No. 13-562

IN THE

Supreme Court of the United States

STATE OF ALASKA,

Petitioner,

v.

SALLY JEWELL, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the State is precluded from challenging the application of the federal reserved water rights doctrine to navigable waters to effectuate the rural subsistence priority provided for by the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3101 et seq., when the State previously litigated and lost the issue twice in the Ninth Circuit, chose not to petition for certiorari from the second of those decisions a decade ago, and forfeited the issue by declining to raise it in the courts below in this present round of litigation.

2. Whether the fact-bound application by the district court and the Ninth Circuit of the federal reserved water rights doctrine to various Alaska waters in order to fulfill the rural subsistence priority warrants review by this Court.

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INTRODUCTION

At root, the Petition challenges whether ANILCA's rural subsistence priority may be applied to navigable waters in which the federal government has reserved water rights. However, the State is clearly precluded from attempting to relitigate that issue. It litigated and lost the issue twice previously in the Ninth Circuit, with the court of appeals holding each time that ANILCA's rural subsistence priority applies to those navigable waters in which the United States has reserved rights. *John v. United States*, 247 F.3d 1032 (9th Cir. 2001) ("*Katie John II*") (initial en banc); *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995) ("*Katie John I*").

The en banc decision in *Katie John II* included a "Special Statement" by Judge Rymer expressing the concern that "Alaska has had two bites at the same apple," *id.* at 1050 (Rymer, J.), because it was "raising precisely the same issue on this appeal as we heard and determined on the last one," *id.* at 1051, a view echoed by other members of the initial en banc panel. *See id.* at 1033-34 (Reinhardt, J., concurring). The decision also included a vigorous debate between three judges on the one hand who were of the view that the subsistence priority should extend "to *all* navigable waters within the State of Alaska," *id.* at 1034-44 (Tallman, J., concurring in the judgment) (emphasis in original), and three judges on the other who argued that ANILCA does not contain a clear statement of Congress's intent to divest Alaska of authority over its navigable waters, and thus that the federal government can effectuate the subsistence priority in none of them. *Id.* at 1044-50 (Kozinski, J., dissenting). The latter view did not prevail, and the State chose not to seek this Court's review of the en banc court of appeals' decision. At that point, pursu-

ant to well-established doctrines of repose and finality, the applicability of the subsistence priority to navigable waters in Alaska in which the federal government has reserved water rights became a matter decided, and is not properly susceptible to challenge in the instant proceedings. Congress, of course, retains authority to adopt a new approach, but it has chosen not to act in the intervening 13 years.

The State did not urge either of the lower courts to revisit application of the reserved rights framework. It merely challenged how that framework applied to particular bodies of water. It is only before this Court that the State now seeks a third bite at the apple. Because it is precluded as a matter of law from doing so, and because it has forfeited such a challenge in any event, the petition plainly should be denied.

The only issue not waived or precluded is the painstaking, fact-bound application of the reserved rights doctrine to various bodies of water in Alaska. The Secretaries assembled a 10,500 page administrative record to document their conclusions and rationale after a multi-year rule-making process that included intense congressional scrutiny. Their conclusions were affirmed by the district court and the Ninth Circuit – in opinions written by two experienced Alaskan judges possessing intimate familiarity with the subject matter. Perhaps recognizing that this is not normally the stuff of certiorari, the State dresses up its Petition with claims that the federal government's effectuation of the rural subsistence priority amounts to a massive intrusion into Alaska's sovereign rights. But these claims are pure hyperbole. While the Petition nowhere mentions this fact, the federal regulations at issue provide that state fish and game laws and regulations shall operate in all areas to which the priority extends – except in the limited circum-

stances of an express determination to preempt state fishing regulations. 36 C.F.R. § 242.25(b), (l). The State cites only *one* instance of such preemption in the subsistence fishing context in the 14 years since the federal regulations became effective – and then only to the extent of a three-day closure of non-subsistence fishing in a federal wildlife refuge. Moreover, Alaska retains the power to change its laws to unify subsistence management in the State on all lands and waters in Alaska under the cooperative federalism scheme the State urged Congress to embody in ANILCA and that Congress embraced.

The argument of the State and its *amici* that this case possesses national implications likewise falls flat. The definition of "public lands" in ANILCA at issue here applies only "in Alaska," 16 U.S.C. § 3102(3); *see Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 546-56 (1987), and the Secretaries utilized that definition only to identify the waters in which the United States holds an interest for purposes of this unique statute.

In sum, the Petition should be denied.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The State's Refusal to Honor Native Subsistence Rights

While the Petition asserts that Alaskans sought statehood because of concerns over a federal management scheme that was diverting much of the benefit of Alaska's fisheries to non-Alaskan interests, it leaves out the second part of the story, in which the new State then took numerous actions to deprive Alaska Natives of their time-honored rights to utilize those fisheries for subsistence purposes. State regu-

latory restrictions on Native subsistence harvests proliferated after the responsibility for managing fish and game was transferred from the federal government to the State. Regulatory bodies strongly influenced by the views of urban sport and commercial interests imposed these restrictions. D. Case & D. Voluck, ALASKA NATIVES AND AMERICAN LAWS 294-95 (3rd Ed. 2012) (Case & Voluck).

Congress, however, had conditioned statehood on Alaska's agreement not to interfere with Alaska Native aboriginal hunting and fishing rights. 1958 Statehood Act, Pub. L. No. 85-508, § 4, 72 Stat. 339, 339 (1958) (providing the "State and its people do agree . . . [and] forever disclaim all right and title . . . to any lands or other property (including fishing rights)" belonging to Alaska Natives, authority over which "shall be and remain under the absolute jurisdiction and control of the United States"); *see generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.07[3][b][i] (Lexis/Nexis 2012). Recognizing that subsistence hunting and fishing are essential to the continued physical, economic, traditional and cultural existence of Alaska Natives, Congress had long provided statutory protections for those uses of fish and wildlife. Act of June 7, 1902, 32 Stat. 327, *amended by* Act of May 11, 1908, 35 Stat. 102 (Alaska's first game act); Alaska Game Commission Act of 1925, §10, 43 Stat. 739, 744. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra*, at § 4.07[3][c][i] (detailing pre-ANILCA history); Case & Voluck, *supra*, at 270-71. The Secretary of the Interior and his Solicitor had likewise long acknowledged the unextinguished aboriginal hunting and fishing rights of Alaska Natives. *See, e.g.,* Aboriginal Fishing Rights in Alaska, 57 Interior Dec. 461, 462-63, 1942 WL 4531 (1942).

Section 6(b) of the Statehood Act granted the State the right to select 102.55 million acres for its own use from "vacant, unappropriated, and unreserved" public lands. 72 Stat. at 340. As the new State began to select lands, Native tribes and individuals protested to the Secretary of the Interior that their aboriginal claims blanketed the state, and on January 17, 1969, Secretary Stewart Udall imposed a freeze on further patenting or approval of applications for public lands in Alaska pending the settlement of Native claims. Pub. Land Order No. 4582, 34 Fed. Reg. 1025 (1969); *see Alaska v. Udall*, 420 F.2d 938 (9th Cir. 1969).

B. The Alaska Native Claims Settlement Act and the Alaska National Interest Lands Conservation Act

In 1971, Congress enacted the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1601, et seq. Section 4(b) explicitly extinguished hunting and fishing rights based on aboriginal title: "All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy . . . including any aboriginal hunting and fishing rights that may exist, are hereby extinguished." *Id.* § 1603(b). Congress did so, however, only after making clear its expectation that "both the Secretary and the State [would] take any action necessary to protect the subsistence needs of the Natives." H. Conf. Rep. No. 92-746, at 37 (1971), *reprinted in* 1971 U.S.C.C.A.N. 2247, 2250.

Neither the Secretary of the Interior nor the State complied with those expectations.

> [S]ome nine years later it was compellingly clear that neither the state nor the Secretary were likely to protect subsistence in the manner Congress had contemplated. Neither the secretary nor the state had withdrawn any lands for sub-

> sistence uses, let alone established any sort of hunting and fishing preferences to limit nonresident access to resources needed by [local] subsistence users.

Case & Voluck, *supra*, at 292-93. Urban and sporting interests continued to dominate State management of fish and wildlife resources and state agencies were simply unwilling to protect Native subsistence uses. *Id.* at 294-95.

By the late 1970's, it was accordingly obvious that in order for the federal government to be faithful to its policy of dealing honorably with Alaska's indigenous peoples, Congress would have to devise a new means of protecting Native customary and traditional hunting, fishing, and gathering in Alaska. Former Secretary of the Interior Stewart Udall had written that "there can be no subsistence program worth the paper it is written on unless the Congress uses its power under the U.S. constitution and grants such rights to the Alaska Natives." *Id.* at 295. In keeping with this view, Congress passed Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§ 3111-3126.

Early drafts of what became Title VIII of ANILCA contained a Native subsistence preference on federal public lands in Alaska, and allowed for State management of the priority. 126 Cong. Rec. 29,278–79 (1980) (written statement of Rep. Udall). However, Congress recast the priority as one for "rural" residents in order to alleviate the State's concern (unfounded under well-established principles of federal law) that a Native-only priority would violate the Equal Protection Clause and would therefore preclude the State from effectively managing these resources. H.R. Rep. No. 96-97, part 1 at 541-44 (1979). *See* Case & Voluck, *supra*, at 297. The statutory pri-

ority accordingly reflected a compromise between the United States, the State, and the Alaska Native community to protect customary and traditional uses of fish and game under federal law.

Congress prefaced Title VIII with a declaration that "the continuation of the opportunity for subsistence uses by rural residents of Alaska . . . is essential to Native physical, economic, traditional, and cultural existence. . . ." 16 U.S.C. § 3111(1).[1] Congress further found that it was necessary "to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents." *Id.* § 3111(4).

In terms of its operative sections, Title VIII 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." *Id.* § 3114 (emphasis added). The statute directs the Secretary of the Interior to establish an administrative structure necessary for the implementation of the statute. *Id.* § 3115(a)–(c). Importantly, the State of Alaska can preclude federal management by enacting "laws of general applicability which are consistent with, and which provide for the definition, preference, and par-

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[1] "Subsistence uses" are defined as "the customary and traditional uses by rural Alaska residents of wild, renewable resources" for a variety of purposes. *Id.* § 3113. "Subsistence fishing and hunting provide a large share of the food consumed in rural Alaska. The state's rural residents harvest about 22,000 tons of wild foods each year — an average of 375 pounds per person. Fish makes up about 60 percent of this harvest. Nowhere else in the United States is there such a heavy reliance upon fish and game." U.S. Fish & Wildlife Service, *Alaska Subsistence Fisheries*, *available at* http://www.fws.gov/fisheries/fishhabitats/ak_subsistence_fisheries.html.

ticipation specified in, sections 3113, 3114, and 3115 of this title." *Id.* § 3115(d). The Secretary is to monitor the State's performance in this regard, and report periodically to appropriate congressional committees. *Id.* § 3116. ANILCA authorizes any person or organization aggrieved by the failure of the state or federal government to enforce the subsistence priority set forth in section 3114 to file a civil action for injunctive relief in federal district court. *Id.* § 3117.

The working assumption of all parties was that the State of Alaska would take full advantage of the cooperative federalism scheme that was a central component of Title VIII by enacting and implementing laws consistent with Title VIII's rural priority, thereby facilitating a unified management regime on federal, state, and private lands. Indeed, Alaska was so committed to the proposed management program that it had enacted the necessary statutes in 1978, *while Congress was still working on the final version of ANILCA*. *See* Case & Voluck, *supra*, at 298-99. "In 1982, the Secretary of the Interior certified that the state legislative program was in compliance with ANILCA." *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 313-14 (9th Cir. 1988).

The cooperative federalism regime operated for eight years. At that point the State was disabled from continuing its role due to the decision of the Alaska Supreme Court in *McDowell v. State*, 785 P.2d 1 (Alaska 1989), which held that the rural subsistence priority violated the Alaska Constitution. Since that decision, the State has chosen not to amend its laws to allow for unified state management of subsistence uses. *See* Case & Voluck, *supra*, at 303.

C. The Failure of State Management and the Issuance of Federal Regulations

Even before the *McDowell* decision, problems arose with the State's management of the subsistence priority. Under the State's auspices, many traditional upriver subsistence fisheries along the Copper River had been shut down shortly after statehood in favor of downriver commercial fisheries. *See John v. Alaska*, No. A85-698-CV, Order on Cross Motions for Summary Judgment at 2 (D. Alaska Jan. 19, 1990). These upriver closures were the genesis for the *Katie John* litigation, which commenced in 1985 after the Alaska Board of Fisheries refused a request from Katie John and Doris Charles that the fishery at the site of historic Native Village of Batzulnetas be opened. *Id.* at 2-3. Katie John and Doris Charles were respected Alaska Native elders whose families had resided and fished at Batzulnetas for hundreds of years until the State closed the fishery in 1964. They and others with a custom and tradition of fishing at the site brought an action against the State pursuant to § 807 of ANILCA to enforce Title VIII's priority for subsistence uses. *Id.* The federal district court issued an injunction opening the fishery in 1989, and then entered judgment contemplating State rulemaking to comply with the subsistence priority. *Id.* at 6-8. Because of the intervening decision in *McDowell*, however, the State could not engage in such rulemaking, and the federal government reassumed its statutory duty to enforce the priority on federal lands and waters. *See* 16 U.S.C. § 3115(d). The federal government issued permanent regulations implementing ANILCA in 1992. *See* 57 Fed. Reg. 22940 (1992).

II. COURSE OF PROCEEDINGS

Although the federal government's regulations were supposed to implement ANILCA's subsistence priori-

ty, they excluded nearly all navigable waters (and hence nearly all waters where fishing occurs) from their ambit. *See* 57 Fed. Reg. 22940, 22942 (1992) (noting that the rule "generally excludes navigable waters" from federal subsistence management); 55 Fed. Reg. 27114, 27115 (1990) (same). *See also* App. 189a. The one percent of navigable waters over which federal jurisdiction was assumed were those over pre-statehood withdrawals of submerged lands retained by the United States. 57 Fed. Reg. at 22941.

Not surprisingly, litigation ensued. The lead case was *Katie John, Doris Charles and Mentasta Village Council v. United States*, No. A90-484-CV (HRH) (D. Alaska), in which the State was joined as a party. Shortly thereafter, the State filed *Alaska v. Babbitt*, No. A92-264-CV (HRH) (D. Alaska), which alleged that the federal government was without any authority at all to adopt a management program on public lands, including navigable waters. These cases were consolidated. *See John v. United States*, 1994 WL 487830 (D. Alaska March 30, 1994).

In the course of the federal assumption of management on federal lands, the Katie John plaintiffs and others filed a rule-making petition with the Secretaries of Interior and Agriculture asking that the federal government promulgate a regulation defining all navigable waters as public lands. *See* Advance Notice of Proposed Rulemaking, 61 Fed. Reg. 15014, 15015 (1996). After these petitions were filed, the United States modified its position and concluded that waters subject to the federal reserved rights doctrine are public lands as defined in Title VIII of ANILCA. App. 189a.

In 1994, the district court granted partial summary judgment to the Native plaintiffs and against the State. The court first upheld the authority of the fed-

eral government to implement by regulation a subsistence management program on "public lands" under Title VIII. It then rejected the government's position that public lands should be defined by reference to the reserved water rights doctrine. Instead, it held that the federal defendants were required by virtue of the navigational servitude to extend the program to protect subsistence fisheries in all navigable waters in Alaska. Both the federal government and the State appealed. *John v. United States*, 1994 WL 487830 at *12-*14.

The Ninth Circuit rejected the district court's conclusion that ANILCA's subsistence priority extends to all navigable waters. Instead, it agreed with the federal government's position that "public lands" under the statute should be defined with reference to federally reserved waters. The court concluded that the Secretaries have responsibility for identifying those waters and applying the subsistence priority to them. *Katie John I*, 72 F.3d 698, 703-04 (9th Cir. 1995). This Court denied certiorari. 517 U.S. 1187 (1996).

The district court then entered an order modifying its previous March 1994 decision so as to require the government to apply the ANILCA priority only to waters in which the United States has reserved water rights. *John v. Alaska*, Nos. A90-484-CV and A92-0264-CV, Civil Order (Feb. 7, 1996). On December 17, 1997, the agencies published proposed regulations identifying federally reserved waters in Alaska. 62 Fed. Reg. 66216 (1997). These regulations became effective October 1, 1999. App. 188a.

The district court then entered final judgment dismissing all claims in *Katie John I* in January 2000. *John v. United States*, Nos. A90-0484-CV and A92-0264-CV, Order of Dismissal (Jan. 6, 2000) ("The court now readopts all of its rulings on the merits

heretofore made. Those rulings shall be deemed final for all purposes and as to all parties."). *See* App. 14a-15a. The final judgment in the long-running litigation thus made the State's loss on whether the "public lands" definition in Title VIII encompassed federal reserved waters ripe for review.

"The State of Alaska appealed this final judgment, arguing that the 'clear statement doctrine' precluded the determination that any navigable waters in Alaska could constitute 'public lands.'" App. 15a. It was granted initial *en banc* review by the Ninth Circuit. *Id.* After extensive briefing on the merits, "[a] majority of the en banc court . . . determined that the judgment rendered by the prior panel [in *Katie John I*], and adopted by the district court, should not be disturbed or altered by the en banc court." *Katie John II,* 247 F.3d at 1033. As discussed above, concurring and dissenting opinions engaged in a vigorous debate as to whether the priority should in fact apply to all navigable waters, to no navigable waters, or to some navigable waters under the reserved water rights doctrine. The State prepared to seek certiorari from this Court, but then-Governor Knowles ultimately elected to "stop a losing legal strategy that threaten[ed] to make a permanent divide among Alaskans." Bill McAllister, *Knowles Drops Katie John Case,* JUNEAU EMPIRE Aug. 27, 2001, *available at* http://juneauempire.com/stories/082701/sta_knowles.shtml. Accordingly, the judgment in the litigation became final and thereby entitled to the claim and issue preclusion that attaches to all final judgments.

In 2005, the State initiated a challenge to the regulations' identification of the waterways subject to federal subsistence priority. The State conceded that federally reserved waters existed, and where deline-

ated would constitute "public lands" subject to the federal subsistence priority. *See* Alaska's Complaint ¶¶ 1, 35, Resp. App. 1a-2a, 11a. The thrust of the State's complaint was that the 1999 rule included too many waters under the standard finalized in the previous litigation. *Id.* at ¶¶ 1-2, Resp. App. 1a-3a. Separately, the Katie John plaintiffs (one of the Respondents here) filed suit alleging that the scope of covered waters was too narrow. *See* App. 16a. The court of appeals took the middle course. It upheld the federal regulations as to which waters were reserved. App. 29a-64a. It also upheld the rulemaking process utilized by the Secretaries to identify the reserved waters in the face of the State's argument that the United States should have commenced a judicial adjudication of all waters in Alaska.[2] *Id.* at 23a-26a.

REASONS FOR DENYING THE PETITION

I. THE STATE IS PRECLUDED FROM ARGUING THAT ANILCA DOES NOT APPLY TO NAVIGABLE WATERS UNDER THE RESERVED WATER RIGHTS DOCTRINE.

The State asks this Court to decide "[w]hether the Ninth Circuit properly held . . . that the federal re-

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[2] The State does not explicitly raise this process issue in its Petition, and to the extent it does argue the point, Pet. 21-22, it has no merit. In general, agencies have great discretion as to the method by which they carry out their assigned functions. *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("The views expressed in *Chenery*[] . . . make plain that . . . the choice between rulemaking and adjudication lies in the first instance within the [agency]'s discretion."). This general authority is reinforced by section 814 of ANILCA, 16 U.S.C. § 3124, which authorizes the Secretaries to promulgate regulations to implement the subsistence use priority. There is no contrary statutory direction.

served water rights doctrine authorizes" the federal Rule, and "[w]hether the Ninth Circuit properly proceeded on the premise . . . that ANILCA [can] be interpreted to federalize navigable waters at all given Congress's silence on the Act's application to navigable waters." Pet. i. In raising these questions, the State challenges not the decisions below, but the prior Ninth Circuit decisions in *Katie John I* and *II*, where the court of appeals 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." *Katie John I*, 72 F.3d at 703-04; *Katie John II*, 247 F.3d at 1033. The State cannot now be heard to challenge those final rulings. Its opportunity to seek review of *Katie John I* and *II* is long past, and it is precluded from challenging those holdings under the doctrines of both issue preclusion and claim preclusion.[3]

As detailed above, the State has twice litigated the issue of ANILCA's applicability to navigable waters under the reserved water rights doctrine in the Ninth Circuit, and has twice lost. In *Katie John II*, members of the en banc panel who saw the merits very differently concurred in the concern that "Alaska has had two bites at the same apple" because it was "raising precisely the same issue on this appeal as we heard and determined on the last one." *Katie John II*, 247 F.3d at 1050-51 (Special Statement of Rymer, J.); 1033-34 (Reinhardt, J., concurring). The State chose not to seek certiorari from *Katie John II*, and at

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[3] As discussed below, preclusion does not apply to the first question presented to the extent that the State is merely challenging the Secretaries' fact-bound application of the reserved water rights doctrine to particular bodies of water in Alaska. *See infra* at 24-27.

that point the court of appeals' holdings became final and binding with respect to the State.[4]

It is a "general and well-established . . . maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401-02 (1981). "By precluding parties from contesting matters that they have had a full and fair opportunity to litigate, [the doctrines of issue and claim preclusion] protect against the expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibility of inconsistent decisions." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (internal citations and quotation omitted). Indeed, these preclusion doctrines are "demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination." *San Remo Hotel L.P. v. City & Cnty of S.F., Cal.*, 545 U.S. 323, 337 (2005). Here, these "rule[s] of fundamental and substantial justice, of public policy and private peace," *Federated Dep't Stores*, 452 U.S. at 401 (*quoting Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917)) (internal quotation marks omitted), mean quite simply that the State's serial efforts to litigate the question of ANILCA's applicability to navigable waters under

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[4] The Alaska State Legislature and other non-parties to the case filed an untimely petition for leave to intervene and petition for certiorari, which was opposed by the State, *see Alaska State Legislature v. United States*, No. 01M26, Opposition of State of Alaska (Nov. 2, 2001), Resp. App. 22a, and rejected by this Court. *Alaska State Legislature v. United States*, 534 U.S. 1038 (2001).

the reserved water rights doctrine must come to an end.

The doctrine of "issue preclusion bars successive litigation of an issue of fact or law that is actually litigated and determined by a valid and final judgment, and is essential to the judgment." *Bobby v. Bies*, 556 U.S. 825, 834 (2009) (internal marks and citations omitted); *see Taylor*, 553 U.S. at 892 ("Issue preclusion . . . bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." (internal citations and quotation marks omitted)). All of these factors are easily satisfied here.

The same issues that the State seeks to raise in its petition—"[w]hether the Ninth Circuit properly held . . . that the federal reserved water rights doctrine authorizes" the federal government's rule, and "[w]hether the Ninth Circuit properly proceeded on the premise . . . that ANILCA could be interpreted to federalize navigable waters at all"—were actually litigated in *Katie John I* and *II*. In *Katie John I*, the plaintiffs "argued that public lands include virtually all navigable waters, . . . [t]he state contended that public lands exclude navigable waters," and the federal government argued "that public lands include those navigable waters in which the federal government has an interest under the reserved water rights doctrine." *Katie John I*, 72 F.3d at 701; *see also id.* at 700 ("the parties dispute whether navigable waters fall within the statutory definition of public lands and are thus subject to federal management to implement ANILCA's subsistence priority"). The Ninth Circuit decided those issues, "hold[ing] that the subsistence priority applies to navigable waters in which the United States has reserved water rights." *Id.* Nor

can there be any dispute that this holding was essential to the judgment—these were the only issues decided on appeal.

"[P]recisely the same issue[s]" were again litigated and necessarily resolved in *Katie John II*; "[i]ndeed, Alaska's brief frame[d] the issue as whether the prior panel got it right." *Katie John II*, 247 F.3d at 1051 (Special Statement of Rymer, J.). Again, the Ninth Circuit held that ANILCA applies to navigable waters under the reserved water rights doctrine, "determin[ing] that the judgment rendered by the prior panel, and adopted by the district court, should not be disturbed or altered by the en banc court." 247 F.3d at 1033.

There is no doubt, moreover, that the Ninth Circuit rendered a final judgment on these issues. After *Katie John I* decided the issues on interlocutory review, the Ninth Circuit "declined to take the panel decision en banc, and the Supreme Court denied certiorari." *Katie John II*, 247 F.3d at 1050 (Special Statement of Rymer, J.). The "decision was, in every sense that matters, a final judgment." *Id.* In 2000, the district court on remand "issued an order 'readopting all of its rulings on the merits,' deeming those rulings final 'for all purposes and to all parties,' and dismissing the case." App. 14a-15a. The State appealed, and *Katie John II* was decided by the Ninth Circuit en banc, giving the State a second "bite[] at the same apple." *Katie John II*, 247 F.3d at 1050 (Special Statement of Rymer, J.). The State chose not to seek certiorari from that decision. McAllister, *supra* at 12. At that point, there could be no question that the issues the State seeks to raise here had been litigated to a final judgment.

Furthermore, this is not an instance where "controlling facts or legal principles have changed signifi-

cantly" since the prior judgment, nor where "'unmixed questions of law' in successive actions involv[e] substantially unrelated claims." *Montana v. United States*, 440 U.S. 147, 155, 162 (1979). Most of the cases that the State relies on for its navigable waters arguments were decided prior to *Katie John II*, and the State makes no assertion that the subsequent decisions broke new legal ground. There is likewise no significant difference in the factual setting, and the claims can hardly be called "unrelated." Indeed, the State raises the exact same claims in its petition for certiorari that it made in *Katie John I* and *II*: that Department of the Interior rules implementing ANILCA are invalid because ANILCA does not apply to navigable waters under the reserved water rights doctrine. Issue preclusion therefore bars the State from relitigating those issues here. *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 171 (1984) ("[W]hen the claims in two separate actions between the same parties are the same or are closely related . . . it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the same issue in what is essentially the same controversy, *even if the issue is regarded as one of 'law.'*") (emphasis added).

In addition, claim preclusion applies against the State. The doctrine of claim preclusion provides that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *see also Taylor*, 553 U.S. at 892 ("Under the doctrine of claim preclusion, a final judgment forecloses successive litigation of the very same claim."). As discussed above, *Katie John I* and *II* unquestionably rendered a final judgment on the merits of the issues that the State

attempts to raise here. The same parties were involved in these previous suits as in this action: the Department of the Interior, the Native Alaska Katie John plaintiffs, the Alaska Federation of Natives, and the State of Alaska. Furthermore, the State raised the same claim in those actions as it raises here. *See supra* at 16-17; *N.R.D.C. v. EPA*, 513 F.3d 257, 261 (D.C. Cir. 2008) (holding that claim preclusion barred a challenge to an EPA rule when an earlier suit challenged a related prior rule on the same legal grounds and the two suits "share[d] the same nucleus of facts"). The judicial system's compelling interest in finality accordingly precludes the State from seeking a third bite at the apple, nearly 20 years after the decision in *Katie John I*. *See Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 154 (2009) ("Almost a quarter-century after the . . . Orders were entered, the time to prune them is over.").[5]

At a minimum, the presence of substantial claim and issue preclusion concerns makes this a particularly poor vehicle for deciding whether ANILCA applies to navigable waters, and whether the reserved water rights doctrine is the proper method for applying Title VIII of ANILCA. It is far more likely than not that the Court will never reach the questions presented by the State and there is no reason for the Court to divert scarce resources to resolving questions of claim and issue preclusion that will have no

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[5] Respondents did not argue below that the questions presented in the State's petition for certiorari are precluded because the State did not raise these issues in the courts below. Pet. 33 n.8; *see infra* at 21 n.6. Respondents are therefore properly raising claim and issue preclusion at the first opportunity. *See* 18 Wright & Miller, *Federal Practice and Procedure* § 4405 (2013).

significance beyond the specific dispute between the parties in this particular case.

II. THE STATE FORFEITED ITS ARGUMENTS THAT ANILCA DOES NOT APPLY TO NAVIGABLE WATERS UNDER THE RESERVED WATER RIGHTS DOCTRINE.

Furthermore, certiorari should be denied because the State made no attempt to raise or preserve its challenges to the applicability of ANILCA to navigable waters before the district court or the Ninth Circuit. The Court therefore has "no occasion to consider" the issue. *United States v. Jones*, 132 S. Ct. 945, 954 (2012) (argument not raised below is forfeited).

As the courts below explained, in the instant proceedings the State did not question the underlying premise established by *Katie John I* and *II* – that the rural subsistence priority extends to navigable waters in which the United States has reserved water rights. Rather, it challenged the Secretaries' determinations as having "fail[ed] to properly apply the reserved water rights doctrine," App. 115a, "by designating as 'public lands' . . . waterways outside the boundaries of federal lands, conservation system units, or national forests," waterways that the State contended were "marine water," and "land selected for but not yet conveyed to Alaska or a Native corporation," App. 16a-17a. Hence, the district court explained that

> [a]t an April 24, 2006, status conference, it was agreed by all of the parties . . . that two overarching issues [are] raised by these cases: (1) Did the Secretaries employ a proper administrative procedural process for determining the existence of reserved water rights within navigable waters for purposes of ANILCA? . . . [and] (2) What specific water bodies are "public lands" for purposes

> of ANILCA as a result of the Ninth Circuit Court's determination that public lands include navigable waters within which the Government has reserved water rights?

App. 117a. None of the State's filings indicates *any* intent or desire to relitigate the question whether ANILCA applies to navigable waters under the reserved water rights doctrine. *See* Alaska's Complaint ¶ 35, Resp. App. 11a (conceding that ANILCA applies to "some specific navigable waters . . . determined on a case-by-case basis to have a Federal reserved right"). To the contrary, as the State itself admits in its petition, it "did not challenge *Katie John I* below." Pet. 33 n.8.

In sum, in the present round of litigation the State has raised its challenges to the underlying holding of *Katie John I* and *II* for the very first time in its petition for certiorari. "Because this argument was not raised below, it is waived." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002); *see also Jones*, 132 S.Ct. at 954.[6]

III. THE STATE IS ESTOPPED FROM ASSERTING A CONFLICT WITH *TOTEMOFF*, AND NO CONFLICT EXISTS IN ANY EVENT.

What has been said above disposes of the State's argument that the petition should be granted to resolve a purported conflict between *Katie John I* and *II*

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[6] It is no answer to suggest, as the Petition does, that the State did not challenge the *Katie John* holdings below because the court of appeals was bound by them. Pet. 33 n.8. The State is a sophisticated litigant, and it would have been rudimentary for it to have preserved the challenge had it wished to do so. In any event and as detailed above, the place and time to challenge the ruling on the reserved waters issues was in this Court after the *Katie John II* decision.

and the Alaska Supreme Court's decision in *Totemoff v. State*, 905 P.2d 954 (Alaska 1995). Because the State is estopped from challenging ANILCA's applicability to navigable waters under the reserved water rights doctrine, the purported conflict is of no moment because it relates only to that issue.

In any event, no conflict presently exists. As the State notes, the *Totemoff* court concluded in part that ANILCA's subsistence priority does not extend to navigable waters. Pet. 7. That conclusion reflected the federal regulations in force at that time. *See Totemoff*, 905 P.2d at 967 (asserting that the regulations "generally excluded navigable waters from the definition of public lands" and emphasizing that the contrary position, adopted by the *Katie John I* court, had "not been formalized in any regulation"). After *Katie John I and Totemoff* were decided, the Secretaries amended the rules to expressly identify those navigable waters subject to ANILCA's subsistence preference on "public lands." *See* Proposed Rules, Subsistence Management Regulations for Public Lands in Alaska, 62 Fed. Reg. 66216 (1997).

The final regulations are controlling law in the Alaska state courts as well as in the federal system. *See Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes."). No conflict will arise between State and federal law unless, as the State implicitly suggests, the Alaska Supreme Court were to invalidate federal regulations that were drafted in conformity with the decisions of the federal court of appeals. The Court should not grant certiorari on such a dubious assumption.

Moreover, the issue is hardly a burning one even in Alaska. In the nearly 15 years since the 1999 Rules took effect, the Alaska courts have not applied

Totemoff in a manner conflicting with those Rules. As discussed in greater detail below, Title VIII and the federal rules do not generally displace state regulations governing sport, commercial or subsistence fishing, and to date there have been few instances in which inconsistent federal and state regulations have resulted in any legal conflict. *See, e.g.*, *Totemoff*, 905 P.2d at 960 ("There is no direct conflict between Alaska's anti-spotlighting regulation and any federal statute or regulation." (internal citation omitted)). As a result, the majority of the post-*Totemoff* cases cited by Petitioner did not turn on the "public lands" issue; rather, those cases relied on the lack of an actual conflict between the State and federal regulations at issue, and this is true for the only case cited by the State that followed the promulgation of the Rules. *Charles v. State*, 232 P.3d 739, 741, 744 (Alaska Ct. App. 2010) (holding ANILCA's subsistence preference did not displace the State's harvest limit of four male deer per season). *See also Jones v. State*, 936 P.2d 1263, 1267 (Alaska Ct. App. 1997) (noting the defendant "cite[d] no provision of federal law that conflicts with the State's establishment of the deer hunting season" and holding that "ANILCA does not bar the State from exercising its traditional authority to regulate the method and means of hunting, even on federal lands within the state, so long as the State regulations do not conflict with federal law.").[7]

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[7] Petitioner cites only two cases that discussed *Totemoff* in relation to an ANILCA "public lands" issue. Both of these cases were decided before the 1999 Rules took effect. *See James v. State*, 950 P.2d 1130 (Alaska 1995); *Miyasato v. State*, No. A-5486, 1996 WL 33686451 at *1 (Alaska Ct. App. Mar 13, 1996). In *James*, the defendant claimed ANILCA applied because the United States held title to certain of Alaska's tidal waters, a claim that was rejected by the Court. 950 P.2d at 1132, 1139. The Court noted that the defendant did not rely on the reserved

In the event such a conflict were to arise, it could be litigated and would be subject to review in this Court. This situation has not presented itself in nearly 15 years of dual management. There is simply no problem with the management of fisheries as a result of the *Totemoff* case, and the State's alleged split in authority provides no basis for granting the petition.

IV. THE ONLY ISSUE THAT IS NOT WAIVED OR PRECLUDED IS THE FACT-BOUND APPLICATION OF THE RESERVED RIGHTS DOCTRINE TO PARTICULAR BODIES OF WATER, WHICH IS NOT A PROPER BASIS FOR CERTIORARI.

Shorn of the issue whether ANILCA applies to navigable waters under the reserved water rights doctrine, the State's Petition challenges only the fact-bound application – first by the Secretaries, on the basis of a 10,500 page administrative record, and then by the district court and the court of appeals on review of that record – of that doctrine to various bodies of water under the unique circumstances of this case. The hyperbolic claims of the State and its amici notwithstanding, this is decidedly not the stuff of certiorari.

Judge Kleinfeld's opinion for the unanimous panel painstakingly lays out the black letter law regarding the reserved water rights doctrine (as well as the black letter law regarding the equal footing doctrine and the navigational servitude), including the requirement "that the federal reserved water rights

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rights doctrine, so this decision does not implicate the State's purported conflict. *Id.* at 1132 n.5. The only Alaska case following *Totemoff* that arguably implicates the alleged conflict is the unpublished Alaska Court of Appeals decision in *Miyasato,* which was rendered three years before the 1999 rules took effect.

doctrine is limited to the quantity of water necessary to fulfill the primary purposes of the reservation." App. 21a. The opinion then evaluates the Secretaries' application of the doctrine to the unique circumstances of this case, where the Secretaries utilized the doctrine – in accordance with *Katie John I* and *II* – to "identify[] the geographic scope of ANILCA's rural subsistence priority management when it comes to water." *Id.* at 22a-23a. That the court of appeals forthrightly acknowledged the challenges involved in this exercise, *id.*, only underscores its seriousness of purpose in assessing the Secretaries' fact-bound determinations.

The court upheld the Secretaries' determinations that the United States has reserved rights in certain bodies of water, including (1) those waters appurtenant to federally reserved lands, App. 29a-34a (noting that "[n]o court has ever held that the waters on which the United States may exercise its reserved water rights are limited to the water within the borders of a given federal reservation"); and (2) specific bodies of water, including Sixmile Lake, seven Juneau-area streams, and waters on inholdings. App. 35a-38a. In addition, and in contrast to the Petition's unsupported assertions that the court of appeals held the priority to apply to marine waters, Pet. 16, the court affirmed the Secretaries' determination for delineating the boundary between inland and marine waters, a boundary that is "necessary because, as the Secretaries recognize, federal reserved water rights have never been held to exist in marine waters." App. 39a. Finally, the court affirmed the Secretaries' determinations, challenged by the Katie John plaintiffs, that under the reserved rights doctrine the subsistence priority does *not* apply to waters upstream

and downstream from federal reservations. App. 40a-57a.

The federal agencies applied the federal reserved rights doctrine in a painstaking manner, consistent with a long line of administrative and judicial precedent. Petitioners acknowledge, as they must, that the federal reserved rights doctrine has long been applied to navigable waters throughout the west. Pet. 18-20.[8] The federal agencies developing the public lands rule considered the existence of federal reserved water rights in this legal context and determined that Congress intended to reserve waters adjacent to federal areas.

The administrative record contains the specific findings underlying the Secretaries' legal determinations. Included in the Administrative Record is the *Final Katie John Issue Paper and Recommendations* (June 15, 1995), AR at 1684–1742. That document identifies each class of "conservation system units" under ANILCA and the legislation relied upon to support the determination that federal reserved rights exist. The *Final Issue Paper* identifies reserved waters for each of the conservation system units, including National Parks, AR 1720-22; U.S. Fish and Wildlife Service Reservations, AR 1694, 1724-26; Bureau of Land Management Reservations,

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[8] This Court recognized reserved water rights for a variety of similar federal reservations, including a National Recreation Area, two National Wildlife Refuges, and a National Forest, in *Arizona v. California,* 373 U.S. 546, 601 (1963), *overruled on other grounds*, *California v. United States*, 438 U.S. 645 (1978). *See also* Alaska Department of Natural Resources, *Fact Sheet: Federal Reserved Water Rights* (September 1992) (acknowledging potential federal reserved rights on nearly 178 million acres of land in Alaska, which may apply to instream and out of stream uses). AR 5251.

AR 1728; National Forests, AR 1696, 1730-38; and Wild and Scenic Rivers, AR 1740-42. It is not surprising that the Secretaries in the Final Rule chose to rely on the definitive Interior Solicitor's Opinion as providing the legal support for the determination of the reserved rights for the Interior conservation system units. And with respect to the Forest Service, this Court found that reserved water rights exist in National Forests in *United States v. New Mexico*, 438 U.S. 696, 707-08 (1978) ("The legislative debates surrounding the Organic Administration Act of 1897 and its predecessor bills demonstrate that Congress intended national forests to be reserved for only two purposes – '[t]o conserve the water flows, and to furnish a continuous supply of timber for the people.'").

Finally, Congress has implicitly (if not explicitly) approved the federal agencies' regulations. After the use of the reserved rights doctrine was announced in 1996 in an Advance Notice of Proposed Rulemaking, 61 Fed. Reg. 15014, Congress imposed a series of moratoria on the effective date of the proposed rules to give the State time and incentive to amend its laws and thus regain authority to manage subsistence uses on all lands and waters in Alaska. *See, e.g.*, Pub. L. No. 104-208, 110 Stat 3009, 3009-222 § 317. After the State's final refusal in late 1999, Congress authorized the rules to take effect. *See* 16 U.S.C. § 3102 (historical note).

While the State and its amici struggle mightily to do so, they cannot transform these determinations into something other than what they truly represent – the careful, balanced, fact-bound application of the reserved water rights doctrine by the court of appeals (in affirmance of a similarly serious evaluation by the district court) to the unique circumstances of

this case. No basis for certiorari lies in such determinations.

V. THE STATE'S FEDERALISM ARGUMENTS ARE EXAGGERATED.

Given that the only issue the State may properly present to this Court is highly fact-bound in nature and implicates no conflict in decisional authority, the petition goes to great lengths to present that issue as "extraordinarily important," Pet. 13, and as involving a massive intrusion into the State's sovereignty. *Id.* These claims are dramatically exaggerated, and present no basis for further review.

One would search the Petition in vain for mention of these important facts: the 1999 Rules provide that state fish and game laws and regulations shall operate in all areas to which the federal priority extends, except in the limited circumstances of an express determination to preempt state fishing regulations. 36 C.F.R. § 242.25(l) ("Rural residents, nonrural residents, and nonresidents not specifically prohibited by Federal regulations from fishing, hunting, or trapping on public lands in an area may fish, hunt, or trap on public lands in accordance with the appropriate State regulations."). Indeed, the Environmental Assessment that accompanied the rulemaking noted that, "[a]s a starting point, the proposed Federal regulations pertaining to the seasons, harvest limits, methods, and means (Subpart D of the Federal subsistence regulations) are based on the existing State regulations with minor modifications." U.S. Department of the Interior, *Environmental Assessment, Modification of the Federal Subsistence Fisheries Management Program,* ch. II-2 (June 2, 1997), http://www.doi.gov/subsistence/library/ea/upload/EA ModFSFMP.PDF. The State cites but one instance when federal preemption has occurred in the nearly

15 years since the Rules took effect. Pet. 32. That "conflict," if it can be called that, resulted in a three-day closure of non-subsistence fisheries within a national wildlife refuge. The State and the U.S. Fish and Wildlife Service had agreed on closures and limitations on subsistence uses for nine other days in both state and federal waters during a season that encompassed June and July 2011. *See* Alice M. Bailey & Holly C. Carroll, Alaska Dep't of Fish & Game, Fishery Management Report No. 12-36, *Activities of the Kuskokwim River Salmon Management Working Group, 2011*, at 6-7, 11-12 (Oct. 2012), *available at* http://www.adfg.alaska.gov/fedaidpdfs/FMR12-36.pdf

This does not remotely reflect a "federal takeover" of the State's resource management. Pet. 13. State regulations governing commercial, sport, and subsistence activities continue to apply throughout Alaska's navigable waters. 36 C.F.R. § 242.25(l). Less than two percent of the take of fish and game resources in Alaska is for subsistence uses, so the effect of the federally guaranteed priority on State management is minimal.[9] This is hardly the federal usurpation of State authority that the State makes it out to be.

The United States Senate Energy and Natural Resources Committee recently held a Full Committee Hearing "[t]o examine wildlife management authority

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[9] "Approximately 40 million pounds of fish and wildlife are harvested annually by subsistence users, of which fish account for 60 percent. While critically important to subsistence users, the statewide subsistence salmon harvest is slightly more than 1 percent (8.3 million pounds) of the entire salmon harvest." Environmental Assessment, *supra*, ch. III-1. "In the 1990s, commercial fisheries took about 97% of the statewide harvest of fish and wildlife; subsistence harvesters took 2%, and sport hunters and fishers took 1%." http://www.adfg.alaska.gov/index.cfm?adfg=subsistence.faqs#QA9.

within the State of Alaska under the Alaska National Interest Lands Act and the Alaska Native Claims Settlement Act" (Sept. 19, 2013), at which the Deputy Commissioner of the Alaska Department of Fish and Game testified. In his extensive spoken and written testimony, the Deputy Commissioner complained about the failure of the federal government to shoot more wolves on federal land, but made only fleeting references to fisheries management issues. S. Hrg. 113-118 at 15-21 (Sept. 19, 2013). If there were a crisis of federalism as portrayed in the Petition, it surely would have merited at least a mention in what Senator Lisa Murkowski believed to be the first full committee hearing on Title VIII of ANILCA since Congress enacted it in 1980. *Id.* at 2.

The argument of the State and its *amici* that this case possesses national implications likewise falls flat. The definition of "public lands" in ANILCA that is at issue applies only "in Alaska," 16 U.S.C. § 3102(3), and the Secretaries utilized that definition only to identify the waters in which the United States holds an interest for purposes of this unique statute. In *Amoco Production Co. v. Village of Gambell, Alaska*, (the only case interpreting this definition, and one not cited by the State), this Court rejected a similar argument that ANILCA's use of "the phrase 'public lands,' in and of itself, has a precise meaning, without reference to a definitional section or its context in a statute." 480 U.S. 531, 548 n.15 (1987). The definition of the term "public lands" must be considered within the context of a broad conservation statute (ANILCA), in which Congress explicitly provided that it is "the intent and purpose of this Act . . . to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so." 16 U.S.C. § 3101(c). The Secretaries applied the public lands

definition in a sensible way that gives effect to Congress's purpose in enacting ANILCA. Indeed, the State's contrary interpretation would completely defeat the statutory purpose of protecting the right to take "*fish* . . . for nonwasteful subsistence uses," *id.* § 3114, by eliminating from the statute's coverage almost all waters in the state in which subsistence fishing occurs.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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