No. 13-562

In the Supreme Court of the United States

STATE OF ALASKA,

Petitioner,

v.

SALLY JEWELL, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Ninth Circuit's decision in this case upholding the 1999 Rule not only directly contravenes this Court's precedents, but greatly expands the federal reserved water rights (FRWR) doctrine. As the western States' amicus brief underscores, that is a matter of profound general importance given the increasing significance of water in the American West and the strong presumption against finding a federal intent to defeat a State's entitlement to waters under the equal-footing doctrine. *See* Colorado Br. 6-16. And this case is a matter of extraordinary importance to the State of Alaska and its residents in particular, because the 1999 Rule's unprecedented application of the FRWR doctrine effectively divests the State of its authority to manage fish and game along vast stretches of waters in over half of Alaska. In a very real sense, this case cuts at the heart of Alaska's sovereignty.

In response, the United States does not seriously defend the Ninth Circuit decision below. Instead, it argues that Alaska is *precluded* from seeking review of that decision. But that argument is clearly wrong. The lead question concerns the application of the FRWR doctrine sanctioned by the 1999 Rule, Pet. i, 17-25, and the United States itself acknowledges (at 15) that the Ninth Circuit's application of the FRWR doctrine *is* "properly before this Court." This issue could not have been litigated in the *Katie John* action because the Secretaries had not yet applied the FRWR doctrine and, indeed, the 1999 Rule was not even at issue in that

action.[1] Either the United States has simply mistaken the first question presented or it is improperly attempting to evade review of what the government must recognize is an indefensible decision.

The United States also overlooks what it told this Court in the earlier *Katie John* action. There, the government urged the Court to deny certiorari on the ground that the agencies had yet to promulgate final regulations with a "direct bearing on the precise contours and practical importance of the issues"—and represented that "those regulations will, of course, be subject to judicial review." U.S. Opp. 15, *Alaska v. Babbit*, Nos. 95-1084 & 1496. The 1999 Rule at issue in this case represents the final regulations to which the Solicitor General was referring. There is no basis to deny Alaska review of the Ninth Circuit's deeply flawed decision below upholding that Rule.

I. THE FIRST QUESTION MERITS REVIEW

A. The Issue Is Properly Presented

Although it spends most of its brief arguing preclusion, the United States acknowledges that Alaska *may* challenge the Secretaries' "application of the reserved water rights doctrine" before this Court. U.S. Opp. 16; *see id.* at 15-16 ("[W]hether the Secretaries properly determined ... that particular waters are covered" under the FRWR doctrine is "properly before this Court."); Alaska Federation of

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[1] The reason why there was a "second suit" (U.S. Opp. 2) is that the *district court* concluded that the *Katie John* litigation should not be the vehicle for "litigation over the Secretaries' new [1999 Rule]," Pet. App. 76a, and ordered the parties to "commence new actions" challenging the 1999 Rule, Order at 2, *Katie John I*, No. A90-0484-CV (D. Alaska) (Dkt. 268).

Natives *et al.* (AFN) Opp. 14 n.3 ("preclusion does not apply" to the "application of the reserved water rights doctrine"). That necessary concession disposes of the United States' (and AFN's) preclusion argument.

From the outset of this case, Alaska has contended that, in adopting the 1999 Rule, the Secretaries failed to properly apply the FRWR doctrine. AFN App. 2a, 15a-16a (complaint). For example, Alaska's complaint challenged the Secretaries' failure to apply specific elements of the FRWR doctrine, including the failure to determine the specific purposes of reservations and whether (and to what extent) water was needed to accomplish such purposes. *Id.* at 16a (listing flaws). Alaska has made these arguments throughout this litigation, including on appeal. *See* Alaska CA9 Opening Br. 37-52; Alaska CA9 Answering Br. 12, 20-52; Alaska CA9 Reply Br. 14-32. And the Ninth Circuit squarely addressed the arguments. Pet. App. 23a-40a; *see id.* at 29a (addressing argument that Secretaries failed to apply key elements of FRWR doctrine).

The first question presented covers these same arguments. The petition contends that the Ninth Circuit erred in applying the FRWR doctrine in reviewing the 1999 Rule—in particular, by failing to determine whether the waters at issue were *necessary* to serve the *primary purpose* of the reservations. Pet. 17-25. These legal errors pervaded the Ninth Circuit's analysis of "[a]djacent waters" and "[s]pecific water bodies" used as illustrative examples—Sixmile Lake, seven Juneau-area streams, waters on inholdings, and coastal waters. Pet. App. 29a-40a (subheadings 1-2). The United States' argument (at 17) that the State "does not renew" its challenges to the Rule's federalization of these waters is baseless (and baffling).

The State's challenge to the Secretaries' failure to enforce the limits of the FRWR doctrine is a direct challenge to the Secretaries' *application* of the doctrine. And the categorical nature of that error makes this case more certworthy, not less.

The United States suggests that "*Katie John I* commanded" the Secretaries to disregard the necessity and purpose requirements of the FRWR doctrine in identifying FRWRs in the 1999 Rule. U.S. Opp. 18. That argument is directly refuted by *Katie John I*. *Katie John I* expressly recognized the limits imposed by the FRWR doctrine, including the necessity and purpose requirements, 72 F.3d 698, 703; held that the United States had "implicitly reserved" waters only "to the extent *needed* to accomplish the *purposes* of the reservations," *id.* (emphases added); and ultimately instructed the agencies to determine the waters in which "the United States has an interest *by virtue of the reserved water rights doctrine*," *id.* at 704 (emphasis added). Yet, in the 1999 Rule and the decision below, the Secretaries and Ninth Circuit simply disregarded the fundamental limits of the FRWR doctrine.[2]

B. The Ninth Circuit's Decision Sharply Conflicts With This Court's Cases

As then-Justice Rehnquist explained for the Court in *United States v. New Mexico*, in applying the FRWR doctrine, "the Court has repeatedly emphasized that Congress reserved 'only that amount of water

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[2] AFN's preclusion argument on question one (at 13-21) is even more misguided, because (though they have abandoned the argument here) the Katie John respondents themselves challenged the 1999 Rule below on the ground that it is "irreconcilable with settled [Supreme Court] law" establishing the FRWR doctrine. Katie John *et al.* CA9 Opening Br. 18.

necessary to fulfill the purpose of the reservation, no more.'" 438 U.S. 696, 700 (1978) (citation omitted). "Each time this Court has applied the 'implied-reservation-of-water doctrine,' it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated." *Id.* Both the 1999 Rule and the decision below flout those limits.

The 1999 Rule fails to undertake both the purpose and necessity inquiries in declaring FRWRs. Pet. 20-24. The Ninth Circuit then upheld the 1999 Rule across the board, reasoning that it was "not necessary" to determine the "purpose of the land reservation and the amount of water necessary for each reserved unit," Pet. App. 29a, and that it was sufficient to conclude that waters "may" or "might" be necessary to serve unspecified purposes, *id.* at 35a-36a. Applying that reasoning, the court upheld the designation of FRWRs in waters adjacent to federal reservations, *id.* at 32a-33a, Sixmile Lake, *id.* at 36a, State and privately owned inholdings on federal reservations, *id.* at 38a, and tidally influenced waters, *id.* at 39a. That analysis grossly conflicts with this Court's precedents.

The United States does not seriously address the clear conflict with this Court's FRWR cases. And it does not deny that the Ninth Circuit upheld the 1999 Rule based on the premise that waters "*may be* necessary" for unspecified purposes. Instead, the government tries (at 21) to recast the decision below as a matter of "statutory construction." But, by its own terms, the 1999 Rule seeks to "identif[y] Federal land units in which reserved water rights exist," Pet. App. 190a (1999 Rule), and the Ninth Circuit itself

recognized that the "[FRWR] doctrine underlies the 1999 Rule[]," Pet. App. 18a. In declaring that FRWRs exist across the State, the 1999 Rule directly contravenes this Court's FRWR precedents. And far from declaring "*contingent* interest[s]" (U.S. Opp. 20), the 1999 Rule declares what FRWRs "exist" (Pet. App. 190a), and then—based on that declaration—immediately transfers management authority from the State to the United States over the waters.[3]

C. The Issue Is Unquestionably Important

The United States' attempt (at 26-27) to trivialize the importance of this case is startling. "[N]avigable waters uniquely implicate sovereign interests." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 284 (1997). The FRWR doctrine has heretofore existed as a carefully constrained exception to the rule that States take control of navigable waters within their borders upon entering the Union. Pet. 14-15. Especially in the arid American West—where water is increasingly precious—the limits that this Court has imposed on the doctrine are vitally important. Colorado Br. 1-16.

This issue is by no means "fact-bound" (AFN Br. 2). The State is challenging the Secretaries' and the Ninth Circuit's failure to enforce—or even analyze—critical limits of the FRWR doctrine. The challenge goes beyond any fact-bound determination that a particular waterway has a particular purpose; or that a particular amount of water is necessary to serve that purpose. The problem is fundamental: neither the Secretaries

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[3] AFN argues (at 26) that the Secretaries applied the FRWR doctrine in a "painstaking manner," consistent with a "long line" of precedent. But there is no precedent—from any court—authorizing an agency to disregard the purpose and necessity requirements of the FRWR doctrine.

nor the Ninth Circuit even undertook those inquiries. Thus, far from a "fact-bound" challenge, this case tests the fundamental limits of the FRWR doctrine in the context of the most far-reaching application of the doctrine in history and places at stake the stability of water law in the West. Colorado Br. 14-16.

The exceptional importance of this case for Alaska is unassailable. Fishing and hunting are central to Alaska's way of life. Pet. 14-17. The 1999 Rule transfers from the State to the federal government the authority to manage "'subsistence fisheries in *60 percent* of Alaska's waters,'" on over "'200 million acres'" of land. *Id.* at 15-16 (quoting U.S. Fish and Wildlife Service); *see* Add. 1a (map). The United States claims that it has not exercised this authority inconsistent with state law. U.S. Opp. 27-29; *see* AFN Opp. 28-30. But just as the Court "would not uphold an unconstitutional statute merely because the Government promised to use it responsibly," it should not uphold an unlawful declaration of FRWRs based on a promise that federal regulators will not intrude on state interests in managing the federalized waters. *United States v. Stevens*, 559 U.S. 460, 480 (2010).

Moreover, the federal takeover effected by the 1999 Rule is far from hypothetical. The 1999 Rule extensively regulates fishing and hunting to implement the rural subsistence priority (*e.g.*, proscribing the equipment that may be used and number of fish and game that may be taken), *see* Pet. 31-32; 64 Fed. Reg. 1276, 1288-313 (Jan. 8, 1999). The 1999 Rule empowers a Federal Subsistence Board—made up entirely of federal officers and federal designees—to implement these regulations and adopt further regulations. 64 Fed. Reg. at 1289-90. And the 1999 Rule declares that

federal hunting and fishing rules trump inconsistent state law, and that the Board "may close public lands to hunting and fishing, or take actions to restrict the taking of fish and wildlife despite any State authorization [to the contrary]." *Id.* at 1291.

The United States acknowledges (at 28) that conflicts *have* arisen (though it understates them, Pet. 31-32). There has also been conflict between federal regulations that allow the use of subsistence-harvested fish for customary trade, and state law that generally prohibits it. Ken Lord, U.S. Dep't of the Interior, Memorandum re: Customary Trade Regulations and the Enforceability of Alaska's Subsistence Scheme on State and Federal Lands at 1 (July 6, 2000) (quoting 50 C.F.R. § 100.26(c)(11) (2000)). Even beyond such conflicts, the federal monitoring of the waters and reporting requirements are alone significant. And this is just the beginning. The United States is already relying on the 1999 Rule and the decision below in arguing that the government can restrict public use of navigable rivers in Alaska for *non*-subsistence uses *outside* ANILCA. *See Sturgeon v. Masica*, No. 11-cv-00183-HRH (D. Alaska), ECF No. 84 at 11-17 (Mar. 8, 2013); *see* Pacific Legal Foundation (PLF) Br. 14-15.

II. THE SECOND QUESTION MERITS REVIEW

A. The Issue Is Properly Presented

On the second question, the United States' primary response is again preclusion and—though the argument is different than its preclusion argument on question one—it too fails. Indeed, the Alaska Supreme Court rejected essentially the same preclusion argument in *Totemoff v. Alaska*, 905 P.2d 954, 965 (Alaska 1995), *cert. denied*, 517 U.S. 1244 (1996).

Claim preclusion does not apply because the State is challenging a materially different rule in this case that it could not have challenged in the *Katie John* action. *Contra* U.S. Opp. 21-22; AFN Opp. 18-19. In *Katie John*, the State challenged the 1990 Rule, which did not apply to navigable waters at all. *Katie John I*, 72 F.3d at 701; *see* 55 Fed. Reg. 27,114, 27,115 (June 29, 1990); 57 Fed. Reg. 22,940, 22,942 (May 29, 1992). This action (which was not filed until 2005, AFN App. 21a) challenges the separate 1999 Rule—which *does* apply to navigable waters—on the ground that (*e.g.*) the Secretaries misapplied the FRWR doctrine. Recognizing the fundamental differences in the two rules, the district court itself *forced* Alaska to bring a separate case to challenge the 1999 Rule. *Supra* n.1.

Issue preclusion does not work either. *Contra* U.S. Opp. 21-22; AFN Opp. 14-16. Not only is the statutory interpretation issue presented by question two purely legal, but issue preclusion also does not operate when—as here—there has been a material change in the surrounding factual and legal context. *See Bobby v. Bies*, 556 U.S. 825, 834 (2009) (recognizing exception to rule where there is an intervening change in context); *Montana v. United States*, 440 U.S. 147, 162 (1979) (same). In *Katie John I*, the Ninth Circuit addressed the statutory interpretation question in the abstract because the 1990 Rule did not apply to navigable waters at all. That factual and legal context fundamentally changed once the Secretaries' actually applied the FRWR doctrine in the 1999 Rule.

The 1999 Rule graphically illustrates that the FRWR doctrine is unworkable as a means of defining the scope of "public lands" under ANILCA. As the Ninth Circuit below put it: "We, and perhaps the

Secretaries, failed to recognize the difficulties in applying the [FRWR] doctrine in this novel way, and in retrospect the doctrine may provide a particularly poor mechanism for identifying the geographic scope of ANILCA's rural subsistence priority management when it comes to water." Pet. App. 22a-23a. In particular, the new context exposed that FRWRs have "*no physical location* separate and distinct from the waters on which the right[s] can be enforced," *id.* at 34a (emphasis added), so their geographic scope cannot be determined *ex ante*. The demonstrated unworkability of the FRWR doctrine in divining the scope of ANILCA bears directly on whether Congress could have intended the Ninth Circuit's interpretation.

Nor is Alaska barred from raising this argument because it did not challenge *Katie John I* below. This Court does not require litigants to make futile arguments foreclosed by circuit precedent. *See, e.g.*, *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007). As AFN emphasizes (at 1-2), the Ninth Circuit would have been particularly hostile to *another* challenge to *Katie John I*. Even still, Alaska *did* argue below that ANILCA must be interpreted in light of the clear statement rule. Alaska CA9 Opening Br. 18; Alaska CA9 Answering Br. 24. Furthermore, the Ninth Circuit passed upon the issue below—in its "Analysis" section—by calling *Katie John I* into question and yet still relying on it, Pet. App. 18a-23a, so the issue is properly before the Court. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

B. The Ninth Circuit's Construction Of ANILCA Subverts Settled Principles

The reason that the United States seeks to avoid the merits is that the Ninth Circuit's interpretation of

ANILCA not only defies the text of the Act but violates the well-established rule that, "[i]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear *in the language of the statute*." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (citations and internal quotation marks omitted); *see* Pet. 26-30; Colorado Br. 16-21. The United States does not even acknowledge the clear statement rule. Instead, like the Ninth Circuit, it turns to *Chevron* deference. That argument not only implicates a circuit conflict, but contravenes this Court's precedent. Pet. 28-29; *see* PLF Br. 6-8.

The Ninth Circuit's interpretation also directly conflicts with the Alaska Supreme Court's decision in *Totemoff*. Pet. 30-32. The United States argues (at 26-27) that the 1999 Rule would result in a different outcome in future cases in Alaska. But under *Totemoff*, the 1999 Rule's declaration of FRWRs would be invalid because it is not authorized by ANILCA. *Totemoff* thus remains directly contrary to Ninth Circuit law.

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For Alaska, if not all western States, this is one of the most important federalism cases to reach the Court in years. All the requirements for certiorari are met.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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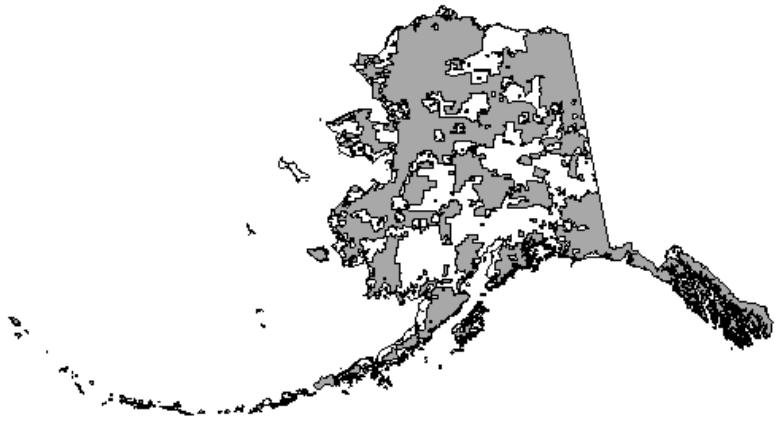
ADDENDUM

AREAS IMPACTED BY THE 1999 RULE

The map below shows the federal lands in Alaska in grey. The waters at issue in this case fall both within and outside the grey areas of the map.



[Source: U.S. Geological Survey, *available at* http://water.usgs.gov/wid/html/ak.html.]