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No. 14-1209

IN THE

Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF ON THE MERITS OF *AMICI CURIAE* DOYON, LIMITED, NANA REGIONAL CORPORATION, CALISTA CORPORATION, AHTNA, INCORPORATED, THE ALEUT CORPORATION, BRISTOL BAY NATIVE CORPORATION, GANA-A' YOO, LIMITED, AND TIHTEET' AII, INCORPORATED SEEKING REVERSAL

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I. Interest of the *Amici Curiae*.[1]

A. The *amici*'s ANCSA land rights are significantly and uniquely affected by the Ninth Circuit's decision.

This brief is submitted on behalf of *amici curiae* Alaska Native Regional Corporations Doyon, Limited, NANA Regional Corporation, Calista Corporation, Ahtna, Incorporated, The Aleut Corporation, and Bristol Bay Native Corporation, and Alaska Native Village Corporations Gana-A' Yoo, Limited, and Tihteet' Aii, Incorporated. The *amici curiae* were created pursuant to the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§1601–1629h and represent the interests of more than 60,000 Alaska Native shareholders, many of whom have limited incomes and live in remote locations in rural Alaska.

This case has extraordinary importance to the Alaska Native community. The *amici curiae* alone own over 12 million acres of lands granted to them under ANCSA that lie within the boundaries of Alaska conservation system units ("CSUs") created or expanded by the Alaska National Interest Lands Conservation Act ("ANILCA"), Pub. L. 96-487, 94 Stat. 2371 (1980).[2] These lands

1. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their shareholders, or their counsel made a monetary contribution to its preparation or submission.

2. Section 102(4) of ANILCA, 16 U.S.C. §3102(4), defines "conservation system unit" as "…any unit in Alaska of the National

constitute an area about 50% larger than Maryland. All ANCSA Corporations together own approximately 18 million acres within ANILCA CSUs, an area larger than West Virginia. (See Exhibit 1.)

ANILCA §103(c), 16 U.S.C. §3103(c), applies to these Native Corporation lands, and while the dispute that gave rise to this litigation is whether §3103(c) allows the National Park Service to enforce its regulations on navigable waters, the Ninth Circuit interpreted the statute in a way that would allow the National Park Service (the "NPS") and other conservation agencies to enforce their regulations on Native Corporation lands and waters within CSUs. However, Congress specifically enacted §3103(c) in order to *exempt* Native Corporation lands from CSU regulations. The Native Corporation *amici* thus are directly impacted by the Ninth Circuit's decision.

Passed in 1971, ANCSA granted approximately 44 million acres of federal land to Alaska Native Corporations in exchange for the complete settlement of the aboriginal land claims of Alaska Natives. The economic development of these lands by Native Corporations was a core purpose underlying this historic settlement, and the Native Corporations made many of their land selections during the 1970s based on development potential.

Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument including existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such units, and any such unit established, designated, or expanded hereafter."

Then, in 1980, Congress passed ANILCA, which placed about 105 million acres of federal land into new or expanded CSUs. One result of this legislation was that approximately 18 million acres of Native Corporation land, as well as some State and private land, became surrounded by CSU lands. Congress included §3103(c) in ANILCA in order to clarify that the location of Native Corporation lands within CSU boundaries would not "restrict use of such lands by the owning Corporations," 125 Cong. Rec. 9905 (1979), or make them "subject to *any* of the laws or regulations that pertain to U.S. public lands" or "controlled by *any* of the public land laws of the United States," *id.* at 11158 (emphasis added).

Congress granted ANCSA lands a complete exemption from CSU regulations in §3103(c), because it very well understood that such regulation would be incompatible with the economic development activities that it contemplated in ANCSA for the benefit of Alaska Natives. Its common sense conclusion was, Native lands cannot be managed as part of a CSU, and still be available for the economic development of ANCSA lands that Congress foresaw as essential to ANCSA. Such an exemption still leaves these lands subject to an extensive body of generally applicable regulations.

Whether or not the NPS likes what Congress did, and whether or not the NPS now wishes to control Native lands in CSUs notwithstanding §3103(c), the fact remains, Congress unambiguously exempted Native land from all CSU regulations 35 years ago, and that remains the law of the land. It is up to Congress, not the NPS, to change that law.

There are already a number of important ANCSA land developments on CSUs, and in reliance on the language of §3103(c) and the assurances of Congress, several of the Native Corporation *amici* are pursuing other resource development projects on lands within CSU boundaries, including mining and oil and gas projects on which millions of dollars have already been spent. Now, however, the Ninth Circuit has issued an opinion that would cast significant doubt on these and future projects by turning §3103(c) on its head and exposing these Native Corporation lands to regulations that could make meaningful economic development impossible. The Ninth Circuit's decision creates two classes of ANCSA lands not contemplated in either ANCSA or ANILCA—those lands within CSUs, and those lands that are not.

The Ninth Circuit's decision, if allowed to stand, would substantially alter and diminish the Congressional settlement of Native land rights under ANCSA and harm the interests of the Native Corporation *amici*.

B. Shortly after grant of *certiorari*, the National Park Service issued proposed regulations that cite the Ninth Circuit's decision as rulemaking authority.

This is no theoretical concern for the *amici*. In its brief in opposition to *certiorari*, at 20-21, the United States aggressively reassured this Court that the Ninth Circuit holding would not broadly authorize regulation of Native owned lands within the boundaries of CSUs, that to do so would require a dramatic shift in policy "under the application of stringent criteria that the NPS has almost never invoked," and that the Native *amici* simply

"misunderstand[] both the NPS's regulations and the decision below...."

However, notwithstanding these statements, the National Park Service has just published draft oil and gas regulations doing exactly what the United States claimed it would not do. See 80 Fed. Reg. 65571 (Oct. 26, 2015). The preamble to these regulations asserts jurisdiction and control over oil and gas development on ANCSA lands within CSUs, citing the Ninth Circuit's decision as authority:

> We also note that because these regulations are generally applicable to NPS units nationwide and to nonfederal interests in those units, they are not "applicable solely to public lands within [units established under ANILCA]," and thus are not affected by section 103(c) of ANILCA. *See Sturgeon v. Masica,* 768 F.3d 1066, 1077–78 (9th Cir. 2014).

Id. at 65573. These regulations are thus proposed to apply for the first time to large tracts of Native lands in National Parks in Alaska.[3] Just as Congress foresaw in enacting

3. According to the NPS website, these regulations would now apply to 534 operations nationwide, 455 of which (85%) are located in just four units of the NPS system in Tennessee, Kentucky, Ohio and Texas (Lake Meredith, Cuyahoga Valley, Big South Fork, and Big Thicket). http://www.nature.nps.gov/geology/oil_and_gas/9b_index.cfm (then "12 units of the National Park System").

The NPS says many of these operations occur on the mineral estate where the NPS owns the surface estate, and that many were "grandfathered"—i.e., oil and gas operations were inherited by the NPS when it obtained its interests in the lands, and that NPS regulations are necessary to control access issues.

§3103(c), these regulations can have a significant negative impact on the achievement of the economic development purposes of ANCSA.

As but one example, Doyon owns approximately 206,000 acres (320 square miles) of ANCSA lands in the Kandik Basin area of the Yukon-Charley Rivers National Preserve (the CSU at issue in this case) that Doyon selected because of its high potential for the discovery of oil and gas. Doyon selected and was conveyed this land *before* enactment of ANILCA. Under the new regulations and the Ninth Circuit's decision, Doyon's development of these lands will now be subject to Park Service permission.

The NPS has done *precisely* what the Native Corporation *amici* have been concerned with in this case—it has adopted so-called "national" regulations under the cover of the Ninth Circuit ruling that erase the protections of §3103(c) and in effect manage these large areas of ANCSA lands as National Park lands. The door is now open to wholesale regulatory abridgement of the statutory protections contained in §3103(c) in reliance upon the Ninth Circuit's ruling, simply by adopting "national" regulations. The *amici* fully expect this will

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None of these operations are currently located in Alaska, and none of the cited conditions apply to ANCSA lands locate within the boundaries of National Parks in Alaska (generally, ANCSA Corporations own both the surface and subsurface estates, and access in CSUs is subject to special provisions in ANILCA). It is unclear what, if any, expertise the NPS possesses to administer such a program in Alaska's unique arctic and sub-arctic environment, how the NPS would give effect to the land development purposes of ANCSA, or what the NPS's motives are in acting so quickly, in light of its emphatic assurances to this Court just three months ago.

not be the only such assertion of CSU regulations over ANCSA lands in reliance on the Ninth Circuit holding, if it is not reversed.

Congress has unambiguously acted to exempt ANCSA lands from such NPS regulations and that action should be honored. Congress acted, because its common sense appraisal of the likely impact of such NPS regulation of ANCSA lands is that it would limit and discourage such activity. The *amici* have an extraordinary interest in preserving §3103(c)'s exemption on their 12 million acres of ANCSA lands within the boundaries of CSUs. The NPS has already moved to control the use of Native lands in one regulatory program in the very recent past, after *certiorari* was granted herein, and more such efforts are sure to follow if unchecked by this Court.

For these reasons, the Native Corporation *amici* respectfully request that this Court reverse the Ninth Circuit's decision and hold that §3103(c) prohibits the NPS and other conservation agencies from enforcing any of their regulations on Native Corporation lands within CSU boundaries. Even if this Court reaches the same *result* as the Ninth Circuit—that is, even if this Court concludes that §3103(c) does not exempt the navigable river at issue from NPS regulation—the *amici* respectfully submit that the interpretation of the statute should distinguish navigable waters from ANCSA lands and waters and give effect to the complete regulatory exemption that Congress intended, thereby avoiding the destructive impact upon ANCSA lands and waters sanctioned by the Ninth Circuit.

II. Summary of the Argument.

Under the plain language of §3103(c), Native Corporation lands that lie within the boundaries of CSUs are exempt from CSU regulations. Only by reading the second sentence of the provision in isolation was the Ninth Circuit panel able to reach a different conclusion. The panel also read §3103(c) in a way that would render its first and third sentences meaningless. The three sentences of §3103(c) complement and flow logically from one another, and this Court's precedent requires that each sentence in the statute be given effect.

The history of ANCSA and ANILCA demonstrates Congress's unambiguous intent to grant approximately 40 million acres of land to Alaska Native Corporations for purposes including economic development, to assist Alaska Natives in achieving financial independence and self-sufficiency, and by enacting §3103(c), to protect the economic value and development potential of these Native Corporation lands by shielding them from restrictive CSU regulations. To avoid this result, the Ninth Circuit panel completely disregarded ANCSA and then selectively quoted and inaccurately characterized several key pieces of ANILCA's legislative history, to reach an interpretation of §3103(c) that would break the promise made to Alaska Natives in ANCSA. In reality, the legislative history of ANILCA uniformly contradicts the Ninth Circuit panel's decision.

The meaning of §3103(c) is further demonstrated when it is viewed in the context of ANILCA as a whole. The provision was placed in the "Maps" section to clarify that an ANILCA map's depiction of non-public lands

within the boundaries of a CSU is of no legal effect. In addition, numerous other sections of ANILCA support the conclusion that Native Corporation lands are generally exempt from CSU regulations.

The Ninth Circuit panel's holding—that nationwide CSU regulations are applicable to non-public lands but Alaska-specific CSU regulations are not—would lead to an absurd result. As the NPS itself has acknowledged, Alaska-specific regulations are generally relaxations of the nationwide regulations, meaning that non-public lands within the boundaries of a CSU would be regulated more strictly than the public lands within the same CSU boundaries.

Finally, the *amici* respectfully requests that this Court resolve this case in a manner that does not disturb the Ninth Circuit's "Katie John" subsistence decisions.[4]

III. Argument.

A. The text of §3103(c) unambiguously exempts ANCSA lands from CSU regulations.

The plain language of §3103(c) establishes that ANCSA lands that lie within the external boundaries of CSUs are not part of the CSUs and are exempt from CSU regulations. Only by reading the second sentence of the provision in isolation was the Ninth Circuit panel able to reach a different conclusion. The panel also read §3103(c) in a way that would render its first and third sentences

4. The *amici* also agree with the *amicus* brief filed by Arctic Slope Regional Corporation (ASRC) *et al.*

meaningless. Congress wrote the three sentences of §3103(c) to work together as a comprehensive whole.

The first sentence states: "Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit." This sentence establishes that non-public lands (including ANCSA lands) lying within the external boundaries of a CSU are not part of the CSU merely by virtue of that geographic fact.[5]

The second sentence states: "No lands which, before, on, or after December 2, 1980, are conveyed to the State, *to any Native Corporation*, or to any private party shall be subject to the regulations applicable solely to public lands within such units." (Emphasis added.) This sentence is a direct complement to the first and means that ANCSA land that is not part of a CSU will not be subjected to CSU regulations simply because it lies within the external boundaries of the unit.

The third sentence states: "If the State, *a Native Corporation*, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered

5. Consistent with this first sentence, the provision of ANILCA that established the Yukon-Charley Rivers National Preserve, where the dispute underlying this case arose, states that the Preserve contains "approximately one million seven hundred and thirteen thousand acres of *public lands*." 16 U.S.C. §410hh(10) (emphasis added). All of the sections of ANILCA that created or expanded CSUs include the same limitation to "public lands."

accordingly." (Emphasis added.) This sentence explains how the acquisition of land by the relevant Secretary alters the state of affairs established by the first two sentences: the lands "become part of the unit" and are "administered accordingly." Until this happens, though, the lands are not administered as "part of the unit."

"It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citations and quotations omitted). The Ninth Circuit panel violated this "cardinal principle" by giving undue attention to the second sentence of §3103(c), not only distorting its meaning but also rendering the first and third sentences meaningless. That is, if the second sentence subjects non-public land to regulations governing a CSU, then the land is, for practical purposes, "a portion of" the CSU (contrary to the first sentence), and it can be "administered accordingly" even if it is never acquired by the federal government (contrary to the third sentence). Giving effect to all three sentences, the provision's meaning is unmistakable: non-public lands within the boundaries of a CSU are not part of the unit and will not be subject to CSU regulations unless they are acquired by the federal government.[6]

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6. Even if this Court were to agree with the Ninth Circuit's novel reading of the plain language of §3103(c)—a reading that creates a distinction between nationwide and Alaska-specific CSU regulations—the legislative history of ANILCA, discussed below, unequivocally demonstrates a "clearly expressed legislative intention" contrary to that reading of the language. See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 433 n.12 (1987).

B. The history of ANILCA, starting with ANCSA, supports the conclusion that Native Corporation lands are exempt from CSU regulations.

A review of the history of ANILCA, beginning in 1971 with ANCSA and continuing through the legislative wrangling that led to the enactment of ANILCA, leads inexorably to the conclusion that ANCSA lands are to remain exempt from CSU regulations.

1. ANILCA, including §3103(c), must be interpreted in light of the economic development purposes of ANCSA.

This Court has held that a statute should be interpreted in light of "any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006). None of ANILCA's provisions—particularly those, like §3103(c), that address the land rights of Alaska Native Corporations—can be fully understood without an appreciation for the purposes of ANCSA. Indeed, this Court has only interpreted one section of ANILCA, and, when it did, it looked to three closely related sections of ANCSA. See *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 552 (1987).

ANCSA was, quite literally, the precursor to ANILCA. In Section 17(d)(2) of ANCSA, Congress directed the Secretary of the Interior to withdraw up to eighty (80) million acres of unreserved federal land "which the Secretary deems are suitable for addition to or creation as units of the National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems." 43 U.S.C.

§1616(d)(2)(A); see also *Amoco*, 480 U.S. at 549 ("ANILCA's primary purpose was to complete the allocation of federal lands in the State of Alaska, a process begun with the Statehood Act in 1958 and continued in 1971 in ANCSA."). ANILCA was a "direct outgrowth" of ANCSA, 125 Cong. Rec. 9905 (1979), and it should be interpreted as such. It is remarkable, then, that the Ninth Circuit did not even *mention* ANCSA in its opinion.

"Congress enacted ANCSA in 1971 to settle the aboriginal claims of Alaskan Natives." *City of Angoon v. Marsh*, 749 F.2d 1413, 1414 (9th Cir. 1984). Congress intended the settlement to be accomplished "in conformity with the real economic and social needs of Natives" and "with maximum participation by Natives in decisions affecting their rights and property." 43 U.S.C. §1601(b). Thus, as compensation for the complete settlement of the aboriginal claims, Congress authorized the payment of almost $1 billion cash and the conveyance of approximately 40 million acres of land to Alaskan Natives "*to assist them in achieving financial independence and self-sufficiency.*" *City of Angoon*, 749 F.2d at 1414 (emphasis added).[7]

7. The land provisions of ANCSA are complex, but can be summarized as follows: ANCSA granted up to 22 million acres of surface estate to Village Corporations. ANCSA granted to Regional Corporations the subsurface (mineral) estate beneath those Village surface lands, and approximately 18 million acres of additional surface and subsurface estate. See 43 U.S.C. §§1610, 1611 and 1613. Pursuant to 43 U.S.C. §1631 (a)(1) and (2), all ANCSA land grants include title to lands beneath all water courses and water bodies within or adjacent to their land selections, except where such title was previously vested in the State of Alaska. This is important because up to 50% of the surface area of lands in Alaska is occupied by such waters, depending upon the location. In addition, ANCSA

Obviously, ANCSA was a revolutionary development in American law. "Congress sought to end the sort of federal supervision over Indian affairs that had previously marked federal Indian policy." *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 523-24 (1998). As opposed to the lower 48 system of reservations, Alaska Natives would own lands and be tasked with developing them for their own benefit. In Alaska, Natives would be in control of their own financial destiny.

Accordingly, the Ninth Circuit stated that the most significant purpose of the ANCSA land grant was economic development:

> ANCSA's legislative history makes clear that Congress contemplated that land granted under ANCSA would be put primarily to three uses—village expansion, subsistence, and capital for economic development. See H.R. Rep. 92-523 at 5, 1971 U.S.C.C.A.N. at 2195. *Of these potential uses, Congress clearly expected economic development would be the most significant*....

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granted about 4 million acres of surface and subsurface estate to Village Corporations on revoked Indian reservations that opted not to accept any further benefits of ANCSA. 43 U.S.C. §1619. As further compensation, ANCSA also provided for the grant of $962.5 million to Native Corporations in payments terminating in 1981. 43 U.S.C. §1609. ANCSA also required each Regional corporation to share 70% of its proceeds from subsurface and timber resource development of its ANCSA lands with other land-owning Regional Corporations, and in turn with all Village Corporations. 43 U.S.C. §1606(i) and (j). (See discussion *infra*.)

* * *

> [W]e have no doubt that Congress intended, at least, that *those Native corporations that did select land for its economic potential would be able to develop that land and to realize that potential*.

Koniag, Inc. v. Koncor Forest Resource, 39 F.3d 991, 996-997 (9th Cir. 1994) (emphasis added). See also *City of Saint Paul v. Evans*, 344 F.3d 1029, 1031 (9th Cir. 2003) (ANCSA corporations "receive land from the federal government for the purpose of economic development in Native communities"). In short, Congress knew that Alaska Native Corporations would select most of their lands based on economic potential and that the freedom to develop these lands was absolutely essential to the success of the settlement embodied by ANCSA.

The revenues derived from development of these ANCSA lands are fundamental to the innovative settlement Congress devised. Under ANCSA §7(i), 43 U.S.C. §1606(i), each Regional Corporation is required to share seventy percent (70%) of its revenues from natural resource development (including timber, minerals, and oil and gas) on its ANCSA lands with the other land-owning Regional Corporations. Under §7(j), 43 U.S.C. §1606(j), one-half of the revenues that are received by a Regional Corporation under §7(i) are distributed to the Village Corporations located within its regional boundaries, and to its "at large" shareholders (those not enrolled to a Village Corporation). Thus, a share of resource revenues from ANCSA lands flow directly or indirectly to nearly all Alaska Natives. Well over $1 billion derived from oil and

gas, mineral, and timber resource development of ANCSA lands has been distributed to ANCSA Corporations and to Alaska Natives under 43 U.S.C. §1606(i) and (j) since 1971.[8]

In summary, ANCSA served two critical national purposes, one of which—extinguishment of Alaska Native aboriginal title—has already been accomplished. The accomplishment of the second purpose—securing the economic futures of Alaska Natives—is an ongoing concern that hinges significantly on the meaning of §3103(c). Yet, without even acknowledging the existence of ANCSA, the Ninth Circuit panel interpreted §3103(c) in a way that would subject up to 40% of all ANCSA lands to restrictive CSU regulations, rendering them undevelopable and essentially valueless. In effect, the Ninth Circuit panel eviscerates a large portion of the ANCSA land settlement. If that holding is allowed to stand, then ANILCA took back much of what ANCSA promised to Alaska Natives in return for giving up their aboriginal rights.

But surely the Ninth Circuit's interpretation cannot stand. As another panel of that court said in a slightly different context just a few years after ANILCA was passed, "[I]t is inconceivable that Congress would have extinguished [Alaska Natives'] aboriginal claims and insured their economic well-being by forbidding the only real economic use of the lands so conveyed." *City*

8. ASRC, one of the ANCSA Regional Corporations, alone has distributed in excess of $1 billion pursuant to §7(i). See http://www.asrc.com ("About Us," then "We Are ASRC"); see also "Alaska Native Corporations Share Wealth: ANCSA 7(i) and 7(j) Mandates Redistribution of Some Profits," Alaska Business Monthly, September 2009 (available at http://www.thefreelibrary.com).

of Angoon, 749 F.2d at 1418.[9] When read against the backdrop of ANCSA, one critical intention of §3103(c) becomes abundantly clear: to preserve the economic value of lands conveyed to Native Corporations by exempting them from regulations written to govern CSUs.

2. The legislative history of ANILCA is consistent with the purposes of ANCSA, but the Ninth Circuit offered a selectively edited version to bolster its interpretation of §3103(c).

Having interpreted the text of §3103(c) without even one mention of ANCSA, the Ninth Circuit panel went on to suggest that its strained reading of the provision is supported by the legislative history of ANILCA. This is absolutely, unequivocally incorrect. Every single piece of legislative history cited by the panel, quoted accurately and fully, actually demonstrates that Congress intended to exempt ANCSA lands from *all* CSU regulations. There is no legislative history whatsoever supporting the

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9. The Ninth Circuit panel that decided *City of Angoon* relied heavily on ANCSA in concluding that Native Corporation lands within the external boundaries of a National Monument created by ANILCA are not "within" the Monument and therefore are not subject to a timber harvesting ban applicable to the Monument. See, e.g., 749 F.2d at 1416 (citing ANCSA §22(i) (43 U.S.C. §1621(i)) in support of its conclusion that "Congress has made it clear that the Secretary cannot manage private lands which have been conveyed to a Native Corporation"). That panel also cited §3103(c) as support for its conclusion that "the drafters of ANILCA never intended the mere location of boundary lines on maps delineating the overall conservation system to indicate that private lands conveyed to Native Corporations were to be treated as public lands." *Id.* at 1417-18.

panel's artificial distinction between Alaska-specific and nationwide regulations. Only through extensive editing was it able to paint a different picture.

Congress began considering legislation that would become ANILCA in the late 1970s. Alaska Native Corporations, having already made their land selections, were greatly concerned. ANILCA would place approximately 105 million acres of federal lands in new or expanded CSUs, and Congress sought to include entire ecosystems within the units. As a result, many ANCSA lands would be completely surrounded by CSU lands: the Native Corporation *amici* alone own about 12 million acres within ANILCA CSUs, comprising about 30% of all ANCSA lands; all ANCSA Corporations together own approximately 18 million acres within ANILCA CSUs, or about 40% of all ANCSA lands.[10] The Native Corporations knew that this development would directly threaten their rights under the ANCSA land settlement, and they fought vigorously for the inclusion of provisions in ANILCA that would preserve the economic potential of their lands and prevent them from being affected by the CSUs, and to preserve the promise made to Alaska Natives in ANCSA that they would be able to economically develop their ANCSA lands. See, e.g., 126 Cong. Rec. 21882 (1980) (referencing concerns of Doyon, Limited president Tim

10. See Exhibit 1 attached hereto (Map of ANCSA Lands Within CSUs). Some of the Native Corporation *amici*'s land holdings in CSUs are surface estate only, some are subsurface only, and some are both surface and subsurface. The ANCSA lands within CSUs represent from about 20% to 100% of the total ANCSA entitlements of the individual *amici*. The small portion of CSU lands within pre-ANCSA Wildlife Refuges is subject to additional federal refuge regulation pursuant to 43 U.S.C. §1621(g), and 16 U.S.C. §3143.

Wallis). These efforts, and those of the State of Alaska, resulted in the enactment of §3103(c).

Section 3103(c) (ANILCA §103(c)) began as an amendment offered by Representative John Seiberling.[11] On May 15, 1979, Rep. Seiberling took to the House floor and described in detail the purpose of the amendment:

> The other amendment is an amendment to respond to a point that I think has been beaten to death by the gentleman from Alaska (Mr. YOUNG) but I think it needs to be clarified because some people may not understand.
>
> The Udall-Anderson bill…includes certain State-selected lands and certain State-owned lands on which they already have patent (as well as some Native or private lands) within the borders of some of the conservation system units in Alaska.... [T]here is no question in my mind that the present text of the Udall-Anderson bill *does not alter in any way the ability of the State or Natives to do what it will with those lands*....[12]

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11. Rep. Seiberling's amendment was in the form of a new subsection (c) of §810 of H.R. 3651, the Udall-Anderson bill that eventually became ANILCA. Section 810 later was renumbered as §103, and the subsection 810(c) proposed by Seiberling precisely duplicates the enacted version of §103(c), with the minor exception of an internal cross-reference at the end to account for the different numbering. See 125 Cong. Rec. 10304-05 (1979).

12. Here, Rep. Seiberling was referencing numerous provisions of ANILCA other than §3103(c) that establish that Native lands are not to be administered as part of CSUs. See Section C, below.

> *All this amendment does is restate and make clear beyond any doubt that any State, Native or private lands, which may lie within the outer boundaries of the conservation system unit are not parts of that unit and are not subject to regulations which are applied to public lands which, in fact, are part of the unit.*
>
> *[T]his amendment reinforces the already ample protections accorded to such lands that are within the boundaries of such a park or refuge or other conservation area.*

125 Cong. Rec. 11158 (emphasis added).

In suggesting that the legislative history supports its reading of §3103(c), the Ninth Circuit panel cited just a few words of this statement, noting only that Rep. Seiberling "offered the view that his amendment 'restate[d] and ma[de] clear' that nonfederal lands within CSUs would not be 'subject to regulations which are applied to public lands which, in fact, are part of the unit.'" Op. 24 (citing 125 Cong. Rec. 11158). The panel omitted Rep. Seiberling's contemporaneous explanation that he offered his amendment to reinforce the existing text of the bill, which, he believed, "*does not alter in any way the ability of the State or Natives to do what it will with those lands*." 125 Cong. Rec. 11158 (emphasis added).

After providing the summary quoted above, Rep. Seiberling responded to skeptical questioning from Alaska Rep. Don Young:

> Mr. YOUNG of Alaska. Are there any catch words in the gentleman's amendment that say there is compatibility with the unit or anything like this that will preclude us because of some nice little sharp lawyer sitting down in one of the coalition areas?
>
> * * *
>
> Mr. SEIBERLING. Mr. Chairman, what it does is say that the fact that it is within the boundaries drawn on the map for that conservation unit does not in any way change the status of that State, native, or private land *or make it subject to any of the laws or regulations that pertain to U.S. public lands, so that those inholdings are clearly not controlled by any of the public land laws of the United States.*

Id. (emphasis added).

Citing part of Rep. Seiberling's answer, the Ninth Circuit panel observed that "[t]he first sentence of §3103(c) makes clear that the boundaries of CSUs 'do[…] not in any way change the status of that State, native, or private land' lying within those boundaries." Op. 21 (quoting 125 Cong. Rec. 11158 (1979)). The panel's reliance on this passage is puzzling. Before ANILCA, the "status" of these lands was that they did not lie within CSUs and therefore were not subject to regulations governing CSUs. Rep. Seiberling's clarification—that he offered §3103(c) to ensure that this status would not change—conflicts starkly with the panel's interpretation of the provision.

More troubling is the fact that the Ninth Circuit panel chose to cut Rep. Seiberling's one-sentence answer in half and omit the portion that directly contradicts its holding: the statement that the location of non-public land within CSU boundaries does not "make it subject to *any* of the laws or regulations that pertain to U.S. public lands, so that those inholdings are clearly not controlled by *any* of the public land laws of the United States." 125 Cong. Rec. 11158 (emphasis added). The panel also ignored Rep. Seiberling's declaration, from the same floor session, that his amendment "makes it clear that any lands, State, native or private lands, which lie within the outer boundaries of the conservation unit in the Udall bill *are not subjected to regulations which are applied to public lands*." *Id.* at 11156 (emphasis added).

ANILCA's exemption of ANCSA lands from CSU regulations was also confirmed by the primary sponsor of ANILCA in the House, Representative Morris "Mo" Udall, who stated:

> It is important to remember, when considering the conservation and other provisions of the Udall-Anderson substitute, that this bill, like all other proposals for legislation on this topic *…is a direct out-growth of the Alaska Native Claims Settlement Act of 1971*…. Thus, it is important to recall the relationship between the conservation system units…and the lands which the Native peoples of Alaska have received and will receive pursuant to the Alaska Native Claims Settlement Act in return for the extinguishment of their claims based on aboriginal title.

> We recognize that there are certain lands which have been selected by Native Corporations and which are within the exterior boundaries of some of the conservation system units. This situation occurs because of the location of Native villages along stream courses and because unit boundaries have been drawn, wherever possible, to include whole ecosystems and to follow natural features, and thus also include some Native Corporation lands. *I want to make clear that inclusion of these Native lands within the boundaries of conservation system units is not intended to affect any rights which the Corporations may have under this act, the Alaska Native Claims Settlement Act, or any other law, or to restrict use of such lands by the owning Corporations nor to subject the Native lands to regulations applicable to the public lands within the specific conservation system unit.*

125 Cong. Rec. 9905 (1979) (emphasis added).

In its opinion, the Ninth Circuit panel merely observed that Rep. Udall "declared that nonfederal land would not be constrained by 'regulations applicable to the public lands within the specific conservation system unit.'" Op. 24 (citing 125 Cong. Rec. 9905 (1979)). It made no mention whatsoever of Rep. Udall's explanation, *in the same sentence*, that "inclusion of these Native lands within the boundaries of conservation system units is not intended to affect *any* rights which the corporations may have under this act, the Alaska Native Claims Settlement Act, or any other law, *or to restrict use of such lands by the owning corporations*[.]" 125 Cong. Rec. 9905 (emphasis added).

The Senate Committee on Energy and Natural Resources shed further light on the scope of the exemption. In a 1979 report, the Committee explained:

> Those private lands, and those public lands owned by the State of Alaska [located within the external boundaries of CSUs] are not to be construed as subject to the management regulations which may be adopted to manage and administer any national conservation system unit which is adjacent to, or surrounds, the private or non-Federal public lands. Federal laws and regulations of general applicability to both private and public lands, such as the Clean Air Act, the Water Pollution Control Act, U.S. Army Corps of Engineers wetlands regulations and other Federal statutes and regulations of general applicability would be applicable to private or non-Federal public land inholdings within conservations [sic] system units, and to such lands adjacent to conservation system units, and are thus unaffected by the passage of this bill.

S. Rep. No. 96-413, at 303 (1979), as reprinted in 1980 U.S.C.C.A.N. 5070, 5247. The Committee's intent, then, was that non-public lands within the external boundaries of CSUs would be exempt from CSU regulations but would remain subject to "Federal laws and regulations of general applicability to both private and public lands," such as the Clean Air Act and the Clean Water Act.

The Committee's report also reveals why the word "solely" was included in the second sentence of §3103(c)—a

reason quite different than the Ninth Circuit panel asserted. Without that word, the second sentence would exempt non-public lands within the external boundaries of CSUs from all "regulations applicable [ ] to public lands within [CSUs]." See 16 U.S.C. §3103(c). Such language could be read to exempt these non-public lands from not only CSU regulations but also regulations promulgated under environmental statutes like the Clean Air Act and the Clean Water Act. As such, the word "solely" was included to distinguish between these two classes of regulations.

The Ninth Circuit panel acknowledged only a handful of the Committee's words, stating that the report "notes that §[3]103(c) would exempt non-Federal land from 'regulations which may be adopted to manage and administer any [CSU] which is adjacent to, or surrounds, the private or non-Federal public lands.'" Op. 24-25 (citing S. Rep. No. 96-413, at 303 (1979), reprinted in 1980 U.S.C.C.A.N. 5070, 5247). The panel said *nothing* about the second sentence quoted above, which shows that the Committee did not intend to distinguish between nationwide and Alaska-specific regulations, but rather, between CSU regulations and laws—like the Clean Air Act and the Clean Water Act—that apply to *all* land in the United States, whether public or private. Only by ignoring the actual words of the Senate Report could the Ninth Circuit avoid the Committee's true intent.

Finally, just before the final vote on ANILCA, a question by the president of Doyon, Limited (one of the Native Corporations filing this brief) prompted Alaska Senator Ted Stevens (joined by Senator Henry "Scoop" Jackson, Chairman of the Senate Committee on Energy

and Natural Resources) to offer one last assurance to Alaska Native Corporations that the use and development of their lands would not be affected by the Act:

> If I may ask it of the chairman, *there has been a question raised by Tim Wall[is], president of Doyon, Ltd., one of the Alaska Native regional corporations*. I wish to make certain that the record is clear with regard to the question he raised.
>
> In the substitute, many parcels of land selected by Native corporations are included within the exterior boundaries of the proposed conservation system units. This situation occurs because the unit boundaries have been drawn, whenever possible, to encompass natural areas or to follow natural features, and thus also to include Native lands which, if the corporations ever decide to dispose of their property, could become part of the conservation system unit. *The fact that Native lands lie within the boundaries of conservation system units is not intended to affect any rights which the corporations have under this act, the Alaska Native Claims Settlement Act, or any other law.... The Native organizations have been given repeated assurances that including their lands within conservation units will not affect the implementation of the Native Claims Settlement Act*. We intend to have these assurances translated into practice by the administrative agencies.

> Does the Chairman of our Committee agree with that statement?
>
> MR. JACKSON: Mr. President, I agree with the Senator from Alaska on this matter.

126 Cong. Rec. 21882 (1980) (emphasis added). The Ninth Circuit panel did not acknowledge Senator Stevens' unambiguous pledge in its opinion.

Based upon these emphatic declarations, Alaska Native Corporations had good reason to believe that Congress intended to stand by the promise it made in ANCSA and that Native Corporation lands would be exempt from CSU regulations. Only by heavily editing and mischaracterizing this legislative history was the Ninth Circuit panel able to justify a different conclusion.

C. The location of §3103(c) within ANILCA and the language of other relevant provisions of the Act demonstrate Congress's intent to exempt ANCSA lands from CSU regulations.

This Court has held that provisions of ANILCA "must be viewed in the context of the Act as a whole." *Amoco*, 480 U.S. at 549; see also *Dada v. Mukasey*, 554 U.S. 1, 16 (2008); *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 438, 455 (1993). Viewing §3103(c) in the context of ANILCA as a whole, any lingering doubts about its meaning are resolved.

First, the placement of §3103(c) within ANILCA is telling. In its brief in opposition to certiorari, the United States suggested that §3103(c) must be inconsequential

because it is "buried" in the "Maps" section, §3103. However, §3103 is actually a critical part of ANILCA. In ANILCA, Congress described the 105 million acres of CSUs it was creating or expanding by reference to the maps incorporated into the Act, rather than using legal descriptions. By including subsection (c), Congress sought to eliminate the possibility that a person would look at an ANILCA map, see that non-public land falls within the boundaries of a CSU, and assume that it is part of the CSU or subject to CSU regulations. As discussed above, Representative Seiberling, the sponsor of the amendment that became §3103(c), explained on the House floor that this was the precise purpose of the provision:

> Mr. Chairman, what [§3103(c)] does is say that the fact that [State, native, or private land] is within the boundaries drawn on the map for that conservation unit does not in any way change the status of that State, native, or private land or make it subject to *any* of the laws or regulations that pertain to U.S. public lands, so that those inholdings are clearly not controlled by *any* of the public land laws of the United States.

125 Cong. Rec. 11158 (1979) (emphasis added). Far from creating a distinction between Alaska-specific and nationwide regulations, as the Ninth Circuit held, §3103(c) clarified that non-public lands would not be subject to *any* CSU regulations, notwithstanding their location on an ANILCA map.

This reading of §3103(c) is also consistent with other relevant provisions of ANILCA, none of which

were given any weight by the Ninth Circuit. The first section of ANILCA explains that the Act serves both environmental *and* economic purposes, in that it "provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, *and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people*[.]" 16 U.S.C. §3101(d) (ANILCA §101(d)) (emphasis added). The Ninth Circuit panel cited this provision but then immediately mischaracterized a passage from an earlier Ninth Circuit decision to suggest that ANILCA is a strictly conservational measure: "Summarized succinctly, ANILCA is generally concerned with the designation, disposition, and management of land for environmental preservation purposes.' *Stratman v. Leisnoi, Inc.*, 545 F.3d 1161, 1165 (9th Cir. 2008)." Op. 19.

What the Ninth Circuit actually said in *Stratman* was this: "*Although* ANILCA is generally concerned with the designation, disposition, and management of land for environmental preservation purposes, *part of ANILCA is devoted to the implementation and cleanup of ANCSA*." 545 F.3d at 1165 (emphasis added; citation omitted). The panel's careful avoidance of the ANCSA reference is telling. Of ANILCA's 180 pages, only about 45 related to the creation or expansion of CSUs (see Titles II-VII), while most of the remaining 135 were made up of compromise provisions addressing various ANCSA and State concerns (see, e.g., Titles VIII-XIV and parts of Title I). Contrary to the panel's suggestion, ANILCA was not only directed at environmental protection—it was also directed at implementing ANCSA.

Further evidence of the overriding importance of ANCSA can be found in §1412 of ANILCA (43 U.S.C. §1639), which provides, "Except as specifically provided in this Act, (i) the provisions of the Alaska Native Claims Settlement Act are fully applicable to this Act, and (ii) nothing in this Act shall be construed to alter or amend any of such provisions." Needless to say, the Ninth Circuit's interpretation of §3103(c) would "alter or amend" the very promise at the heart of ANCSA, that ANCSA lands would be available for economic development and other purposes, for the benefit of Alaska Natives.

Several more-specific provisions of ANILCA demonstrate that non-public lands within the external boundaries of CSUs are generally exempt from CSU regulations. Most notably, 43 U.S.C. §1635(o)(2) (ANILCA §906(o)(2)) provides, "*Until conveyed* [to a Native Corporation or the State], all Federal lands within the boundaries of a conservation system unit…shall be administered in accordance with the laws applicable to such unit." (Emphasis added.) The obvious corollary to this requirement is that once lands within the boundaries of a CSU are conveyed to a Native Corporation or the State, they shall *not* "be administered in accordance with the laws applicable to such unit." If this were not the case, 43 U.S.C. §1635(o)(2) would be entirely superfluous.

Another provision, Section 304(f) (16 U.S.C. §668dd note), provides that owners of non-federal lands within any National Wildlife Refuge (including ANCSA corporations) may enter into cooperative management agreements with the Secretary of the Interior, and "the land subject to the agreement shall be managed by the owner…in a manner compatible with the major purposes of the refuge."

(Emphasis added.) If a landowner does *not* enter into a cooperative management agreement, the lands are *not* subject to management compatible with the CSU. If this were not the case, ANILCA §304(f) would be unnecessary.

Also, 43 U.S.C. §1636 (ANILCA §907), which established the Alaska Land Bank Program, provides in subsections (a)(2) and (b)(3) for a private landowner (including ANCSA corporations) whose lands adjoin federal land to "consent" to coordinated management by the federal government. If the federal government already had the power to manage such private lands, no such consent would be necessary.

These are the type of provisions to which Representative Seiberling was referring when he said, "[T]here is no question in my mind that the present [pre-§3103(c)] text of the Udall-Anderson bill *does not alter in any way the ability of the State or Natives to do what it will with those lands*." 125 Cong. Rec. 11158 (emphasis added). His proposal of the language that would become §3103(c) was intended to eliminate any possible remaining doubt in this regard.

D. The Ninth Circuit's interpretation of §3103(c) would lead to an absurd result.

This Court has instructed that an interpretation of a statute that leads to an absurd result should be avoided if there is a reasonable alternative interpretation. See, e.g., *Tarrant Regional Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2131 (2013); *United States v. Wilson*, 503 U.S. 329, 334 (1992). Under the Ninth Circuit panel's strained interpretation of §3103(c), non-public lands

(including ANCSA lands) that are situated within the external boundaries of Alaska CSUs would be subject to nationwide CSU regulations but would be exempt from Alaska-specific CSU regulations. However, the National Park Service has itself recognized that Alaska-specific regulations "generally are relaxations of prohibitions contained in the general regulations." See 61 Fed. Reg. 35134 (1996). It would be patently absurd for ANCSA lands to be subject to greater use restrictions than the surrounding CSUs, and this Court should avoid such a result.

E. The *amici* respectfully urge this Court to resolve this case in a manner that does not disturb the Ninth Circuit's "Katie John" subsistence decisions.

While the primary objective of the Native Corporation *amici* in filing this brief is to have this Court reverse the Ninth Circuit's erroneous interpretation of §3103(c), they also want to stress the critical importance of this Court doing so in a way that leaves undisturbed the Ninth Circuit's 1995 holding that certain navigable waters in Alaska are "public lands" for purposes of §804 of ANILCA (16 U.S.C. §3114) and are therefore subject to the rural subsistence priority established by that provision. *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995), cert. denied, 517 U.S. 1187 (1996); see also *John v. U.S.*, 247 F.3d 1032 (9th Cir. 2001) (en banc).

It appears likely that the United States will argue that even if the Ninth Circuit's interpretation of §3103(c) is overbroad, the navigable river at issue still constitutes "public lands" for purposes of that statute under the

Babbitt holding, and thus is subject to NPS regulation. See "Brief for the Respondents in Opposition," at pp. 15-16.

However, the matter is not presently before this Court, nor should it be. The Ninth Circuit did not address §3103(c) in its subsistence-specific decision in *Babbitt*, and while the parties in the instant case debated the scope of the *Babbitt* holding in their lower court briefing, neither the district court nor the Ninth Circuit reached that issue. It is clear that *Babbitt* was decided in a manner that does not apply to the instant case.

The holding in *Babbitt* resolved a decades-long cycle of litigation and intense political division about subsistence rights, and this Court has rejected several invitations to review it. See *Alaska State Legislature v. Alaska*, 516 U.S. 815 (1995); *Alaska Fish & Wildlife Federation & Outdoor Council, Inc. v. Alaska*, 516 U.S. 906 (1995); *Alaska v. Babbitt*, *supra*; *John v. U.S.*, 720 F.3d 1214 (9th Cir. 2013), cert. denied sub nom. *Alaska v. Jewell*, 134 S. Ct. 1759 (2014).

The Ninth Circuit's 2013 decision in *John v. U.S.* upheld the federal subsistence regulations adopted pursuant to ANILCA Title VIII. See 16 C.F.R. Part 242. In part, this decision upheld the application of these subsistence regulations to waters on ANCSA lands within CSUs, by upholding their definition of "public lands" and "inland waters" for subsistence purposes based upon federally reserved water rights in such Native-owned waters. *Id.* at 1232-1233. It thereby extended to such Native-owned waters the subsistence priority under ANILCA §804. The decision in effect used federally reserved water rights to transform these Native-owned waters into "public

lands" for the limited purposes of the subsistence priority, resolving this difficult issue in a manner that the Native community strongly supports. This decision includes a lengthy and detailed history of the subsistence issue and its resolution by the courts, as well as a recognition of the difficulties encountered by the courts in resolving this dispute and the limitations of the novel "reserved water rights" solution eventually reached. *John*, 720 F.3d at 1226, 1245.

Federal reserved water rights arising in connection with provisions of ANILCA cannot be applied so as to amend ANCSA or frustrate the fundamental purposes of its land conveyances. As discussed above, §1412 of ANILCA (43 U.S.C. §1639) provides, "…(i) the provisions of the Alaska Native Claims Settlement Act are fully applicable to this Act, and (ii) nothing in this Act shall be construed to alter or amend any of such provisions."

Nor can this doctrine be applied in a way that renders §3103(c) inoperative. If this unique subsistence rationale were extended to matters of land use regulation arising under §3103(c), the result would simply be to swallow and eviscerate §3103(c) as it relates to ANCSA lands in CSUs, because such lands contain large amounts of water acreage, which could be subject to federal reserved water rights.[13] Such a result would render §3103(c) superfluous, and thus would be contrary to this Court's precedents.

13. Pursuant to 43 U.S.C. §1631(a)(1) and (2), Alaska Native Corporations receive title to the lands beneath nearly all waters within or adjacent to their ANCSA land selections. This is important because Alaska contains so many lakes (3 million) and rivers (12,000), and because up to 50% or more of the surface area of lands in Alaska can be occupied by waters, depending upon the location.

See, e.g., *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Accordingly, any reasonable application of the regulatory exemption under §3103(c) to Native lands in CSUs must include a clear extension of this exemption to such waters for it to be effective.

The 2013 decision in *John v. U.S.*, and this Court's subsequent denial of *certiorari*, appear to have finally put to rest further direct challenges relating to the subsistence issue. However, in light of the Ninth Circuit's recognition of the difficulties and limitations of its original *Babbitt* holding, the 2013 decision should not be applied to this case concerning the application of §3103(c) to ANCSA lands and waters.

Today, nearly 20 years after the Ninth Circuit announced its decision, the *Babbitt* holding is a well-settled fact of life for rural Alaskans who rely heavily on subsistence hunting and fishing. Thus, in seeking to have this Court reverse the Ninth Circuit's erroneous interpretation of §3103(c), the Native Corporation *amici* also wish to express their firm support for the *Babbitt* holding as applied to the ANILCA subsistence preference, and they strongly urge this Court to resolve the instant case in a manner that leaves that holding intact as the solution to subsistence.

IV. Conclusion.

For the foregoing reasons, this Court should reverse the Ninth Circuit's holding in this matter and hold instead that §3103(c) exempts Native Corporation lands within the boundaries of CSUs from all CSU regulations, whether those regulations are applicable nationwide or only in Alaska, and whether those regulations apply to public lands or to private lands within such CSUs.

Respectfully submitted,

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EXHIBIT 1
MAP OF ANCSA LANDS WITHIN ALASKA
FEDERAL CONSERVATION SYSTEM UNITS

ANCSA Lands Within Alaska Federal Conservation System Units

Legend

- ANCSA lands in Federal CSUs
- ANCSA Lands Boundary
- Federal CSU Boundary

18,160,172 Acres
ANCSA Lands Within CSUs
Derived from BLM Data
Based upon whole sections within CSU boundaries

0 100 200
Miles

0 100 200
Kilometers

N
W E
S

National Geographic, Esri, DeLorme, NAVTEQ, UNEP-WCMC, USGS, NASA, ESA, METI, NRCAN, GEBCO, NOAA, iPC