No. 17-949

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 OF *AMICI CURIAE* STATES OF ARIZONA, ARKANSAS, IDAHO, INDIANA, NEBRASKA, NEVADA, SOUTH CAROLINA, WISCONSIN, AND WYOMING IN SUPPORT OF PETITIONER

LAWRENCE G. WASDEN
Attorney General of Idaho
DARRELL G. EARLY
Chief, Natural Resources Division
STEVEN W. STRACK
Counsel of Record
SHANTEL M. CHAPPLE KNOWLTON
Deputy Attorneys General
Natural Resources Division
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-4124
Facsimile: (208) 854-8072
Email: steve.strack@ag.idaho.gov

Counsel for Amici Curiae States

[Additional Appearances On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

MARK BRNOVICH
Attorney General
STATE OF ARIZONA

LESLIE RUTLEDGE
Attorney General
STATE OF ARKANSAS

CURTIS T. HILL, JR.
Attorney General
STATE OF INDIANA

ADAM PAUL LAXALT
Attorney General
STATE OF NEVADA

DOUG PETERSON
Attorney General
STATE OF NEBRASKA

ALAN WILSON
Attorney General
STATE OF SOUTH CAROLINA

BRAD D. SCHIMEL
Attorney General
STATE OF WISCONSIN

PETER K. MICHAEL
Attorney General
STATE OF WYOMING

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INTERESTS OF *AMICI CURIAE*

The States of Arizona, Arkansas, Idaho, Indiana, Nebraska, Nevada, South Carolina, Wisconsin, and Wyoming (collectively "*amici* States") appear in support of reversing the Ninth Circuit's decision holding that the Nation River is "public land" under the Alaska National Interest Lands Conservation Act (ANILCA) by virtue of the United States holding an implied federally-reserved water right. The *amici* States file this brief pursuant to Supreme Court Rule 34.4, providing that "[n]o motion for leave to file an *amicus curiae* brief is necessary if the brief is presented . . . on behalf of a State . . . when submitted by its Attorney General."

This case implicates the preemption of a state's authority over its navigable waters. *Amici* States are concerned with the Ninth Circuit's failure to apply the clear statement doctrine, which requires courts to presume that Congress did not intend to supersede state authority in areas traditionally regulated by states unless such intent is clearly manifested. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 172-74 (2001); *United States v. Bass*, 404 U.S. 336, 349 (1971). Ignoring the directions of the clear statement doctrine, the Ninth Circuit divested a state of its traditional authority over its navigable waters based on an unprecedented expansion of the implied-reservation-of-water doctrine.

The *amici* States, many of which include large swaths of federal land, have an interest in the correct application of the implied-reservation-of-water

doctrine.[1] In these States, reserved water rights have had, and will continue to have, a large impact on both the States and private water users. *See United States v. New Mexico*, 438 U.S. 696, 699 (1978). Of upmost concern to the *amici* States is the Ninth Circuit's novel expansion of the implied-reservation-of-water doctrine as a basis to justify increasing the National Park Service's authority over state-owned navigable waters. That concern is compounded by the Ninth Circuit's failure to apply this Court's established precedent and limit the United States' claimed reserved water right to "the amount of water necessary to fulfill the purposes of the reservation, no more." *Id.* at 700.

Although the discrete issue before the Court is the interpretation of "public lands" under ANILCA, whether a state-owned navigable river qualifies as "public land," touches "on vital issues of state sovereignty." *Sturgeon v. Frost*, ___ U.S. ___, 136 S. Ct. 1061, 1072 (2016). Moreover, the Ninth Circuit's interpretation of "public lands" under ANILCA could potentially be far reaching, as similar provisions are found throughout Title 16 of the United States Code.[2] The *amici* States are concerned that the Ninth Circuit's decision, if upheld, may be treated as a springboard for

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[1] In the *amici* States, the following percent of land is federally owned: Arizona (38.7%), Arkansas (12.6%), Idaho (61.6%), Indiana (1.7%), Nebraska (1.1%), Nevada (79.6%), South Carolina (4.7%), Wisconsin (5.1%), and Wyoming (48.4%). Carol Hardy Vincent et al., Cong. Research Serv., R42346, *Federal Land Ownership: Overview and Data* 7-9 (2017).

[2] *See, e.g.*, 16 U.S.C. §§ 45f(b)(1), 90, 121, 228b(a), 410ff-1(a), 410mm-2(b), 460q-2, 460aa-7, 460bb-3(a), 460kk(c)(1), 1609.

the expansion of federal control over state-owned navigable waters throughout the country.

SUMMARY OF THE ARGUMENT

This case implicates the careful balance between federal and state authority over navigable waters. *Amici* States file this brief in support of reversing the Ninth Circuit's decision to divest the State of Alaska of its traditional regulatory authority over the Nation River, a navigable waterway, based solely on the United States' ownership of an implied federally-reserved water right. In order to reach this result, the Ninth Circuit went beyond analyzing the clear and manifest intent of Congress in enacting ANILCA, instead mutating a reserved water right into a vehicle to impart "title" over a state-owned navigable waterway. Moreover, the Ninth Circuit never conducted the careful examination required by this Court to determine whether the United States in fact owns a reserved water right on the Nation River. Rather, the Ninth Circuit allowed federal administrative agencies to designate which navigable waters the United States may seek to enforce an implied federally-reserved water right sometime in the future. The court then treated that designation as conclusive of the issue. The Ninth Circuit's decision is simply out of line with this Court's precedent and misconstrued the nature of reserved water rights. For those reasons, the decision should be reversed.

ARGUMENT

A. The Ninth Circuit Failed to Properly Apply the Clear Statement Doctrine.

The Ninth Circuit concluded that in enacting ANILCA Congress did not intend to preempt state authority over navigable waters under its navigable servitude or Commerce Clause authority. *Sturgeon v. Frost*, 872 F.3d 927, 933 (9th Cir. 2017). However, it went on to conclude that the Park Service regulations nevertheless preempt state law in waters in which the United States owns an implied federally-reserved water right. *Id.* at 934-36. In reaching this conclusion, the Ninth Circuit relied heavily on its decisions in *Katie John I* and *Katie John III*, where the court gave complete deference to administrative agencies' interpretation of "public lands" to include navigable waters in which those agencies decided the United States owned a reserved water right. *Id.* at 933-34; *Alaska v. Babbitt (Katie John I)*, 72 F.3d 698, 703-04 (9th Cir. 1995) ("we hold to be reasonable the federal agencies' conclusion that the definition of public lands includes those navigable waters in which the United States had an interest by virtue of the reserved water rights doctrine"); *John v. United States (Katie John III)*, 720 F.3d 1214, 1245 (9th Cir. 2013) ("it was reasonable for the Secretaries to decide that: the 'public lands' subject to ANILCA's rural subsistence priority include the waters within and adjacent to federal reservations"). The *amici* States disagree with the approach applied by the Ninth Circuit and believe that the court erred in

deferring to the administrative agencies' interpretation of "public lands."

"Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* (quoting *Bass*, 404 U.S. at 349). This Court has instructed that a statute should not be read to preempt the historic powers of the States absent a clear and manifest intent, even in the face of a contrary administrative interpretation.

"Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172. "This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73. "This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 173.

The Park Service appears to argue that the clear statement doctrine should not apply because States only own the submerged lands, not the water, in navigable waterways. Br. for the Resp'ts in Opp'n at 12-14. The Ninth Circuit also appears to have taken this approach, concluding that while the States have an interest in submerged lands under navigable waterways, "lands submerged beneath inland waterways are distinct from the waterways themselves." *Sturgeon*, 872 F.3d at 933. The Ninth Circuit, however, does not explain why this distinction matters, and it is directly contrary to this Court's holding that "[o]wnership of submerged lands . . . carries with it the power to control navigation, fishing, and other public uses of water." *United States v. Alaska*, 521 U.S. 1, 5 (1997). The traditional authority of the States to regulate activity occurring on navigable waters arises from the States' ownership of submerged lands—not from ownership of the water itself.

As the Ninth Circuit recognized, under the Submerged Lands Act, 43 U.S.C. §§ 1301-1356b, and the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 343 (1958), Alaska secured all right and title to lands beneath navigable waters within its boundaries "and the natural resources within such lands and waters." *Sturgeon*, 872 F.3d at 932 (quoting 43 U.S.C. § 1311(a)). Those rights were also conferred under the equal-footing doctrine, whereby "[u]pon statehood, the State gains title within its borders to the beds of waters then navigable." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012). States are entitled to "allocate and

govern those lands according to state law subject only to 'the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.'" *Id.* (quoting *United States v. Oregon*, 295 U.S. 1, 14 (1935)). "Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged." *Oregon*, 295 U.S. at 14.

The Park Service relies on this Court's decision in *Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.10 (1954), where this Court stated that "[n]either sovereign nor subject can acquire anything more than a mere usufructuary right" in water because water can never become "the subject of fixed appropriation or exclusive dominion." Br. for the Resp'ts in Opp'n at 14. According to the Park Service, the States do not have traditional authority over navigable waterways because the States cannot "own" the water. *Id.* Additionally, the Park Service appears to argue that the States do not have traditional regulatory authority over navigable waters because that authority is subject to the federal government's authority under the navigable servitude. *Id.* at 12. These arguments largely parallel arguments this Court has considered and rejected when addressing the States' traditional authority over wildlife.

This Court has stated that "it is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these

creatures until they are reduced to possession by skillful capture." *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 284 (1977). Although this Court concluded that States do not "own" wildlife in an exclusive or absolute sense, it still recognized "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Id.* Moreover, the Court continued to recognize the States' police power over wildlife even though wildlife was subject to federal regulation in some circumstances. "The fact that the State's control over wildlife is not exclusive and absolute in the face of federal regulation and certain federally protected interests does not compel the conclusion that it is meaningless in their absence." *Baldwin v. Fish and Game Comm'n of Mont.*, 436 U.S. 371, 386 (1978).

Likewise, water is a critical resource, and this Court has long recognized the States' authority to regulate the use of water within their borders. "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *California v. United States*, 438 U.S. 645, 653 (1978). This deference is cemented in the Submerged Lands Act, stating that the Act shall not be construed as in "any way interfer[ing] with or modify[ing] the laws of the States . . . relating to the ownership and control of ground and surface waters; and the control, appropriation, use, and distribution of such waters

shall continue to be in accordance with the laws of such States." 43 U.S.C. § 1311(e). This Court even recently applied the clear statement doctrine and declined to adopt an administrative interpretation of the Clean Water Act where it "would result in a significant impingement of the States' traditional and primary power over land *and water use*." *SWANCC*, 531 U.S.C. at 174 (emphasis added).

The Ninth Circuit erred in concluding that States do not have traditional regulatory authority over navigable waters because they do not "own" the water. The States have traditional authority to regulate activity on navigable waters based on their ownership of the submerged lands thereunder. *Alaska*, 521 U.S. at 5. Additionally, the Ninth Circuit's decision is out of line with this Court's recognition of the States' primary authority over water management and use. *SWANCC*, 531 U.S.C. at 174; *California*, 438 U.S. 645.

Interpreting "public lands" to include navigable waters in which the United States owns an implied federally-reserved water right would result in a significant impingement of the States' traditional authority over navigable waters within their borders. Such a result should not be reached unless Congress clearly manifested an intent to exercise its authority under the navigable servitude and the Commerce Clause to preempt state law. As the Ninth Circuit concluded, in enacting ANILCA, Congress did not intend to exercise this authority. *Sturgeon*, 872 F.3d at 933. Under the clear statement doctrine, the Ninth Circuit's analysis should have ended there.

B. The Ninth Circuit Failed to Conduct the "Careful Examination" Necessary to Determine Whether and to What Extent the United States Held an Implied Federally-Reserved Water Right in the Nation River.

The conclusion that the United States holds an implied federally-reserved water right in the Nation River is the crux of the Ninth Circuit's decision. However, the Ninth Circuit gave that determination little attention, resolving this bedrock factual issue based on generalizations and assumptions, rather than conducting the careful examination required under this Court's precedents.

"In determining whether there is a federally-reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water." *Cappaert v. United States*, 426 U.S. 128, 139 (1976). "Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." *Id.* However, the Court has repeatedly emphasized that the implied-reservation-of-water doctrine only reserves "the amount of water necessary to fulfill the purpose of the reservation, no more." *New Mexico*, 438 U.S. at 700 (quoting *Cappaert*, 426 U.S. at 141).

"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.* "This careful examination *is required* both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water." *Id.* at 701-02 (emphasis added).

The Ninth Circuit failed to apply the above-required examination, instead broadly concluding that the United States held an implied federally-reserved water right in all navigable and non-navigable waters within the Yukon-Charley Rivers National Preserve ("Yukon-Charley") for the purpose of "provid[ing] sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska." *Sturgeon*, 872 F.3d at 934-35. The Ninth Circuit did not analyze whether this purpose would be entirely defeated if the United States did not have a right to use water from all water sources within the Yukon-Charley, including the Nation River. Nor did the court ascertain the minimum amount of water necessary to fulfill that purpose. Rather, the court concluded that it was "bound under its *Katie John* precedent." *Id.* at 934.

In *Katie John*, the Ninth Circuit addressed whether some navigable waters were subject to subsistence fishing and hunting management under ANILCA. *Katie John I*, 72 F.3d at 700, 703. As in this case, the United States argued that the subsistence priority requirement applied to navigable waters in

which the United States owned an implied federally-reserved water right because such waters were "public lands," as defined in ANILCA. *Id.* at 701. The Ninth Circuit agreed with the United States, concluding that when land was reserved under ANILCA, the United States "implicitly reserved appurtenant water, including appurtenant navigable waters, to the extent needed to accomplish the purposes of the reservations." *Id.* at 703. However, the court did not quantify the United States' water rights. Instead the Ninth Circuit concluded that the United States has interests in "some navigable waters," and that "the federal agencies that administer the subsistence priority are responsible for identifying those waters."[3] *Id.* at 703-04.

Thereafter, the Secretaries of the Departments of Agriculture and the Interior initiated an administrative rulemaking proceeding "amend[ing] the scope and applicability of the Federal Subsistence Management Program in Alaska to include subsistence activities occurring on inland navigable waters in which the United States has a reserved water right and to identify specific Federal land units where reserved water rights exist." *Katie John III*, 720 F.3d at 1222. The rules did not identify specific waterbodies or set forth the elements of the water rights the United States claimed to hold. Instead the rules stated generally that the subsistence priority in ANILCA extended to all non-navigable waters within certain land units, all

[3] In *John v. United States (Katie John II)*, 247 F.3d 1032 (9th Cir. 2001) (en banc) (per curiam), a much divided court reaffirmed its holding in *Katie John I*.

navigable and non-navigable waters within other land units, and inland waters adjacent to certain land units. *Id.* The Ninth Circuit concluded that the rulemaking at issue was lawful, although the court recognized that an implied federally-reserved water right would normally be decreed by a court. *Id.* at 1227. The court reasoned that because the Secretaries were only "identifying the geographic scope of those rights for the purposes of administering ANILCA's rural substance priority" and not "actually allocat[ing] or reserv[ing] any water in these bodies . . . [t]he agencies are not . . . 'determining their own water rights.'" *Id.* at 1226-27.

Then, focusing on the specific language in Title VIII of ANILCA and the unique circumstances surrounding the subsistence-priority regulations, the Ninth Circuit went on to uphold the agencies' inclusion of all sources listed in the rules as having implied federally-reserved water rights for the purpose of protecting the subsistence way of life for rural residents. *Id.* at 1235-39, 1241. The court did so in spite of the recognition that the United States had never even claimed that "the water itself must be reserved to fulfill the purpose of the ANILCA reservation." *Id.* at 1238. Rather than requiring the United States to prove in fact ownership of an implied federally-reserved water right, the Ninth Circuit concluded that it "must include within its potential scope all the bodies of water on which the United States' reserved rights could at some point be enforced—i.e., those waters that are or may become necessary to fulfill the primary purposes of the federal reservation at issue." *Id.* at 1231.

In the present case, the Ninth Circuit expanded its holding in *Katie John III,* concluding that the same geographic locations designated in *Katie John III* as public lands should apply because "[i]t would be anomalous if we treated the regulation at issue in *Katie John III* . . . as employing a different construction of 'public lands' than applicable elsewhere in ANILCA."[4] *Sturgeon*, 872 F.3d at 934. The court's decision was not based on a finding that an amount of water from any of the designated sources was necessary to fulfill the primary purposes of the federal reservation. Rather, the court simply reiterated its conclusion from *Katie John III* that it should include "all the bodies of water on which the United States' reserved rights *could at some point* be enforced—i.e., those waters that are or *may become necessary* to fulfill the primary purposes of the federal reservation at issue."[5] *Id.*

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[4] The *amici* States take no position on the subsistence regulations that effectuate Title VIII's subsistence priority, an issue unique to the State of Alaska. Rather, the *amici* States' concerns in this case are focused on the misapplication and expansion of the implied-reservation-of-water doctrine and the impact this may have on the States going forward.

[5] Although the Ninth's Circuit's decision was specifically focused on the "geographic scope" of the United States' implied federally-reserved water right, the Ninth Circuit stated that because "one of the reservation's primary purposes is to protect fish[,] [t]he diminution of water in any of the navigable waters within Yukon-Charley's boundaries would necessarily impact this purpose, giving rise to a reserved water right." *Sturgeon*, 872 F.3d at 936. The *amici* States find this statement to be particularly alarming as it appears to imply that the United States' reserved water right extends to *all water on all navigable waters within the reservation*. This is inapposite to this Court's analysis in *Cappaert*, where it was held that a reservation to protect a particular race of desert

at 936 (quoting *Katie John III*, 720 F.3d at 1231) (emphasis in original).

The Ninth Circuit failed to apply the well-established standard set forth by this Court in *Cappaert* and *New Mexico*, instead concluding that it should consider the "geographic scope" of the United States water rights to be any water on which the United States may hypothetically claim a right at some point in the future. Although in *Katie John III* the Ninth Circuit adamantly stated that it was not allowing the federal agencies to determine their own water rights, in practical effect that is what occurred. The Ninth Circuit has treated that administrative designation as conclusive as to whether the United States in fact owns an implied federally-reserved water right in the navigable waters at issue. This is in spite of the Ninth Circuit's own recognition that the United States has never even claimed—let alone proved—that it needed any water from any of the sources designated to meet the primary purposes of the federal reservation. *See Sturgeon,* 872 F.3d at 934-36; *Katie John III*, 720 F.3d at 1238.

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fish did not reserve all of the water in the source at issue. 426 U.S. at 141. Rather, this Court held that "the level of the pool may be permitted to drop to the extent that the drop does not impair the scientific value of the pool as the natural habitat of the species sought to be preserved." *Id.* There has been no evidence presented in this proceeding as to the minimum stream flow needed to protect different fish species on the waterways at issue. Nor has there been any suggestion that it is necessary for the United States to maintain the current flow of all waterways to fulfill the primary purposes of the federal reservation.

The United States does not hold a decreed implied federally-reserved water right in the Nation River. Nor has the Ninth Circuit—or any other court—conducted the careful examination required under this Court's decisions in *Cappaert* and *New Mexico* to determine whether it is necessary for the United States to use water from the Nation River to meet the primary purposes of ANILCA. Under the Ninth Circuit's decision, the United States' claim of ownership of a reserved water right divests a state of its sovereign authority over navigable waters within the its borders. *Sturgeon*, 872 F.3d at 936. The *amici* States ask that before such an extraordinary result can be reached, the Park Service should be required to prove that the United States in fact owns a reserved water right.

C. An Implied Federally-Reserved Water Right Does Not Give Any Right to a Particular Waterway Beyond a Priority to Use a Designated Quantity of Water.

The Ninth Circuit's misapplication of the implied-reservation-of-water doctrine appears to stem from the assumption that the benefits conferred by a reserved water right extend beyond a priority to use a designated amount of water from a specified source. *See Katie John III*, 720 F.3d at 1226. This, however, is

inapposite to this Court's analysis of the implied-reservation-of-water doctrine and the nature of water rights generally.[6]

The United States' entitlement to an implied federally-reserved water right is intrinsically tied to the amount of water necessary to fulfill the purposes of the federal reservation. The idea that the "geographic scope" of an implied federally-reserved water right can be separated and adjudicated separately from the quantity of water needed is in direct contradiction to this Court's ruling that a reserved water right only extends to "the amount of water necessary to fulfill the purpose of the reservation, *no more*." *New Mexico*, 438 U.S. at 700 (quoting *Cappaert*, 426 U.S. at 141) (emphasis added). If the United States does not need any water from a particular waterway to fulfill the purposes of the reservation, then it does not hold a reserved water right in that waterway.

The Ninth Circuit's analysis also misconceives the scope of a vested water right. A water right is a special type of property right. *See Navajo Dev. Co., Inc. v. Sanderson*, 655 P.2d 1374, 1377 (Colo. 1982). "The

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[6] The *amici* States' brief focuses on the nature of water rights under the prior appropriation doctrine, as that doctrine is applied in some form in Alaska and the majority of western states with large areas of federally-reserved land. *See* Alaska Const. art. VIII, § 13; Ariz. Rev. Stat. § 45-151(A); Cal. Civ. Code § 1414; Colo. Const. art. XVI, § 6; Idaho Code § 42-106; Mont. Code § 85-2-401; N.D. Cent. Code § 61-04-06.3; Nev. Rev. Stat. § 533.030; N.M. Stat. § 72-1-2; Or. Rev. Stat. § 537.120; S.D. Codified Laws § 46-5-5; Utah Code § 73-3-1; Wash. Rev. Code § 90.03.010; Wyo. Const. art. XIII, § 3.

value of the property right is that it allows a priority to the use of a certain amount of water at a place somewhere in the hierarchy of users who also have rights to water from a common source." *Id*. A water right's primary value "is in its relative priority and the right to use the resource and not in the continuous tangible possession of the resource." *Id.*

By holding a water right, the owner obtains a legally vested priority date that can be asserted against junior water users on the same source. A water right, however, does not entitle an owner to any possessory interest in the source itself or even to actual possession of water from that source. That is because a water right has "always been subject to the rights of senior water rights holders and the amount of water available in the tributary system." *Kobobel v. State, Dep't of Natural Res.*, 249 P.3d 1127, 1130 (Colo. 2011). "[T]he right of property in water is usufructuary and consists not so much of fluid itself as the advantage of its use." *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340, 1353 (Fed. Cir. 2013) (quoting *Eddy v. Simpson*, 3 Cal. 249, 252 (Cal. 1853)); *see also Niagara Mohawk Power Corp.*, 347 U.S. at 246.

The Ninth Circuit's approach of determining the "geographic scope" of a water right without determining the quantity and priority of that right ignores the very nature of a water right. The sole benefit conferred by a water right is the right to assert a priority to use a designated quantity of water as against junior water users on that source. If the United States is not asserting a priority right to use a specified quantity of water

from a waterway, it is simply not asserting ownership of a water right, under the implied-reservation-of-water doctrine or otherwise.

As stated by this Court, the implied-reservation-of-water doctrine is the exception to Congress' almost invariable deference to state water law. *New Mexico*, 438 U.S. at 701-02; *see also California*, 438 U.S. at 653. It is for that reason that implied federally-reserved water rights are to be construed narrowly. *New Mexico*, 438 U.S. at 700-02; *Cappaert*, 426 U.S. at 139-41. The Ninth Circuit's interpretation, however, is anything but narrow. Under the Ninth Circuit's decision, the United States may use a reserved water right solely as a means of expanding an administrative agency's regulatory authority, whether or not water is needed to meet the purposes of a federal reservation. This expands the implied-reservation-of-water doctrine beyond recognition. Allowing such an expansion undermines decades of precedent from this Court and has the potential to significantly increase the impact of reserved water rights to the detriment of the States and private citizens.

D. Even if the United States Holds an Implied Federally-Reserved Water Right, Such a Right Does Not Give the United States "Title" in the Nation River.

Under ANILCA, "[o]nly 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." 16 U.S.C. § 3103(c). "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." *Id.*

Public lands are defined as "land situated in Alaska which, after December 2, 1980, are Federal lands," excepting:

> (A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;
>
> (B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and
>
> (C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act.

Id. § 3102(3). Federal lands are "lands the title to which is in the United States after December 2, 1980." *Id.* § 3102(2). Lands include "lands, waters, and interests therein." *Id.* § 3102(1). As found by this Court, the foregoing provides that "only 'lands, waters, and interests therein' to which the United States has 'title' are considered 'public' land 'included as a portion' of the

conservation system units in Alaska." *Sturgeon*, 136 S. Ct. at 1067.

The Ninth Circuit determined that the United States had a "title" interest in the Nation River by virtue of holding an implied federally-reserved water right. *Sturgeon*, 872 F.3d at 935-36. Specifically, the Ninth Circuit reasoned that "[t]he word 'title' has many meanings," including equitable title, "[t]hus 'title' to an 'interest' in water almost certainly means a vested interest in the water, such as a reserved water right." *Id.* at 936. The court went on to state that "even if we were uncertain, *Katie John I* already decided the matter." *Id.* However, the Ninth Circuit in *Katie John I* never analyzed or defined "title" or expressly ruled on whether ownership of an implied federally-reserved water right granted the United States a "title" interest. *See generally Katie John I*, 72 F.3d 698.

The *amici* States disagree with the overly-broad interpretation of "title" employed by the Ninth Circuit. As it is commonly understood, "title" is "[t]he union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property." *Black's Law Dictionary* 1522 (8th ed. 2004).[7] Additionally, while courts that have addressed the definition of "title" have reached varying results, even the most liberal interpretations have required a *possessory*

[7] This definition is mirrored in Webster's II New College Dictionary 1185 (3d ed. 2005), defining title as "[t]he coincidence of all the elements that constitute the fullest legal right to control and dispose of property or a claim" or "[t]he aggregate evidence that gives rise to a legal right of possession or control."

interest in the property at issue. *Compare Kohl Indus. Park Co. v. Rockland Cty.*, 710 F.2d 895, 903 (2d Cir. 1983) ("in the absence of limiting language, 'title' is commonly understood to mean a fee interest"), *United States v. City of New Brunswick*, 11 F.2d 476, 477 (3d Cir. 1926), *rev'd on other grounds sub nom. City of New Brunswick v. United States*, 276 U.S. 547 (1928) ("the ownership of title means ownership of property"), *and United States v. Hunter*, 21 F. 615, 617 (C.C.E.D. Mo. 1884) ("when we speak of a man as having title to certain lands, the ordinary understanding is that he is the owner of the fee and not that he is a mere lessee"), *with Totemoff v. State*, 905 P.2d 954, 965 (Alaska 1995) ("'title' signifies at least some sort of possessory interest in property"), *Roberts v. Wentworth,* 59 Mass. 192, 193 (Mass. 1849) ("If he has the actual or constructive possession of property or the right of possession, he has title thereto."), *Shingleton v. State*, 133 S.E.2d 183, 189 (N. C. 1963) ("If a person has the actual or constructive possession of property, or the right of possession, he has a title thereto, though another person may be the owner."), *and Brady v. Carteret Realty Co.*, 90 A. 257, 258 (N.J. 1914) ("'Title' is generally applied to signify the right to land and real effects. It is the right of possession or of property in lands as distinguished from the actual possession.").

The Ninth Circuit appears to believe that the common definition of "title" is very broad because it includes equitable title. *Sturgeon*, 872 F.3d at 936. According to the Ninth Circuit, because courts have used the terms "equitable title" and "vested interest"

interchangeably, "title" must also include a vested interest in a water right. *Id.* (citing *R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1067 n.6 (9th Cir. 1997)). The *amici* States disagree: equitable title is held when all the benefits of property ownership are vested in one person, except for "the naked legal title." *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U.S. 428, 432 (1892). Equitable title is not just any beneficial interest in property, but is "[a] title that indicates a beneficial interest in property *and that gives the holder the right to acquire formal legal title*." *Black's Law Dictionary* at 1523 (emphasis added). A person holding equitable title is vested with "the real and substantial ownership of the property." *Hanson v. Eustace's Lessee*, 43 U.S. 653, 672 (1844). Therefore, a holder of equitable title holds the same rights as one holding legal title, including the right to ownership and possession of the property.

In contrast, a water right is a usufructurary interest, not a possessory or ownership interest. *Niagara Mohawk Power Corp.*, 347 U.S. at 246. A "usufruct" has been defined as "a right to use and enjoy the fruits of another's property for a period without damaging or diminishing it."[8] *Black's Law Dictionary* at 1580. This definition is in line with how both federal and state courts have defined water rights. *Niagara Mohawk Power Corp.*, 347 U.S. at 246 (water rights are

[8] Usufruct has also similarly been defined as "[t]he right to utilize and enjoy the profits and advantages of something belonging to another so long as the property is not damaged or altered." Webster's II New College Dictionary at 1244.

"usufructuary rights to use the water . . . as distinguished from claims to the legal ownership of the running water itself"); *United States v. Estate of Hage*, 810 F.3d 712, 719 (9th Cir. 2016) ("the owner of water rights owns neither the land nor the water; the right is usufructuary only"); *Casitas Mun. Water Dist.*, 708 F.3d at 1354 ("a party having a right to use a given amount of California surface water does not have a possessory property interest in the corpus or molecules of the water itself"); *Ronzio v. Denver & R.G.W.R. Co.*, 116 F.2d 604, 605 (10th Cir. 1940) (quoting *Murphy v. Kerr*, 296 F. 536, 541 (D.N.M. 1923)) ("While the corpus of naturally running water belongs to the state in trust for the public, the law recognizes a property right in its flow and use, known as the usufructuary right or the water right."); *Navajo Dev. Co., Inc.*, 655 P.2d at 1377 ("The uncertain nature of the property right in water is evidence that its primary value is in its relative priority and the right to use the resource and not in the continuous tangible possession of the resource."); *Mont. Trout Unlimited v. Beaverhead Water Co.*, 255 P.3d 179, 185 (Mont. 2011) ("a water right is usufructuary, i.e., it is a right to make use of waters owned by the state—a water right confers no ownership in those waters") (quotation marks omitted).

The Park Service's argument in this proceeding draws from the classification of water rights as "rights in real property." *See* Br. for the Resp'ts in Opp'n at 15. *Amici* States agree that in many jurisdictions water rights are considered "property rights." *See, e.g.*, *Olson v. Idaho Dep't of Water Res.*, 666 P.2d 188, 191 (Idaho

1983); *Mont. Trout Unlimited*, 255 P.3d at 185. However, that does mean that the law extends the same benefits to the owner of a water right as is conferred to the owner of land. As stated by the Montana Supreme Court, use of the phrase "property right" in that sense may be misleading:

> Terminology can affect how people think about the subject. The words "property right" draw to themselves and connote a bundle of old, sacred, absolute, and inviolate ideas of exclusivity, possession and permanence. Although these concepts are not alien to water law, they are not the language of water law . . . because water law does not deal with these things, but with uses, re-uses, sharing, and priorities rather than exclusivity, possession or even permanence.

Mont. Trout Unlimited, 255 P.3d at 185 (citation omitted).

Although a water right grants a priority use in a specified quantity of water, it does not grant an unequivocal interest in the water source or in the water itself. A water right has "always been subject to the rights of senior water rights holders and the amount of water available in the tributary system." *Kobobel,* 249 P.3d at 1130. This is because there is always uncertainty as to the quantity of water that will be available for use due to "drought, precipitation, and variable human uses [that] create ever-changing circumstances." Sandra B. Zellmer & Jessica Harder, *Unbundling Property in Water*, 59 Ala. L. Rev. 679, 691-92 (2008).

For this reason, the primary benefit conferred by a water right is "its relative priority and the right to use the resource." *Navajo Dev. Co., Inc.*, 655 P.2d at 1377. A water right does not grant "title" in a water source or even an unequivocal right to actually possess an amount of water. The benefit conferred is the right to assert the relative priority of the right in order to exclude junior water users until the senior right is satisfied. This type of right simply is not a "title" interest as it is commonly understood.

Amici States are concerned that the Ninth Circuit's holding may have broad implications. First, the Ninth Circuit's decision regarding title indicates that it is applicable to any vested water right, not just one acquired pursuant to federal law. *See Sturgeon*, 872 F.3d at 936 ("'title' to and 'interest' in water almost certainly means a vested interest in the water"). On its face, the Ninth Circuit's decision appears to indicate that the United States' ownership of a water right, whether obtained under state or federal law, would grant the United States title and divest the State of its traditional authority over navigable waters. If this decision is upheld, a State could potentially be considered to have divested itself of authority over a particular waterway by granting the United States a water right license. This could have major impacts for States in the arid West, where the United States has acquired

thousands of water rights under state law for various purposes.[9]

Second, as discussed above, the Ninth Circuit's decision fails to address the quantity of the claimed implied federally-reserved water rights at issue. The court, therefore, appears to conclude that the United States has "title" in a waterway by virtue of holding a water right, no matter how small that right may be. Under this reading, the United States could divest a State of its authority over navigable waters by holding a water right to use as little as a miner's inch of water.[10] To put this in context, in June 2018, the discharge of the Yukon River near Eagle, Alaska, varied between

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[9] The United States Department of Justice states:

> The federal government has also had many notable successes in acquiring water rights under state law. For instance, in the Snake River Adjudication, the United States has been partially decreed approximately 10,000 stockwater rights under state law on BLM lands and approximately 9,000 on national forest lands. The United States has also received 900 partial decrees for state water rights for domestic, irrigation and other uses, such as wildlife, commercial, power, and recreation for Forest Service lands and 50 partial decrees for water uses associated with irrigation on BLM lands.

U.S. Dep't of Justice, *Federal Reserved Water Rights and State Law Claims,* www.justice.gov, https://www.justice.gov/enrd/federal-reserved-water-rights-and-state-law-claims (last visited July 5, 2018).

[10] A miner's inch converts to roughly .02 cubic feet per second (cfs). *See* Idaho Dep't of Water Res., *Water Conversion Factors*, www.idwr.idaho.gov, https://www.idwr.idaho.gov/files/water-measurement/Water-Conversion-Factors.pdf (last visited July 5, 2018).

134,000 and 177,000 cubic feet per second (cfs).[11] Under the Ninth Circuit's decision, the United States could hold title and divest Alaska of its sovereign authority over the Yukon River by holding a priority right to use less than .000015% of the water that flows through the river. Such a conclusion expands the definition of "title" well beyond its common meaning, and completely jettisons the careful balance between federal and state regulatory authority over navigable waters.

CONCLUSION

In enacting ANILCA, Congress did not clearly manifest an intent to preempt Alaska's traditional regulatory authority over state-owned navigable waters in which the United States holds a reserved water right. Owning a water right does not grant a "title" interest in the source of the water. Such an interest is necessary under the plain terms of ANILCA for those waters to be considered "public lands." Moreover, even if owning a water right did provide a title interest, the Park Service has never proved that the United States

[11] This information was obtained from stream flow measurement data collected by the United States Geological Survey (USGS). USGS, *National Water System: Web Interface*, https://waterdata.usgs.gov, https://waterdata.usgs.gov/ak/nwis/uv?cb_00060=on&format=gif_stats&site_no=15356000&period=&begin_date=2018-06-01&end_date=2018-06-30 (last visited July 5, 2018). USGS does not appear to collect stream flow data for the Nation River, so the *amici* States focused on data from the Yukon River at the measurement point closest to the Yukon-Charley.

in fact owns an implied federally-reserved water right on the Nation River. At most, an agency's administrative determination that Congress intended to reserve water for its use is a claim, not a right, to water. For these reasons, the *amici* States respectfully request this Court reverse the Ninth Circuit's decision.

Respectfully submitted,

LAWRENCE G. WASDEN
Attorney General of Idaho
DARRELL G. EARLY
Chief, Natural Resources Division
STEVEN W. STRACK
Counsel of Record
SHANTEL M. CHAPPLE KNOWLTON
Deputy Attorneys General
Natural Resources Division
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-4124
Facsimile: (208) 854-8072
Email: steve.strack@ag.idaho.gov

Counsel for Amici Curiae States