No. 14-1209

In The
Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, in his Official Capacity as Alaska Regional Director of the National Park Service,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* STATE OF ALASKA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Section 103(c) of the Alaska National Interests Lands Conservation Act of 1980 prohibits the National Park Service from exercising regulatory control over State, Native Corporation, and private Alaska land physically located within the boundaries of the National Park System.

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INTEREST OF *AMICUS CURIAE*

This case is about who has regulatory authority over millions of acres of nonfederal lands and waters within Alaska – the State of Alaska or a federal land management agency. The Ninth Circuit's decision below interprets §103(c) of the Alaska National Interest Lands Conservation Act ("ANILCA") to give that authority to the National Park Service. After Native Corporations, the State owns the second largest area of nonfederal lands in Alaska's National Park System units. It has a uniquely compelling interest in managing those lands, as well as its waters, which are deeply tied to its sovereignty. Alaska's "ownership of [its] submerged lands, and the accompanying power to control navigation, fishing, and other public uses of water" – like its right to regulate its navigable waters – is "an essential attribute of sovereignty." *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2132 (2013) (internal quotation marks omitted); *Coyle v. Smith*, 221 U.S. 559, 573 (1911).

The Ninth Circuit's interpretation of §103(c) to eliminate local control of nonfederal lands in favor of nationalized land management has broad ramifications that will adversely impact Alaska and its people. The ruling ignores the reality of life throughout much of rural Alaska, where residents face unparalleled access challenges, are acutely reliant on the State's resources, and regularly use the State's waterways as transportation thoroughfares. The State has a powerful interest in preserving its authority to manage its lands as Congress intended, freely using

its lands and waters for scientific study and other beneficial uses, and protecting the Alaskans who rely on access to and use of the State's lands and waters to provide for their families.

INTRODUCTION

The Alaska National Interest Lands Conservation Act sought both to "provide[ ] sufficient protection for the national interest in the scenic, natural, cultural, and environmental values on the public lands in Alaska, and at the same time provide[ ] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. §3101(d). ANILCA dedicated over 100 million acres of federal land – an area larger than California – for conservation and protection. 16 U.S.C. §§3101 *et seq*. It organized vast swaths of Alaska's new and expanded national parks, wildlife refuges, wild and scenic rivers, national trails, wilderness preservation systems, and national forest monuments into conservation system units ("CSUs") managed by different federal land management agencies. *Id.* §3102(4). Roughly forty percent of Alaska falls within an ANILCA CSU. Alaska's National Parks now make up two-thirds of the National Park System's entire acreage,[1] and the federal government owns over sixty

[1] In addition, approximately eighty-six percent of the total land area administered by the United States Fish and Wildlife Service and nearly one-third of the land area administered by

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percent of all land in Alaska – making it the largest landowner in the state.

Congress understood that many nonfederal lands fell within CSU boundaries; realized that Congress's massive land grant to Alaska at statehood reflected the State's unique need to manage and develop its resources to meet the costs of statehood; that Alaskans confront unique geographic, climactic, and economic challenges; and that Alaska needed to retain its authority to manage its own lands to provide for its people. While ANILCA reserved and placed massive amounts of public land into conservation status – significantly constraining Alaska's future economic development – it also included multiple provisions intended to protect Alaska's sovereign authority over the land it owns itself. *See id.* §§3103, 3111-14, 3202, 3207. Most important, Congress balanced federal conservation goals and the importance of State self-determination through §3103(c) ("§103(c)"), which provides:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after the date of enactment of this Act, are conveyed to the State, to any Native Corporation, or to any private party shall be

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the Bureau of Land Management is in Alaska. The attached appendix shows those lands.

> subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

This section ensured that nonfederal "lands" falling within newly expanded park boundaries – defined to include State waters like the Nation River – would not be treated and managed as if they were federally owned public lands. *Id.* §§3102(1), 3103(c).

Petitioner John Sturgeon was operating a small personal hovercraft on a State-owned navigable waterway, the Nation River, as Alaska law allows. While on a gravel bar, he was approached by armed Park Service officials and threatened with criminal citation for violating a nationwide Park Service ban on hovercraft use. In considering Mr. Sturgeon's challenge to that regulation below, the Ninth Circuit acknowledged that the first sentence of §103(c) instructs that State, Native, and private owned lands are not to be deemed a part of a CSU. But it refused to give meaning to the second sentence, which confirms that because nonfederal lands are not a part of CSUs, federal land management agencies have no authority to manage them as if they were. Instead, the court construed the language to mean nonfederal land within CSUs were exempt from only "[Alaska] CSU-specific regulations." Pet. App. 24a. Because the

hovercraft ban applied to all Park Service lands and waters nationwide – including "navigable waters without regard to the ownership of submerged lands, tidelands, or lowlands," 36 C.F.R. §§1.2(a)(1), (3) – and not "solely" to Alaska CSU public lands, the court held the regulation did not violate ANILCA. Pet. App. 25a-26a.

SUMMARY OF ARGUMENT

This case asks whether §103(c) of ANILCA explicitly authorizes the National Park Service – or any other federal land management agency – to usurp the State of Alaska's sovereign right to manage state-owned lands and waters in Alaska, and to similarly seize management authority over Native Corporation and privately owned lands. It does not.

In concluding otherwise, the Ninth Circuit ignored Congress's decision to explicitly exclude non-federal lands from CSUs and to curtail the Park Service's jurisdiction over those nonfederal lands. Under the Ninth Circuit's decision, the Park Service can seize jurisdiction over Native inholdings, State lands or riverbeds, or private homesteads lying within a Park Service boundary even though those lands are not a part of a CSU, simply by promulgating nationwide regulations. This decision impedes Alaska's sovereignty and overhauls ANILCA, to Alaska's detriment. It also contradicts the language of §103(c), in

which Congress endeavored to preserve Alaska's authority to manage its lands.

Alaska has a sovereign right to and interest in managing its lands and waters. It owns the riverbed of the Nation River and other navigable rivers like it as a matter of constitutional grace by virtue of the equal footing doctrine. Alaska's sovereign ownership of its submerged lands also includes the right to regulate its waters. The Ninth Circuit's misreading of §103(c) ignores Alaska's ownership of its submerged lands. In so doing, the decision usurps the state's traditional authority to control its resources. By permitting the Park Service to control lands and waters it does not own and holds no title to, this decision hinders Alaska's power to assure continued access to its resources for its people.

The alarming federalism consequences stemming from this decision have unique and real consequences for Alaskans. Alaska's control over its abundant resources has been a central compact of its sovereignty since statehood, and access to those resources is critical for many of its residents. For rural Alaskans living in remote villages unconnected to the road system, use of and access to the state's lands and waters provide a food source, an important means of travel across a remote territory, and an opportunity to supplement income through localized resource-based activities. Alaska's waters form a unique part of this way of life and often provide critical access routes across the vast, varied terrain. The Ninth Circuit's decision thus threatens not only the State's

sovereignty – even requiring it to ask for a permit from a federal agency to access and use its own resources – but also the way of life of ordinary Alaskan citizens. And the Park Service is actively working to expand the scope of the Ninth Circuit's ruling, already proposing regulations that rely solely on the court's ruling to further expand its jurisdiction over nonfederal lands.

All of these harms are rooted in the Ninth Circuit's fundamental misreading of §103(c). Rather than understanding the plain and precise statutory text to mean what it says – State, Native, and private lands are not federal lands, and cannot be managed as though they were – the Ninth Circuit misread the statute. The court's untenable interpretation of §103(c) creates a distinction between a national and Alaska-specific management regime that is not part of the provision's text. This interpretation not only misreads the plain text of the statute, but also contradicts the law's basic purposes, transforming a provision designed to preserve Alaska's sovereignty into one that undermines it. The Ninth Circuit's ruling flies in the face of congressional intent that ANILCA's inclusion of nonfederal inholdings within CSU boundaries "does not alter in any way the ability of the State or Natives to do what it will with those lands." 125 Cong. Rec. 11158 (1979) (statement of Rep. Seiberling). It gives the Park Service more authority over nonfederal lands than federal ones, and it allows the Park Service to regulate State, Native, and private lands on a nationwide basis, but not on a

statewide one – despite the fact Congress crafted ANILCA to create Alaska-specific rules for land use and management. Such an unreasonable interpretation, and one that does such damage to Alaska's sovereignty, is entitled to no deference and should be rejected. This Court should reverse the Ninth Circuit's decision and give effect to ANILCA's guarantees that State, Native, and private landowners would maintain control over the lands and waters that they own.

ARGUMENT

I. The Ninth Circuit's Decision Deprives Alaska Of Its Sovereign Prerogative To Manage Its Lands And Waters Consistent With The Needs Of Its People.

The Ninth Circuit's decision deprives Alaska and its people of the benefit of the bargain that ANILCA struck. It transfers state decision-making authority over how best to responsibly manage Alaska's lands to a federal agency. And it blesses the Park Service's decision to regulate nonfederal lands in Alaska whenever it wants. This decision usurps Alaska's rightful authority to manage its own lands, including the waters flowing over submerged lands to which the state was granted title at statehood. And it hampers the State's ability to meet the exceptional needs of Alaskans, who face unparalleled transportation, economic, and social challenges. The Ninth Circuit's decision thus strikes at the heart of Alaska's sovereignty

and upsets the usual federal-state balance. In so doing, it inflicts real harms on Alaskans, for whom open access to and use of Alaska's rich resources are essential to their way of life.

A. Alaska's ownership of its lands and waters is an essential aspect of its state sovereignty.

Authority to manage its lands and waters is a particularly important sovereign interest to the State of Alaska, inextricably tied to its history and self-governance. The drive to secure local management of Alaska's resources lay at the very genesis of its statehood: Alaskans' interest in controlling the State's fisheries without unwarranted federal control was a principal motivation for statehood. *See Metlakatla Indian Community v. Egan*, 369 U.S. 45, 47 (1962). But the territory's lack of taxable industry and population stood in the way: "[o]ne of the principal objections to Alaska's admittance into the Union was the fear that the territory was economically immature and would be unable to support a state government." *Trustees for Alaska v. State of Alaska*, 736 P.2d 324, 335 (Alaska 1987). Ultimately, "[t]he congressmen who favored statehood . . . maintained that the Statehood Act sufficiently provided for Alaska's financial well-being. The land grant of 103,350,000 acres was perceived by these congressmen as an endowment which would yield the income that Alaska needed to meet the costs of statehood." *Id*. at 336. The "unprecedented size" of the land grant accounted for the fact

that "the federal government had already reserved the most valuable land and the new state would, in effect, have second choice" and that lands available for state selection were "only marginally productive." *Id*. at n.23 (citations omitted). In 1971, when Congress conveyed 44 million acres of federal land and its subsurface estate to support Alaska's Native peoples under the Alaska Native Claims Settlement Act, that conveyance also had development importance for Alaskans. *See* 43 U.S.C. §§1601 *et seq.*; *City of Saint Paul, Alaska v. Evans*, 344 F.3d 1029, 1031 (9th Cir. 2003).

Alaska's constitutional delegates viewed state management of the anticipated grant of land and resources as a serious sovereign responsibility. They drafted an entire natural resources article in the Alaska Constitution – Article VIII – with provisions designed to preserve and protect the State's lands, waters, and other resources while allowing for responsible access and use, including sections reserving the State's resources to the people "for maximum use consistent with the public interest"; managing the state's replenishable resources on the sustained yield principle; and ensuring free access to Alaska's navigable and public waters. Alaska Const. art. VIII, §§1-4, 14. And as anticipated at statehood, Alaskans have indeed funded their state government – including executive agencies that provide public programs and benefits, a court system, and the state legislature

– primarily by using the land and resources the State holds for this purpose.[2]

The importance of retaining the State's authority to carry out these responsibilities is magnified by the size of the federal government's role in Alaska. Alaska takes up an area one-fifth the size of the lower forty-eight states, encompassing the largest intact temperate rainforest in the world – equal to the size of West Virginia – and a northern coastal tundra bigger than Kansas. The federal government possesses almost two-thirds of all land. Alaska's federal lands are larger in area than fifteen eastern seaboard states, from Maine to South Carolina, combined. This extraordinary concentration of federal ownership means that any nationwide Park Service regulation will disproportionately affect Alaskans. But it also underscores the relevance of continued State management of state resources.

In addition to the State's interest in its vast lands, Alaska has a sovereign interest in its navigable waters. Alaska owns the riverbed of the Nation River, where Mr. Sturgeon was approached by armed federal officials. *See Alaska v. United States*, 201 F.3d 1154, 1164-66 (9th Cir. 2000). Alaska, like all states, took title to the lands underlying its inland navigable waters as a matter of constitutional grace by virtue of

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[2] *See* Alaska Department of Revenue, Revenue Sources Book (2015 Spring), http://tax.alaska.gov/ programs/documentviewer.aspx 1143r/.

the equal footing doctrine, codified by the Submerged Lands Act. *Alaska v. United States*, 545 U.S. 75, 79 (2005) (citing 43 U.S.C. §§1301 *et seq.*, §1311(a); Alaska Statehood Act, Pub. Law No. 85-508, 72 Stat. 339 §6(m) (1958) (incorporating Submerged Lands Act)); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel*, 429 U.S. 363, 374 (1977) ("[T]he state's title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself.").[3]

Alaska's ownership of its submerged lands includes the right to regulate the waters for its people. Indeed, that is the entire purpose of state ownership of submerged lands. A State's title to land underlying navigable waters gives it "the right to control and regulate navigable streams." *Coyle v. Smith*, 221 U.S. 559, 573 (1911); *see also* 43 U.S.C. §1311(a) (defining the rights of states to include "ownership of the natural resources within such lands and waters" and the "right and power to manage, administer, lease, develop, and use said lands and natural resources all in accordance with applicable State law."). States hold the lands in trust for the public to use the waterways for commerce, navigation, and fishing. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892) (holding state's title to lands under navigable waters

[3] The State agrees with and joins in petitioner's argument that when title to its submerged lands passed from the United States to Alaska at Statehood, it was "conveyed to the State" for purposes of §103(c). *See* Pet. Br. at 33-35.

"necessarily carries with it control over the waters above them"). The Alaska Constitution protects Alaskans' rights to access and use the State's waters, Alaska Const., art. VIII §§1, 3, 6, 14, and state statutes further provide that Alaska "holds and controls all navigable or public water in trust for the use of the people of the state." Alaska Stat. §38.05.126(b); *see also* Alaska Stat. §§38.05.127-.128.

Allowing the Park Service to broadly usurp the State's control over its navigable waters, regardless of Alaska's ownership of its submerged lands, therefore would impede the State's sovereignty. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997) (acknowledging "navigable waters uniquely implicate sovereign interests"); *United States v. Alaska*, 521 U.S. 1, 5 (1997) (holding that ownership of submerged lands "is an essential attribute of sovereignty"). Such a federal takeover would thwart the public trust doctrine and hinder Alaska's sovereign power to ensure open access to its waters for purposes of navigation, fishing, and commerce. *See Illinois Central R.R. Co.*, 146 U.S. at 452. And given Alaska's ownership of its submerged lands under these principles, there can be no reasonable claim that they, or the waters above them, are "public lands" within the meaning of ANILCA.[4] Sections 102(2)-(3) of ANILCA defines

[4] The Ninth Circuit's analysis in *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995) ("*Katie John*"), would not require a different outcome in this case even if it were a part of the question presented, and even if this Court were bound by a circuit court's

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"public land" as lands to which the United States holds title after December 2, 1980, excluding lands selected by Alaska or Native Corporations or other nonfederal lands under the Alaska Native Claims Settlement Act. Alaska's lands and waters do not fall into this category.

B. Loss of Alaska's Sovereign Power to Regulate its Own Lands and Waters Will Inflict Serious Harms on Ordinary Alaskans.

Alaska's sovereign interests in its lands and waters are not merely academic. The loss of State management authority inflicts real and unique harms on not just the State, but on ordinary Alaskans. The state's vast territory is sparsely populated, with more caribou than people. Roughly twenty percent of Alaskans live in regions unconnected to the road system; half of these residents live in Alaska's most

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decision – which of course it is not. In *Katie John*, the Ninth Circuit held that "public lands include some specific navigable waters" as a result of the reserved water rights doctrine for the sole purpose of administering ANILCA's rural subsistence priority. *Id*. at 704. But the court explicitly cautioned that its holding was limited to those portions of ANILCA "necessary to give meaning to [ANILCA's] purpose of providing an opportunity for a subsistence way of life." *Id.* at 702 n.9. This case does not concern subsistence or the subsistence-related portions of ANILCA, so *Katie John* is inapplicable. The *Katie John* court remained convinced that "ANILCA does not support [ ] a complete assertion of federal control" over Alaska's navigable waters. *Id.* at 704.

remote villages. For these rural Alaskans, daily life means dealing with limited infrastructure, few transportation options, harsh weather, limited services, and scarce job opportunities. Residents confront disproportionately higher levels of poverty; some lack essential services like water and sanitation. Localized resource-based activities such as local tourism and recreation related jobs or small-scale sport fishing, wildlife guiding, and trapping often provide a vital part of families' incomes and significantly contribute to the economic activity of remote regions.

In addition, the State's waters – including over 12,000 rivers and three million lakes – provide essential travel corridors for many Alaskans who use personal skiffs and other small craft. Major rivers like the Yukon and Kuskokwim serve as critical arteries for transporting fuel and other essential daily goods to residents in western Alaska throughout warmer months. In winter, rivers become frozen highways and remain part of Alaska's transportation infrastructure, allowing travel by all-terrain vehicle, snowmachine, pick-up truck, and dogsled. For the State's most rural residents in particular, the ability to access and use Alaska's resources is critical.

ANILCA reflects this unique reality. Considered in proper context, §103 is best viewed as an attempt to reconcile and balance potentially conflicting visions: the advantages of increased federal government ownership of nationally significant public land, on one hand, and the need for continued State management of nonfederal lands to allow for State growth

and prosperity, on the other. Congress believed that ANILCA was "both a fair and equitable resolution of competing claims for protection and development" of Alaska's lands and cautioned that "the delicate balance between competing interests which is struck in the present bill should not be upset in any significant way." S. Rep. 96-413, 135, *reprinted in* 1980 U.S.C.C.A.N. 5070, 5080. As a result of this balancing of interests, ANILCA preserves Alaska's sovereign ability to manage its lands and waters for the benefit of its people in several ways.

First, Congress assured in the statement of purpose that the Act would provide "adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." §3101(d). Second, §103(c) imposes boundary limitations and a corresponding restraint on federal regulatory authority. Third, other provisions of the Act reinforce Alaska's reservation of its traditional land management authority: §3202(a) provides that "[n]othing in this Act is intended to . . . diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands," and §3207 ensures that "[n]othing in this Act shall be construed as . . . expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control." 16 U.S.C. §3207.

These provisions were intended to allow Alaska to make policy choices and to help assure access to the State's lands and waters free from unwarranted federal interference – even in ways that appear odd

in other areas of the country.[5] Prohibiting all-terrain vehicle traffic in small national parks throughout much of the country might create a quieter experience for an afternoon snowshoeing enthusiast or minimize safety concerns to other park visitors on recreational trails. *See* 36 C.F.R. §§1.4(a), 4.10. But in Alaska, barring such use on frozen rivers could prevent families from restocking essential fuel supplies or bartering for important winter provisions in nearby villages. Limiting commercial activity might safeguard the pristine character of most national parks, but applying those restrictions on major Alaska navigable waters like the Yukon or Kuskokwim rivers would cripple local industries like commercial fishing or tourism in and around Native villages. *See* 36 C.F.R. §5.3. Nationwide access restrictions applied to Alaska would impede winter ice road traffic, threaten the flow of goods and services to remote communities along the State's rivers, exacerbate the high cost of

[5] Although ANILCA does not authorize the Park Service or any other federal agency to unilaterally seize control over State, Native, and privately owned lands and waters, Congress itself might have the authority to do that, if it did so consistent with the Property and Commerce Clauses. *See United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979) (holding that the Property Clause "grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters"). But neither clause gives the *Park Service* the wide-ranging plenary authority over nonfederal lands endorsed under the Ninth Circuit's decision, in the absence of Congress's explicit command.

living in rural Alaska, and chill Native corporations' ability to develop their land.

Even the hovercraft ban exposes a pitfall of applying a nationalized land management scheme: while using a small, low-draft personal craft to travel is a far cry from the reality of many Americans, in Alaska it provides a realistic means of water access in rugged, isolated regions of the State. In fact, Congress acknowledged Alaska's unusual need for atypical access options, including hovercraft use. Title XI of ANILCA, which provides for a consolidated application process for transportation and utility systems in and across CSUs, anticipates accommodation of "air cushion vehicles" – hovercraft. §1102(4)(B)(vi).

It makes little sense for Congress to acknowledge Alaska's exceptional challenges – including the State's nascent infrastructure, unusual transportation realities, and unparalleled resource needs – yet simultaneously shoehorn vast tracts of nonfederal land into a monolithic regulatory scheme ill-suited to Alaska's individuality. But the Ninth Circuit's interpretation of §103(c) does exactly that. By wresting land management decisions away from the State despite congressional intent to respect Alaska's uniqueness, the Ninth Circuit bypassed the "well-established principle that States do not easily cede their sovereign powers, including their control over waters within their own territories." *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2123 (2013).

The impact of the loss of these principles in Alaska extends well beyond Mr. Sturgeon. The Park Service's own actions, many of which were brought to light in the State's companion case below, further illustrate the initial wave of overreach this decision allows. In 2010, the State of Alaska was forced to obtain a scientific research and collecting permit to conduct genetic sampling on chum salmon in the Alagnak River, a State-owned navigable river, even though the State's activities occurred on its own lands and waters. The permit terms also declared – despite the State's ownership of its submerged lands and ownership of resources in its navigable waters – that all samples collected and the results of the research using those samples were the property of the federal government. In 2009, the Alaska Department of Fish and Game was forced to obtain a permit to continue a decades-long study of the Western Arctic caribou herd, despite the fact that the collaring and tissue collection were conducted entirely from the navigable, State-owned Kobuk River. Requiring the State to ask for permission from the federal government before accessing its lands to carry out beneficial scientific study unduly interferes with Alaska's ability to make use of its resources. Yet the Park Service mandates that Alaska sacrifice its sovereign dignity and beg, hat in hand, to conduct scientific research on State land.

In opposing the petition for certiorari, the Solicitor General sought to minimize these harms, framing the Ninth Circuit's decision as concerning "limited

regulations in effect on navigable waters in national parks within Alaska." BIO 22. The Park Service claimed that the scope of the Ninth Circuit's decision concerned only navigable waters and "did not hold that the Secretary may enforce nationwide parks regulations on such privately-held, state-held, or Native-held lands in the future" because "[a]ny such regulation would need to be based on an independent grant of regulatory power." BIO 21-22. And it assured that expanding the Park Service's regulatory reach in Alaska would require "dramatic[ ] shifts [in] its regulatory approach." BIO 22. But the Solicitor General is wrong. There is nothing "limited" about the Ninth Circuit's decision or its impacts. And the Park Service is now attempting to augment its authority on the basis of the decision, even while downplaying the ruling's broad reach.

The Park Service is in the process of expanding the scope of its *Sturgeon* jurisdiction in Alaska beyond the State's waters. It has *already* proposed regulations that extend its reach onto private, State, and Native owned lands within the borders of Alaska CSUs, publishing proposed revised national regulations governing nonfederal oil and gas activities within Park Service units (36 C.F.R. §9(b)) in the federal register on October 26, 2015. Under current regulations, Alaska is exempted from oil and gas regulations on the basis that ANILCA §1110(b) governs access to inholdings. But the new proposed regulations eliminate the Alaska exemption, extending Park Service regulatory jurisdiction over oil and gas

to all lands within CSUs regardless of ownership. In support of this jurisdictional expansion, the Park Service bases its newly claimed authority on *nothing more than the Ninth Circuit's decision below*:

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

80 Fed. Reg. 65571, 65573 (proposed Oct. 26, 2015). This action reveals the breadth and ongoing impact of the Ninth's Circuit's decision.

The Park Service's eagerness to utilize the Ninth's Circuit's ruling – rather than congressional authorization – as a basis for further federalization of nonfederal lands brings to mind this Court's caution against accepting an agency's "expansive theory" of jurisdiction that "rather than preserv[ing] the primary rights and responsibilities of the States, would [bring] virtually all plan[ning of] the development and use . . . of land and water resources by the States under federal control." *Rapanos v. United States*, 547 U.S. 715, 737 (2006) (internal quotation marks omitted; alterations and omissions in original). This Court has disallowed "extensive federal jurisdiction urged by the Government [that] would authorize the [agency] to function as a *de facto* regulator of immense

stretches of intrastate land – an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board." *Id*. at 738. It should likewise prevent that overreach here.

The Ninth Circuit encouraged nationalized land management decisions and handed a federal land management agency unprecedented control over lands that, unlike the vast majority of lands in Alaska, do not belong to the federal government. Regardless of how broadly the Park Service extends its regulatory arm, §103(c) no longer cabins federal jurisdiction or assures any meaningful balance of federal and State land management authority. State, Native, and private property owners are now subjected to unwarranted federal control. Because Alaska contains nearly two-thirds of the Park Service's lands as part of the State's complex patchwork of land ownership, any regulation of purported nationwide applicability will disproportionately impact Alaska. Any time a federal land management agency disagrees with Alaska's approach to managing its own lands, it need only pass a nationwide regulation to usurp the State's regulatory scheme. Be it in effect or by design, the result of this decision is to dramatically enhance the federal administrative state's power. This Court should reverse the Ninth Circuit's ruling to reinstate ANILCA's careful balance between State and federal control.

II. ANILCA §103 Exempts Nonfederal Lands from Federal Park Management Regulation.

The harms flowing from the Ninth Circuit's decision and the loss of the State's sovereignty all stem from the Ninth Circuit's flawed reading of §103(c). The Ninth Circuit interpreted §103(c) to mean that "only public land lying within a CSU's boundaries may be subjected to *CSU-specific regulations*," but that Park Service regulations of general applicability – those that apply both inside and outside of Alaska – properly governs all nonfederal lands within Alaska CSUs. Pet. App. 24a (emphasis in original). It then held that because the Park Service's hovercraft ban applies to all Park Service lands and waters nationwide – even "navigable waters and areas within their ordinary reach . . . without regard to the ownership of submerged lands, tidelands, or lowlands" (citing 36 C.F.R. §1.2(a)(3)) – the ban did not apply "solely" to Park Service lands in Alaska and thus did not violate ANILCA. Pet. App. 25a-26a. The Ninth Circuit was wrong, and application of traditional statutory interpretation tools show why.

The court misread §103(c)'s plain language and disregarded its context, while simultaneously ignoring legislative history. But the text, context, and congressional intent surrounding §103(c) are clear: nonfederal lands are not to be regulated as if they were a part of a CSU and are not to be subject to the innumerable federal regulations that apply nationwide. Even if §103(c) were ambiguous, however, the Park Service's interpretation of that provision is not

entitled to any deference. The Park Service's view of §103 intrudes upon Alaska's sovereignty in the absence of clear congressional intent to alter the traditional federal-state balance of land management, and it should be rejected.

A. The plain language of §103(c) exempts State, Native Corporation, and privately owned land within CSUs from being regulated as though they were federal lands.

Interpreting a statute begins with its text. *BP America Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006). The Ninth Circuit's interpretation of §103(c) contravenes the plain meaning of the statute, which, properly read, is straightforward and sensible.

Section 103(c) has three sentences, which work in tandem. The first states that CSUs, by definition, include only federal lands: "Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit." ANILCA §§102(2)-(3) define "public land" as lands to which the United States holds title after December 2, 1980, and expressly excludes lands selected by Alaska or Native Corporations or other nonfederal lands under the Alaska Native Claims Settlement Act. Thus, the first sentence of §103(c) makes clear that nonfederal lands physically located within CSU boundaries are not considered to be part of any CSU.

Section 103(c)'s second sentence then limits the federal agencies' ability to regulate nonfederal lands within a CSU: "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." The third sentence reinforces this limitation, providing that nonfederal lands can become public – and thus subject to plenary federal regulation – only if they are conveyed to the federal government: "If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly."

The "plain and precise language," *Mansell v. Mansell*, 490 U.S. 581, 589 (1989), of the three sentences of §103(c) work together: the first defines which lands are part of Alaska CSUs and which – specifically State, Native, and privately owned lands – are not. The second confirms that federal land management agencies have no authority to manage those nonfederal lands that are not a part of the CSU. The third provides that the government can acquire management authority over those nonfederal lands, but only if they first become "public [federal] lands" through conveyance or operation of law. Section 103(c) thus operates as a cohesive whole, sensibly maintaining traditional private property ownership and State management rights and limiting the federal

government's power over private, State, and Native-owned lands.

The Ninth Circuit's interpretation of the law turns this provision on its head. The court correctly understood the first sentence of §103(c), recognizing that the exclusion of nonfederal lands from ANILCA's definition of "public lands" "does not in any way change the status of that State, native, or private land" within the CSU boundaries. Pet. App. 23a (quoting 125 Cong. Rec. 11158 (1979)). But its interpretation of the second sentence undermined that very principle by misreading the language of the provision.

In considering the second sentence of §103(c), the Ninth Circuit focused on the word "solely." In the court's view, the word "solely" modified "public lands within [Alaska CSUs]," rather than "public lands" generally. Pet. App. 25a-26a. Under the Ninth Circuit's interpretation, nonfederal lands could then be subjected to the regulations in 36 C.F.R. Part 2 – like the hovercraft ban – because they applied nationwide, not *only* to Alaska CSUs. The court concluded that "[b]ecause of its general applicability, the regulation may be enforced on both public and nonpublic [nonfederal] lands alike within CSUs." Pet. App. 26a.

The Ninth Circuit's interpretation makes little sense. As used in §103(c), "solely" properly modifies "public lands." Following the lead of the first sentence, which directs that nonfederal lands are not a part of CSUs, the second sentence confirms the

federal government cannot regulate them as if they were. Read this way, the second sentence restricts the application of federal land management regulations "[exclusively] to public lands" inside the CSUs. It quarantines federal regulatory jurisdiction to only those lands deemed to be part of a CSU, meaning public, federally owned lands. But by misinterpreting "solely," the Ninth Circuit conflated the meaningful distinction between federal and nonfederal lands and construed the second sentence to give the Park Service expansive power over lands that are neither a part of a CSU nor federally owned.

The court's fixation on the second sentence of §103(c) fails to give proper meaning to §103(c)'s first sentence, which exempts nonfederal lands from even being deemed a part of a CSU. It would make no sense for Congress to explicitly instruct that nonfederal lands are not a part of a CSU – regardless of their location – but then subject those lands to nationwide public lands management regulations as if they were. Similarly, the Ninth Circuit's myopic focus on the second sentence of §103(c) largely negates the meaning of the third sentence, which provides that nonfederal lands can "become part of the unit, *and be administered accordingly*" only upon formal transfer to the United States. (Emphasis added.) While the first sentence states that nonfederal lands within CSU boundaries are not part of the CSUs, the third sentence forbids those nonfederal lands from being administered like CSU lands unless and until they are conveyed to the United States. It is difficult, if not

impossible, to harmonize these commands with the Ninth Circuit's view of the middle sentence – which would allow the Park Service to exert management control over lands that are: (1) not public lands; and (2) have not been conveyed to the United States.

The Ninth Circuit failed to offer any explanation for this anomaly, or to explain how its interpretation squares with the third sentence. Under the Ninth's Circuit's interpretation, the Park Service is free to administer Alaska's nonfederal lands whether or not they have been conveyed to the United States as long as it promulgates a nationwide regulation. This interpretation undermines the meaning and manner in which each sentence of §103(c) work toward the same goal and violates the "canon against interpreting any statutory provision in a manner that would render another provision superfluous." *Bilski v. Kappos*, 561 U.S. 593, 607-08 (2010).

B. ANILCA's context and structure confirm that the Park Service cannot regulate nonfederal lands within Alaska CSUs.

The Ninth Circuit's interpretation of §103(c) not only misreads the plain meaning of its text. It also contravenes the canon that statutory construction is a "holistic endeavor" requiring the statute to be read as a whole. *E.g.*, *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (citations omitted). This Court has emphasized that

"[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Id.* at 455 (citing numerous cases). Instead, "reasonable statutory interpretation must account for both the specific context in which . . . language is used and the broader context of the statute as a whole." *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)) (internal quotation marks omitted). These principles are fatal to the Ninth Circuit's interpretation of §103(c).

The Ninth Circuit's reading violates the whole-text canon not only because it focuses on the second sentence of §103(c) without meaningfully considering the first and third. On a broader level, the Ninth Circuit's reading fundamentally ignores ANILCA's context: it is an Alaska-specific law rooted in Alaska's uniqueness and the need for specialized management of its public lands. Viewing the second sentence of §103(c) in isolation, the court permits the Park Service to exert regulatory control over nonfederal lands within Alaska CSUs, so long as it does so through regulations of general applicability and discounts Alaska's specific needs and circumstances. But ANILCA's very existence is grounded in Alaska's specific needs and circumstances. This law and its "predecessor statutes, the [Alaska] Statehood Act and ANCSA," are, by definition, state-specific. *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 552 (1987). ANILCA acknowledged that Alaskans

confront unusual challenges due to the State's geography, climate, diffuse population, and largely rural character. It did so by providing select access protections and authorizing the use of snowmachines, motorboats, and airplanes on federal CSU lands in Alaska for traditional activities and travel to and from villages and homesites. 16 U.S.C. §3170.

Congress also recognized that Alaskans had unique economic and subsistence needs, and that the State's resources were its economic foundation. *Id.* §§3101(d), 3111-26. Thus, Congress's statement of purpose acknowledges that ANILCA furthered conservationist goals but also "provided adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." *Id.* §3101(d); *see also City of Angoon v. Marsh*, 749 F.2d 1413, 1415-16 (9th Cir. 1984) ("Congress became aware of the need for a legislative means of maintaining the proper balance between the designation of national conservation areas and the necessary disposition of public lands for more intensive private use. Thus, ANILCA was passed. . . .").

Accepting the Ninth Circuit's interpretation of §103(c) and adopting its view that the Park Service has unbridled authority to regulate private land also leads to a peculiar friction with ANILCA's other provisions. In some cases, it would mean that the Park Service has greater authority to regulate nonfederal lands than public ones. For example, ANILCA restricts the Park Service's ability to limit Alaskans' transportation across federal conservation system

units. On those federal lands, the Park Service cannot prohibit travel by plane or snowmachine "for traditional activities" or "travel to and from villages and homesites" without making findings that the access is damaging to the unit, and providing notice and a hearing. 16 U.S.C. §3170(a). But the Park Service now claims the authority to go much further: under the Ninth Circuit's view of 36 C.F.R. §1.2, the Park Service could ban such travel on nonfederal lands within CSUs through a self-granted regulatory authority – and without making those findings. The impact of the Ninth Circuit's ruling thus unreasonably allows the Park Service to provide less access, and less process, on nonfederal lands than on federal ones. But Congress intended §103(c) to preserve, not diminish, State and Native land ownership rights.

Another anomalous effect of the Ninth Circuit's decision is that nonfederal land located within Alaska CSUs would not only be subject to nationwide Park Service regulations – they would also be *exempt* from Alaska-specific regulations. After all, under the Ninth Circuit's reading of §103(c), regulations designed specifically for, and applicable "solely" to, Alaska CSUs are inapplicable to nonfederal CSU lands. But Alaska-CSU specific regulations generally provide freedom from the more rigid national land management regulations, in recognition of Alaska's unique cultural and geographic features. They implement ANILCA's protections for hunting, trapping, and motorized access within national parklands by presumptively allowing various activities the Park Service's nationwide

regulations would otherwise restrict, like the use of bear spray, carrying of firearms, storage and caching of fuel, and use of temporary campsites. *See* 36 C.F.R. §§13.25, 13.30, 13.45, 13.182. It makes no sense to read §103(c) in a manner that subjects state, Native, or privately-owned land to nationwide regulation but permits only federal land to stand under the umbrella of an Alaska-specific regulatory regime.

The Park Service's interpretation of §103(c) thus not only allows the Park Service to subject nonfederal Alaska lands to nationwide rules that do not account for Alaska's unique terrain, climate, rural character, and social and economic needs. It also *prevents* the nonfederal lands from obtaining the benefit the Alaska-specific regulations provide. The Ninth Circuit did not and could not explain how this result squares with ANILCA's explicit goal of considering and providing for "the economic and social needs of the State of Alaska and its people." 16 U.S.C. §3101(d). The Ninth Circuit's reading of §103(c) is dissonant with ANILCA as a whole, and for that reason this Court should reject it.

C. ANILCA's legislative history confirms Mr. Sturgeon's reading of §103(c).

Section 103(c)'s text is clear, and the context of the provision confirms its plain purpose, so this Court's statutory analysis can stop there. "Given the straightforward statutory command, there is no reason to resort to legislative history." *United States v.*

Gonzales, 520 U.S. 1, 6 (1997). Even so, legislative history confirms that Congress never intended ANILCA to allow the Park Service or other land management agencies the authority to regulate nonfederal lands – under ANILCA itself, under the National Park Service's Organic Act, under the 1976 Park Service Improvement Act, or under any other pre-existing public lands legislation. To the contrary, during the drafting process ANILCA was clarified to "make clear beyond any doubt that any State, Native or private lands, which may lie within the outer boundaries of the conservation system unit are not parts of that unit and are not subject to regulations which are applied to public lands which, in fact, are part of the unit." 125 Cong. Rec. 11158 (1979) (statement of Rep. Seiberling). There was "no question" that ANILCA's inclusion of nonfederal inholdings within CSU boundaries "does not alter in any way the ability of the State or Natives to do what it will with those lands." *Id.*

Congress did draw a distinction between the types of laws and regulations that would apply on inholdings and those that would not. But it was not the Ninth Circuit's newly-created distinction between Alaska CSU-specific regulations and nationwide regulations. Congress drew a different line. ANILCA defined and preserved inholdings as private lands outside of and not subject to the United States' public lands management and control. These nonfederal inholdings were not to be subject to public lands management laws and regulations, but would continue to

be governed by generally-applicable laws *outside the public lands arena*. Thus, a 1979 Senate Report explains that inholdings within CSU boundaries – like nonfederal lands outside those boundaries – would remain subject to non-public lands laws like the Clean Water Act, the Clean Air Act, the Civil Rights Act, and any other generally-applicable federal legislation:

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

S. Rep. 96-413, 303, *reprinted in* 1980 U.S.C.C.A.N. 5070, 5247. ANILCA's congressional advocates explained that "the boundaries drawn on the map for that conservation unit do[ ] not in any way change the status of that State, native, or private land or make it

subject to the any of the laws and regulations that pertain to U.S. public lands, so that these inholdings are clearly not controlled *by any of the public land laws* of the United States" but, at the same time, reassured Congress that §103(c) "is not an effort to amend the Clean Air Act or any of the other acts *that are not public lands laws*." 125 Cong. Rec. 11158 (1979) (emphases added). Taken together, this history reinforces the plain meaning of §103(c): ANILCA does not give the Park Service augmented authority to regulate nonfederal lands within CSU boundaries, but generally applicable laws retain their force and effect. Thus, when Congress wrote in §103(c) that no nonfederal lands "shall be subject to the regulations applicable solely to public lands," it used "solely" to distinguish between public land regulations – which do not apply on nonfederal land – and other types of generally applicable regulations – which do.

D. The Park Service's interpretation of §103(c) impinges on Alaska's right to regulate its lands absent clear congressional intent, and therefore conflicts with the clear statement doctrine and is not entitled to *Chevron* deference.

The Park Service may suggest that the expansive interpretation of §103(c) adopted by the Ninth Circuit is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). This Court should reject any such claim. As an initial matter, where "the intent of Congress is clear,

that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. This Court should give effect to the provision's plain meaning: State, Native, and privately owned lands and waters within the boundaries of CSUs are not federal public lands, and the Park Service may not regulate them as if they were. *See General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (explaining that "deference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent" and relying on "text, structure, purpose, and history" of ADEA to foreclose agency's interpretation). But even if ANILCA §103(c) were ambiguous or Congress's intent unclear, the Park Service's interpretation of the provision would not be entitled to deference. "[A]n agency interpretation that is inconsisten[t] with the design and structure of the statute as a whole" or otherwise unreasonable "does not merit deference." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (citation and internal quotation marks omitted). Because the Park Service's analysis of the second sentence of §103(c) fails to take into account the language of the rest of the subsection or context of ANILCA as a whole, the Park Service's interpretation falls into that category.

The significant and unwarranted encroachment onto Alaska's sovereignty discussed in Part I *supra* is another reason that this reading of the statute is not

entitled to any deference. The Ninth Circuit's reading of the statute significantly intrudes upon Alaska's sovereignty in the absence of clear Congressional intent to alter the traditional federal-state balance of land management. It therefore is not entitled to deference because it conflicts with the clear statement doctrine.

The clear statement doctrine is rooted in the assumption that "Congress does not exercise lightly" the "extraordinary power" to "legislate in areas traditionally regulated by the States." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). This Court therefore will not interpret a statute to "alter the usual constitutional balance between the States and the Federal Government," unless Congress has made "its intention to do so unmistakably clear in the language of the statute." *Id.* (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)) (internal quotation marks omitted). Any interpretation of a statute that infringes on state sovereignty must be "plain to anyone reading [it]." *Gregory*, 501 U.S. at 467. This rule is an "acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461.

Because the Park Service seeks to override Alaska's traditional regulation of its own lands and navigable waters for the benefit of its citizens, there can be no question that the clear statement doctrine applies to this case. This Court confirmed the doctrine's application and vitality in *Solid Waste Agency*

of Northern Cook County v. U.S. Army Corps of Engineers, holding that the clear statement doctrine applied where federal regulation "would result in a significant impingement of the States' traditional and primary power over land and water use." 531 U.S. 159, 174 (2001). In *Solid Waste*, the Court held that the clear statement doctrine foreclosed the use of *Chevron* deference to authorize federal regulation of State waters where the proposed regulation was not clearly authorized by statute, would usurp traditional State sovereignty, and raised significant constitutional questions about the extent of federal authority. *Id.* at 172-73.

Contrary to the interpretation the Park Service advocates, §103(c) does not clearly allow it to regulate nonfederal lands within CSUs. Nothing in its text, context, or history suggests that Congress intended to transfer the State's "traditional and primary power over land and water use," *id.* at 174, to a federal land management agency. The Ninth Circuit erred in its interpretation of this law, and the Park Service is not entitled to *Chevron*'s shelter in defending it.

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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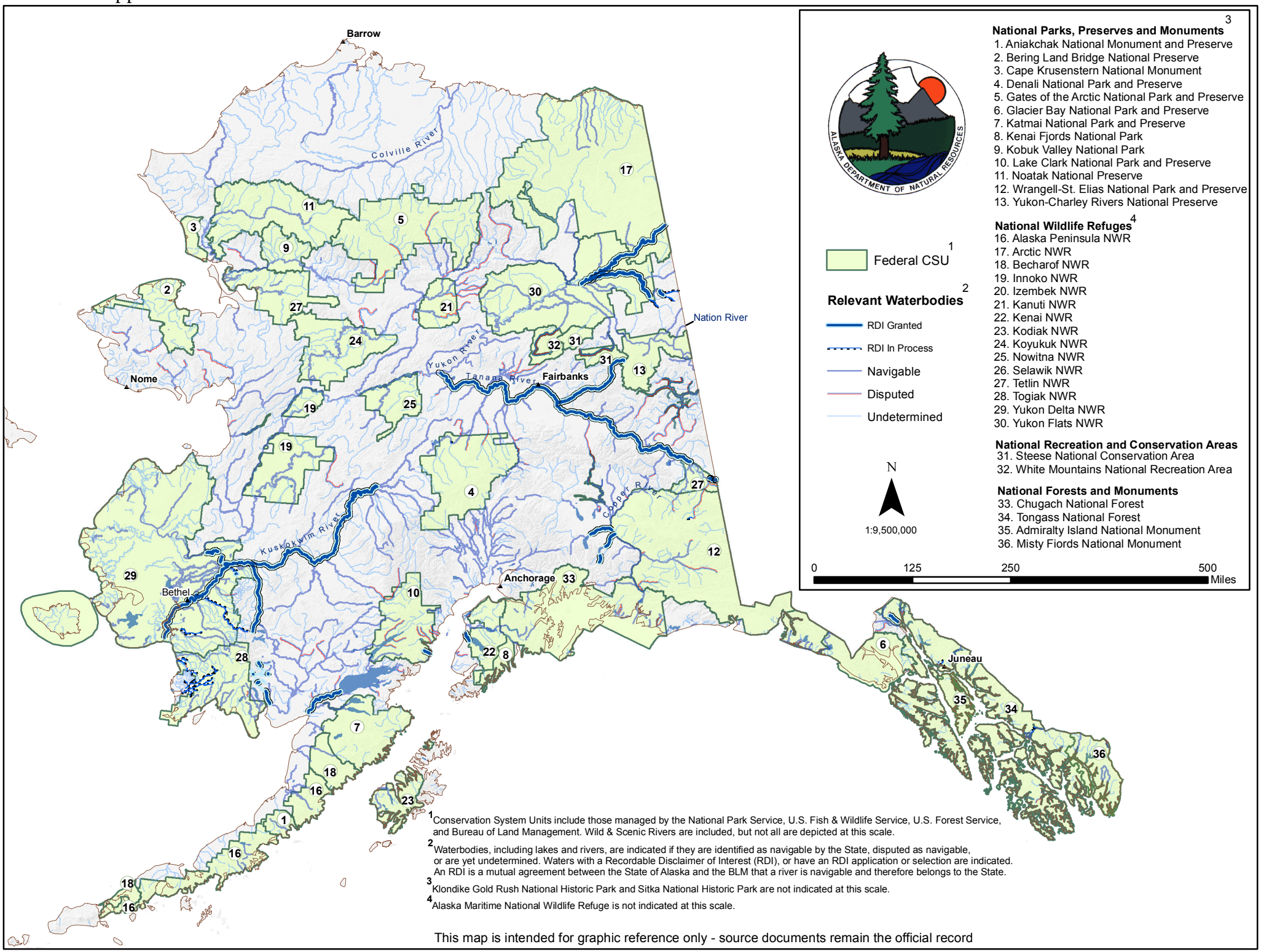
App. 1



[1] Conservation System Units include those managed by the National Park Service, U.S. Fish & Wildlife Service, U.S. Forest Service, and Bureau of Land Management. Wild & Scenic Rivers are included, but not all are depicted at this scale.

[2] Waterbodies, including lakes and rivers, are indicated if they are identified as navigable by the State, disputed as navigable, or are yet undetermined. Waters with a Recordable Disclaimer of Interest (RDI), or have an RDI application or selection are indicated. An RDI is a mutual agreement between the State of Alaska and the BLM that a river is navigable and therefore belongs to the State.

[3] Klondike Gold Rush National Historic Park and Sitka National Historic Park are not indicated at this scale.

[4] Alaska Maritime National Wildlife Refuge is not indicated at this scale.

This map is intended for graphic reference only - source documents remain the official record