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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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

INTERVENOR-PLAINTIFFS AHTNA TENE NENÉ & AHTNA, INC.'S COMBINED REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT & OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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> *The State of Alaska will prosecute four elderly Copper River Natives for illegal subsistence fishing. The citations, issued about two weeks ago, sparked widespread protests in the Copper River valley, and Alaska's Department of Fish and Game at press time had not solved the problem: how to divide a poor Copper River salmon run between local people and competing urban fishermen . . . The citations resulted from a decision by the Department to close fishing for all but two days of the week—Saturday and Sunday—in order to allow adequate escapement for spawning. The chosen days allow maximum access to urban fishermen, depriving local subsistence-dependent people an opportunity to fish under less competitive conditions.*
>
> -THE TUNDRA TIMES, July 12, 1978[1]

INTRODUCTION

Each summer, on the banks of the Copper River in southcentral Alaska, Ahtna people fish for migrating salmon in the same places, at the same times, and following largely the same fishing practices as their forebearers have done since time before memory.[2] Now world renowned, the Copper River salmon fishery has sustained the Ahtna people's nutritional, spiritual, social, and economic needs for millennia. It is inconceivable that the rights to a fishery of such vital importance—or any other fishery

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[1] Erickson Decl., Ex. A.

[2] *See* Martin Decl. at ¶¶ 3-6; Erickson Decl., Ex. B (Affidavit of Katie John).

similarly relied upon by Alaska Natives[3]—would have been dealt away inadvertently and unintentionally, or that those vital fishing rights would have fallen through the cracks of congressional enactments designed specifically to preserve Alaska Natives' traditional ways of life. But that is precisely what the State would have this Court decide.

The State argues that Title VIII of the Alaska National Interest Lands Conservation Act ("ANILCA")—a statute in which Congress declared that protecting and preserving Alaska Natives' subsistence ways of life is an essential matter of national policy[4]—does not apply to navigable waters in Alaska[5]—waters where "[m]ost subsistence fishing (and most of the best fishing)" occurs.[6] The State begins with a false rationalization that state management under the Alaska Constitution is the "best" in the world and that state law has adequately protected subsistence fishing for "All Alaskans."[7] But the State's distorted version of history is nothing more than a snapshot viewed through rose-colored glasses. Over the last six decades, Alaska Natives' traditional and customary fishing practices

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3 *See* Docket 14-1 at 2 (describing importance of Kuskokwim River salmon to Alaksa Natives in southwest Alaska).

4 *See* ANILCA, Pub. L. No. 96-487, § 801 (1980) (codified at 16 U.S.C. § 3111).

5 *See* Docket 72 at 9 (State Brief).

6 *Native Village of Quinhagak v. United States*, 35 F.3d 388, 393 (9th Cir. 1994); *see generally Metlakatla Indian Community v. Egan*, 362 P.2d 901, 903 (Alaska 1961), *reversed in part*, 369 U.S. 45 (1962) ("As a life sustaining food the salmon is hardly excelled and because of its abundance in Alaskan waters it has always been one of the basic food resources of the people as well as the basis of their main industry.").

7 *See* Docket 72 at 3-4.

have been dismissed and disrupted under the State's mismanagement, resulting in severe hardships and attacks on Alaska Natives' fundamental identity, beliefs, and ways of being.[8]

Conflicts between the State and Alaska Native people, including the arrest and prosecution of four Ahtna elders simply for fishing according to their traditions, induced the federal government to step in and fulfill its trust responsibility by protecting Alaska Native fishing from State infringement.[9] This case is about maintaining that promise through the continued protection and preservation of Alaska Native subsistence fishing under federal law.

Title VIII of ANILCA provides that "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."[10] Congress acted because "the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to

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8 *See, e.g.*, *Native Village of Quinhagak*, 35 F.3d at 393, 394 (noting that "navigable waters are critical for subsistence rainbow trout fishing" and state regulations "attack the way [tribes] put food in our families' stomachs, and they also hurt our minds and spirits"); *United States v. Alexander*, 938 F.2d 942, 945 (9th Cir. 1991) ("If their right to fish is destroyed, so too is their traditional way of life.").

9 *See* 16 U.S.C. §§ 3111-3126.

10 16 U.S.C. § 3114.

Native physical, economic, traditional, and cultural existence."[11] Under the State's fish and wildlife management, the "continuation of the opportunity for subsistence uses of resources" was "threatened."[12] Congress concluded that "in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act [("ANCSA")] and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents."[13] Thus, put simply, where there are not enough fish to provide for rural Alaskans' subsistence needs, it is the federal government's obligation to secure the federal subsistence priority through appropriate regulations preempting contrary State laws.[14]

The State's naked attempts to evade federal preemption by undermining the core protections and purposes of Title VIII are unsupportable. Congress clearly established a federal subsistence preference for fishing on navigable waters in Alaska under Title VIII. To hold otherwise would require this Court to jettison the Ninth Circuit's binding precedent in the *Katie John* cases, which this Court cannot do. Moreover, rejecting Title

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11 *Id*. at § 3111(1).

12 *Id*. at § 3111(3).

13 *Id*. at § 3111(4).

14 *See id*. at § 3114.

VIII jurisdiction on navigable waters in Alaska would require this Court to ignore the United States' longstanding, recognized property interests in navigable waters in Alaska. In addition to federal reserved water rights, Section 4 of the Statehood Act reserved the United States' title to fishing rights held in trust for Alaska Natives.[15] Federal reserved fishing rights, which were never relinquished or disposed of by Congress, are a traditional property "interest" that brings navigable waters under the definition of "public lands" for Title VIII purposes. The United States' and intervenor-plaintiffs' motions for summary judgment should be granted and the State's motion for summary judgment should be denied.

BACKGROUND

I. Early Alaska Fisheries Regulation and the Establishment of the Federal Trust Responsibility over Alaska Native Fishing

Fishing has always been a matter of predominant importance to Alaska Natives.[16] For the Ahtna people, the salmon ("*Luk'ae*") that arrive to the Upper Copper River ("*Tatl'ah Nene*"") and its tributaries each June ("*Luk'ae Na'aaye'* " or "salmon month") provide a critical resource, not only as food source but just as importantly for their

15 Alaska Statehood Act, Pub. L. No. 85-508, § 4, 72 Stat. 339, 339 (1958).

16 *See Organized Village of Kake v. Egan*, 369 U.S. 60, 66 (1962).

cultural, spiritual, and religious identity.[17] For thousands of years, the Ahtna people have set fish traps in the rivers and streams, and built weirs and fences to direct the fish runs. The goal has always been to yield bountiful harvests of salmon that when dried or smoked would last the tribe throughout the winter.[18] Katie John—the renowned Ahtna elder whose eponymous case the State now seeks to overturn—recalled that growing up in the early 1900s her father would yell "*Wey xoo xoo! Wey xoo xoo*!" when the first salmon were sighted each summer, signaling to the entire village that the fish had arrived.[19]

The Ahtna people, and Alaska Natives generally, were mostly free to continue their subsistence fishing undisturbed for the first 40 years after the United States' acquisition of the Alaska territory, but the era of "total neglect" by the federal government was not destined to last.[20] As Western resource colonization accelerated, the

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17 *See* Katie John, *Tatl' Ahwt' Aenn Nenn': The Headwaters People's Country, Narratives of the Upper Ahtna Athabaskans* (1986) (transcribed and edited by James Kari) (translated by Katie John and James Kari).

18 *See* William E. Simeone, Ph.D., *Ahtna, The People and Their History* 26-27, 54, 73 (2018).

19 *Id*. at 44.

20 *See* Ernest Gruening, *The State of Alaska* 33-78 (Random House 1968).

federal government faced the undeniable fact that Alaska was "being overrun by strangers, the game slaughtered and driven away, [and] the streams depleted of fish."[21]

The federal government's response to Alaska Native rights was characteristically unique.[22] Unlike in the lower 48 states, there was never a statewide attempt to isolate Alaska Natives on reservations or define "Indian title" to lands or hunting or fishing rights through treaties or agreements with tribes.[23] However, by the end of the Nineteenth Century, the federal government began to assert its trust responsibility for Alaska Natives,[24] which it exercised through multiple efforts to protect Alaska Native lands and subsistence rights.[25]

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[21] President's Annual Message, 39 Cong. Rec. 10, 18 (Dec. 6, 1904) (President Theodore Roosevelt).

[22] *See Sturgeon v. Frost (Sturgeon I)*, 577 U.S. 424, 438 (2016) (observing that "Alaska is different").

[23] *See Yellen v. Confederated Tribes of the Chehalis Reservation*, 141 S. Ct. 2434, 2438-39 (2021).

[24] *See United States v. Berrigan*, 2 Alaska 442, 450 (D. Alaska 1905) ("The United States has the right, and it is its duty, to protect the property of its Indian wards."); *see also* Jon W. Katchen and Nicholas Ostrovsky, *Strangers in Their Own Land: A Survey of the Status of the Alaska Native People From the Russian Occupation through the Turn of the Twentieth Century*, 39 Alaska L. Rev. 1, 45-46 (2022) (noting that *Berrigan* represented a "seminal case heralding a shift in federal policy" toward Alaska Natives).

[25] *See, e.g.*, Alaska Game Law, 43 Stat. 739, 743-44 (1925) (allowing Alaska Natives to take game and birds out of season if other food is not available); Act of June 7, 1902, 32 Stat. 327 (1902) (exempting Alaska Natives from hunting seasons and bag limits); Organic Act of Alaska, 23 Stat. 24, 26 (1884) (recognizing that "the Indians or other persons in [Alaska] shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them").

The Copper River fishery was a prime example of the federal government's early efforts to protect Alaska Native fishing rights under the trust responsibility. In 1889, commercial fishing operations had opened at the mouth of the Copper River, intercepting migrating salmon bound for spawning grounds hundreds of miles upstream.[26] By 1915, the commercial fishery had expanded upstream into the Copper River, introducing commercial fish traps and a cannery at Abercrombie Rapids.[27] The annual commercial salmon harvests from the Copper River quickly increased, more than doubling between 1915 and 1919.[28] The results were devasting for the Ahtna people; actually starving local residents who could not meet their subsistence needs due to competition from the commercial fishery.[29]

In response, Ahtna elders petitioned the federal government to protect their subsistence fishery and to stop commercial fishing at Abercrombie Rapids.[30] After years of investigations and hearings, the U.S. Department of Commerce took action under its

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26 *See* Simeone, *supra* note 18 at 169.

27 *See id*.

28 *See id*.

29 *See* William E. Simeone and J. Fall, *Patterns and Trends in the Subsistence Salmon Fishery of the Upper Copper River* 16 (2003) ("According to reports from the Copper River Basin, the local population faced starvation because of the depleted runs.").

30 *See* William E. Simeone et al., *Ahtna Knowledge of Long-term Changes in Salmon Runs in the Upper Copper River Drainage, Alaska* (2007) (available at https://www.adfg.alaska.gov/techpap/tp324.pdf).

trust authority to protect Alaska Native fishing. The Department of Commerce adopted temporary regulations eliminating commercial salmon fishing in the Copper River, its tributaries and lakes, and within 500 yards of the Copper River mouth.[31] Subsequent regulations, promulgated by the Department of the Interior under the White Act of 1924, limited commercial fishing areas, times, and gear types in the Copper River, providing some limited protections for the Ahtna people to continue their traditional and customary fishing practices.[32]

In other areas of Alaska, the federal government exercised its trust responsibility for Alaska Natives by establishing Indian reserves, exclusive Alaska Native fisheries, and special exceptions for Alaska Native subsistence uses.[33] In one notable example, the United States prevailed in a suit on behalf of Alaska Natives to enjoin a commercial fishing operation from maintaining fish traps in a reservation established to protect Alaska Native fishing rights.[34] In other instances, the federal government's efforts to protect Alaska Native fishing rights were rebuffed by the courts due to the lack of

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31 *See id*. at 77.

32 *See id*.

33 *See supra* note 25; *see also United States v. Libby, McNeil & Libby*, 107 F. Supp. 697 (D. Alaska 1952) (discussing history of land claims and federal efforts to protect Alaska Native hunting and fishing).

34 *See Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 88 (1918).

congressional direction.[35] Nevertheless, the federal government continued to recognize Alaska Native fishing rights,[36] even though those fishing rights remained uncodified by Congress as statehood loomed.

II. The Statehood Act and Post-Statehood Federal Fishing Regulations

Local control of Alaska's fisheries—specifically the elimination of commercial fish traps, including those used by some Alaska Natives—was a major part of the campaign for statehood.[37] In anticipation of joining the Union, the Alaska Constitution Convention supported, and Alaska voters adopted, a constitutional referendum prohibiting fish traps in all waters of the state.[38] Because statehood would have significant implications for fisheries management,[39] Congress could not ignore the issue

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35 *See Hynes v. Grimes Packing Co.*, 337 U.S. 86, 123 (1949).

36 *See* 57 Interior Dec. 461, 475-76 (1942) ("[I]t must be remembered that the Indians of Alaska, like those of the continental United States, are largely dependent upon the Federal Government for the vindication and protection of their property rights. . . . The fact therefore, that Indian fishing rights have not received adequate protection in the past is not a ground upon which the Federal Government could rely in denying the present existence of these rights.").

37 *See Metlakatla Indian Community*, 362 P.2d at 905 (noting territorial legislature's "[r]egular memorials to Congress recommending complete abolition of fish traps").

38 *See id*. at 906 (describing Ordinance No. 3, "which prohibited the use of fish traps for the taking of salmon for commercial purposes in the coastal waters of the state").

39 *See* Docket 72 at 10; *Geer v. Connecticut*, 161 U.S. 519, 527 (1896), *overruled*, *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (recognizing state ownership of fish and game); *Pollard v. Hagan*, 44 U.S. 212, 228-29 (1845) (recognizing new states acquire title to beds of navigable waters under the equal-footing doctrine).

of Alaska Native fishing rights. During the statehood debates, Congress recognized Alaska Native fishing to be "of vital importance to Indians in Alaska" and noted the Interior Solicitor's opinion that aboriginal fishing rights existed in Alaska.[40]

But instead of resolving Alaska Native fishing rights definitively, Congress opted to preserve the status quo. Section 4 of the Statehood Act specifically reserved to the United States and Alaska Natives property rights, including "fishing rights," that the State disclaimed: "As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title . . . to any lands or other **property (including fishing rights)**, the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives."[41]

The federal government continued to exercise its trust responsibilities over Alaska Natives after statehood, including through regulations protecting Alaska Native subsistence fishing as it had done before statehood. In 1960, the Department of the Interior published notice of proposed "Alaska Indian Fishing" regulations, invoking the federal government's authority "to implement [Section 4 of the Statehood Act] by declaring existing fishing rights of Indians in Alaska and providing for the protection and

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40 *Organized Village of Kake*, 369 U.S. at 66.

41 72 Stat. 339, 339 (emphasis added).

control thereof."[42] The proposed regulations authorized three southeast Alaska Native tribes (Angoon, Kake, and Metlakatla) to operate fish traps;[43] however, most importantly, the proposed regulations contemplated a general, statewide Alaska Native subsistence fishing priority. "In all water of Alaska Indians, Eskimos and Aleuts shall be permitted to take salmon or other species of fish for personal use except in those waters where the State of Alaska has determined that a complete prohibition on all fishing is necessary to prevent the destruction of existing salmon or other fish populations."[44]

After receiving public comments on the proposed regulations and considering subsequently adopted state regulations, the Interior Department published final "Commercial Indian Fishing in Alaska" regulations.[45] The 1960 regulations included the fish trap authorizations,[46] but the Alaska Native subsistence fishing priority was essentially dropped in the final rule.[47] The federal government deferred to state regulations, which, according to the final rule, "substantially provided for continuance of

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42 U.S. Department of the Interior, Bureau of Indian Affairs, Proposed Rule Making, Alaska Indian Fishing Regulations, 25 Fed. Reg. 3079, 3079 (Apr. 9, 1960).

43 *See id*. at 3079-80.

44 *Id*. at 3080.

45 U.S. Department of the Interior, Bureau of Indian Affairs, Rules and Regulations, Commercial Indian Fishing In Alaska, 25 Fed. Reg. 4864 (June 2, 1960).

46 *See id*. at 4864-65.

47 *See id*. at 4866.

[Alaska Native subsistence fishing] rights."[48] Thus, instead of mandating a federal Alaska Native subsistence priority, the 1960 regulations only recognized that "[s]ubsistence or personal use fishing rights granted by Federal law to the Indians of Alaska are preserved in the Statehood Act."[49]

The federal government clearly believed that it had the power and duty to implement its reserved fishing rights that were held in trust for Alaska Natives,[50] including through an Alaska Native subsistence priority.[51] And there is no indication that the State objected to the federal government's proposed Alaska Native subsistence priority. However, the State did object to the authorizations of tribal fish traps, which directly challenged the State's fish trap prohibition. When the State took action to enforce its fish trap laws against the tribes, the tribes sued.[52]

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48 *Id*.

49 *Id*.

50 *See id*. ("The regulations in this part will be modified from time to time as the Secretary of the Interior may deem necessary. The native Indians and Indian villages of Alaska shall be governed by the regulations in this part in the waters where they apply or by the regulations of the State of Alaska, *whichever are least restrictive to their fishing operations*.") (emphasis added).

51 *See* 72 Stat. 339, 339; 25 Fed. Reg. 4864, 4865 ("The regulations in this part implement section 4 of the [Statehood Act] by declaring existing fishing rights of Indians in Alaska and providing for the protection and control thereof.").

52 *See Organized Village of Kake v. Egan,* 174 F. Supp. 500 (D. Alaska 1959), *rev'd and remanded*, 363 U.S. 555 (1960).

The fish trap cases were the first significant test of the new State's legal authority, placing Section 4 of the Statehood Act squarely at issue. Initially, it was not clear which court had jurisdiction to hear the cases because they had been filed in the interim federal District Court during Alaska's transition from a territory to a state before the Alaska state court system had been organized.[53] After Justice Brennan stayed enforcement of the district court's order dismissing the cases, the Supreme Court remanded to the newly formed Alaska Supreme Court.[54]

Although the federal government was not a party to the state court proceedings on remand, the U.S. Department of Justice filed an amicus brief urging the Alaska Supreme Court to rule in favor of the tribes.[55] Relying on Section 4 of the Statehood Act, the federal government argued that "[c]ontrol over Indian fishing was reserved to the United States."[56] "In our view, the correct construction of this Section 4 is that the *federal rights* over and power to control Indian lands, fisheries, and other interests were preserved in status quo."[57] "Congress deliberately intended to keep full control in the Federal Government (i.e., under the protection of the Interior Department) over Indian 'fishing

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53 *See id*.

54 *See Metlakatla Indian Community v. Egan*, 363 U.S. 555, 563 (1960).

55 Erickson Decl., Ex. C at 4.

56 *Id*. at 9.

57 *Id*. at 10 (emphasis added).

rights' (rather than to vest control in the States), whether or not those 'fishing rights' rose to the dignity of compensable rights or were mere privileges accorded by the Federal Government."[58] Thus, it was unequivocally the federal government's position that regulation of Alaska Native fishing remained within the purview of the federal government, and not the State.

> The Secretary [of the Interior] has full authority to do what he considers proper for the protection of Indian fishing rights, **including enlargement of fishing rights beyond those now enjoyed**, subject to his consideration of other pertinent factors, including conservation.[59]

After the Alaska Supreme Court affirmed the dismissal of the tribes' claims that the State fish trap prohibition did not apply—rejecting the federal government's interpretation of Section 4 of the Statehood Act[60]—the tribes appealed to the U.S. Supreme Court. In two companion cases, the Court reversed the Alaska Supreme Court's narrow interpretation of Section 4,[61] but reached different results for the Kake and

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58 *Id*. at 11.

59 *Id*. at 15 (emphasis added); *see also id*. at 22 (Appendix A) (Letter from George A. Abbott, Solicitor, US. Department of the Interior, to J. Lee Rankin, Solicitor General, U.S. Department of Justice (May 4, 1960)) ("Section 4 of the amended Statehood Act preserves in status quo full Federal control over Indian lands and other property, including fishing rights.").

60 *See Metlakatla Indian Community*, 362 P.2d at 927, 932.

61 *See infra* Argument II.A.

Metlakatla claims.[62] In *Organized Village of Kake*, the Court affirmed the dismissal of Kake's claim based on the conclusion that Section 4 "neither authorized the use of fish traps at Kake and Angoon nor empowered the Secretary of the Interior to do so."[63] However, in *Metlakatla Indian Community*, the Court vacated and remanded Metlakatla's claims.[64] The Court reiterated that Section 4 did not authorize the existing federal regulations providing for Metlakatla's fish traps, but recognized that the 1891 Act establishing the Annette Islands Reserve may provide the statutory authority for the federal government to authorize Metlakatla's fish traps and preempt the State's prohibition.[65] Thus, under the *Egan* cases, Section 4 preserved the status quo with respect to Alaska Natives' and the United States' "proprietary" interests in fishing,[66] but it did not completely displace State fishery regulations, at least regulations based on conservation, and did not provide an independent basis for the federal government to implement Alaska Native fishing rights without further congressional action.

Much to the detriment of the Ahtna people, the Court's holding in the *Egan* cases that the federal government lacked statutory authority to fully implement the United

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62 *Compare Organized Village of Kake*, 369 U.S. at 76, *with Metlakatla Indian Community v. Egan*, 369 U.S. 45, 59 (1962).

63 *Organized Village of Kake*, 369 U.S. at 76.

64 *Metlakatla Indian Community*, 369 U.S. at 59.

65 *See id*.

66 *Organized Village of Kake*, 369 U.S. at 69.

States' reserved fishing rights held in trust for Alaska Natives meant that in the absence of congressional action, the State was free to backtrack on the state subsistence protections to which the federal government had deferred in 1960.[67] That was exactly what happened. In 1964, the Alaska Department of Fish and Game ("ADF&G") closed all tributaries of the Copper River and the main channel of the river above the Slana River to subsistence fishing, eliminating traditional Ahtna fishing sites on the Tonsina, Klutina, and Slana Rivers—including the traditional fishery at Batzulnetas.[68]

In 1966, the situation worsened when ADF&G modified the Copper River subsistence fishing closures by moving the opening dates of the upriver subsistence fishery from June 1 to June 15.[69] That new limitation on subsistence fishing triggered fierce protests from Ahtna leaders, who viewed the State's actions as a direct assault on the Ahtna people's traditions of fishing throughout *Luk'ae Na'aaye'* ("salmon month" or June).[70] Ahtna leaders declared that they would fish on June 1, as "they have done for centuries" and that "if necessary, each Indian will catch a fish and turn it into the Department of Fish and Game, demanding to be arrested."[71] Facing such an organized

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67 *See* 25 Fed. Reg. 4864, 4866.

68 *See* Simeone, *supra* note 18 at 206-07.

69 *See id*. at 206.

70 *See id*.

71 *Id*. at 208.

resistance, ADF&G again backtracked and re-opened the subsistence fishery beginning on June 1 each year.[72] While victorious in that instance, the Ahtna people's efforts to protect their traditional and customary fishing practices were not over—and Congress would soon throw another wrinkle into the complex legal framework.

III. ANCSA and ANILCA

Because Section 4 of the Statehood Act preserved Alaska Natives' land claims as they had existed pre-statehood, the State's efforts to fulfill its 102.5-million-acre land entitlement were stymied by controversy and litigation.[73] Congress responded with a comprehensive settlement of Alaska Native claims. ANCSA "extinguished Alaska Natives' claims to land and hunting rights and revoked all but one of Alaska's existing reservations."[74] In exchange, "Congress authorized the transfer of $962.5 million in state and federal funds and approximately 44 million acres of Alaska land to state-chartered private business corporations that were to be formed."[75]

Importantly, although ANCSA declared that "[a]ll *aboriginal* titles, if any, and claims of aboriginal title in Alaska based on use and occupancy . . . including any

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72 *See id*.

73 *See, e.g.*, *Alaska v. Udall*, 420 F.2d 938 (9th Cir. 1969);*United States v. Atlantic Richfield Co*., 435 F. Supp. 1009, 1017 (D. Alaska 1977).

74 *Confederated Tribes of the Chehalis Reservation*, 141 S. Ct. at 2439.

75 *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 524 (1998).

aboriginal hunting and fishing rights that may exist, are hereby extinguished,"[76] Congress did not extinguish its trust responsibility to protect the opportunity for Alaska Natives to continue their subsistence hunting and fishing ways of life. Congress emphasized the importance of taking subsistence uses into consideration when identifying lands that would be made available for Alaska Native Corporation selections, and noted that Alaska "Natives will be able to continue their present subsistence uses regardless of whether the lands are in Federal or state ownership."[77] In a clear statement recognizing the ongoing federal trust responsibilities over Alaska Native hunting and fishing, the House Conference Committee stated that it "expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives."[78]

That expectation was not met. When, in 1978, ADF&G closed the upper Copper River subsistence fishery except for on weekends—a measure designed specifically to enhance urban Alaskans' access to the fishery—four Ahtna elders (the "Copper River Four") were arrested for protest fishing. The federal government, however, stayed on the sidelines, failing to take any action to protect the Ahtna people's subsistence fishing rights, even after ADF&G placed padlocks on Ahtna subsistence fish wheels.

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[76] ANCSA, Pub. L. No. 92-203, § 4, 85 Stat. 688, 690 (1971) (codified at 43 U.S.C. § 1603) (emphasis added).

[77] H.R. Rep. 92-523 (1971), *as reprinted in* 1971 U.S.C.C.A.N. 2193, 2195.

[78] H.R. Rep. 92-746, at 37 (1971) (Conf. Rep.), *as reprinted in* 1971 U.S.C.C.A.N. 2247, 2250.

Members of Congress were well aware of the Copper River "subsistence wars."[79] It was against that background that Congress crafted Title VIII in ANILCA and declared that "the [continued] subsistence opportunity for rural residents engaged in a subsistence way of life" would be protected by federal law. In discussing the judicial enforcement provisions of proposed Title VIII, the Senate Energy Committee used the protection of subsistence fishing specifically on the Copper River as an example of how Congress intended ANILCA to be implemented.[80] Title VIII was a direct response to the federal government's and the State's failures to protect subsistence.[81] It was an exercise of the federal government's trust responsibility and "absolute jurisdiction and control" over Alaska Native fishing, which the federal government had reserved in Section 4 of the Statehood Act as a federal property interest held in trust for Alaska Natives.[82]

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[79] *See* Mark Up of Alaska (d)(2) Lands, Senate Comm. on Energy and Natural Resources, 95th Cong. (Aug. 2, 1978), *reprinted in* Vol. XXX pp. 201-04, ANILCA Legislative History, Alaska Department of Fish and Game (1981) (citing July 12, 1978 TUNDRA TIMES article [Exhibit A] and discussing need for amendment to compel the State to stop regulating fishing on the Copper River in a manner that disadvantaged local subsistence fishermen).

[80] *See* S. Rep. No. 96-413, at 272 (1979) ("The failure to adequately restrict harvest of a particular fish or wildlife population by persons engaged in subsistence or other uses in a particular area (*e.g. salmon on the Copper River*, . . .) pursuant to the criteria set forth in section 804 may threaten such population with immediate and irreparable harm and engender considerable hardship among residents of rural communities which are dependent upon such populations." (emphasis added)).

[81] *See* Robert T. Anderson, *Sovereignty and Subsistence: Native Self-Government and Rights to Hunt, Fish, and Gather After ANCSA*, 33 Alaska L. Rev. 187, 213 (2016).

[82] *See* 16 U.S.C. § 3111(4) (invoking constitutional authority over Native affairs).

ARGUMENT

Ahtna joins the arguments advanced by the United States and the other intervenor-plaintiffs in their oppositions to the State's motion for summary judgment. Under the doctrines of issue preclusion, judicial estoppel, and claim preclusion, the State cannot seek to relitigate the same issues that it has already raised and lost.[83] It is also clear that Congress had the constitutional authority to manage subsistence fisheries in Alaska,[84] and Congress ratified the federal government's interpretation of Title VIII of ANILCA, which extended the federal subsistence priority to navigable waters in Alaska.[85]

Ahtna writes separately to emphasize two points. First, this Court is bound by the Ninth Circuit's decisions in *Katie John* concluding that "public lands" under Title VIII of ANILCA include navigable waters in which the United States has reserved water rights.[86]

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[83] *See* Docket 101 at 13-23 (United States Reply); Kuskokwim River Inter-Tribal Fish Commission's Combined Reply in Support of Motion for Summary Judgment and Opposition to State's Motion for Summary Judgment at Argument I.A-I.C ("KRITFC Reply").

[84] *See* Alaska Federation of Natives' Opposition to Defendants' Motion for Summary Judgment and Reply in Support of Plaintiff's Motion for Summary Judgment at Argument III ("AFN Reply").

[85] *See* KRITFC Reply at Argument II.B.

[86] *See Alaska v. Babbitt (Katie John I)*, 72 F.3d 698, 701 (9th Cir. 1995) (concluding navigable waters are "public lands" by virtue of federal reserved water rights); *John v. United States (Katie John II)*, 247 F.3d 1032, 1033 (9th Cir. 2002) (en banc) (declining to reconsider *Katie John I*).

The Supreme Court's recent decision in *Sturgeon II*[87] did not overrule *Katie John* nor undermine the reasoning of the Ninth Circuit's holding.

Second, in addition to reserved water rights, the United States holds title to reserved "fishing rights" in navigable waters in Alaska pursuant to Section 4 of the Alaska Statehood Act. The United States' title to "fishing rights" has never been disposed of by Congress and is distinct from "aboriginal fishing rights," which were extinguished by ANCSA. Under the common law, "fishing rights" are a property interest—technically a "*profit a prendre*"—which is an estate to which title can be held. Thus, the rural subsistence priority provided under Title VIII of ANILCA applies to the navigable waters in which the United States has reserved "fishing rights," including the Kuskokwim River.

I. The Supreme Court's Decision in *Sturgeon II* Did Not Disturb the Ninth Circuit's *Katie John* Precedent.

It is axiomatic that this Court is bound by the Ninth Circuit's decisions.[88] But it is also true that Ninth Circuit decisions may be called into question by subsequent holdings from the Supreme Court. Thus, the Ninth Circuit has established a standard in which a three-judge panel of that court may "reexamine normally controlling circuit precedent in

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87 *Sturgeon v. Frost (Sturgeon II)*, 139 S. Ct. 1066 (2019).

88 *See Agostini v. Felton*, 521 U.S. 203, 258-59 (1997); *Alaska v. United States*, No. 3:12-cv-00114-SLG, 2016 U.S. Dist. LEXIS at * 16 (May 3, 2016) ("A decision by [a circuit court], not overruled by the United States Supreme Court, is . . . binding on all inferior courts . . . ." (quoting *Allegheny General Hospital v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979))).

the face of an intervening United States Supreme Court decision."[89] Under *Miller v. Gammie*, three-judge panels of the Ninth Circuit are not bound by prior circuit decisions if a subsequent Supreme Court ruling "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable."[90]

Here, the State relies on that Ninth Circuit prudential standard to argue that *Katie John* was "effectively overruled" by *Sturgeon II*.[91] But even if applying the Ninth Circuit's test is appropriate here, this Court should conclude that *Sturgeon II* did not effectively overrule *Katie John* because the two holdings are legally and factually distinct and are not "clearly irreconcilable."[92]

This Court's analysis should begin and end with the explicit direction from the Supreme Court itself. In footnote 2 of the *Sturgeon II* opinion, the Court expressly did not overrule *Katie John*:

> 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,

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89 *Miller v. Gammie*, 335 F.3d 889, 892 (9th Cir. 2003).

90 *Id*. at 900.

91 Docket 72 at 38. *See also* AFN Reply at Background III for an overview of *Katie John* facts and proceedings.

92 *See United States v. Eckford*, 77 F.4th 1228, 1237 (9th Cir. 2023). *See also* Docket 101 at 18-19; AFN Reply at Argument I-II; KRITFC Reply at Argument II.A.; Association of Village Council Presidents et al.'s Combined Reply in Support of Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment at Argument I ("AVCP Reply").

> 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.** *See generally* Brief for State of Alaska as *Amicus Curiae* 29-35 (arguing that this case does not implicate those decisions); Brief of Ahtna, Inc., as *Amicus Curiae* 30-36 (same).[93]

In describing footnote 2, the State implicitly admits that *Sturgeon II* did not "effectively overrule" *Katie John*.[94] The State acknowledges that the "subsistence-fishing provisions were 'not at issue' " in *Sturgeon II* and rationalizes that the Court "simply refrained from addressing the issue."[95] But that is precisely the point. The Court recognized that the subsistence provisions at the core of *Katie John* "are not at issue" in *Sturgeon II*. The Court would not have stated that "we therefore do not disturb the Ninth Circuit's holdings" if it was "effectively overruling" those very holdings.[96]

Under the principle of *stare decisis*, this Court remains bound not only by the holding in *Katie John*, but also the Ninth Circuit's "explications of the governing rules of law"[97] concluding that navigable waters in Alaska are "public lands" by virtue of the

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93 *Sturgeon II*, 139 S. Ct at 1080 n.2 (emphasis added) (case citations omitted).

94 *See* Docket 72 at 39.

95 *Id*.

96 *Sturgeon II*, 139 S. Ct at 1080 n.2 (emphasis added).

97 *See Miller*, 335 F.3d at 900 (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989)).

reserved water rights doctrine.[98] *Katie John* and its reasoning remains the law that this Court must apply to the questions presented in this case.[99]

II. In Addition to Federal Reserved Water Rights, Navigable Waters in Alaska are "Public Lands" Because "Fishing Rights" Held in Trust by the United States and Reserved Under Section 4 of the Statehood Act are a Property "Interest" the Title to which is Held by the United States.

If this Court reaches the merits of the State's arguments that navigable waters in Alaska are not "public lands" under Title VIII of ANILCA, there is a property "interest" in those waters in addition to reserved water rights and the navigational servitude that brings navigable waters, including the Kuskokwim River, within the scope of ANILCA's definition of "public lands."[100] From the moment the State joined the Union, the United States has held title to reserved fishing rights in trust for Alaska Natives.[101] The United States' reserved fishing rights were never relinquished or disposed of by Congress and are a traditional property interest that is distinct from "aboriginal fishing rights," which were extinguished by ANCSA.[102] Because reserved fishing rights are a common law

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98 *Katie John I*, 72 F.3d at 704. Ahtna generally agrees with the proposition that the term "public lands" may be interpreted differently for Title VIII than other parts of ANILCA, *see Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007); however, that issue need not be decided by this Court because *Katie John* controls.

99 *See Miller*, 335 F.3d at 900.

100 *See* AVCP Reply at Argument III.

101 *See* 72 Stat. 339, 339.

102 *See* 43 U.S.C. § 1603.

property interest the title to which is held by the United States, navigable waters in Alaska are "public lands" under Title VIII of ANILCA.

A. The United States Holds Title to Reserved "Fishing Rights" Held in Trust for Alaska Natives in Navigable Waters in Alaska.

Before statehood, the federal government held all "right or title" to public lands and waters in Alaska—including the rights to fish in those waters—subject only to Alaska Natives' "title of occupancy" or "aboriginal title."[103] In Section 4 of the Statehood Act, Congress preserved that "status quo"—reserving the title held by the United States in trust for Alaska Natives and specifically "(including fishing rights)."[104]

Section 4 of the Statehood Act provides:

> As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (**including fishing rights**), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United

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103 *See Alaska Pacific Fisheries*, 248 U.S. at 87 (noting that pre-statehood, Congress had exclusive authority over waters and fishing in the Alaska Territory) ("All were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority."); *Johnson v. McIntosh*, 21 U.S. 543, 592 (1823) ("The absolute ultimate title has been considered as acquired by discovery, subject only the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.").

104 72 Stat. 339, 339.

> States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe. . . .[105]

Pursuant to Section 4, federal rights over and power to control Alaska Native lands and fishing were unaffected by statehood.[106] "Section 4 must be construed in light of the circumstances of its formulation and enactment."[107] In the *Egan* cases, the Court noted that the "fishing-rights provision is unique to Alaska . . . It was included because fishing rights are of vital importance to Indians in Alaska."[108] "Clearly this section does not protect only 'recognized' Indian rights . . . Committee reports demonstrate the aim of

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105 *Id*. (emphasis added). The Alaska Omnibus Act amended and clarified Section 4 "by striking out the words 'all such lands or other property belonging to the United States or which may belong to said natives,' and inserting in lieu thereof the words 'all such lands or other property (including fishing rights), the right or title to which may be held by said natives or his held by the United States in trust for said natives.' " 73 Stat. 141 (1959).

106 Congress was exceedingly clear in reserving "absolute jurisdiction and control" over reserved fishing rights in Alaska. *See* 72 Stat. 339, 339. Thus, it is the State, and not the Plaintiffs, that seeks to "significantly alter the balance between federal and state power" in the absence of supervening congressional direction. *See* Docket 72 at 37 (citing *Sackett v. EPA*, 143 S. Ct. 1322, 1341 (2023)).

107 *Organized Village of Kake*, 369 U.S. at 65.

108 *Id*. at 66.

Congress to preserve the status quo as to a broader class of 'right' . . . We need not here explore the remoter reaches of this protection."[109]

Here, it is significant that Section 4 preserved the "status quo" with respect to two distinct types of property "(including fishing rights)." First, the State disclaimed any interest in property (including fishing rights), "the right or title to which may be held by" Alaska Natives.[110] This type of property interest, held by Alaska Natives, is known as "Indian title" or "aboriginal title."[111] It is a right of occupancy "claimed by a tribe by virtue of its possession and exercise of sovereignty rather than by virtue of letters or patent of any formal conveyance."[112]

Second, in addition to aboriginal title, the State also disclaimed any interest in property (including fishing rights), "the right or title to which" *is* "held by the United States in trust for said natives."[113] This type of property interest, held by the United States, is distinct from aboriginal title.[114] When the United States holds title in trust on

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109 *Metlakatla Indian Community*, 369 U.S. at 58.

110 72 Stat. 339, 339.

111 *See* Restatement of the Law of American Indians § 77 (2022).

112 Felix Cohen, Handbook of Federal Indian Law § 15.04[2] (2012).

113 72 Stat. 339, 339.

114 *Compare* Restatement of the Law of American Indians § 77, *with id*. at § 80 ("Indian tribes are presumptively the beneficial owners of natural resources located on, under, or above their lands, subject to contrary federal law.").

behalf of Indians, it owns "legal title to the land and power to control and manage the affairs of the Indians."[115] The Court has described the United States' trust title as the "naked fee," which is subject to a beneficial interest retained by Indians.[116] The federal trust relationship arises "even though nothing is said expressly," by virtue of the federal government's assumption of control or supervision over Indian rights or property.[117]

By describing the property (including fishing rights) in Section 4 that was reserved by Alaska Natives and the United States, and disclaimed by the State, using terminology that clearly identified two distinct types of property,[118] Congress is presumed to have acted deliberately and with full awareness of the legal implications.[119] Congress preserved the status quo for both Alaska Natives' aboriginal title and the United States' title held in trust for Alaska Natives, retaining "the absolute jurisdiction and control" over

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115 *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 115 (1938).

116 *Id*. at 116.

117 *See United States v. Mitchell*, 463 U.S. 206, 225 (1983); *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980).

118 *See Kungys v. United States*, 485 U.S. 759, 779 (1988) (Scalia, J. plurality opinion) (citing "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant").

119 *See Minerva Surgical, Inc. v. Hologic, Inc*., 141 S. Ct. 2298, 2313 (2021) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent." (quoting *Ryan v. Valencia Gonzales*, 568 U.S. 57, 66 (2013))).

both types of property (including fishing rights) "until disposed of under [Congress's] authority."[120]

Congress has not relinquished or disposed of federal reserved fishing rights held in trust for Alaska Natives. In 1971, ANCSA extinguished "[a]ll *aboriginal titles*, if any, and claims of aboriginal title in Alaska."[121] Undoubtedly, the extinguishment clause was intended to be broad and cover all claims by Alaska Natives based on aboriginal use, including hunting and fishing rights. Thus, ANCSA may be considered a final disposition of Congress's "absolute control" over property interests held by Alaska Natives under aboriginal use or title.[122] However, ANCSA did not relinquish, convey, abandon, or extinguish any federal property (including fishing rights) the title to which is "*held by the United States in trust*."[123] The fishing rights held in trust by the United States were not limited to protecting rights derived solely from aboriginal use,[124] and therefore, were not

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120 72 Stat. 339, 339.

121 43 U.S.C. § 1603(b) (emphasis added).

122 *See* 72 Stat. 339, 339.

123 *Id*. (emphasis added);

124 *See supra* notes 55-59 and accompanying text, noting the federal government's contemporaneous interpretation of Section 4 was that the "Secretary has full authority to do what he considers proper for the protection of Indian fishing rights, including enlargement of fishing rights beyond those now enjoyed." *See Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.").

affected by ANCSA's extinguishment clauses which applied only to "aboriginal" rights and title.[125]

Moreover, Congress's silence in ANCSA regarding fishing rights "held by the United States in trust," cannot be construed as an implicit relinquishment of those federal property interests.[126] Congress would not have inadvertently relinquished federal property rights, and courts do not presume that federal property has been conveyed absent clear statutory language.[127]

Importantly, ANCSA also did not extinguish the federal government's trust responsibility for Alaska Natives, which was the explicit purpose of the federal government's reserved fishing rights in Section 4. In *Adams v. Vance*, a case involving

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125 *See* 43 U.S.C. § 1603. Statutory interpretation "begins with the text" of the statute itself. *Merit Mgmt. Grp. LP v. FTI Consulting, Inc*., 138 S. Ct. 883, 893 (2018).

126 *See Metlakatla Indian Community v. Dunleavy*, 48 F.4th 963, 970 (9th Cir. 2023) ("Statutes that touch upon federal Indian law are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." (internal quotation marks omitted)); Felix Cohen, Handbook of Federal Indian Law § 2.03 (2012) ("The Court also has long applied the [Indian] canons to preserve rights guaranteed by statute or common law.").

127 *See Montana v. United States*, 450 U.S. 544, 552 (1981); *United States v. Steinmetz*, 973 F.2d 212, 222 (3d Cir. 1992) ("The United States cannot abandon its own property except by explicit acts."); *United States v. Maritime Exchange Museum,* 303 F. Supp. 3d 546, 550 (E.D. Mich. 2018) (concluding that to extinguish federal government's property interests, "[n]ot only must the purported act of extinguishment be authorized by Congress, it must be an explicit action"); *see also Herrara v. Wyoming*, 139 S. Ct. 1686, 1697 (2019) (overruling *Ward v. Race Horse*, 163 U.S. 504 (1896) and reiterating holding from *Minnesota v. Mille Lacs Band of Chippewa Indians*, 562 U.S. 172 (1999) that Indian treaty rights are not impliedly terminated by statehood ("Statehood is irrelevant" to whether Congress intended to reserve Indian rights)).

Alaska Natives' subsistence whaling rights and the federal government's trust obligations, the D.C. Circuit noted that ANCSA "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."[128] The federal government has continued to recognize its trust responsibility for Alaska Natives post-ANCSA,[129] including the trust obligation to protect Alaska Native "subsistence resources."[130] Congress clearly expected the federal government to continue protecting Alaska Native subsistence fishing rights—Congress's final words on ANCSA directed the Secretary of the Interior "to take any action necessary to protect the subsistence needs of the Natives."[131]

Because Section 4 of the Statehood Act explicitly reserved federal fishing rights held in trust for Alaska Natives, and ANCSA did not extinguish those federal property rights or the federal government's trust responsibility to Alaska Natives, the United States continues to hold title to fishing rights in trust for Alaska Natives.

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128 *Adams v. Vance*, 570 F.2d 950, 953 n.3 (D.C. Cir. 1977).

129 *See Aguilar v. United States*, 474 F. Supp. 840, 846 (D. Alaska 1979).

130 *See People of Togiak v. United States*, 470 F. Supp. 423, 428 (D.D.C. 1979) (noting the federal government's "various responsibilities impose fiduciary duties upon the United States, including the duties so to regulate as to protect the subsistence resources of Indian communities and to preserve such communities as distinct cultural entities against interference by the States").

131 H.R. Rep. 92-746, at 37 (1971) (Conf. Rep.), *as reprinted in* 1971 U.S.C.C.A.N. 2247, 2250.

B. Title VIII of ANILCA Implements the United States' Reserved Fishing Rights Held in Trust for Alaska Natives.

Section 4 of the Statehood Act reserved federal fishing rights in Alaska waters in order for Congress to fulfill its trust responsibilities to Alaska Natives, and in particular Alaska Native fishing. Congress provided the necessary statutory authority to implement those reserved fishing rights under Title VIII of ANILCA. This Court should conclude that the United States' title to fishing rights is an "interest" in navigable waters that brings those waters under ANILCA's definition of "public lands."

The federal rural subsistence priority in Title VIII of ANILCA applies to "public lands" in Alaska.[132] ANILCA's definitions provide,

> (1) The term "land" means land, *waters, and interests therein*.
>
> (2) The term "Federal land" means lands the *title* to which is in the United States after the date of enactment of this Act.
>
> (3) The term "public lands" means land situated in Alaska which, after the date of enactment of this Act, are Federal lands . . . .[133]

Courts have struggled to reconcile Congress's clear intent to extend Title VIII"s rural subsistence priority to fishing in navigable waters (where "[m]ost subsistence

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132 16 U.S.C. § 3114.

133 16 U.S.C. § 3102 (emphasis added).

fishing" occurs),[134] with the fact that the United States does not hold "*title*" to navigable waters "in the ordinary sense."[135] Thus, the crux of the issue was identifying a federal "interest" in navigable waters the title to which is held by the United States. Section 4 of the Statehood Act provides an additional answer. The Supreme Court recognized that Section 4 reserved to the United States "proprietary" interests that the State disclaimed, including "fishing rights."[136] Reserved fishing rights are not "title" to the water itself but rather a property interest in the water where fishing occurs.

Under the common law, a "fishery" or "fishing right" has long been recognized as a traditional property interest, or "incorporable hereditament"—an intangible interest in the water that could be inherited through title, like an estate.[137] "[B]y the common law of England, a man may have a proper and several interest, as well in a water or river, as in a fishery . . . If one grants to another *aquam suam*, the fishery in it shall pass . . . for a man

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134 *Native Village of Quinhagak*, 35 F.3d at 393.

135 *See Sturgeon II*, 139 S. Ct. at 1078; *Katie John I*, 72 F.3d at 703; *John v. United States*, No. A90-0484-cv-HRH, 1994 U.S. Dist. LEXIS 12785 (D. Alaska Mar. 30, 1994); *Totemoff v. State*, 905 P.2d 954, 965 (Alaska 1995).

136 *Organized Village of Kake*, 369 U.S. at 69.

137 *See* Black's Law Dictionary (9th ed. 2009) ("fishery") ("A right or liberty of taking fish. Fishery was an incorporeal hereditament under old English law.").

may have an estate freehold in a fishery."[138] Thus, one who owns a "fishing right" has "title" to that distinct property interest and may pass title to their heirs or assigns.[139]

In more modern terms, a "fishing right" is technically a "*piscary profit a prendre*"—the right to take fish—and is widely recognized by American courts as a

[138] *The Case of the Royal Fishery of Banne*, 80 Eng. Rep. 540 (1611); *see also* Stuart A. Moore, The History and Law of Fisheries 75 (1908)

[139] *See Cobb v. Davenport*, 1867 N.J. Sup. Ct. LEXIS 17 at * 34 ("[T]he right of fishing being a *profit a prendre* in another's soil, as distinguished from an easement, cannot be claimed by custom, but must be prescribed for in a *que* estate." (citing *Waters v. Lilley*, 1826 Mass. LEXIS 73)).

distinct property interest.[140] Notably, the concept of fishing rights as a "*profit a prendre*" has also been used to describe reserved tribal fishing rights.[141]

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[140] *See, e.g.*, *Damon v. Hawaii*, 194 U.S. 154, 158 (1904) ("The right claimed is a right within certain metes and bounds to set apart one species of fish to the owner's sole use . . . A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or *profit a prendre* as such."); *Alexander Dawson, Inc. v. Fling*, 396 P.2d 599, 601 (Colo. 1964) ("An owner who grants to another the right to fish in waters located on his lands conveys a *profit a prendre*."); *Bosworth v. Nelson*, 152 S.E. 575, 578 (Ga. 1930) ("The right reserved by the grantors to fish in the waters covering the lands conveyed by this deed . . . was one to *profits a prendre* . . . Such a right is considered an interest or estate in the land itself . . ."); *Payne v. Sheets*, 55 A. 656, 658, 660 (Vt. 1903) ("The right to take fish . . . is so far a subject of distinct property or ownership that it may be granted, and will pass by a general grant of the land itself unless expressly reserved; or it may be granted as a separate and distinct property from the freehold of the land; or the land may be granted while the grantor reserves the fishing to himself . . . it is a right of profit in the land of another, and therefore an interest in the land itself." (quoting *Beckman v. Kreamer*, 1867 Ill. LEXIS 96)); *Bingham v. Salene*, 14 P. 523, 525-26 (Or. 1887) ("Here there is a grant of a sole and exclusive right and privilege . . . to shoot, take, and kill such game on the lakes and waters upon the lands of the grantors . . . This right, then to take something out of the soil, or from the land of another, which includes shooting, hunting, and fishing, is a *profit a prendre*; [and] is so far of the character of an estate or interest in the land itself that, if granted to one in gross, it is treated as an estate." (quoting Washburn on Easements, 9) (internal quotation marks omitted)); *Mountain Springs Ass'n v. Wilson*, 196 A.2d 270, 275 (N.J. Super. Ct. Ch. Div. 1963) ("[T]he right to fish is a *profit a prendre* held as an appurtenance to the land conveyed."); *Bass Lake Co. v. Hollenbeck*, 1896 Ohio Misc. LEXIS 377 at * 9 (Ohio Cir. Ct.) ("A free fishery arises when one who thus owns in severalty, conveys an interest in the property, or in the right to fish, to another. . . . A free fishery is a profit in the land, a right to take a part of its products, to-wit: the fish, and therefore is termed a '*profit a prendre*,' and as such it is inheritable and assignable as a fee, although the owner of the free fishery may own no part of the land itself.").

The State argues that there is no federal interest in the Kuskokwim River because the State acquired title to the beds of navigable waters at statehood[142] and the "running waters cannot be owned."[143] But those premises are not inconsistent with the reservation of a federal interest in navigable waters, including a reserved federal fishing right. It is now settled that Congress may reserve submerged lands or other federal property interests[144] by expressing its intent to retain title at the time of statehood.[145] Here, Congress expressly reserved title to property (including fishing rights) held in trust by the United States in order to retain "absolute jurisdiction and control" over Alaska Native

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141 *See New York ex. rel. Kennedy v. Becker*, 241 U.S. 556 (1916); *Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir. 1983), *cert denied* 464 U.S. 805 (describing scope of treaty-recognized non-reservation fishing rights as similar to a *profit a prendre*); *Menominee Indian Tribe v. Thompson*, 943 F .Supp. 999 (W.D. Wis. 1996); *Mille Lacs Band of Chippewa Indians v. Minnesota Dep't of Natural Resources*, 861 F. Supp. 784, 834 (D. Minn. 1994) ("Conveyance of hunting and fishing rights cannot transfer ownership of wildlife because the state owns fish and game. The conveyance of hunting and fishing rights by property owners merely conveys a right to enter the land for that purpose. Such rights are normally classified as a *profit a prendre*."); *State v. Davis*, 534 N.W.2d 70 (Wis. 1995) ("The tribal right to hunt and fish is considered a *profit a prendre* and an interest in real property."); *Van Camp v. Menominee Enterprises, Inc*., 228 N.W.2d 664 (Wis. 1975).

142 *See* Docket 72 at 35.

143 *Id*. (citing *Sturgeon II*, 139 S. Ct. at 1078).

144 *See United States v. Gratiot*, 39 U.S. 526, 538 (1840).

145 *See Alaska v. United States*, 545 U.S. 75, 100 (2005); *Idaho v. United States*, 533 U.S. 262, 274 (2001).

fishing[146]—the reservation would not have been necessary but for the State's automatic acquisition of the river beds.[147] Thus, the federal reserved fishing right is an "interest" that brings navigable waters throughout Alaska, and not just those within conservation system units, under Title VIII's definition of "public lands."[148]

Finally, Congress's decision to provide a rural subsistence preference instead of an Alaska Native subsistence preference does not undermine the fact that the United States holds title to fishing rights in Alaska, which are "interests" in navigable waters. Congress's power to control federal property, including property interests, "is without limitation."[149] Congress may rationally have concluded that providing a rural subsistence preference adequately protects Alaska Native fishing, thus fulfilling its trust responsibility, while also providing additional opportunity for non-Native subsistence users. It is for Congress to decide what rules should be adopted governing federal property.[150]

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146 72 Stat. 339, 339.

147 *See United States v. Alaska*, 521 U.S. 1, 5 (1997) ("Ownership of submerged lands—which carries with it the power to control navigation, fishing, and other public uses of water—is an essential attribute of sovereignty.").

148 *See Katie John II*, 247 F.3d at 1034 (Tallman, J. concurring) ("[W]e do not believe Congress intended the reserved water rights doctrine to limit the scope of ANILCA's subsistence priority.").

149 *Gratiot*, 39 U.S. at 537; *accord United States v. Gardner*, 107 F.3d 1314, 1318 (9th Cir. 1997).

150 *See Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

CONCLUSION

For the foregoing reasons, this Court should grant the United States' and intervenor-plaintiffs' motions for summary judgment and deny the State's motion for summary judgment. *Sturgeon II* did "not disturb" the Ninth Circuit's holdings in *Katie John*, which remain binding on this Court. If this Court reaches the merits of the State's arguments regarding whether navigable waters are "public lands," this Court should conclude that navigable waters in Alaska are public lands because the "fishing rights" held in trust by the United States and reserved in Section 4 of the Statehood Act are a property interest the title to which is held by the United States.

Respectfully submitted.

DATED: November 3, 2023

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CERTIFICATE OF COMPLIANCE WITH DOCKET 47

I certify that pursuant to this Court's Order Regarding Ahtna's Motion to Intervene (Docket 47 at 7) my co-counsel and I have met and conferred with counsel for the other Intervenor-Plaintiffs regarding the parties' positions with respect to the State's Motion for Summary Judgment. The diverse positions taken by each of the Intervenor-Plaintiffs, including their respective background sections focusing on different aspects of the history and context of this case, were determined to be appropriate for separate filings; however, my co-counsel and I continued to coordinate closely with the other Intervenor-Plaintiffs throughout the drafting process to avoid unnecessary duplication of facts and arguments in the final memoranda.

s/ Andrew Erickson

_____

Andrew Erickson

CERTIFICATE OF COMPLIANCE WITH LOCAL CIVIL RULE 7.4

Pursuant to Local Civil Rule 7.4(a)(3), I hereby certify compliance with the page/word limitation of Local Civil Rule 7.4(a)(1) because this memorandum contains 9,967 words, excluding the parts exempted by Local Civil Rule 7.4(a)(4). This memorandum has been prepared in a proportionately spaced typeface, Times New Roman 13-point font, and I obtained the word count using Microsoft Word.

s/ Andrew Erickson

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Andrew Erickson

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2023, a copy of the foregoing was served by electronic means on all counsel of record by the Court's CM/ECF system.

s/ Andrew Erickson

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Andrew Erickson