No. 13-562

In the Supreme Court of the United States

STATE OF ALASKA, PETITIONER

v.

SALLY JEWELL, SECRETARY OF THE INTERIOR, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Did regulations issued in 1999 reasonably determine, for purposes of the Alaska National Interest Land Conservation Act (ANILCA), that the United States has an interest in certain particular waters as a result of the reserved water rights doctrine?
2. Do preclusion and forfeiture doctrines bar petitioner from challenging the rule adopted more than a decade ago, in a lawsuit brought by petitioner, that ANILCA's priority for rural subsistence users extends to waters in which the United States has an interest as a result of the reserved water rights doctrine?

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-64a) is reported at 720 F.3d 1214. The orders of the district court (Pet. App. 65a-95a and Pet. App. 96a-183a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 2013. On September 27, 2013, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including November 4, 2013, and the petition was filed on that date. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is the second suit filed by petitioner State of Alaska to challenge the geographic scope of a priority for rural subsistence hunting and fishing activities that is set out in the Alaska National Interest Land Conservation Act (ANILCA), 16 U.S.C. 3101 *et seq.* In the first suit, the court of appeals held that ANILCA's subsistence-use priority extends to those navigable waters in which the United States has an interest as a result of the reserved water rights doctrine. It rejected petitioner's view that this subsistence-use priority does not extend to any navigable waters, and also rejected the view of Alaska Native plaintiffs that the priority covered all navigable waters within the State. After that decision became final, petitioner elected not to seek this Court's review.

Throughout the proceedings in the lower courts in this case, petitioner did not challenge the established framework for determining the geographic scope of ANILCA's subsistence-use provision in navigable waters, but instead challenged whether the Secretaries of Agriculture and the Interior (the Secretaries) properly applied that framework through the issuance of regulations rather than by adjudication, and whether they had correctly designated particular waterways as covered. Now, at the certiorari stage, petitioner attempts to challenge the underlying framework for determining the geographic scope of the ANILCA subsistence-use priority. The validity of that framework, however, was established with preclusive effect in petitioner's earlier suit.

1. Congress enacted ANILCA to preserve "certain lands and waters in the State of Alaska that contain

nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values." 16 U.S.C. 3101(a). Congress recognized that public lands in Alaska have special value in supporting "subsistence uses," which Congress defined to include "the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption." 16 U.S.C. 3113. Congress declared a federal policy "to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of [public] lands." 16 U.S.C. 3112(1).

ANILCA contains specific provisions to preserve "the opportunity for rural residents [of Alaska] engaged in a subsistence way of life to continue to do so." 16 U.S.C. 3101(c). In particular, Title VIII of ANILCA establishes a priority for "the taking on public lands of fish and wildlife for nonwasteful subsistence uses * * * over the taking on such lands of fish and wildlife for other purposes." 16 U.S.C. 3114. The Act defines "public lands" to mean (with certain exceptions) lands situated within Alaska that are "[f]ederal lands." 16 U.S.C. 3102(3). It defines "[f]ederal land" to mean "lands the title to which is in the United States," 16 U.S.C. 3102(2), and it defines "land" to mean "lands, waters, and interests therein," 16 U.S.C. 3102(1).

Title VIII of ANILCA authorizes the Secretaries to "prescribe such regulations as are necessary and appropriate to carry out [their] responsibilities" under the Act. 16 U.S.C. 3124; see 16 U.S.C. 3102(12). Title VIII also directs the Secretaries to establish regional advisory councils to review and evaluate proposals for regulations, policies, management plans, and other

matters relating to subsistence uses of fish and wildlife. 16 U.S.C. 3115(a). The Secretaries must consider the reports and recommendations of the regional advisory councils when exercising their "administrative authority over the public lands," 16 U.S.C. 3115(c), but the Secretaries need not follow the recommendation of a regional council if they determine that the recommendation violates recognized principles of fish and wildlife conservation or "would be detrimental to the satisfaction of subsistence needs." *Ibid.*

In recognition of the State of Alaska's traditional responsibility for regulation of fish and wildlife within its boundaries, Title VIII of ANILCA permits the establishment of an alternative state regulatory structure to protect subsistence use of wild, renewable resources on public lands by rural Alaska residents. The Act provides that if, within one year of ANILCA's enactment, the State "enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in" ANILCA for rural residents, then the Secretary shall not implement the provisions of ANILCA directing the establishment of regional advisory councils. 16 U.S.C. 3115(d). Instead, the state laws, "unless and until repealed, shall supersede such sections [of ANILCA] * * * for the taking of fish and wildlife on the public lands for subsistence uses." *Ibid.*

2. When ANILCA was enacted, Alaska had already enacted a statute conforming generally to ANILCA's requirements for management of subsistence uses of fish and wildlife. See *Bobby* v. *Alaska*, 718 F. Supp. 764, 767, 788-791 (D. Alaska 1989). That

statute provided a priority for nonwasteful subsistence use of wild, renewable resources, but it did not limit the priority to "rural Alaska residents," as required by 16 U.S.C. 3113. After ANILCA was adopted, the State promulgated regulations recognizing that limitation. See *Bobby*, 718 F. Supp. at 767. On May 14, 1982, after the federal government reviewed and approved the regulatory scheme, the State became responsible for all regulation of subsistence use of wild, renewable resources on public lands under ANILCA. *Ibid.*

In 1985, the Alaska Supreme Court struck down the state regulations' limit on eligibility for the subsistence priority to rural Alaska residents. *Madison* v. *Alaska Dep't of Fish & Game*, 696 P.2d 168 (Alaska 1985). Without that eligibility limitation, the State's subsistence priority no longer complied with ANILCA, and the Secretary of the Interior withdrew certification of the State's regulatory scheme, pending enactment of state subsistence-use legislation consistent with ANILCA. See *Bobby*, 718 F. Supp. at 768.

The Alaska Legislature then amended the State's subsistence laws to remedy the inconsistency with ANILCA. See *Bobby*, 718 F. Supp. at 768; see also *Kenaitze Indian Tribe* v. *Alaska*, 860 F.2d 312, 314 (9th Cir. 1988), cert. denied, 491 U.S. 905 (1989). In 1989, however, the Alaska Supreme Court concluded that the amended state subsistence statute violated Alaska's Constitution. See *McDowell* v. *State*, 785 P.2d 1 (1989). As a result, the Secretaries were obligated under ANILCA to implement the statute's subsistence-use requirements. See 16 U.S.C. 3115.

3. a. On June 29, 1990, the Department of the Interior and the Department of Agriculture jointly published temporary subsistence management regulations. See 55 Fed. Reg. 27,114. Among other things, the regulations provided that the priority for subsistence use on "public lands" did not apply at all to navigable waters. The departments noted that "[t]he United States generally does not hold title to navigable waters and thus navigable waters generally are not included within the definition of public lands." *Id.* at 27,115; see *id.* at 27,118. The final regulations provided that the priority for subsistence use was limited to "all public lands including all non-navigable waters located on these lands." 50 C.F.R. 100.3(b) (1998); see 57 Fed. Reg. 22,940, 22,942 (May 29, 1992).

b. Petitioner and Alaska Native plaintiffs each filed suit to challenge the federal government's implementation of the subsistence-use priority on Alaskan waterways under ANILCA. First, in 1990, a group of Alaska Natives filed suit against the United States challenging the exclusion of navigable waters from the federal subsistence-use regulations promulgated under ANILCA. *John* v. *United States*, No. A90-484-CV, 1994 WL 487430, at *9 (D. Alaska Mar. 30, 1994). Then, while that suit was pending, petitioner brought its own suit against federal officials, challenging the federal government's authority to implement the subsistence management program set out in the temporary federal regulations. *Alaska* v. *Lujan*, No. A92-264-CV (D. Alaska). The district court consolidated the suits. The parties then filed motions for summary judgment concerning whether the term "public lands" in ANILCA extends to navigable waterways. The district court concluded that "'public

lands' includes all navigable waterways in Alaska," but certified its ruling for interlocutory appeal. 1994 WL 487430, at *1, *10, *18.

The court of appeals granted interlocutory review and held that "the definition of public lands" under ANILCA includes "those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine." *Alaska* v. *Babbitt*, 72 F.3d 698, 703-704 (9th Cir. 1995) (*Katie John I*). The court reasoned that ANILCA's language and legislative history left "no doubt that Congress intended that public lands include at least some navigable waters." *Id.* at 702. But it was unwilling to accept the Alaska Natives' contention that ANILCA's subsistence priorities extended to all of Alaska's navigable waters. Instead, the court of appeals agreed with the United States' position, first taken in the district court,[1] that ANILCA extends to "those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine." *Id.* at 704. On December 19, 1995, the court of appeals withdrew its original unanimous decision and reissued it as a majority opinion, accompanied by a dissenting opinion of Judge Hall. *Id.* at 699. It then remanded the case to the district court for further proceedings consistent

[1] At the start of the litigation, the United States defended the federal regulations that excluded all navigable waters from the federal subsistence management program. At oral argument on the motions for partial summary judgment, the United States explained that it had concluded that that interpretation was not correct and urged instead that at least some navigable waters—those that are subject to federal reserved water rights—are subject to federal subsistence management. See *John* v. *United States*, 247 F.3d 1032, 1038 (9th Cir. 2001) (Tallman, J., concurring in the judgment).

with its opinion. *Id.* at 704. On January 5, 1996, petitioner filed a petition for a writ of certiorari seeking review of the court of appeals' decision, which this Court denied. *Alaska* v. *Babbitt*, 517 U.S. 1187 (1996).[2]

4. a. While the original suit remained before the district court on remand, the Secretaries published regulations to "conform the Federal subsistence management regulations" to the court of appeals' decision in *Katie John I* by "identif[ying] Federal land units in which reserved water rights exist." See Pet. App. 189a, 191a, 202a, 236a-238a (reprinting 64 Fed. Reg. 1276, 1279, 1286-1287 (Jan. 8, 1999) (36 C.F.R. 242.3(b) (2001), 50 C.F.R. 100.3(b) (2001))). The regulations were proposed in draft form in 1997, see 62 Fed. Reg. 66,216, 66,222-62,223 (Dec. 17, 1997), and became final in 1999, see Pet. App. 188a-367a.

Under those regulations, federal authority over the covered public lands is limited. Federal regulations to implement the subsistence-use priority "[f]or the most part * * * continue[] pre-existing subsistence harvest activities at a level already occurring under State management." Pet. App. 198a (reprinting 64 Fed. Reg. at 1278); see also *id.* at 232a ("[S]ubsistence fisheries will continue at essentially the same levels as they presently occur.") (reprinting 64 Fed. Reg. at 1286). The ANILCA regulations do "not restrict any existing sport or commercial fishery on the public lands," *ibid.* (reprinting 64 Fed. Reg. at 1285-1286)—activities that remain within the purview of state

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[2] Alaska had also sought certiorari from the court of appeals' initial panel decision in No. 95-892, but it withdrew that petition after the court of appeals' initial decision was itself withdrawn. *Alaska* v. *Babbitt*, 516 U.S. 1036 (1996).

regulation. A Federal Subsistence Board is charged with implementing the subsistence-use priority, and has the authority to restrict non-subsistence activities on public lands if needed to protect subsistence use, but may only take such actions "to the extent necessary, to implement [the subsistence-use priority] of ANILCA." *Id.* at 249a (reprinting 64 Fed. Reg. at 1289).

Moreover, under ANILCA, "[s]tate fish and game regulations apply to public lands," and are expressly "adopted and made a part of" the federal regulations, except to the extent they are inconsistent with or superseded by specific federal regulations under ANILCA. Pet. App. 257a (reprinting 64 Fed. Reg. at 1291). In practice, only "a few specific regulations" implementing ANILCA have been inconsistent with the state scheme. *Id.* at 221a (reprinting 64 Fed. Reg. at 1283).

Given the limitations on federal authority under the ANILCA subsistence-use framework, the Secretaries, in adopting the 1999 regulations, concluded that they were "not expected to have a significant impact on either the physical environment or the socio-economic activities generated by Alaska's fisheries." *Id.* at 198a (reprinting 64 Fed. Reg. at 1278).

b. Congress imposed moratoria for several years on the new regulations implementing the subsistence-use priority, thereby giving the State the opportunity to amend its laws to regain full control of subsistence-use management on federal public lands before the regulations took effect. See Department of the Interior and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-134, Tit. I, sec. 1(d), § 336, 110 Stat. 1321-210; Department of the Interior and Related

Agencies Appropriations Act, 1997, Pub. L. No. 104-208, Tit. I, sec. 101(d), § 317, 110 Stat. 3009-222; Department of the Interior and Related Agencies Appropriations Act, 1998 (1998 Appropriations Act), Pub. L. No. 105-83, § 316(a), 111 Stat. 1592; Department of the Interior and Related Agencies Appropriations Act, 1999 (1999 Appropriations Act), Pub. L. No. 105-277, Div. A, sec. 101(e), § 339(a)(1), 112 Stat. 2681-295. Congress expressly provided, however, that the federal regulations would take effect if Alaska did not amend its law to enact a subsistence-use priority for rural residents that complied with ANILCA. See 1998 Appropriations Act, § 316(d), 111 Stat. 1595 (providing that if "[t]he Secretary [could not] certify before December 1, 1998 [that] such laws have been adopted in the State of Alaska," the limitations on operation of the new regulations "shall be repealed on such date"); 1999 Appropriations Act § 339(b)(2), 112 Stat. 2681-296 (restriction "shall be repealed" on October 1, 1999, if the Secretary of the Interior does not make certification by that date); 16 U.S.C. 3102 note. Pursuant to the 1999 Appropriations Act, when the State did not enact measures to assume regulatory authority, the regulations took effect.

5. After the regulations implementing *Katie John I* took effect, the district court entered final judgment in the *Katie John* case. In an order dated January 6, 2000, the district court, which had already modified its rulings to mirror the court of appeals' ruling on the reserved water rights doctrine, "readopt[ed] all of its rulings on the merits of plaintiffs' claims heretofore made" and deemed those rulings final "for all purposes and to all parties." Pet. App. 107a (citation omitted).

Petitioner appealed. The court of appeals voted to hear the second appeal en banc rather than by a three-judge panel. *John* v. *United States*, 247 F.3d 1032, 1033 (9th Cir. 2001) (per curiam) (*Katie John II*). Petitioner argued, among other things, that construing ANILCA to reach waters in which the United States had reserved rights was error because ANILCA lacks a "clear statement" of intent to diminish the State's authority over its waters. Alaska En Banc Br. at 13-14, *Katie John II*, *supra* (No. 00-35121). Some members of the court of appeals would have adopted a more expansive reading of ANILCA, as extending to all navigable waters. See *Katie John II*, 247 F.3d at 1034 (Tallman, J., concurring in the judgment). Others would have read the statute to exclude all navigable waters, on clear-statement grounds. See *id.* at 1044 (Kozinski, J., dissenting). Neither of those alternative approaches garnered a majority of the en banc panel, however. The court therefore affirmed the district court's judgment in a per curiam decision, holding 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." *Id.* at 1033.

Petitioner obtained an extension of the deadline for filing a petition for a writ of certiorari but ultimately decided against seeking further review. Alaska's Governor explained that he had decided to "stop a losing legal strategy that threatens to make a permanent divide among Alaskans." See, *e.g.*, Martha Bellisle & Tom Kizzia, *No Appeal of Katie John*, Anchorage Daily News, Aug. 28, 2001, at A1. Accordingly, the Ninth Circuit's decision became a binding final judgment.

6. On January 6, 2005, petitioner filed this new suit to challenge the provisions of the 1999 regulations that identified particular bodies of water as subject to the ANILCA subsistence-use priority. The suit did not dispute that the subsistence-use priority applied to navigable waters in which the United States had an interest based on the reserved water rights doctrine—the issue resolved against petitioner in the prior litigation. Petitioner contested, however, whether the Secretaries had appropriately identified those waters by regulation, rather than by an adjudication for each water body; whether deference to the Secretaries' determinations was appropriate; and whether the regulations properly identified reserved rights in particular waters, such as those associated with non-federally-owned inholdings within the boundaries of specified national forests and federally designated conservation units, and inland waters adjacent to the external boundaries of specific federal reservations.[3] Pet. App. 66a; see also *id.* at 68a-69a; C.A. Supp. E.R. 39-57. Petitioner also contested whether ANILCA was properly applied on those lands to which the United States held title that had been tentatively approved for transfer to the State of Alaska or to Native Corporations. C.A. Supp. E.R. 16-17.

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[3] The narrow scope of Alaska's challenge comported with public statements of Alaska's Governor that the suit did not seek to challenge the framework in *Katie John I* for determining the ANILCA subsistence-use priority's scope. See, *e.g.*, Elizabeth Bluemink & Timothy Inklebarger, *State to Sue Feds Over Water Rights*, Juneau Empire, Jan. 5, 2005, at A1 (quoting Governor's statement that the case "does not challenge * * * the Katie John decision").

Petitioner's suit was consolidated with a challenge brought by Alaska Native plaintiffs, who argued principally that the regulations should have treated additional waterways as subject to ANILCA based on the reserved water rights doctrine. Pet. App. 66a-67a, 68a.

The district court rejected the challenges of both petitioner and the Alaska Native plaintiffs. Pet. App. 65a-95a, 96a-183a. It first determined that the Secretaries had acted permissibly in determining the areas in which the United States has reserved water rights by rulemaking rather than individual adjudications. *Id.* at 65a-95a.

The district court then affirmed the Secretaries' determination that particular waters identified in the 1999 regulations are waters in which the United States has reserved water rights. Pet. App. 182a-183a. Applying the framework of *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), the court addressed Alaska's challenges to the Secretaries' treatment of particular waters. The court concluded for each of those waters that the Secretaries' construction was permissible. See Pet. App. 144a-150a (inholdings), 151a-156a (waters adjacent to federal reservations), 174a-182a (selected-but-not-yet-conveyed lands and appurtenant waters). In addition, the court rejected petitioner's challenge to the use of the "headland-to-headland" method of drawing a line across the mouth of a river to establish the boundary between the inland waters covered by the ANILCA regulations and marine waters, which are not covered. *Id.* at 136a-144a.

The district court also rejected the challenges of Alaska Native plaintiffs, who argued that the regula-

tions were impermissibly underinclusive based on the exclusion of particular waters. Pet. App. 144a, 156a-163a.

8. The court of appeals unanimously affirmed. Pet. App. 1a-64a. It noted that *Katie John I* formed the "controlling law" against which the 1999 regulations were to be assessed. *Id.* at 23a. In "approv[ing] the Secretaries' use of the federal reserved water rights doctrine to identify which waters are 'public lands' for purposes of ANILCA's rural subsistence priority," *id.* at 18a, the court reasoned, *Katie John I* had called upon the Secretary to "apply[] the federal reserved water rights doctrine in [a] novel way," *id.* at 22a. Specifically, it had called on the Secretaries to identify "locations of water sources" in which the United States has reserved water rights outside the traditional "context of the United States enforcing its right to that amount of water necessary to fulfill the purpose of a particular reservation." *Ibid.*

Against this backdrop, the court of appeals turned first to petitioner's challenge to the Secretaries' methodology, and concluded that "the Secretaries appropriately used notice-and-comment rulemaking, rather than adjudication to identify those waters that are 'public lands' for the purpose of determining the scope of ANILCA's rural subsistence priority." Pet. App. 25a. The court noted that ANILCA authorized the Secretaries to "prescribe such regulations as are necessary" to implement the statute. *Ibid.* (quoting 16 U.S.C. 3124). It also concluded that the *Katie John I* court "intended the agencies to act through rulemaking, where doing so was feasible," not, as petitioner had suggested, to "require the agencies to initiate

individual water rights adjudication proceedings for each identified body of water." *Id.* at 26a.

The court of appeals then turned to petitioner's challenges to the inclusion of particular bodies of water in the 1999 regulations. It determined that "some deference" was appropriate to the Secretaries' assessment of whether particular lands are covered by ANILCA's subsistence-use priority, because the Secretaries were charged with administering the statute. Pet. App. 26a-28a. The court noted that "[t]he administrative record reveals the bases for asserting federal reserved water rights with regard to each unit," *id.* at 29a, and rejected petitioner's particular challenges to the designation of, respectively, waters adjacent to federal lands, *id.* at 29a-34a; seven Juneau-area streams and Sixmile Lake, *id.* at 35a-37a; and waters on inholdings, *id.* at 37a-38a. It further rejected petitioner's challenge to the headland-to-headland methodology used to distinguish inland areas from marine waters. *Id.* at 38a-40a. Finally, the court rejected the Alaska Natives' claims that the Secretaries improperly omitted certain bodies of water from their designation of covered waters. *Id.* at 40a-42a. Petitioner did not seek rehearing en banc.

ARGUMENT

In order to end the dispute over subsistence uses of public lands, petitioner declined in 2001 to seek further review of the court of appeals' holding in the extended *Katie John* litigation that ANILCA's subsistence-use priority applies to waters in which the United States has an interest based on reserved water rights. That holding is binding on petitioner under established principles of preclusion. As a result, the only issues properly before this Court in this subse-

quent litigation—and the only issues actually litigated and decided below—concern whether the Secretaries properly determined, through the issuance of regulations, that particular waters are covered under that established legal framework. The court of appeals did not err in finding that the designations of waters were proper, and there is no conflict warranting review concerning the meaning of ANILCA. In addition, because Title VIII of ANILCA authorizes only limited regulation of public lands, and does not otherwise supplant state authority, the significance of the decisions construing the geographic scope of the federal subsistence-use priority is modest. Further review is not warranted.

1. The court of appeals correctly decided the questions concerning the application of the reserved water rights doctrine, in this unique context of statutory interpretation, that were left open after *Katie John*. In *Katie John I*, 72 F.3d 698 (9th Cir. 1995), after observing that ANILCA applies on lands in which there are "interests * * * the title to which is in the United States," the court of appeals held that "[b]y virtue of its reserved water rights, the United States has interests in some navigable waters." *Id.* at 702-703. *Katie John I*, which thus established the "controlling law" here, Pet. App. 23a, called upon the Secretaries to identify waters in which the United States has an "interest" by virtue of the reserved water rights doctrine, 72 F.3d at 704. The court of appeals reasonably understood *Katie John I* to contemplate that this was to be done by regulation, in order to complete the task as expeditiously as possible. See Pet. App. 25a- 26a; see also 16 U.S.C. 3115(a)(1).

Against this backdrop, the court of appeals correctly upheld the 1999 regulations designating certain waters as covered by ANILCA's subsistence-use priority. As the court of appeals concluded, "[t]he administrative record" of thousands of pages "reveals the bases for asserting federal reserved water rights with regard to each unit." Pet. App. 29a. According the Secretaries "some deference" concerning their interpretation of ANILCA, *id.* at 28a, the court properly rejected the challenges petitioner raised below to the determinations that particular waters were not covered—challenges that petitioner does not renew here. See *id.* at 37a-38a (analyzing inholdings), *id.* at 29a-34a (analyzing adjacent waters), *id.* at 35a-37a (analyzing seven Juneau-area streams and Sixmile Lake). Because that fact-specific decision does not contradict the decision of any court and is not meaningfully challenged in the certiorari petition, no further review is warranted.

2. Rather than challenging the 1999 regulations' treatment of particular waters, petitioner now seeks to challenge matters decided in *Katie John*, in which petitioner elected not to seek this Court's review following final judgment. Petitioner first argues (Pet. 17-25) that the court of appeals misapplied the reserved water rights doctrine, under which the United States impliedly reserves only such quantities of water as are necessary to accomplish the purposes for which a federal reservation was created. This challenge is procedurally barred and in any event lacks merit.

a. First, petitioner's challenge is barred by issue preclusion, which "bars successive litigation of an issue of fact or law actually litigated and resolved in a

valid court determination essential to the prior judgment." *Taylor* v. *Sturgell*, 553 U.S. 880, 892 (2008) (internal quotation marks and citation omitted). As the court of appeals explained, while "previous applications of the federal reserved water rights doctrine" had "focused on the amount of water needed for a specific federal reservation," *Katie John I* commanded a "novel" consideration of reserved water rights, which required a determination of "the locations of water sources that might generally be needed for subsistence living from many such reservations," without any need for an allocation of particular quantities of water. Pet. App. 22a. Under *Katie John*, "[t]he Secretaries were charged with the * * * task" of "identifying those bodies of water to which the rural subsistence priority might apply by virtue of the federal reserved water rights doctrine." *Id.* at 24a. That charge reflected the fact that the court found the doctrine relevant not for the purpose of allocating water, but rather for the purpose of interpreting a statutory provision that required a determination of the geographic scope of federal interests in water. In light of *Katie John's* holdings, when the decision below rejected the claim petitioner now presses—that ANILCA applies only where the United States has shown a need for a particular quantity of water—it did so by concluding that the challenge was foreclosed by the holding of *Katie John*. *Id.* at 22a-23a (recognizing "difficulties" in applying reserved-water-rights principles "in this novel way," but concluding that the court "must attempt to apply" that approach in light of *Katie John I*). Thus, as the court of appeals decided in a determination that it was particularly well-

suited to make, *Katie John I* decided the challenge that petitioner now presses.[4]

Katie John I reasoned from the premise that "Congress spoke to the precise question of whether *some* navigable waters may be public lands" by "clearly indicat[ing] that subsistence uses include subsistence fishing." 72 F.3d at 702. Since "subsistence fishing has traditionally taken place in navigable waters," the court of appeals had "no doubt that Congress intended that public lands include at least some navigable waters." *Ibid.* Thus, the court of appeals in *Katie John I* did not simply conclude that the right to use water to accomplish the purposes of a federal reservation qualified as an interest in ordinary parlance, *id.* at 703-704, but also that this construction was necessary to protect the subsistence fishing that Congress set out to protect, *id.* at 704. Petitioner's view, under which ANILCA would extend to only

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[4] No exception to issue preclusion applies. This is not a case in which "controlling facts or legal principles have changed significantly," *Montana* v. *United States*, 440 U.S. 147, 155 (1979), because the 1999 regulations simply "conform the Federal subsistence management regulations to the Ninth Circuit's ruling in [*Katie John I*]." Pet. App. 191a; see also Alaska En Banc Reply Br. at 39, *Katie John II*, 247 F.3d 1032 (9th Cir. 2001) (No. 00-35121) (noting that 1999 "regulations simply implement the legal ruling" in *Katie John I*) (emphasis omitted). And petitioner may not relitigate the issues decided in *Katie John* by arguing that they are purely legal questions. *United States* v. *Stauffer Chem. 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.'") (quoting 1 Restatement (Second) of Judgments § 28 cmt. B, at 275 (1982)).

waters in which individual adjudications established a present need for a particular quantity of water, would mean that ANILCA would not protect the subsistence-fishing interest at the heart of the holding in *Katie John I*.

b. In any event, while petitioner seeks consideration of this claim principally based upon the assertion that the decision below "vastly expand[ed] the federal reserved water rights doctrine, in direct conflict with this Court's precedent," Pet. 20, that is not so. In the opinion below and in *Katie John I,* the court of appeals explicitly and repeatedly acknowledged, citing the cases on which petitioner relies, that federal reservation of water rights exists only "to the extent needed to accomplish the purpose of the reservation," and that "the federal reserved water rights doctrine is limited to the quantity of water necessary to fulfill the primary purposes of the reservation." Pet. App. 21a (quoting *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976), and citing *United States* v. *New Mexico*, 438 U.S. 696, 716-718 (1978)); see also *id.* at 19a, 33a-34a; *Katie John I*, 72 F.3d at 703.

The court of appeals' holding regarding ANILCA did not diverge from these principles. As the court of appeals explained, the Secretaries' task in promulgating the regulations was to identify public lands within the meaning of ANILCA by determining the waters in which the United States had an "interest," not to allocate water. Pet. App. 24a. The court simply construed the term "interest" to include areas where the United States has a *contingent* interest—*i.e.*, bodies in which the United States could invoke against others a reserved right to use water to accomplish the purposes of particular reservations if the need to assert

such a right arose. *Ibid.* (stating that the Secretaries "were charged with * * * identifying those bodies of water to which the rural subsistence priority might apply by virtue of the federal reserved water rights doctrine"). That resolution of an issue of statutory construction under ANILCA casts no doubt on the principle that the United States must show necessity to establish a particular right to an actual allocation of water. See *id.* at 24a-25a. Similarly, nothing in prior cases addresses whether the term "interest" in ANILCA includes the right to use water to accomplish the purposes of a federal reservation. Accordingly, the cases that petitioner cites (Pet. 17-20)—setting out controlling legal principles that the court of appeals explicitly accepted (see Pet. App. 20a-21a, 33a-34a)—do not call into question the court of appeals' holding.[5]

3. a. Petitioner also questions "[w]hether the Ninth Circuit properly proceeded on the premise * * * that ANILCA could be interpreted to federalize navigable waters at all." Pet. i. That challenge is precluded by *Katie John*. Petitioner's argument that ANILCA lacked a sufficiently clear statement of intent to displace state control over navigable waters is "the very same claim," *Sturgell*, 553 U.S. at 892, that petitioner presented in *Katie John II*, where it was rejected. See, *e.g.*, Alaska En Banc Br. at 19-24, *Katie John II*, *supra* (No. 00-35121). That disposition in the prior proceeding triggers claim preclusion. *Sturgell*, 553 U.S. at 892. And because the *Katie John* holding

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[5] For the same reasons, there is no split of authority with the state court decisions petitioner cites in a footnote, which simply recited the reserved water rights doctrine's standards or concluded that the United States lacks reserved water rights in particular parcels of land. See Pet. 24 n.5.

regarding the geographic scope of ANILCA's subsistence-use priority necessarily rejected petitioner's arguments that the priority does not attach to navigable waters at all because there is not a clear statement by Congress to that effect, the doctrine of issue preclusion bars successive litigation of this "issue of * * * law actually litigated and resolved in a valid court determination essential to the prior judgment." *Ibid.* (quoting *New Hampshire* v. *Maine*, 532 U.S. 742, 748-749 (2001)). Indeed, even petitioner acknowledges (Pet. 33 n.8) that the issue it now presses was actually decided against it in the *Katie John* litigation.

The policies underlying those preclusion doctrines have particular force here. Rules of preclusion are "central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions." *Montana* v. *United States*, 440 U.S. 147, 153 (1979). "By precluding parties from contesting matters that they have had a full and fair opportunity to litigate," those rules "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." *Sturgell*, 553 U.S. at 892 (brackets, first set of internal quotation marks, and citation omitted). Since petitioner elected to forgo review by this Court of the final *Katie John* judgment, the interests of those who have relied on the rules established in that litigation are entitled to protection against petitioner's apparent second thoughts about its election many years later. At the very least, these threshold preclusion issues render this case an inappropriate vehicle for consideration of the scope of the rural subsistence-use priority for fishing.

b. Moreover, petitioner concedes, as it must, that it did not raise its challenge to the established legal framework in the lower courts in this case. Pet. 33 n.8. But petitioner could have stated its intent to challenge the *Katie John* framework if it wished to do so—and if it were not contemporaneously disclaiming any challenge to *Katie John*. See Elizabeth Bluemink & Timothy Inklebarger, *State to Sue Feds Over Water Rights,* Juneau Empire, Jan. 5, 2005, at A1. And petitioner did not seek en banc review of the panel's ruling to raise its broader arguments. Because petitioner elected to bring only narrow challenges to the 1999 regulations, the Court should not grant review to entertain the far broader challenge petitioner now seeks to raise.

c. Petitioner's claims would not warrant review in any event. The now long-settled rulings in the *Katie John* cases were correct. ANILCA spoke clearly to whether the subsistence-use priority extends to navigable waters, by protecting subsistence fishing, see, *e.g.*, 16 U.S.C. 3114, which "has traditionally taken place in navigable waters." *Katie John I,* 72 F.3d at 702; see also *Katie John II*, 247 F.3d 1032, 1036 (9th Cir. 2001) (Tallman, J., concurring in the judgment) ("Given the crucial role that navigable waters play in traditional subsistence fishing, it defies common sense to conclude that when Congress indicated an intent to protect traditional subsistence fishing, it meant only the limited subsistence fishing that occurs in non-navigable waters.").

In addition, ANILCA's geographic scope is defined in terms that readily encompass lands in which the United States has an interest short of full ownership. The statute provides that the subsistence-use priority

applies to "lands the title to which is in the United States," 16 U.S.C. 3102(2), and that "land" means "lands, waters, *and interests therein*," 16 U.S.C. 3102(1) (emphasis added). Against a backdrop that made plain Congress's desire to protect the subsistence fishing that occurs principally in navigable waters, the term "interests" in the statute is best read to include the interests of reserved water rights. Even were there ambiguity in the term's meaning, because Congress charged the Secretaries with administering ANILCA, see 16 U.S.C. 3115(a)(1), deference to their reasonable construction of the geographic scope of the subsistence-use priority would be appropriate.

Moreover, Congress has acquiesced in the regulatory framework that the Secretaries adopted to implement *Katie John*, by providing that the regulations would go into effect if, after a brief moratorium, the State did not enact its own ANILCA-compliant rural subsistence-use priority. See 1998 Appropriations Act § 316(a), 111 Stat. 1592; 1999 Appropriations Act, § 339(b)(2), 112 Stat. 2681-296; see also 16 U.S.C. 3102 note. The text of the 1998 Appropriations Act itself establishes that Congress acted with the understanding that, as provided in *Katie John I*, the statutory priority and the regulations implementing it "applie[d] to navigable waters in which the United States has reserved water rights as identified by the Secretary of the Interior." 1998 Appropriations Act, § 316(b)(3)(B) (16 U.S.C. 3111(b)(5) (Supp. III 1997)).

d. Nor is there a conflict of authority that would justify review. ANILCA's subsistence-use provision applies only in Alaska and has not been interpreted by any other federal court of appeals. And because the court of appeals' interpretation of ANILCA relied

heavily on statutory context, that court's interpretation of ANILCA's language in the *Katie John* cases has little relevance to the interpretation of other statutes.

Petitioner asserts that there is a conflict with a decision of the Alaska Supreme Court. In *Totemoff* v. *State*, 905 P.2d 954 (Alaska 1995), cert. denied, 517 U.S. 1244 (1996), the assertedly conflicting case, the State of Alaska prosecuted a rural hunter for locating and shooting a deer at night through the use of a spotlight—a practice prohibited under state law. The hunter shined his spotlight and fired his gun from a boat in the marine waters of Prince William Sound while the deer stood on a federally owned island. *Id.* at 957. The defendant contended that he was engaged in "customary and traditional" subsistence hunting practices, *ibid.*, and that ANILCA therefore preempted the state regulation at issue. The state supreme court rejected that contention, explaining that Alaska retains its authority to enforce hunting regulations on federal lands except to the extent that there is an actual conflict between federal and state regulation. *Id.* at 958-960. It concluded that there was no conflict between ANILCA's federal subsistence program and the State's anti-spotlighting regulation. See *id.* at 960-961. The state supreme court's conclusion that ANILCA did not preempt the state regulation resolved the defendant's preemption claim.

The Alaska Supreme Court went on to opine that "even if" ANILCA had generally preempted the State's anti-spotlighting regulation, the prosecution would have been proper because, in the court's view, and contrary to the *Katie John* cases, a boat in navigable waters was outside of ANILCA's geographic

reach. *Totemoff*, 905 P.2d at 961-968. But that subsequent discussion of ANILCA was not necessary to the disposition in *Totemoff*, and the Alaska Supreme Court, in the nearly 20 years since *Totemoff*, has not invoked that discussion to actually decide a case.[6]

In any event, the Alaska Supreme Court's 1995 decision in *Totemoff* predated the 1999 regulations defining the geographic scope of the subsistence-use priority to include certain navigable waters, the statutory provisions enacted by Congress expressly allowing these regulations to go into effect if the State did not enact measures to provide for state regulation of subsistence hunting and fishing (see pp. 9-10, 24, *supra*), and petitioner's deliberate decision in 2001 not to seek

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[6] In *James* v. *State*, 950 P.2d 1130 (Alaska 1997), which petitioner cites, defendants charged with violating state wildlife laws raised a claim of ANILCA preemption based on the theory that "the United States holds title to the coastal sea floor." *Id.* at 1133 n.5. The defendants did not "contend that the reserved water right doctrine applies," but contended that the waters at issue were public lands on the theory that they lay above submerged lands to which the United States held title as a result of a pre-statehood reservation by the United States. *Id.* at 1132-1333 & n.5. In rejecting the defendant's claim, *James* relegated both *Totemoff* and *Katie John I* to a footnote, where it described their conclusions before explaining that the defendants had not raised the navigable-servitude and reserved-rights arguments at the center of those cases. *Id.* at 1132 n.5. The only case cited by petitioner that appears, over 20 years, to have applied *Totemoff* in the manner that petitioner describes is an unpublished lower court case. *Miyasoto* v. *State*, No. A-5486, 1996 WL 33686451, at *1 (Alaska Ct. App. Mar. 13, 1996) (relying on *Totemoff* as having "held that navigable waters are generally not 'public land' under ANILCA"); cf. *Charles* v. *State*, 232 P.3d 739, 744 (Alaska Ct. App. 2010) ("In *Totemoff*, the supreme court held that Congress in enacting ANILCA only preempted enforcement of state hunting laws when there was 'actual conflict' between state and federal law.") (quoting *Totemoff*, 905 P.2d at 960-961)).

this Court's review of the court of appeals' decision in *Katie John II*.[7] Federal regulations are binding authority in state courts under the Supremacy Clause, just as federal statutes are. See *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1981). Accordingly, those regulations—in addition to Congress' acceptance of them in 1998—likely eliminate any split of authority between state and federal courts concerning the scope of ANILCA's subsistence priority. At a minimum, even if the issue otherwise warranted review, the Alaska Supreme Court should first be permitted the opportunity to consider the impact of those regulations and related developments on ANILCA's application before this Court addresses the issue.

4. Finally, neither the questions raised nor the questions actually presented here are of sufficient significance to warrant this Court's intervention. Alaska law continues to govern the waters covered by the subsistence-use priority, unless federal preemp-

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[7] In *Totemoff*, the Alaska Supreme Court held that the State was not bound by collateral estoppel by virtue of the Ninth Circuit's contrary decision in *Katie John I* because, the state supreme court ruled, collateral estoppel should not apply with respect to a pure question of law. See 905 P.2d at 963-964. The state supreme court relied, however, on state-law principles of issue preclusion resulting from judgment in a prior case in state court. See *ibid.* (quoting *State* v. *United Cook Inlet Drift Ass'n*, 895 P.2d 947, 954 (Alaska 1995)). The preclusive effect of the judgment of a federal court is, however, a question of federal law. See, *e.g.*, *Blonder-Tongue Labs., Inc.* v. *University of Ill. Found*, 402 U.S. 313, 324 n.12 (1971). In any event, the Alaska Supreme Court had no occasion in *Totemoff* to consider the federal preclusive effect of the Ninth Circuit's subsequent final judgment in *Katie John II*, from which the State deliberately chose not to seek this Court's review.

tion is necessary to achieve the objectives in the ANILCA statute. Pet. App. 221a, 257a. In practice, this has meant that State fishery rules remain in place, governing both subsistence and non-subsistence users, in all but unusual cases. See *id.* at 221a (explaining that state fishery management plans apply on public lands except for a "few specific regulations" that would not be applied to rural subsistence users).

In addition, because the Federal Subsistence Board may limit non-subsistence fishing only if necessary under specified circumstances, such as to protect subsistence fishing or the natural resource at issue, see *id.* at 249a; see also *id.* at 155a, the Board has rarely taken actions that limit non-subsistence use. This Office has been informed by the Department of the Interior that the Board has closed portions of specific waterways without petitioner's assent on only approximately eight occasions over approximately 15 years. That experience has proved accurate the Secretaries' assessment when the regulations were issued that the regulations do not significantly alter the level of subsistence fishing, *id.* at 198a, the conduct of sport or commercial fishing, *id.* at 232a, or "either the physical environment or the socio-economic activities generated by Alaska's fisheries," *id.* at 198a.

Moreover, ANILCA itself specifically allows for the State to assume complete authority for administering the rural subsistence-use priority on all federal public lands, including navigable waters in which the United States holds reserved water rights, but the State has not enacted the measures necessary to do so. Especially in these circumstances, there is no occasion for this Court to consider petitioner's efforts to upset the regulatory framework that has governed

rural subsistence-use fishing within and adjacent to specified federal reservations for the past 15 years.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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