and provide the opportunity for continued subsistence uses on the public lands by

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[28] *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 313 n.1 (9th Cir. 1988) (the Ninth Circuit then went on to note the irony of the State's "subsequent narrowing of the definition of 'rural residents' to exclude the native villages," at issue in that case); *see also* 125 CONG. REC. 9904 (May 4, 1979); 126 CONG. REC. 29, 278 (Nov. 12, 1980) (extended remarks of Rep. Morris Udall).

[29] 16 U.S.C. § 3111(4) (priority necessary to fulfill policies and purposes of ANCSA; invoking Congress' power over Native affairs as justification); *see also* 126 CONG. REC. 29,278 (Nov. 12, 1980) (extended remarks of Rep. Morris Udall) ("Although the Federal and State subsistence management system established in the bill is racially neutral, it is important to recognize that the primary beneficiaries of the subsistence title and the other provisions in the bill relating to subsistence management are the Alaska Native people. Although there are many non-Natives living a subsistence way of life in rural Alaska which may be an important national value, the subsistence title would not be included in the bill if non-Native subsistence activities were the primary focus of concern. Rather, the subsistence title and the other subsistence provisions are included in recognition of the ongoing responsibility of the Congress to protect the opportunity for continued subsistence uses in Alaska by the Alaska Native people, a responsibility consistent with our well recognized constitutional authority to manage Indian affairs.").

[30] 16 U.S.C. § 3111(3).

Native and non-Native rural residents."[31] Congress also invoked its plenary power to manage "Native affairs" in Title VIII[32] and Representative Morris Udall "lodged a detailed discussion of the pending [final] bill in the Congressional Record,"[33] in which he noted Title VIII's

> [M]anagement provisions which recognize the responsibility of the Federal government to protect the opportunity from generation to generation for the continuation of subsistence uses by the Alaska Native people so that Alaska Natives now engaged in subsistence uses, their descendants, and their descendants' descendants, will have the opportunity to determine for themselves their own cultural orientation and the rate and degree of evolution, if any, of their Alaska Native culture.[34]

Importantly, Congress also included in ANILCA's Title VIII an offer to the State: the option of managing subsistence on federal public lands—in addition to the authority it already had over State and private (mostly ANC) lands—if the State enacted a law of general applicability containing the same rural subsistence priority.[35] The ability to manage a unified statewide system was, and remains, the State's incentive to comply with Title VIII's provisions.

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[31] 16 U.S.C. § 3111(4).

[32] *Id.*

[33] *John v. United States*, 1994 WL 487830, at *21, Appendix n.2 (D. Alaska 1994).

[34] 126 CONG. REC. 29, 278 (Nov. 12, 1980) (extended remarks of Rep. Morris Udall).

[35] 16 U.S.C. § 3115(d).

Despite the passage of Title VIII, the attacks on Alaska Native subsistence were far from over, and the two decades following the passage of ANILCA are often referred to as the "subsistence wars."[36]

II. *McDowell v. State of Alaska* Holds that the Rural Subsistence Priority Violates the Alaska Constitution.

Throughout the 1980s, the Alaska Native community worked tirelessly to urge the State to seize the opportunity offered by Title VIII and enact a statute of general applicability containing a rural subsistence priority. In 1986 the Alaska State Legislature finally passed such a law.[37] Unfortunately, anti-subsistence forces, which had previously placed an unsuccessful subsistence repeal on the general election ballot, found success

[36] *E.g.*, Br. of Amicus Curiae Ahtna Inc. at 23, *Sturgeon*, 139 S. Ct. 1066; *see also* Goska Decl., Ex. I at 4-5 (describing the inflammatory language used to publicly attack Alaska Native subsistence in the years after *McDowell v. State of Alaska*). Suits filed by Native subsistence users against State managers during this era include *Kenaitze Indian Tribe*, 860 F.2d 942 (reasoning that the State's unduly restrictive definition of "rural" was a transparent attempt to deny subsistence fishing rights to Native residents of the Kenai Peninsula and "protect commercial and sport fishing interests"); *Bobby v. Alaska*, 718 F. Supp. 764 (D. Alaska 1989) (ruling against the State's imposition of closed moose and caribou seasons and individual bag limits on the Athabaskan peoples of Lime Village in Southwestern Alaska, finding that the limitations unnecessarily undercut communal patterns of hunting and sharing the harvest, while the seasonal limits restricted traditional hunting patterns without sufficient biological justification); *Kwethluk IRA Council v. Alaska*, 740 F. Supp. 765 (D. Alaska 1990) (holding that the State Board of Game could not arbitrarily apply the principle of "sustained yield" to prohibit residents of Kwethluk, a Yupik village, from a subsistence hunt of the Kilbuck caribou herd).

[37] *See McDowell v. State of Alaska*, 785 P.2d 1, 1-2 (Alaska 1989).

before the Alaska Supreme Court.[38] In 1989, the Alaska Supreme Court held in *McDowell v. State of Alaska* that the Alaska State Constitution does not allow for a rural subsistence priority.[39] Specifically, the *McDowell* court held that a criterion based on residency that "conclusively excludes all urban residents from subsistence hunting and fishing regardless of their individual characteristics"[40] violated three clauses of the State Constitution that prohibit "exclusive or special privileges to take fish and wildlife."[41] While the court noted the importance of ensuring that "Alaskans who need to engage in subsistence to provide for their basic necessities are able to do so," it described the rural-urban distinction as an "extremely crude" means to accomplish that purpose.[42] As a result of *McDowell*, the State's ability to take over subsistence management on federal lands via implementation of a rural preference pursuant to Title VIII is contingent upon amending the Alaska Constitution.

Following *McDowell*, the State repeatedly requested stays of the operative effect of the decision (i.e., federal management of the rural subsistence priority within federal lands, consistent with Title VIII), promising Congress that it could resolve the issue through a

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[38] Goska Decl., Ex. B at 8 ("This suit had been brought by anti-subsistence leaders who had failed in 1982 to remove the priority by the ballot box – and had then turned to the courts.").

[39] *McDowell,* 785 P.2d at 9 (holding that the rural user priority for subsistence hunting and fishing was unconstitutional under sections 3, 15, and 17 of article VIII of the Alaska Constitution).

[40] *Id.*

[41] *Id.* at 6 (summarizing AK. CONST. art. VIII, §§ 3, 15, 17).

[42] *Id.* at 10.

constitutional amendment passed by the State Legislature.[43] Despite repeated attempts throughout the 1990s, a series of congressional moratoria, guarantees of federal appropriations, and tireless advocacy by the Native community and many others, the State was unable to pass a constitutional amendment allowing for a rural subsistence priority.[44]

III. The *Katie John* Trilogy and the State's Repeated Efforts to Undermine Title VIII's Subsistence Protections.

After *McDowell*, and the State's failed efforts to take advantage of Title VIII's pathway for a unified State subsistence management system on all lands in Alaska, the federal government implemented initial subsistence management regulations in 1990.[45] Those regulations, however, only asserted federal jurisdiction over hunting on federal public land, and excluded navigable waters.[46] That interpretation left fishing, which provides the majority of the rural subsistence diet and has traditionally taken place on navigable waters,[47] without the protection of Title VIII's rural priority.

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[43] *See John*, 1994 WL 487830, at *4.

[44] Goska Decl. Ex. B at 9-13. Since 2002, no significant action on the federal-state subsistence impasse has been taken by the State Legislature. *Id.* at 14.

[45] Temporary Subsistence Management Regulations for Public Lands in Alaska, 55 Fed. Reg. 27,114 (June 29, 1990). The regulations, with very few changes, became permanent in 1992: Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, and C, 57 Fed. Reg. 22,940 (May 29, 1992). *See also John*, 1994 WL 487830, at *12.

[46] Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, and C, 57 Fed. Reg. at 22,942.

[47] *See Katie John I*, 72 F.3d at 702; Goska Decl., Ex. E at 3 (ADF&G's 2020 subsistence harvest report showing that subsistence fisheries provide 56.8% of the wild foods harvested by rural residents for subsistence purposes, with 32.3% coming from salmon alone).

In 1990, Alaska Native plaintiffs led by Ahtna elders Katie John and Doris Charles filed suit challenging the federal government's decision that its Title VIII regulatory authority did not extend to navigable waters.[48] The State countersued, initially claiming that ANILCA gave the federal government no power of direct management on *any* lands or waters in Alaska, and the cases were consolidated.[49] In 1994, the U.S. District Court for the District of Alaska ruled for the *Katie John* plaintiffs, holding that all navigable waters encompassed by the navigational servitude were public lands for the purposes of federal subsistence management authority under Title VIII.[50]

The State appealed and argued before the Ninth Circuit 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."[51] In a 1995 opinion that became known as *Katie John I*, the Ninth Circuit held that "the definition of public lands includes those navigable waters in which the United States has

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[48] *John*, 1994 WL 487830. Plaintiffs argued that the reserved water rights doctrine and the navigational servitude in Alaska waters provided the basis for all navigable waters in Alaska to fall under ANILCA's definition of "public lands." *Id.* at *11.

[49] *Katie John I*, 72 F.3d at 701.

[50] *John*, 1994 WL 487830, at *14-18. The federal government initially took the position that it did not have jurisdiction over navigable waters, but then modified its position at oral argument and instead argued that "public lands include those navigable waters which the federal government has an interest under the reserved water rights doctrine." *Katie John I*, 72 F.3d at 701. Judge Holland rejected the federal government's reserved rights argument in favor of the navigational servitude as the basis for the federal government's jurisdiction. *John*, 1994 WL 487830, at *14.

[51] *Katie John I*, 72 F.3d at 702.

an interest by virtue of the reserved water rights doctrine."[52] The State petitioned the U.S. Supreme Court for certiorari, but was denied.[53]

In response to *Katie John I*, the federal government conducted a rulemaking identifying the navigable waters that the United States has interests in pursuant to the reserved water rights doctrine; that final rule went into effect in 1999 ("1999 Rule").[54] Implementation was delayed for three years because the State again asked Congress for additional time to achieve compliance with Title VIII,[55] which only encouraged Alaska's anti-subsistence legislators to further oppose efforts to amend the State Constitution.[56] Once the 1999 Rule was finalized, the District Court dismissed the case and the State appealed to the Ninth Circuit challenging yet again the existence of a sufficient federal interest in navigable waters necessary to allow a subsistence priority to fish, where it received an en banc hearing.[57]

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[52] *Katie John I*, 72 F.3d at 703-04.

[53] *Alaska v. Babbitt*, 516 U.S. 1036 (1996).

[54] 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) (codified as amended at 50 C.F.R. pt. 100).

[55] Goska Decl., Ex. B at 9.

[56] *Id.*

[57] *Katie John v. United States (Katie John II)*, 247 F.3d 1032 (9th Cir. 2001); *see also Katie John v. United States (Katie John III)*, 720 F.3d 1214, 1222-23 (9th Cir. 2013) (describing history of *Katie John* litigation).

The en banc court issued a short decision affirming *Katie John I*, in an opinion known as *Katie John II*.[58] Judge Tallman, joined by two other judges, wrote a concurring opinion reasoning that because Congress was exercising its authority under the Commerce Clause, "federal protection of traditional subsistence fishing [should extend] to *all* navigable waters within the State of Alaska, not just to waters in which the United States has a reserved water right."[59] Judge Rymer also wrote separately to express concern the State had "two bites at the same apple," suggesting that the challenge should have been precluded because it "rais[ed] precisely the same issue on this appeal as [the Ninth Circuit] heard and determined [in *Katie John I*]."[60]

After the Ninth Circuit again rejected the State's challenge to Title VIII, the State contemplated its next steps. Meeting with Katie John at her traditional fishery, then Alaska Governor Tony Knowles decided not to petition the U.S. Supreme Court to review the decision.[61] "We must stop a losing legal strategy that threatens to make a permanent divide among Alaskans," said Knowles, "Therefore, I cannot continue to oppose in court what I know in my heart to be right."[62] He also thanked Katie John, expressing support for her, her family, and the rural families "whose lives depend on subsistence."[63]

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[58] *Katie John II*, 247 F.3d at 1033.

[59] *Id.* at 1034.

[60] *Id.* at 1050-51.

[61] Goska Decl., Ex. J at 1.

[62] *Id.*

[63] *Id.*

Four years later, the State did an about-face and decided to challenge the 1999 Rule anew, this time arguing that too many waters had been included.[64] A cross-appeal was filed by Katie John, AFN, and others in the Native community, arguing that too few waters were included.[65] In *Katie John III*, the Ninth Circuit concluded that the federal government had correctly applied *Katie John I* in its use of the reserved water rights doctrine to identify which waters in its 1999 Rule are "public lands" for the purpose of Title VIII's rural subsistence priority—those navigable waters running through federal lands, primarily the conservation system units, and waters adjacent to those lands.[66] The State then filed a petition for certiorari to the Supreme Court, but was again denied.[67]

After over three decades of litigation, finality in the *Katie John* cases seemingly put the validity of a federal Title VIII subsistence fishing priority in certain designated waters in Alaska to rest. Federal and State management authority had been clearly delineated, and Title VIII continued to provide a path for the State to legitimately assume authority over subsistence on federal lands via a State constitutional amendment allowing for a rural subsistence priority.[68]

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[64] *Katie John III*, 720 F.3d at 1223-24.

[65] *Id.*

[66] *Id.* at 1230-31.

[67] *Alaska v. Jewell*, 572 U.S. 1042 (2014).

[68] 16 U.S.C. § 3115(d). Amending the Alaska Constitution to allow for a rural subsistence priority has, in the past, found support in public opinion polls. *See* Goska Decl., Ex. C at 3 ("Many Alaskans wanted to amend the State Constitution in order to return management

IV. The U.S. Supreme Court Interprets an Exception in ANILCA Section 103(c) in *Sturgeon v. Frost.*

Sturgeon began when a hovercraft user, John Sturgeon, challenged the National Park Service's ("Park Service") authority to apply its nationwide hovercraft regulations on navigable waters within a National Park in Alaska. The matter made its way to the U.S. Supreme Court, twice, with the Court ultimately agreeing with Sturgeon that the Park Service lacked the authority to enforce nationwide hovercraft regulations applying to park lands on the Nation River because of an exception in ANILCA Section 103(c).[69] In doing so, the Supreme Court was careful to explicitly leave *Katie John* intact, stating:

> 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. 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.[70]

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of subsistence under ANILCA to the State."); Ex. B at 8 ("In public opinion polls during the 1990's, about 60% of respondents consistently favored having a rural priority in state law.").

[69] 16 U.S.C. § 3103(c) reads, in part, "Only those lands within the boundaries of any conservation system 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. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units." *See also Sturgeon*, 139 S. Ct. at 1080 ("If Sturgeon lived in any other State, his suit would not have a prayer of success. . . . Section 103(c) of ANILCA makes it so. As explained below, that section provides that even when non-public lands—again, including waters—are geographically within a national park's boundaries, they may not be regulated as part of the park. And that means the Park Service's hovercraft regulation cannot apply there."); *Sturgeon v. Frost* (*Sturgeon I*), 577 U.S. 424, 438 (2016) ("reject[ing] the interpretation of Section 103(c) adopted by the Ninth Circuit.").

[70] *Sturgeon*, 139 S. Ct. at 1080 n.2 (citations omitted).

The Supreme Court cited two amicus briefs—one written by the State of Alaska—"arguing that this case does not implicate [the *Katie John*] decisions."[71] Specifically, the State's amicus brief took the position that the issue of general hovercraft regulation was distinct from the specific federal subsistence priority addressed in *Katie John*, arguing,

> the Katie John decisions arose in the distinct subsistence context out of a desire to effectuate Congress's clear intention that Title VIII of ANILCA include a meaningful rural subsistence preference. Applying the reserved water rights doctrine for the limited purpose of effecting the subsistence priority explicitly found in Title VIII of ANILCA is a far cry from finding broad federal regulatory authority over Alaska's navigable waters for all purposes.[72]

The State's brief also argued that "the *Katie John* and *Sturgeon* decisions" should not "be tied together" because "Title VIII stands apart from the rest of ANILCA."[73] Highlighting the "prudential and policy reasons why [the] Court should preserve the *Katie John* precedents," the State emphasized Congress' intent in enacting Title VIII and the continued importance of protecting subsistence for Alaska Native ways of life and for ensuring food security among Alaska's rural communities.[74]

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[71] *Id.* The State most recently acknowledged its prior position in a press release dated October 21, 2023, explaining "when the Sturgeon case was before the U.S. Supreme Court, the State specifically asked the court not to disturb the Katie John decision." Goska Decl., Ex. N at 2.

[72] Br. of Amicus Curiae State of Alaska in Supp. of Pet'r at 5, *Sturgeon v. Frost*, 139 S. Ct. 1066 (citation omitted).

[73] *Id.* at 30.

[74] *Id.* at 31-32.

While represented by the State's outside counsel in this case,[75] Petitioner John Sturgeon made these same points, in direct contravention to the State's arguments here:

> The Court need not overturn or otherwise address the issue of subsistence management regulation in Alaska in order to rule in favor of Mr. Sturgeon. . . . The focus of Mr. Sturgeon's challenge is instead the Ninth Circuit's decision to *expand* the reasoning of the *Katie John* cases beyond subsistence and, in so doing, grant NPS plenary control over State waterways.[76]

Post-*Sturgeon*, and after a change of administration, the State began to apply a "death by a thousand cuts" approach to Title VIII, despite representing to the U.S. Supreme Court that *Katie John* was still good law. One of the State's attempts at diminishing Title VIII was issuing fishing orders under the premise that it, not the federal government, had management authority over subsistence fisheries on the 180-mile stretch of Kuskokwim River within the Yukon Delta National Wildlife Refuge.[77] In 2022, the federal government responded to the State's unlawful orders purporting to issue subsistence fishing openings on the Kuskokwim to all Alaskans by suing the State for interfering with federal management of subsistence fisheries.[78]

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[75] In addition to representing the State in this case, J. Michael Connolly, Partner at Consovoy McCarthy PLLC, represented Mr. Sturgeon throughout his two trips to the U.S. Supreme Court.

[76] Br. of Pet'r John Sturgeon at 34 n.4, *Sturgeon v. Frost*, 139 S. Ct. 1066 (emphasis in original).

[77] *See generally*, ECF No. 101; Kuskokwim River Inter-Tribal Fish Comm. Reply in Supp. Summ. J./Opp'n to Defs.' Mot. Summ. J., Background Section.

[78] *See generally*, Compl., ECF No. 1.

In a whiplash-inducing reversal from the legal position it took in *Sturgeon*, the State now argues that *Sturgeon* is "clearly irreconcilable" with *Katie John*, and on that basis, asks this Court to overturn the trilogy of longstanding Ninth Circuit precedent.[79] What the State is really asking, however, is for this Court to gut the subsistence fishing priority in Title VIII of ANILCA.

V. Gutting Title VIII Would Have Grave Consequences.

It is impossible to overstate the importance of fish in the context of Alaska Native subsistence. For many Alaska Native peoples living in rural villages, preserving their ways of life and ensuring their food security depends on their ability to subsistence fish. When subsistence resources are taken away—as has happened in the past under State jurisdiction[80]—the result is economic and cultural catastrophe for the families who rely on those resources.

Alaska Department of Fish and Game ("ADF&G") research shows that 95% of households in rural Alaska consume subsistence-caught fish.[81] Moreover, ADF&G's 2020 subsistence harvest report calculated that subsistence fisheries provide 56.8% of the wild foods harvested by rural residents for subsistence purposes, with salmon comprising the largest portion of the total harvest at 32.3%.[82] And while the Alaska Native population

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[79] Defs.' Mot. for Summ. J., ECF No. 72 at 38-39.

[80] *See, e.g.*, Goska Decl., Ex. B at 6.

[81] *See* Goska Decl., Ex. D at 2.

[82] Goska Decl., Ex. E at 3.

makes up a substantial portion, i.e., approximately 55% of the population of all rural areas in the state,[83] in the most remote, roadless regions, the Alaska Native population comprises a much larger majority: 82%.[84] Subsistence, and fish in particular, feeds many of those communities. Most rural Native village economies are made up of a combination of cash and subsistence, with extremely limited sources of cash income. Subsistence harvest and use (for personal and group consumption) is an integral part of community relationships. When subsistence resources (or the legal right to harvest them) are taken away, they cannot be replaced by substitutes.[85]

Without the legal protection of Title VIII's rural subsistence priority, as upheld by *Katie John,* Alaska Native food security will be significantly threatened: allowing the State to apply its "all Alaskans" policy on navigable waters running through federal lands, as identified in the 1999 Rule, will further diminish what is already a shortage of fish. Furthermore, the *Katie John* cases provide a "fragile equilibrium" that ended the

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[83] Goska Decl., Ex. G at 11.

[84] Goska Decl., Ex. L at 1; *see also* Goska Decl., Ex. K (containing U.S. Census Bureau data showing the Alaska Native population makes up 96.9% of the Kusilvak Census Area, 88.5% of the Bethel Census Area, 88.1% of the Northwest Arctic Borough, 82.6% of the Nome Census Area, 79.9% of the Dillingham Census Area, and 77.2% of the Yukon-Koyukuk Census Area). The State's brief, meanwhile, relies on nationwide demographic information to assert that most Alaska Natives live outside of undefined "tribal areas." *See* ECF No. 72 at 13 (citing Begakis Decl., Ex. H at 7).

[85] The cost to replace wild food harvests (both fish and game) in rural Alaska is estimated to be about $170-$340 million annually, or about $97-$193 million to just replace the 56.8% comprised of fish. Goska Decl., Ex. E at 3.

subsistence wars of the 1980s and 90s.[86] That balance must be preserved to give effect to Title VIII of ANILCA.

ARGUMENT

I. *Katie John* Controls—Which the State has Conceded—and this Court Must Uphold Title VIII.

The State has previously conceded that "this Court is bound by [*Katie John III*]."[87] The State also conceded that the U.S. Supreme Court stated it was not disturbing the Ninth Circuit's *Katie John* holdings in *Sturgeon*.[88] And yet the State goes on to make an absurd request of this Court—determine that the Supreme Court "effectively" overruled a series of cases that the Court explicitly stated it was *not* disturbing. This Court should "follow the case which directly controls"[89] and reject the State's invitation outright under the doctrine of *stare decisis*.[90] Moreover, the Ninth Circuit has repeatedly recognized that the "clearly irreconcilable requirement" that the State erroneously argues applies here is a "high standard that demands more than mere tension between the intervening higher authority

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[86] Br. of Amicus Curiae Ahtna Inc. at 26, *Sturgeon*, 139 S. Ct. 1066.

[87] Defs.' Opp. to Mot. for Restraining Order, ECF No. 9 at 19 n.74.

[88] ECF No. 72 at 39.

[89] *Agostini v. Felton*, 117 S. Ct. 1997, 2017 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc*., 109 S. Ct. 1917, 1921-22 (1989)).

[90] *Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 798 (2014).

and prior circuit precedent."[91] "Nothing short of clear irreconcilability will do,"[92] meaning that if this Court "can apply [Ninth Circuit] precedent consistently with that of the higher authority, [it] must do so."[93]

Only the Supreme Court or a full en banc panel of the Ninth Circuit could modify *Katie John*.[94] Neither has done so. Accordingly, this Court must uphold *Katie John* and protect Title VIII.

II. *Sturgeon* Neither Undermines Nor Overrules *Katie John*.

Contrary to the State's arguments, *Sturgeon* does not undermine the federal government's authority to protect subsistence under Title VIII. *Sturgeon* interpreted language in a different title of ANILCA which presented a legal issue that is easily distinguishable from the present matter.[95] There, the U.S. Supreme Court "held that the Park Service could not apply its hovercraft ban to the disputed waters within park

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[91] *United States v. Eckford*, 77 F.4th 1228, 1233 (9th Cir. 2023) (citing *Fed. Trade Comm'n v. Consumer Def., LLC*, 926 F.3d 1208, 1213 (9th Cir. 2019)) (internal quotations omitted); *see also Rodriguez v. AT & T Mobility Servs. LLC*, 728 F.3d 975, 979 (9th Cir. 2013); *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012); *United States v. Piers*, 2017 WL 6559904, at *4 (D. Alaska Dec. 22, 2017), *aff'd*, 744 F. App'x 505 (9th Cir. 2018).

[92] *Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1074 (9th Cir. 2018) (internal quotations omitted).

[93] *Eckford*, 77 F.4th at 1233 (citing *Avilez v. Garland*, 69 F.4th 525, 533 (9th Cir. 2023)); *see also Fed. Trade Comm'n*, 926 F.3d at 1213.

[94] While the Ninth Circuit's procedure allows for a rehearing by the full court of a decision by a limited en banc court, 9TH CIR. R. 35-3, there is no evidence that this has ever happened. *See, e.g., Abebe v. Holder*, 577 F.3d 1113, 1114 (9th Cir. 2009) (Berzon, J., dissenting) ("[T]his court has never held a full court en banc . . . .").

[95] *Sturgeon*, 139 S. Ct. at 1080.

boundaries in Alaska" under Section 103(c), a statutory provision that is "unique to ANILCA, which was itself borne out of Alaska's unique history and geography."[96] *Sturgeon* thus held only that Section 103(c) excludes Alaska from the broad regulatory authority the Park Service usually has under its Organic Act over *non-public lands* within the boundaries of a park system unit, including navigable waters, in the lower-48.[97] The narrow exception in Section 103(c) is irrelevant here because ANILCA itself specifically prioritizes subsistence in Alaska: dedicating an entire title to it.[98] Nothing in the language of Section 103(c), or *Sturgeon*'s interpretation of that provision in the context of general Park Service regulations enacted pursuant to its Organic Act, undermine the specific federal authority provided for in another title of ANILCA itself, i.e., Title VIII's rural subsistence fishing priority.[99] Adopting the State's "construction would undermine ANILCA's grand bargain."[100]

Sturgeon "arose from the Park Service's attempt to apply its regulation banning hovercrafts . . . to a portion of the Nation River in the Yukon-Charley Rivers National

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[96] *San Francisco Herring Ass'n v. U.S. Dep't of the Interior*, 33 F.4th 1146, 1155 (9th Cir. 2022) (citing *Sturgeon*, 139 S. Ct. at 1073-77).

[97] *Sturgeon*, 139 S. Ct. at 1081.

[98] 16 U.S.C. §§ 3111-3126.

[99] *Sturgeon*, 139 S. Ct. at 1081-82 (holding that the "legal fiction" that State or private interests within a park system unit are "deemed" not to be part of that unit under Section 103(c) creates an exception to only those "regulations applicable solely to public lands within such units," i.e., general regulations enacted under the Organic Act).

[100] *Sturgeon*, 139 S. Ct. at 1083.

Preserve, a park system unit in Alaska."[101] The regulation at issue was created pursuant to the National Park Service Organic Act, which allows the Park Service's general rules and regulations to apply to non-federal lands, including navigable waters, within the boundaries of a park system unit, unless they are "in conflict" with any unit-specific law.[102] In *Sturgeon*, the Supreme Court interpreted ANILCA to mean that inholdings in park system units in Alaska were to be treated differently than those in the rest of the U.S. because Section 103(c) "exempt[s] non-public lands, including waters, from the Park Service's ordinary regulatory authority."[103] Thus, the *Sturgeon* Court held that this exemption means that the Service could not enforce its general hovercraft ban on the Nation River.[104]

The State now argues that this ANILCA exception swallows the entire rule. It argues that in addition to being free from the Park Service's general regulatory authority under the Organic Act over all navigable waters within a park system unit,[105] the federal government

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[101] *San Francisco Herring Ass'n*, 33 F.4th at 1155.

[102] 54 U.S.C. § 100755(a); *see San Francisco Herring Ass'n*, 33 F.4th at 1153. As noted in *Sturgeon*, "the Secretary, acting through the Director of the Park Service, has broad authority under the [Organic Act] to administer both lands and waters within all system units in the country." *Sturgeon,* 139 S. Ct. at 1076 (citations omitted).

[103] *Sturgeon,* 139 S. Ct. at 1081.

[104] *Id.* at 1085.

[105] "The Secretary 'shall prescribe such regulations as [he] considers necessary or proper for the use and management of System units. And he may, more specifically, issue regulations concerning 'boating and other activities on or relating to water located within System units.' Those statutory grants of power make no distinctions based on the ownership of either lands or waters (or lands beneath waters)." *Sturgeon,* 139 S. Ct. at 1076 (citations omitted).

has no interest in those waters that justifies *any* federal control for *any* purpose,[106] not even for the purpose of carrying out the subsistence priority established in ANILCA itself. The State misinterprets *Sturgeon*. *Sturgeon's* holding does not mean the federal reserved water right does not provide for federal authority for the specific subsistence purposes described in Title VIII of ANILCA. Indeed, in not reaching the issue and assuming for purposes of argument that a federal reserved water right was an ownership interest, the Supreme Court reasoned that "[u]nder ANILCA's definition, the 'public land' at issue would consist only of the Federal Government's specific 'interest' in the River—that is, its reserved water right," and that it would "not give the Government plenary authority over the waterway to which it attaches,"[107] especially where the Government had not argued that hovercraft regulation was "related to safeguarding the water,"[108] in other words, the subsistence priority in Title VIII.

Furthermore, although the *Sturgeon* Court reasonably concluded that using the reserved water rights doctrine to justify enforcing the Park Services' general hovercraft

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[106] *Contra Sturgeon,* 139 S. Ct. at 1084 ("By adding 'solely,' Congress made clear that the exemption granted was not from such generally applicable regulations. Instead, it was from rules applying only in national parks—*i.e.,* the newly looming Park Service rules.").

[107] *Sturgeon,* 139 S. Ct. at 1079.

[108] *Id*. at 1080; *see also id.* at 1090 n.3 (Sotomayor, J., concurring) ("Notably, the Park Service did not argue—nor does the Court's opinion address—whether . . . the Federal Government functionally holds title to the requisite interest because of the navigational servitude.").

regulations was a bridge too far,[109] it expressly did not overrule the *Katie John* trilogy.[110] In their concurring opinion, Justices Sotomayor and Ginsburg also specifically noted the limits of *Sturgeon*: "[t]he Court holds *only* that the National Park Service may not regulate the Nation River as if it were within Alaska's federal park system, *not* the Service lacks *all* authority over the Nation River."[111] "A reading of ANILCA[] that left the Service with no power whatsoever over navigable rivers in Alaska's parks would be untenable in light of ANILCA's other provisions . . . . Congress would not have set out this aim and simultaneously deprived the Service of all means to carry out the task."[112]

Boiled down, what the State is fundamentally arguing is that, as a matter of statutory construction, the "public lands" subject to the rural subsistence priority in Title VIII must be the same "public lands" that limit the federal government's plenary authority for purposes of the Section 103(c) exception. This superficial analysis, which is not grounded in the rules of statutory construction, leads to an absurd result and is easily rejected. According to the State, Congress intended to allow subsistence only on the federal government's *titled* interests, and because the federal government does not have a *titled*

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[109] *Id.* at 1080 ("Even if the United States holds title to a reserved water right in the Nation River, that right . . . cannot prevent Sturgeon from wafting along the River's surface toward his preferred hunting ground.").

[110] *Id.* at 1080 n.2 ("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.").

[111] *Sturgeon* at 1088 (emphasis added).

[112] *Id.*

interest to navigable waters running through federal lands, Congress could not have intended to have a rural priority for subsistence fishing on those waters. The State makes this argument despite the specific language in Title VIII extending the subsistence priority to both "*fish* and wildlife"[113] on public lands that includes both "waters, and interests therein."[114] Just as it has in prior court cases, the State "has attempted to take away what Congress has given, adopting a creative redefinition of the [term "public lands"], a redefinition whose transparent purpose is to protect commercial and sport fishing interests."[115]

Although ignored by the State, "[t]he starting point for [the] interpretation of a statute is always its language."[116] When statutory language is "ambiguous or leads to an absurd result," however, the Court must look beyond the plain text.[117] In those circumstances, a Court should look to "legislative history, and the statute's overall purpose to illuminate Congress's intent."[118] Critically, the Supreme Court has confirmed that the "natural presumption that identical words used in different parts of the same act are intended to have the same meaning . . . is not rigid and readily yields whenever there is

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[113] 16 U.S.C. § 3111(3), (5) (emphasis added).

[114] 16 U.S.C. § 3102(1).

[115] *Kenaitze Indian Tribe*, 860 F.2d at 318 (criticizing the State's attempt to redefine "rural").

[116] *United States v. Gallegos*, 613 F.3d 1211, 1214 (9th Cir. 2010).

[117] *United States v. Pacheco*, 977 F.3d 764, 767 (9th Cir. 2020).

[118] *Moran v. Screening Pros, LLC*, 943 F.3d 1175, 1183 (9th Cir. 2019).

such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent."[119]

Here, ANILCA itself expressly prioritizes a subsistence right to both fish and wildlife in Alaska: dedicating an entire title with its own findings[120] and statement of policy[121] to the protection of rural subsistence, and—most uniquely—specifically invoking Congress' authority under the Commerce Clause, the Property Clause, and its "constitutional authority over Native affairs."[122]

Despite Congress' clear intent, the State would read any federal interest in navigable waters, including a reserved water right, out of the definition of "public lands."[123] The definitional language in ANILCA does not support this reading. Section 102 of ANILCA defines "public lands," and included terms, for purposes of the Act 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.

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[119] *Envtl. Def. v. Duke Energy Corp*., 549 U.S. 561, 574 (2007) (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)); *cf. Sturgeon*, 139 S. Ct. at 1093 (Sotomayor, J., concurring) ("Although ANILCA § 103(c) generally has the effect of removing navigable waters from the legal boundaries of Alaska's park, Congress' highly specific definition of the Wild and Scenic Rivers as a portion of Alaska's park system overrides ANILCA § 103(c)'s general carveout. General language of a statutory provision will not be held to apply to a matter specifically dealt with in another part of the same enactment.") (quotations omitted) (citing *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)).

[120] 16 U.S.C. § 3111.

[121] 16 U.S.C. § 3112.

[122] 16 U.S.C. § 3111(4).

[123] ECF No. 72 at 34-37.

> (3) The term "public lands" means land situated in Alaska which, after December 2, 1980, are Federal lands, except [land selected by the State of Alaska or granted to the State under the Alaska Statehood Act, or any other provision of federal law, land selected by an ANC under ANCSA, and lands referred to in ANCSA § 19(b), 43 U.S.C. § 1618(b)].[124]

As the State concedes in its cross-motion, no one holds title to waters because "running waters cannot be owned—whether by a government or by a private party."[125] Thus, although the term "land" includes "waters, and interests therein," this language is meaningless, according to the State, because there can be no titled interest in the very waters subject to ANILCA's subsistence priority for fish.[126]

Sturgeon did not so hold, and "public lands" for purposes of Title VIII must include navigable waters if the subsistence priority to fish is to have any meaning at all. In *Amoco Production Co. v. Village of Gambell* (*Amoco*), a Supreme Court case addressing Title VIII of ANILCA (and curiously not cited by the State), the Supreme Court "reject[ed] the assertion that the phrase 'public lands,' in and of itself, has a precise meaning, without reference to a definitional section or its context in a statute."[127] Here, that context is the

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[124] 16 U.S.C. § 3102 (emphasis added).

[125] ECF No. 72 at 35.

[126] *See, e.g.*, *People of Togiak v. United States,* 470 F. Supp. 424-28 (D.D.C. 1979) (rejecting a construction of the Marine Mammal Protection Act that was "both too ingenuous and too facile" in that it was "wholly at odds" with the "overall purpose evidently sought to be achieved by Congress" in allowing takings "for subsistence purposes by Alaskan natives."); *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (explaining statutes should be construed "so as to avoid rendering superfluous" any statutory language: "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .").

[127] 480 U.S. 531, 548 n.15 (1987) (citing *Hynes v. Grimes Packing Co*., 337 U.S. 86, at 114-16 (1949)).

need for the federal government to have some interest in navigable waters in Alaska in order to enforce a subsistence priority to the fish in those waters.

If adopted, the State's argument could have broad consequences outside of ANILCA as well, potentially eliminating all federal interests to waters in Alaska. For example, it could mean that federal government lacks any interest in the submerged lands of the Outer Continental Shelf ("OCS"), despite the Supreme Court's refusal to decide the *Amoco* case on such grounds and expressing doubt to such a lack of interest:

> Petitioners also assert that the OCS plainly is not "Federal land" because the United States does not claim "title" to the OCS. See ANILCA § 102(2), 16 U.S.C. § 3102(2). The United States may not hold "title" to the submerged lands of the OCS, but we hesitate to conclude that the United States does not have "title" to any "interests therein." Certainly, it is not clear that Congress intended to exclude the OCS by defining public lands as "lands, waters, and interests therein" "the title to which is in the United States."[128]

And perhaps hoping to end all federal oversight of all navigable waters in Alaska for any purpose, the State goes so far as to state in its cross-motion that, "[t]he Supreme Court's recent decision in *Sackett v. EPA* further confirms that 'public lands' do not include navigable waters,"[129] period. But the issue in the *Sackett* case was what waters, *in addition to navigable waters*, are "waters of the United States," and the Supreme Court limited it to wetlands that were adjacent to and formed a "continuous surface connection" with

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128 *Id.*

129 ECF No. 72 at 37.

navigable waters.[130] As noted by Justice Thomas in his concurrence, navigable waters were presumed to be waters of the United States, and the plurality's decision did "not determine the extent to which the CWA's other jurisdictional terms—'navigable' and 'of the United States'—limit the reach of the statute."[131] The State's argument that the federal government has *no* interest in any navigable waters in Alaska sufficient to make those waters "public lands" is completely unmoored from the law.

In *Katie John I*, the Ninth Circuit held that "the definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine."[132] And in *Katie John III*, the Ninth Circuit concluded that the federal government had correctly applied *Katie John I* in its use of the reserved water rights doctrine to identify which waters in its 1999 Rule are "public lands" for the purpose of Title VIII's rural subsistence priority—those navigable waters running through federal lands, primarily the conservation system units, and waters adjacent to those lands.[133]

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[130] *Sackett v. EPA,* 143 S. Ct. 1322, 1341 (2023). It is noteworthy that the *Sackett* Court's decision including "adjacent" waters is consistent with *Katie John III*, affirming the 1999 Rules including navigable waters running through federal lands, and certain waters adjacent thereto, as subject to the Title VIII subsistence priority. 720 F.3d at 1231.

[131] *Sackett*, 143 S. Ct. at 1344 (Thomas, J., concurring).

[132] *Katie John I*, 72 F.3d at 703-04. In *Cappaert v. United States*, 426 U.S. 128, 138 (1976), the Court confirmed that the federal "reservation of water rights is empowered by the Commerce Clause, Art. I, s 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, s 3, which permits federal regulation of federal lands."

[133] *Katie John III*, 720 F.3d at 1224, 1229-30 ("[A]ppurtenancy has to do with the relationship between reserved federal land and the use of water, not the location of the water.").

Although Congress has amended other provisions of ANILCA in the intervening years, it has not limited the application of Title VIII. Given the clear Congressional intent behind the subsistence priority in Title VIII, as discussed at length in all the *Katie John* decisions, and the retroactive adoption of these cases by Congress, the Ninth Circuit's reasoning is sound and remains good law today.[134]

The State cannot undo "ANILCA's grand bargain."[135] The reserved water right in "waters within and adjacent to federal reservations,"[136] is not an abstraction. Rather, as the Supreme Court long ago recognized, it is essential to the survival of Native peoples.[137] The State's penurious view of the reserved water rights underlying the subsistence priority in Title VIII frustrates Congress' clear intent to provide a rural subsistence priority to fish and fails as a matter of law.

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[134] AFN adopts the arguments regarding Congressional ratification more fully developed by the Kuskokwim River Inter-Tribal Fish Commission in Argument II.B. of its Reply in Supp. of Mot. for Summ. J./Opp'n to State's Mot. for Summ. J. It is well established that when Congress passes "positive legislation" that adopts an agency interpretation, that is "persuasive evidence that the interpretation is the one intended by Congress," the courts must "deem that interpretation virtually conclusive." *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 846 (1986); *see also Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015); *N. Haven Bd. Of Educ. v. Bell*, 456 U.S. 512, 535 (1982).

[135] *Sturgeon*, 139 S. Ct. at 1083.

[136] *Katie John III*, 720 F.3d at 1245.

[137] *Arizona v. California*, 373 U.S. 546, 598-99 (1963) ("It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.").

III. Congress Invoked a Trifecta of Constitutional Powers in Title VIII; Those Other Sources of Power Reinforce the Federal Government's Authority to Manage Subsistence Fisheries.

In enacting Title VIII of ANILCA, Congress made plain that it was using every arrow in its constitutional quiver to "protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents," expressly invoking three sources of authority in doing so: its "constitutional authority over Native affairs," its authority under the Property Clause, and its authority under the Commerce Clause.[138] When Congress is legislating pursuant to its powers—here, its combined Commerce Clause, Property Clause, and Native affairs powers—"state law is naturally preempted to the extent of any conflict with a federal statute," including in areas of law, such as hunting and fishing, that are traditionally left to the states.[139] If this Court somehow overturns *Katie John* and concludes that the federal reserved water right is insufficient to give the federal government authority over the subsistence fishing priority in Title VIII, these other sources of constitutional authority invoked by Congress ensure that the federal government's authority to regulate pursuant to ANILCA's subsistence priority extends to fish in navigable waters in Alaska.

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[138] 16 U.S.C. § 3111(4).

[139] *Brackeen*, 143 S. Ct. at 1635; *see also Katie John II*, 247 F.3d at 1035 (Tallman, J., concurring); *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020); U.S. CONST. art. I, § 8, cl. 3; art. VI, cl. 2.

A. The Property Clause

The Property Clause provides the foundation for the federal government's plenary power to regulate federal lands.[140] The Property Clause "in broad terms, gives Congress the power to determine what are 'needful' rules 'respecting' the public lands."[141] Courts have recognized the "expansiveness" of that power, recognizing that "the power over the public land thus entrusted to Congress [under the Property Clause] is without limitations."[142] The Supreme Court has held that "the 'complete power' that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there."[143] And to protect interests in public lands, the Property Clause further provides "congressional power to regulate conduct *on Private land* that affects the public lands."[144] Thus, even if the State were right that the federal government had no reserved water right or other interest in the navigable waters running through federal lands in Alaska, Congress has the power to provide a subsistence priority on those waters under the Property Clause.

In *Sturgeon*, the Supreme Court pointed out that Mr. Sturgeon would absolutely have lost his case if he were in the lower-48, without the protection of the Section 103(c)

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[140] U.S. CONST. art. IV, § 3, cl. 2; *see also Utah Div. of State Lands v. United States*, 482 U.S. 193, 201 (1987) (explaining "[t]he Property Clause grants Congress plenary power to regulate and dispose of land").

[141] *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

[142] *United States v. Gardner*, 107 F.3d 1314, 1318 (9th Cir. 1997) (listing cases).

[143] *Kleppe*, 426 U.S. at 540-41 (1976).

[144] *Id.* at 537 (emphasis added); *see also Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985, 995 n.40 (D. Haw. 1979) ("It is also possible that Congress can assert a property interest in endangered species which is superior to that of the state.").

Alaska-specific exception in ANILCA. "[T]he Park Service freely regulates activities on all navigable (and some other) waters 'within [a park's] boundaries'—once more, 'without regard to . . . ownership.'"[145]

Those navigable waters are the same waters to which the subsistence priority in Title VIII applies. In *Katie John III*, the Ninth Circuit concluded that the federal government had correctly identified which waters in its 1999 Rule are "public lands" for the purpose of Title VIII's rural subsistence priority—those navigable waters running through federal lands, primarily the conservation system units, and waters adjacent to those lands.[146] If the Park Service can be given broad regulatory authority over those waters as provided in the Organic Act under the Property Clause, Congress can certainly provide a subsistence priority in those very same waters under that same source of constitutional power even if this Court were to conclude that there was no federal interest in those waters sufficient to make them "public lands" as defined by ANILCA. The Property Clause provides an alternative source of constitutional power to uphold the *Katie John* decisions and the rural subsistence priority to fish in Title VIII.

B. The Commerce Clause and the Navigational Servitude.

Title VIII is the *only* section of ANILCA that invokes the Commerce Clause, and "[t]he Commerce Clause confers a unique position upon the [federal government] in

[145] *Sturgeon*, 139 S. Ct. at 1076.

[146] *Katie John III*, 720 F.3d at 1245.

connection with navigable waters."[147] Because the State is relitigating the *Katie John* cases, the Court must also reconsider whether the Commerce Clause,[148] and relatedly the navigational servitude, "extend[s] federal protection of traditional subsistence fishing to *all* navigable waters within the State of Alaska," as Judge Tallman stated in his concurrence in *Katie John II*.[149] "It has long been settled that Congress has extensive authority over this Nation's waters under the Commerce Clause."[150] "'Where there is some effect on interstate commerce,' Congress has 'power under the Commerce Clause to regulate the taking of fish

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[147] *United States v. Rands*, 389 U.S. 121, 122 (1967); s*ee also United States v. Virginia Elec. & Power Co*., 365 U.S. 624, 627-28 (1961). Because the federal government did not argue that the navigational servitude was the source of its power in *Sturgeon*, the Court did not address this power in its opinion. *Sturgeon*, 139 S. Ct. at 1090 n.3 (Sotomayor, J., concurring) (noting that the majority opinion did not address "whether navigable waters may qualify as 'public lands' because the United States has title to some interest other than an interest in reserved water rights" and that the "United States did not press the argument that the Federal Government functionally holds title to the requisite interest because of the navigational servitude").

[148] The Ninth Circuit rejected "the argument that the navigational servitude is an 'interest . . . the title to which is in the United States,' such that all navigable waters are public lands within the meaning of ANILCA" in *Katie John I*, 72 F.3d at 703. While *Katie John* remains good law, if the State is intent on reopening the discussion of what constitutes "public lands" for the purposes of Title VIII, the navigable servitude and the various invocations of Congressional power in Title VIII must be on the table as well and therefore those issues are raised here to preserve them for future review. *See Sturgeon*, 139 S. Ct. at 1090 n.3 (Sotomayor, J., concurring).

[149] *Katie John II*, 247 F.3d at 1034-35 (Tallman, J., concurring). The federal navigational servitude is squarely within the Commerce Clause's constitutional limits. *See Kaiser Aetna v. United States*, 444 U.S. 164, 177 (1979).

[150] *Kaiser Aetna*, 444 U.S. at 174 ("In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose.").

in state waters.'"[151] Relatedly, the navigational servitude describes the paramount interest of the United States in navigation and the navigable waters of the nation.[152]

As the *Sturgeon* Court recognized, "rivers 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."[153] And, "[i]t is beyond dispute that taking fish from waters within the State of Alaska substantially affects interstate commerce" such that "Congress has power under the Commerce Clause to regulate the taking of fish in state waters."[154] The Supreme Court long ago recognized that the allocation of fish between states implicates the Commerce Clause: "At the root of the doctrine [of the equitable apportionment of fish] is the same principle that animates many of the Court's Commerce Clause cases: a State may not preserve solely for its own inhabitants natural resources located within its borders."[155]

Although the State implies it has exclusive regulatory authority over navigable waters overlying submerged lands to which it has title, this is not, and has never been, the case. When Congress passed the Submerged Lands Act it "expressly 'retained all of its . . . rights in and powers of regulation and control of . . . navigable waters for the

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[151] *Katie John II*, 247 F.3d at 1034-35 (Tallman, J., concurring) (quoting *Douglas v. Seacoast Prods., Inc.,* 431 U.S. 265, 281-82 (1977)).

[152] *United States v. Certain Parcels of Land Situated in City of Valdez*, 666 F.2d 1236, 1238 (9th Cir. 1982).

[153] *Sturgeon*, 139 S. Ct. at 1087.

[154] *Katie John II*, 247 F.3d at 1035 (Tallman, J., concurring) (cleaned-up).

[155] *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983).

constitutional purposes of commerce.'"[156] The *Sackett* Court recently confirmed that navigable waters, and waters adjacent to those waters are "waters of the United States" for purposes of the Clean Water Act.[157] And while states may hold concurrent regulatory authority over navigable waters and the natural resources within them, federal authority preempts conflicting state authority.[158] Stated another way, and as relevant here, "[a]lthough the State of [Alaska] arguably continues to have some interest in the original bed and banks of the [Kuskokwim River] and the portions of the [] River which were navigable when [Alaska] entered the Union, this does not give it the exclusive right to regulate non-Indian hunting and fishing,"[159] where Congress provided for federal management of fishing in ANILCA under the Commerce and Property Clauses.

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[156] *Katie John II*, 247 F.3d at 1035 (Tallman, J., concurring) (quoting 43 U.S.C. § 1314(a)).

[157] *Sackett,* 143 S. Ct. at 1341 (2023). It is noteworthy that the *Sackett* Court's decision including "adjacent" waters is consistent with *Katie John III*, affirming the 1999 Rules including navigable waters running through federal lands, and certain waters adjacent thereto, as subject to the Title VIII subsistence priority. 720 F.3d at 1229.

[158] *Katie John II*, 247 F.3d at 1035 (Tallman, J., concurring); *see also PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012) (under the equal footing doctrine, states gain title within their borders to the beds of navigable waters and may "allocate and govern those lands according to state law subject only to the paramount power of the United States"); *id.* at 593 (recognizing that the "federal commerce power . . . extends beyond navigation"); *Utah Div. of State Lands v. United States*, 482 U.S. 193, 202 (1987) ("[E]ven if the land under navigable water passes to the State, the Federal Government may still control, develop, and use the waters for its own purposes.").

[159] *Cassidy v. United States,* 875 F. Supp. 1438, 1452-53 (E.D. Wash. 1994) (holding that Congress gave the federal government the right to regulate fishing and hunting by all users, including non-Indians as well as Indians, and that the federal government had the ability to delegate this authority to a tribe).

The scope of Congress' exercise of its Commerce Clause power is determined by the statute's text.[160] Title VIII repeatedly describes Congress' desire to "create a federal regulatory scheme to protect the resources related to . . . the customary and traditional [subsistence] uses by [rural] Alaska residents."[161] Title VIII expressly creates a priority to fish on public lands: "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."[162] Section 102 of ANILCA defines "public lands" to include "waters, and interests therein," and as the State points out, "the title to which is in the United States after December 2, 1980."[163] Even if the reserved water rights is not a titled interest that qualifies it as public lands, "[the] power to regulate navigation confers upon the United States a 'dominant servitude.'"[164]

"'Customary and traditional' subsistence fishing occurs primarily on navigable waters" and "[f]ishing Alaska's navigable, salmonid-bearing waters has sustained Alaska's native populations since time immemorial."[165] "Given the crucial role that navigable waters play in traditional subsistence fishing, it defies common sense to conclude that, when Congress indicated an intent to protect traditional subsistence fishing, it meant only the

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[160] *Katie John II*, 247 F.3d at 1036 (Tallman, J., concurring).

[161] *Id.* (citing 16 U.S.C. §§ 3111-3114).

[162] 16 U.S.C. § 3114.

[163] 16 U.S.C. § 3102.

[164] *Rands*, 389 U.S. at 123.

[165] *Katie John II*, 247 F.3d at 1036 (Tallman, J., concurring).

limited subsistence fishing that occurs in non-navigable waters," or even to navigable waters within and appurtenant to conservation system units, as limited by the 1999 Rule.[166]

ANILCA provides a clear statement from Congress that it was exercising its Commerce Clause power to affect areas traditionally falling under state authority,[167] specifying that Title VIII of ANILCA is the only portion that "is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife."[168] And, further confirming Title VIII conferred federal authority to regulate the rural subsistence priority, Congress provided for State enforcement of Title VIII only in the event it enacted a law of general applicability allowing for such priority.[169]

C. Congress' Plenary and Exclusive Power over Native Affairs.

Congress also expressly invoked its "constitutional authority over Native affairs" in enacting Title VIII of ANILCA.[170] As the U.S. Supreme Court recently outlined in *Haaland v. Brackeen*, there are at least three sources of constitutional power supporting Congress' authority over Native affairs.[171] First, under the Indian Commerce Clause, Congress has

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166 *Id.*

167 *Id.* at 1037 ("In our federalist system of government, when Congress intends to alter the traditional balance of powers between states and the federal government, it must make its intent to do so clear in the statute.").

168 16 U.S.C. § 3202(a) (referring to Title VIII's provisions, 16 U.S.C. §§ 3111-3126, as "subchapter II of this chapter"); *see also Katie John II*, 247 F.3d at 1037 (Tallman, J., concurring) ("acknowledging that federal oversight of the subsistence priority diminishes the responsibility and authority of the State of Alaska for the management of fish.").

169 *Katie John II*, 247 F.3d at 1037 (citing 16 U.S.C. § 3115(d)).

170 16 U.S.C. § 3111(4).

171 *Brackeen*, 143 S. Ct. at 1627-29.

the "power to regulate commerce with the Indian tribes, and such power is superior and paramount to the authority of any State."[172] *Brackeen* confirms the Indian Commerce Clause allows legislation "to reach not only trade, but certain 'Indian affairs' too."[173] Second, the Treaty Clause provides the second source of power, allowing Congress "'to legislate on problems of Indians' pursuant to pre-existing treaties."[174] Third, Congress' power to legislate with respect to Native peoples is inherent in the Constitution and is "plenary and exclusive."[175] Finally, the "'trust relationship between the United States and the Indian people' informs the exercise of legislative power."[176] Pursuant to that relationship, "the Federal Government has 'charged itself with moral obligations of the highest responsibility and trust' toward Indian tribes."[177]

Alaska Natives, as the State's original occupants, held aboriginal title to all of the lands that are now Alaska, and had the right to hunt, fish, and gather on all lands and waters

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[172] *Dick v. United States*, 208 U.S. 340, 353 (1908).

[173] *Brackeen*, 143 S. Ct. at 1627-28 (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)).

[174] *Id.* at 1628.

[175] *Id.* at 1627-29 (noting well-established, broad, and "muscular" power of Congress to legislate with respect to Native peoples); *Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1899) (describing Congress' "plenary power of legislation in regard to" Indian tribes).

[176] *Brackeen,* 143 S. Ct. at 1628 (citing *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974)).

[177] *Id.* (citing *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011); *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)).

in Alaska.[178] As argued more fully by Ahtna Tene Nené and Ahtna, Inc., when the State took title to its submerged lands under the Alaska Statehood Act, it did so subject to the "fishing rights" held by Alaska Natives directly, and "held by the United States in trust for said natives."[179] Although both the early and final versions of ANCSA passed by the Senate explicitly provided for the protection of Native subsistence needs,[180]ANCSA ultimately extinguished aboriginal title and did not codify specific protections for subsistence, but it did not change or abdicate the federal government's trust responsibilities.[181] In enacting Title VIII, Congress intended to fulfill the promises it made to Alaska Natives, which it fully recognized it needed to do to fulfill its trust obligations given that it extinguished aboriginal land title in ANCSA. Congress declared "in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs . . . to protect and provide the opportunity for continued subsistence uses on the public lands."[182]

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[178] *See, e.g.,* Treaty Concerning the Cession of the Russian Possessions in North America, Mar. 30, 1867, 15 Stat. 539.

[179] *See* Alaska Statehood Act, Pub. L. No. 85-508, § 4, 72 Stat. 339 (1958). AFN adopts herein the arguments of Ahtna Tene Nené and Ahtna, Inc.'s Combined Reply in Supp. of Mot. Summ. J./Opp. to Defs.' Mot. Summ. J. in Argument II.

[180] *See* Goska Decl., Ex. A at 3.

[181] 43 U.S.C. § 1603(b).

[182] 16 U.S.C. § 3111(4).

Title VIII further stated Congress' intent to ensure continued "Native physical, economic, traditional, and cultural existence."[183]

Congress' invocation of its power over Native affairs in Title VIII plainly weds the federal government's management of the subsistence priority to its special relationship with Alaska Natives.[184] Unlike the rest of the United States, where there are reservations allowing for subsistence activities, Alaska was once again treated differently. In extinguishing all aboriginal title to lands in Alaska, the federal government undoubtedly took on a heightened trust responsibility to ensure that Alaska Native subsistence was protected. The legislative history of ANCSA confirms that Congress intended that lands conveyed under the Act, as well as State and federal policies, be used to promote and

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[183] 16 U.S.C. § 3111(1).

[184] *See, e.g.*, *Cherokee Nation v. Georgia,* 30 U.S. 1 (1831) (voiding state statutes affecting the Cherokee Nation, holding such state laws "repugnant to" the Constitution, laws, and treaties of the United States); *Eric v. Secretary of U.S. Dep't of Housing and Urban Development*, 464 F. Supp. 44, 46 (D. Alaska 1978) ("This common law doctrine applies to Alaska Natives"); *People of Togiak,* 470 F. Supp. at 428. Congress has also repeatedly recognized this relationship, *see, e.g.*, Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301(a); Indian Child Welfare Act, 25 U.S.C. § 1901, as has the Executive branch, *see, e.g.*, Exec. Order. No. 13,175, 87 Fed. Reg. 74,479 (Nov. 6, 2000); Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021), including the Department of Interior*, see, e.g.*, Joint Secretarial Order No. 3403, Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters (Nov. 15, 2021) (ensuring that federal lands and waters are managed in a manner that protects, among other things, Native subsistence, pursuant to the federal government's trust obligation to federally recognized tribes and their citizens); *Status of Alaska Natives*, 53 Interior Dec. 583, 605-06 (1932) (concluding that Alaska Natives are "entitled to the benefits of and subject to the general laws and regulations governing the Indians of the United States").

maintain Alaska Native subsistence.[185] And to ensure its promise to protect Alaska Native subsistence was fulfilled, Congress then enacted Title VIII—specifically invoking its plenary power over Native affairs and referring back to ANCSA.[186] The extension of the subsistence priority to all rural residents—which was only done at the State's behest—does not diminish the federal government's trust responsibility, which applies anywhere that federal or state actions may affect Native peoples or tribes.[187]

As highlighted by *People of Togiak v. United States*, the trust responsibility is at its greatest force when federal law preempts improper State attempts to regulate Native subsistence activities.[188] The court in that case recognized that the trust responsibility requires the federal government to protect Alaska Native "subsistence resources"

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[185] 1971 U.S.C.C.A.N. 2247, 2250 (ANCSA Conference Committee Report); CASE & VOLUCK at 46; *see also Adams v. Vance*, 570 F.2d 950, n.3 (D.C. Cir. 1978) ("The Alaska Native Claims Settlement Act of 1971 . . . extinguished aboriginal fishing rights, but the Congressional intent was apparently to quiet title to land rather than to end the still-intact obligation of the United States as trustee to protect the subsistence of the Eskimos.").

[186] 16 U.S.C. § 3111(4).

[187] *See, e.g.*, COHEN'S HANDBOOK § 5.04[3][a], at 412-13. For example, in Joint Secretarial Order 3403, the Secretaries of the Interior and of Agriculture affirmed that the trust responsibility includes an obligation to manage all federal lands and waters under their jurisdiction in a manner that protects Native subsistence. Joint Secretarial Order No. 3403, Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters (Nov. 15, 2021).

[188] CASE & VOLUCK at 290 (citing *People of Togiak*, 470 F. Supp. 423).

specifically,[189] including "against interference by the State[]."[190] The *People of Togiak* court held that a construction of the Marine Mammal Protection Act ("MMPA") that would leave Alaska Native subsistence subject to "State regulation inconsistent with the substantive federal plan" would contravene "the comprehensive scheme" and Congressional purpose of the MMPA, in violation of the trust responsibility to Alaska Native peoples.[191]

The present situation, where "[t]he State is now dissatisfied with the consequences of one of [the] promises" that the United States made to Native peoples is an "old and familiar story."[192] Because of its dissatisfaction with the provisions of Title VIII, the State again seeks to "reverse the promise the United States made."[193] And while Congress possesses "the authority to breach its own promises," that power "belongs to Congress alone" and "States have no authority."[194] Put bluntly, the State cannot void Title VIII because that would render Congress' protection of Alaska Native subsistence "essentially

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[189] *People of Togiak*, 470 F. Supp. at 426-27; *cf. Parravano v. Babbitt*, 70 F.3d 539, 545-546 (9th Cir. 1995) (upholding emergency regulation limiting non-Indian fishing in order to protect tribal fishing rights).

[190] *People of Togiak*, 470 F. Supp. at 428.

[191] *Id.* at 428-29 ("any ambiguity on the question of the survival of State regulation inconsistent with the substantive federal plan is properly resolved against the State's assertion of authority . . . .").

[192] *Washington State Dep't of Licensing v. Cougar Den, Inc*., 139 S. Ct. 1000, 1021 (2019) (Gorsuch, J., concurring).

[193] *Id.*

[194] *McGirt*, 140 S. Ct. at 2462.

an empty promise."[195] "ANILCA, like much legislation, was a settlement."[196] This Court must "hold[] the parties to the terms of their deal,"[197] and in this case the rural subsistence priority was part of "ANILCA's grand bargain."[198]

Congress' intent to protect traditional Alaska Native subsistence is contravened when the State purports to open subsistence fisheries to all users in a manner that conflicts with the rural subsistence priority in Title VIII of ANILCA. And the State's position that no rural subsistence priority to fish exists after *Sturgeon* is a direct attack on Title VIII and the federal government's trust responsibility to ensure the continued existence of Alaska Native peoples by allowing subsistence on federal lands. The State's position, if allowed to prevail, would destroy the federal government's ability to fulfill its trust responsibility to Alaska Native peoples, flying in the face of two centuries of federal jurisprudence declaring federal plenary power over Native affairs.

Taken as a whole, Title VIII's invocation of Congress' constitutional authority over Native affairs, the Property Clause, and the Commerce Clause, its explicit purpose of protecting subsistence uses "essential to Native physical, economic, traditional, and cultural existence," and the importance of navigable waters for subsistence fishing in

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195 *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 206 (1999).

196 *Sturgeon*, 139 S. Ct. at 1087.

197 *Cougar Den, Inc*., 129 S. Ct. at 1021 (Gorsuch, J., concurring).

198 *Sturgeon*, 139 S. Ct. at 1083.

Alaska easily leads to the conclusion that the scope of federal authority extends to all navigable rivers in Alaska.[199]

IV. Federal Law Preempts State Law and FSB Members Were Properly Appointed.

AFN incorporates by reference Plaintiff's arguments on federal preemption and the appointments clause.[200] First, the State devotes much of its briefing to discussing the requirements of the Alaska Constitution in an attempt to justify violating federal law.[201] But the Supremacy Clause "render[s] invalid" state law that "frustrates the full effectiveness of federal law."[202] Rather than attempting an end run around Title VIII, the State should amend its Constitution to allow compliance with Title VIII if it wishes to manage all fisheries in Alaska.

And second, the State's arguments that members of the Federal Subsistence Board were improperly appointed in violation of the Appointments Clause and that the Board's orders therefore have no effect are meritless and should be rejected.

CONCLUSION

AFN respectfully requests that the Court grant Plaintiff's and Intervenor-Plaintiffs' motions for summary judgment, deny the State's cross-motion for summary judgment, and provide the declaratory and injunctive relief requested by AFN's Complaint in

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[199] 16 U.S.C. § 3111 (Congressional declaration of findings).

[200] ECF No. 101 at 20, 39-48.

[201] ECF No. 72 at 8, 10-14, 29-30; *see also* Vincent-Lang Decl., ECF No. 74 at 5.

[202] *Perez v. Campbell*, 402 U.S. 637, 652 (1971); *see also Brackeen*, 143 S. Ct. at 1635.

Intervention. For the reasons stated above, this Court should hold that *Katie John* remains good law post-*Sturgeon*. Whether under the federal reserved waters right doctrine, or another provision of the United States Constitution, Congress had the power to create the rural subsistence priority to fish in navigable waters in Title VIII. Such a declaration of law will keep intact the protection of Alaska Native subsistence that Congress intended when it enacted Title VIII of ANILCA. To do otherwise would be detrimental to Alaska Native peoples who rely on subsistence for food security and as the very basis for their cultural survival.

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CERTIFICATE OF SERVICE

I certify that on November 3, 2023, a copy of the foregoing document was served via ECF on all counsel of record.

/s/Jahna M. Lindemuth