No. 157, Original

In the Supreme Court of the United States

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

BRIEF FOR THE DEFENDANTS IN OPPOSITION

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JURISDICTION

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the United States Constitution and under 28 U.S.C. 1251(b)(2) and (3).

STATEMENT

Alaska's Bristol Bay watershed "is an area of unparalleled ecological value, boasting salmon diversity and productivity unrivaled anywhere in North America." Office of Water, United States Environmental Protection Agency, *Final Determination of the U.S. Environmental Protection Agency Pursuant to Section 404(c) of the Clean Water Act Pebble Deposit Area, Southwest Alaska* ES-1 (Jan. 2023) (*Final Determination*). It is also the location of a large copper-bearing ore body known as the Pebble deposit. *Ibid.* After determining that discharges of dredged or fill material into waters of the United States associated with developing the Pebble deposit would have "unacceptable adverse effect[s]"

on fishery areas within the Bristol Bay watershed, the United States Environmental Protection Agency (EPA) exercised its authority under Section 404(c) of the Clean Water Act (CWA), 33 U.S.C. 1344(c), to prohibit and restrict such discharges.

Alaska seeks to file a bill of complaint against the United States alleging that EPA's exercise of its Section 404(c) authority breaches promises made to Alaska in two statutes; violates the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*; and effects a taking of Alaska's property without just compensation. Alaska in essence seeks judicial review of agency action or compensation in the alternative, as any private litigant might do. Those claims do not rise to the level of "seriousness and dignity" that this Court has required for the exercise of its non-exclusive original jurisdiction over a suit against the federal government. *Mississippi* v. *Louisiana*, 506 U.S. 73, 77 (1992) (citation omitted). Moreover, Congress has provided Alaska with other federal forums in which it may bring its claims. The motion for leave to file a bill of complaint should be denied.

A. Statutory Background

1. Section 404 of the Clean Water Act

The CWA, enacted in 1972, prohibits the "discharge of any pollutant" into "navigable waters" except in accordance with the Act's terms. 33 U.S.C. 1311(a). For purposes of the Act, "navigable waters" means "the waters of the United States." 33 U.S.C. 1362(7); see *Sackett* v. *EPA*, 143 S. Ct. 1322, 1336 (2023). Section 404(a) of the Act authorizes the U.S. Army Corps of Engineers (Corps) to issue permits "for the discharge of dredged or fill material into the navigable waters at specified

disposal sites." 33 U.S.C. 1344(a). Section 404(b) authorizes the Corps to "specif[y]" a disposal site for each permit. 33 U.S.C. 1344(b).

The Corps' permitting and specification authority is subject to EPA's authority under Section 404(c) "to prohibit the specification * * * of any defined area as a disposal site" and "to deny or restrict the use of any defined area for specification * * * as a disposal site." 33 U.S.C. 1344(c). EPA may exercise that authority "whenever [it] determines" that "the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." *Ibid.*

2. The Alaska Statehood Act

In 1959, Alaska entered the Union on an equal footing with the other 48 then-admitted States pursuant to the Alaska Statehood Act (Statehood Act), Pub. L. No. 85-508, 72 Stat. 339 (1958). One issue concerning its admission was how Alaska, with a vast territory and a small population, would raise the revenue necessary to bear the responsibilities of statehood. See *Alaska* v. *United States*, 35 Fed. Cl. 685, 688-694 (1996) (reviewing legislative history), aff'd, 119 F.3d 16 (Fed. Cir. 1997), cert. denied, 522 U.S. 1108 (1998). To address that issue, the Statehood Act granted Alaska the right to select over 103,000,000 acres of federal land. Statehood Act § 6(a) and (b), 72 Stat. 340; see *Sturgeon* v. *Frost*, 577 U.S. 424, 429 (2016). Alaska was permitted to select those lands from, *inter alia*, "public lands" that were "vacant, unappropriated, and unreserved" at the time of selection; the selections were to take place within 25 years of admission, Statehood Act § 6(b), 72 Stat. 340, a deadline that was subsequently extended, Alaska

National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, § 906(a), 94 Stat. 2437 (1980).

The Statehood Act's grant of federal lands included mineral rights. Section 6(*i*) of the Act provides:

> All grants made or confirmed under this Act shall include mineral deposits. The grants of mineral lands to the State of Alaska under subsections (a) and (b) of this section are made upon the express condition that all sales, grants, deeds, or patents for any of the mineral lands so granted shall be subject to and contain a reservation to the State of all of the minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same. Mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct: *Provided*, That any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States District Court for the District of Alaska.

Statehood Act § 6(*i*), 72 Stat. 342.

3. The Cook Inlet Land Exchange

In 1971, Congress enacted the Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-203, 85 Stat. 688, which extinguished aboriginal land claims but granted 40 million acres of federal land to corporations organized by Alaska Natives. See *Sturgeon*, 577 U.S. at 429-430. Much of the land around Cook Inlet, however, had already been selected by Alaska under the Statehood Act or reserved by the federal government. See H.R. Rep. No. 643, 104th Cong., 2d Sess. 3-4 (1996). As a result, the land available to Cook Inlet Region, Inc.

(CIRI), an Alaska Native Regional Corporation, was "largely comprised of mountains and glaciers, hardly the settlement contemplated by Congress." *Id.* at 4. To resolve the difficulty, the United States, Alaska, and CIRI agreed to a land exchange, the terms and conditions of which were ratified in an amendment to ANCSA. Act of Jan. 2, 1976 (Cook Inlet Land Exchange Act), Pub. L. No. 94-204, § 12, 89 Stat. 1150-1154; see *Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area* (Dec. 10, 1975), *reprinted in* H.R. Rep. No. 729, 94th Cong., 1st Sess. 35-52 (1975).

Section 12(d)(1) of the Cook Inlet Land Exchange Act directed the Secretary of the Interior to convey to Alaska up to 53 townships, to be selected by the State from areas defined in the Terms and Conditions. Cook Inlet Land Exchange Act § 12(d)(1), 89 Stat. 1152-1153. Section 12(d)(1) also provided that lands granted pursuant to that subsection "shall be regarded for all purposes as if conveyed to the State under and pursuant to section 6 of the Alaska Statehood Act," § 12(d)(1), 89 Stat. 1153, which includes the conveyance and reservation of mineral rights in Section 6(*i*) of that Act, see p. 4, *supra*. Alaska alleges that "lands encompassing the Pebble deposit" were conveyed to the State via this exchange. Compl. ¶ 127.[1]

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[1] Although the lands on which the Pebble deposit is situated were initially designated for conveyance under the Cook Inlet Land Exchange Act, it appears that the lands were ultimately conveyed in part or in full under Section 6(b) of the Statehood Act. See Office of Water, EPA, *Response to Comments on U.S. Environmental Protection Agency Clean Water Act Section 404(c) Determination for the Pebble Deposit Area, Southwest Alaska* 2-83, 2-85 (Jan. 2023); 14-cv-97 D. Ct. Doc. 188, at 39, 41, *Pebble Ltd. P'ship* v. *EPA* (D. Alaska Aug. 18, 2014); see also Compl. ¶ 51 (acknowledging that

B. The Bristol Bay Watershed And The Pebble Deposit

1. "The Bristol Bay watershed represents a largely pristine, intact ecosystem with outstanding ecological resources." *Final Determination* 3-1. Its streams, wetlands, and other aquatic resources support "world-class, economically important, commercial and sport fisheries for salmon and other fishes." *Id.* at ES-1. The watershed produces about half of the world's Sockeye Salmon, and its Chinook Salmon runs are frequently at or near the world's largest. *Ibid.* The watershed also supports significant Coho, Chum, and Pink salmon populations. *Ibid.* The success of those fisheries depends substantially on the fact that the Bristol Bay watershed's diverse aquatic habitats are largely untouched and pristine, unlike those that support many other salmon fisheries worldwide. *Ibid.*

The Bristol Bay region's salmon fishery has "supported Alaska Native cultures for thousands of years and continue[s] to support one of the last intact salmon-based cultures in the world." *Final Determination* ES-1. Today, the salmon fishery is also an important commercial resource. "The total economic value of the Bristol Bay watershed's salmon resources, including subsistence uses, was estimated at more than $2.2 billion in 2019." *Id.* at ES-3. The commercial salmon fishery alone supports 15,000 jobs and provides annual economic benefits of more than $2 billion. *Ibid.*

2. The Pebble deposit is a large, low-grade copper, gold, and molybdenum-bearing ore body located at the

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"some of the land" was conveyed directly under the Statehood Act). It is therefore not clear to what extent the Cook Inlet Land Exchange Act bears on the issues in this case. For present purposes, however, we assume that some of the lands containing the Pebble deposit were conveyed pursuant to that statute.

headwaters of the Bristol Bay watershed, about 200 miles southwest of Anchorage. *Final Determination* ES-3. The deposit was discovered in 1987 but remained largely unexplored until 2002. Compl. ¶¶ 59-63. In 2001, Northern Dynasty Minerals Ltd., a Canadian corporation, acquired mining claims related to the Pebble deposit, which are now held by its subsidiary, Pebble Limited Partnership (PLP). *Final Determination* 2-8; see Northern Dynasty Amicus Br. 1. Alaska continues to own the land where the Pebble deposit is located and the mineral rights in that land; it alleges that mining the Pebble deposit would provide "more than $100 million a year through state taxes, licensing fees, and royalty payments." Compl. ¶¶ 70-71.

In 2020, PLP proposed a Mine Plan that includes an open-pit mine at the Pebble deposit, as well as construction of processing facilities, tailings-storage facilities, water-management ponds, water-treatment plants, and a 270-megawatt power plant. *Final Determination* 2-2, 2-4. The 2020 Mine Plan also calls for the construction of a port over 50 miles to the east, on Cook Inlet, as well as a transportation corridor. *Id.* at 2-2 to 2-3.

C. EPA's Section 404(c) Proceedings

1. Prior Proceedings

In 2010, six Alaska Native Villages in the Bristol Bay watershed petitioned EPA to initiate a process under Section 404(c) of the CWA to consider whether discharges of dredged or fill material related to mining the Pebble deposit might have unacceptable adverse effects on the salmon fishery and, if so, to prohibit or restrict such discharges. *Final Determination* 2-9. Following an ecological risk assessment, EPA initiated a process under Section 404(c). *Id.* at 2-10 to 2-13. In July 2014,

EPA issued a proposed determination (the 2014 Proposed Determination). *Id.* at 2-13; see 79 Fed. Reg. 42,314 (July 21, 2014).

PLP challenged that ongoing Section 404(c) proceeding in district court, with Alaska participating as an intervenor. See *Pebble Ltd. P'ship* v. *EPA*, No. 14-cv-97 (D. Alaska). After that suit was dismissed for lack of any final agency action, PLP brought another challenge under the Federal Advisory Committee Act, and in November 2014, the district court preliminarily enjoined EPA from proceeding. 14-cv-171 D. Ct. Doc. 90, *Pebble Ltd. P'ship* v. *EPA* (D. Alaska Nov. 25, 2014). In 2017, EPA and PLP settled that case, and EPA published a proposal to withdraw the 2014 Proposed Determination. 82 Fed. Reg. 33,123 (July 19, 2017).

EPA withdrew the 2014 Proposed Determination in 2019. 84 Fed. Reg. 45,749 (Aug. 30, 2019). Several tribal, fishing, and environmental groups challenged that action, but the district court dismissed the suit, holding that the withdrawal decision was not subject to judicial review. *Bristol Bay Econ. Dev. Corp.* v. *Hladick*, 454 F. Supp. 3d 892, 908-909 (D. Alaska 2020). The Ninth Circuit reversed in part and remanded, holding that under EPA regulations, the agency may withdraw a proposed determination "*only* if the discharge of materials [at issue] would be unlikely to have an unacceptable adverse effect"; the withdrawal had not been based on such a finding. *Trout Unlimited* v. *Pirzadeh*, 1 F.4th 738, 757 (2021). On remand, the district court vacated the withdrawal of the 2014 Proposed Determination at EPA's request and remanded the matter to the agency. 19-cv-265 D. Ct. Doc. 109, *Bristol Bay Econ. Dev. Corp.* v. *Pirzadeh* (D. Alaska Oct. 29, 2021).

2. EPA's 2023 Final Determination

In 2022, EPA issued a new proposed determination. 87 Fed. Reg. 32,021 (May 26, 2022). In January 2023—after receiving public comment and taking other regulatory steps—EPA issued its Section 404(c) final determination, at issue here (Final Determination). 88 Fed. Reg. 7441 (Feb. 3, 2023).

In the Final Determination, EPA explained that discharges of dredged or fill material into waters of the United States associated with PLP's 2020 Mine Plan would result in significant impacts on aquatic habitats important to anadromous fish in the Bristol Bay watershed, including:

- Permanent loss of approximately 8.5 miles of anadromous fish streams and 91 miles of additional streams that support anadromous fish streams;
- Permanent loss of approximately 2108 acres of wetlands and other waters that support anadromous fish streams; and
- Streamflow alterations that would adversely affect approximately 29 miles of anadromous fish streams downstream of the mine site due to changes in average monthly streamflow of over 20%.

Final Determination ES-15.

Based on those stream losses and streamflow changes, EPA determined that the discharges proposed in PLP's 2020 Mine Plan would have "unacceptable adverse effects" on anadromous fishery areas within the watersheds of the South Fork Koktuli River and North Fork Koktuli River, which drain to the Nushagak, one of the largest rivers in the region. *Final Determination*

ES-3, ES-15. To prevent those adverse effects, EPA prohibited "the specification of waters of the United States * * * as disposal sites" for "the construction and routine operation of the 2020 Mine Plan," as well as future proposals to develop the Pebble deposit that would result in the same or greater level of loss or streamflow changes. *Id.* at ES-15 to ES-16. That prohibition applies within a defined area surrounding the proposed mine footprint that falls within the South Fork and North Fork Koktuli River watersheds. *Id.* at ES-15.

Because the 2020 Mine Plan represents only one configuration of a potential mine at the Pebble deposit—and because relocation of mine-site components would also result in discharges of dredged or fill material into water resources—EPA evaluated the effect of discharges elsewhere in the South Fork Koktuli River, North Fork Koktuli River, and Upper Talarik Creek watersheds, all of which share similar characteristics and aquatic habitats. *Final Determination* 3-9, 4-3, 4-8, 4-23 to 4-24; see *id.* at ES-3 (noting that Upper Talarik Creek drains to the other large river in the region, the Kvichak). EPA determined that such discharges would likewise "have unacceptable adverse effects on anadromous fishery areas * * * anywhere in [those] watersheds if the adverse effects of such discharges are similar or greater in nature and magnitude" to those of the 2020 Mine Plan. *Id.* at ES-16 (footnote omitted). To preclude those adverse effects, EPA restricted "the use of waters of the United States within [those three watersheds] for specification as disposal sites * * * associated with future proposals" to develop the Pebble deposit that would result in a similar or greater level of loss or streamflow changes. *Ibid.* That restriction

applies within a defined area surrounding parts of those three watersheds. *Id.* at ES-18 to ES-19.

The Final Determination does not limit discharges from any other activity in the Bristol Bay region, including mining of deposits other than the Pebble deposit. It prohibits and restricts discharges associated with developing the Pebble deposit specifically, and only those discharges that result in the level of aquatic-resource loss or streamflow changes that EPA found unacceptable.

D. The Corps' Section 404 Permitting Proceedings

While EPA's Section 404(c) proceedings were ongoing, PLP sought a Section 404 discharge permit from the Corps. Compl. ¶¶ 84, 93-94. PLP first applied for a permit in 2017 and submitted a revised application (based on the 2020 Mine Plan) in June 2020. In November 2020, the Corps' Alaska District denied the permit, concluding, *inter alia*, that discharges associated with the proposed mine would result in significant degradation of aquatic resources and that the project was contrary to the public interest. Letter from David S. Hobbie, Chief, Regional Regulatory Division, Alaska District, U.S. Army Corps of Engineers, to James Fueg, Pebble Limited Partnership (Nov. 25, 2020). PLP filed an administrative appeal, and in April 2023, the Corps' Pacific Ocean Division determined that portions of the appeal had merit and remanded the matter back to the Alaska District. Administrative Appeal Decision, U.S. Army Corps of Eng'rs, POA-2017-271 (Apr. 24, 2023). As of this filing, the matter is still pending on remand.

E. Alaska's Claims

In July 2023, Alaska filed a motion in this Court for leave to file a bill of complaint asserting three claims

against the United States and the EPA Administrator that challenge the Final Determination. First, Alaska alleges that the Statehood Act and the Cook Inlet Land Exchange Act constitute contracts between Alaska and the United States, and that the Final Determination breached those contracts "by effectively preventing any mining from ever occurring on the Pebble deposit and the surrounding area." Compl. ¶¶ 175-179.

Second, Alaska alleges that the Final Determination is "arbitrary and capricious" and "not in accordance with law" and should be set aside under the APA, 5 U.S.C. 706(2). Compl. ¶¶ 181-187. Alaska's APA claim does not challenge EPA's interpretation of its authority under Section 404(c) or the substance of the agency's regulatory analysis. See *ibid.* Rather, Alaska alleges that the Final Determination violated or failed to give sufficient weight to the Statehood Act and Cook Inlet Land Exchange Act. Compl. ¶¶ 182-186.

Third, Alaska asserts that the Final Determination effects an uncompensated regulatory taking in violation of the Fifth Amendment, because the action allegedly deprives Alaska of all economically viable use of its property. Compl. ¶¶ 190-191.

ARGUMENT

The Constitution vests this Court with original jurisdiction over a limited class of disputes, including those "in which a State shall be a Party." U.S. Const. Art. III, § 2, Cl. 2. Congress has further specified that the Court "shall have original and exclusive jurisdiction" only over controversies between "two or more States." 28 U.S.C. 1251(a). The Court accordingly has "original but not exclusive jurisdiction" over actions "between the United States and a State," 28 U.S.C. 1251(b)(2), and actions "by a State against the citizens of another State," 28

U.S.C. 1251(b)(3), which include actions by a State against a federal official who is not a citizen of the plaintiff State, *South Carolina* v. *Katzenbach*, 383 U.S. 301, 307 (1966).

This Court has long held that it may decline to exercise its original jurisdiction when doing so "would not disserve any of the principal policies underlying the Article III jurisdictional grant." *Ohio* v. *Wyandotte Chems. Corp.*, 401 U.S. 493, 499 (1971); see *Mississippi* v. *Louisiana*, 506 U.S. 73, 76-77 (1992). And the Court has emphasized, in cases of both exclusive and non-exclusive jurisdiction, that its discretionary power to act as the tribunal of first and last resort "should be invoked sparingly." *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93 (1972) (quoting *Utah* v. *United States*, 394 U.S. 89, 95 (1969) (per curiam)); see *United States* v. *Nevada*, 412 U.S. 534, 538 (1973) (per curiam). That is because original actions "tax the limited resources of this Court by requiring [it] 'awkwardly to play the role of factfinder' and diverting [its] attention from [its] 'primary responsibility as an appellate tribunal.'" *South Carolina* v. *North Carolina*, 558 U.S. 256, 267 (2010) (citations omitted).

The Court accordingly exercises its original jurisdiction only in "appropriate cases," *Wyoming* v. *Oklahoma*, 502 U.S. 437, 451 (1992) (citation omitted), "with an eye to promoting the most effective functioning of this Court within the overall federal system," *Texas* v. *New Mexico*, 462 U.S. 554, 570 (1983). The Court has explained:

> [T]he question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the

> named parties, where the issues tendered may be litigated, and where appropriate relief may be had.

Wyoming, 502 U.S. at 451 (citation omitted).

Alaska's complaint does not meet that high threshold. First, other forums are available for all of Alaska's claims, consistent with congressional design: a district court for the State's APA claim and the Court of Federal Claims (CFC) for the State's claims seeking monetary compensation. Second, and relatedly, Alaska's suit involves challenges to federal agency action of the sort that are the routine business of the lower courts—not the kind of "delicate and grave" dispute warranting this Court's adjudication in the first instance. *Louisiana* v. *Texas*, 176 U.S. 1, 15 (1900). The motion for leave to file the bill of complaint should be denied.[2]

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[2] Alaska's alternative argument (Br. in Support of Compl. 34-36) that this Court's original jurisdiction is mandatory should be rejected. Relying primarily on the statement in *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821), that the Court "ha[s] no * * * right to decline the exercise of jurisdiction which is given," *id.* at 404, Alaska asks the Court to overrule *Wyandotte Chemicals*. But the Court's discretion to decline original jurisdiction has been settled for 50 years, and Alaska fails to confront any of the sound arguments on which the principle reflected in *Wyandotte Chemicals* is based or show why prevailing law is unworkable. See, *e.g.*, *Massachusetts* v. *Missouri*, 308 U.S. 1, 19 (1939) (Hughes, C.J.) (explaining that "the broad statement that a court having jurisdiction must exercise it * * * is not universally true but has been qualified in certain cases where the federal courts may, in their discretion, properly withhold the exercise of the jurisdiction conferred upon them"). Those arguments are especially compelling when it comes to this Court's jurisdiction over suits by a State against the United States or its officers, which Congress has designated as non-exclusive. 28 U.S.C. 1251(b); cf. *Nebraska* v. *Colorado*, 577 U.S. 1211, 1211-1212 (2016) (Thomas, J., dissenting) (distinguishing between this Court's exclusive and non-exclusive jurisdiction).

I. THIS CASE DOES NOT FALL WITHIN THE NARROW CLASS OF DISPUTES THAT WARRANT THE COURT'S EXERCISE OF ORIGINAL JURISDICTION

A. Other Forums Are Available For All Of Alaska's Claims

1. As noted above, this Court's original jurisdiction over suits between a State and the United States and its officers is not exclusive. And where an alternative forum is available for the State's claims, this Court is "particularly reluctant to take jurisdiction." *Nevada*, 412 U.S. at 538; see Stephen M. Shapiro et al., *Supreme Court Practice* 10-15 (11th ed. 2019).

A plaintiff, including a State, generally has a fully adequate forum in district court under the APA to challenge the final action of a federal agency. 28 U.S.C. 1331; 5 U.S.C. 702, 703, 704. Such a plaintiff also has a fully adequate forum in the CFC under the Tucker Act to seek monetary compensation for an alleged breach of contract or taking. 28 U.S.C. 1491(a). Accordingly, "[s]ubsequent to [this Court's] decision in *United States v. Nevada* in 1973," this Court has, "in the majority of actions by States against the United States or its officers, summarily denied the motion for leave to file a bill of complaint." *Nebraska* v. *Wyoming*, 515 U.S. 1, 27 n.2 (1995) (Thomas, J., concurring in part and dissenting in part) (citing cases); see *Louisiana* v. *Bryson*, 565 U.S. 1258 (2012); *Texas* v. *Leavitt*, 547 U.S. 1204 (2006). This case presents no extraordinary occasion for the Court to depart from that practice.

Here, Alaska does not (and cannot) dispute that alternative forums are available for all of its claims. It acknowledges (Br. in Support of Compl. 32) that it may bring its APA challenge to the Final Determination in district court and its contract and takings claims in the CFC. Instead, Alaska asserts (*ibid.*) that these

alternative forums are "problematic" because it is required by statute to litigate different claims sequentially in two different courts. See 28 U.S.C. 1500 (barring the CFC from exercising jurisdiction over damages claims when the plaintiff has a related claim against the United States pending in another court); *United States* v. *Tohono O'Odham Nation*, 563 U.S. 307, 311-313 (2011).

But that is by congressional design. In enacting Section 1500 in 1868, Congress deliberately made an exception to the general preference against claim-splitting by requiring that suits challenging official action and claims against the United States for money damages be brought in different courts—and resolved sequentially—even if they arise out of the same set of operative facts. See *Tohono*, 563 U.S. at 315 (explaining Section 1500's purpose "to save the Government from burdens of redundant litigation," which "purpose is no less significant today"); see also *id.* at 310-311. Alaska's situation is thus no different from that of any other litigant who believes that administrative action is unlawful or, if not unlawful, caused compensable harm. Nor does Alaska's sovereign status make a difference; in *Tohono*, the Court enforced Section 1500 according to its terms in a case brought by an Indian tribe. See *id.* at 316-317. This Court explained that "[e]ven were some hardship to be shown" by Section 1500's operation, "considerations of policy divorced from the statute's text and purpose could not override its meaning." *Id.* at 317.

2. Nor can Alaska justify resort to this Court's original jurisdiction by hypothesizing that its contract and takings claims may be time-barred if its APA claim is not decided within the CFC's six-year statute of

limitations. Br. in Support of Compl. 33; see 28 U.S.C. 2501.[3] Again, the possibility that a litigant might need to choose between pursuing an APA claim and a Tucker Act damages claim is simply the consequence of the intentional choice by Congress to limit the waiver of the United States' sovereign immunity. See *Tohono*, 563 U.S. at 317 (emphasizing that "[a]lthough Congress has permitted claims against the United States for monetary relief in the CFC, that relief is available by grace and not by right"); Cong. Globe, 40th Cong., 2d Sess. 2769 (1868) (statement of Sen. Edmunds, sponsor of the amendment that became Section 1500, explaining that the provision would put plaintiffs "to their election" and require them "either to leave the Court of Claims or to leave the other courts"); see also pp. 29-32, *infra*.

In any event, the risk that Alaska would be put to a choice between its claims is small. District courts review APA claims based on the administrative record, without the need for discovery or trial, and final resolution of such cases rarely requires more than six years. That proposition holds true for challenges to Section 404(c) actions: available examples show that litigants have been able to file timely takings claims following APA challenges, even when review was sought in this Court. See, *e.g.*, *Creppel* v. *United States*, 41 F.3d 627,

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[3] Under current Federal Circuit precedent, Alaska could avoid the Section 1500 bar by filing first in the CFC. See *Tecon Eng'rs, Inc.* v. *United States*, 343 F.2d 943, 949 (Ct. Cl. 1965) (interpreting Section 1500 to preclude the CFC's jurisdiction only if a district-court suit is already pending), cert. denied, 382 U.S. 976 (1966); see also *Tohono*, 563 U.S. at 314-315. The United States maintains its longstanding position, however, that *Tecon* was wrongly decided and that the sequence of filing in the two courts is irrelevant. See, *e.g.*, U.S. Br. in Opp. at 37 n.4, *Resource Invs., Inc.* v. *United States*, 579 U.S 927 (2016) (No. 15-802).

630-631, 634 (Fed. Cir. 1994) (takings claim filed after district court upheld Section 404(c) determination); *United Affiliates Corp.* v. *United States*, 143 Fed. Cl. 257, 261-262 (2019) (regulatory takings claim filed after unsuccessful APA challenge to Section 404(c) determination, which included two appeals and denial of certiorari).

B. Alaska's Claims Are Also Not Appropriate For The Exercise Of This Court's Original Jurisdiction

1. When assessing the "seriousness and dignity" of the claim asserted, the Court examines "the nature of the interest of the complaining State." *Mississippi*, 506 U.S. at 77 (citations omitted). This inquiry typically focuses on whether the State's alleged injury implicates its sovereign interests. See *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 665-666 (1976) (per curiam). Indeed, the Court "has most frequently exercised [its] jurisdiction over cases sounding in sovereignty and property, such as those between states in controversies concerning boundaries, and the manner of use of the waters of interstate lakes and rivers." *Supreme Court Practice* 10-7; see *id.* at 10-6, 10-16.[4]

The claims Alaska raises are quite different. The State challenges final agency action as contrary to law—the sort of suit that is routinely brought by parties, including States, in a district court under the APA or in a court of appeals under a special statutory review

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[4] Alaska points out (Br. in Support of Compl. 34) that it has been a party to prior original actions in this Court. Those cases, however, involved disputed questions of title to submerged lands or boundaries. See *Alaska* v. *United States*, 546 U.S. 413 (2006) (dispute over title to submerged lands); *United States* v. *Alaska*, 530 U.S. 1021 (2000) (similar); *United States* v. *Alaska*, 503 U.S. 569 (1992) (dispute involving federal-state boundary).

procedure. 5 U.S.C. 702, 703, 706; cf. *National Ass'n of Mfrs.* v. *Department of Def.*, 583 U.S. 109, 117-119, 129 (2018) (describing the avenues for obtaining judicial review of EPA actions administering the CWA, including under Section 404). There is nothing distinctly sovereign about such a claim. The same is true of the State's contract and takings claims, which (as noted) must be brought in the CFC under the Tucker Act. See 28 U.S.C. 1491(a)(1); see also pp. 29-32, *infra*. Indeed, when asserting a claim for a taking seeking compensation, the State is essentially assuming the position of a private landowner.[5] And Alaska has in fact brought contract and takings claims in the CFC in the past. See *Alaska* v. *United States*, 35 Fed. Cl. 685 (1996) (breach-of-contract and takings claims based on Statehood Act involving mineral rights), aff'd, 119 F.3d 16 (Fed. Cir. 1997), cert. denied, 522 U.S. 1108 (1998); *Alaska* v. *United States*, 32 Fed. Cl. 689 (1995) (takings claim concerning federal regulation of oil exports, also involving Statehood Act).

Alaska nonetheless contends (Br. in Support of Compl. 19-23) that it has uniquely sovereign interests at stake. But none of those purported interests provides a justification for the Court to adjudicate this dispute as an original action. For instance, the State argues that the Final Determination "strikes at the heart of

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[5] Although the Fifth Amendment provides that "*private* property [shall not] be taken for public use, without just compensation," U.S. Const. Amend. V (emphasis added), this Court has held that "it is most reasonable to construe the reference to 'private property' in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States." *United States* v. *50 Acres of Land*, 469 U.S. 24, 31 (1984).

Alaska's sovereignty" because it "depriv[es] the State of its power to regulate its lands and waters." Br. in Support of Compl. 3. The Final Determination does no such thing: Alaska remains free to subject the lands and waters surrounding the Pebble deposit to its own regulatory requirements in addition to those of the CWA. If a conflict between the two regimes arises, an exercise of federal power to protect federal interests does not infringe upon a State's sovereignty; the supremacy of federal law is inherent in the constitutional design. See U.S. Const. Art. VI, Cl. 2. Moreover, if a State's disagreement with agency action under federal regulatory law were deemed the kind of "delicate and grave" dispute rendering a case appropriate for the exercise of original jurisdiction, *Louisiana* v. *Texas*, 176 U.S. at 15, the Court's docket would soon be overwhelmed.

Alaska also suggests (Compl. ¶ 3) that this suit is appropriate for this Court's original jurisdiction because its claims seek to enforce rights conveyed to the State under the Statehood Act. But this dispute is not about what lands Alaska received under the Statehood Act or the extent of its reserved mineral rights. Compare *Alaska* v. *United States*, 545 U.S. 75, 78-79, 104-110 (2005). Rather, Alaska challenges EPA's exercise of its regulatory authority with respect to the State's property under other generally applicable federal law (the CWA)—just as any other property owner might do. In any event, as explained below, Alaska's Statehood Act claims are not substantial. See pp. 21-28, *infra*.

Finally, Alaska argues (Compl. ¶¶ 110-111, 113) that the proposed mine would bring benefits to its economy and its citizens more generally. But the State lacks standing to sue the United States on behalf of its

citizens as *parens patriae*, see *Haaland* v. *Brackeen*, 143 S. Ct. 1609, 1640 (2023), a rule that is no less salient in an original action, see *Massachusetts* v. *Laird*, 400 U.S. 886 (1970). And Alaska's related reliance on generalized benefits to the State's economy could open this Court's original docket to all manner of challenges to federal agency action under the APA.

Thus, far from being "unique," Br. in Support of Compl. 19, the interests Alaska invokes here could be asserted by any number of States seeking to challenge significant regulatory action by the federal government or alternatively seeking money damages. This Court should not open the floodgates to routine disputes about the meaning and application of federal law that the lower courts are fully capable of resolving in the first instance.

2. This Court has also declined to exercise original jurisdiction over suits that do not present a substantial claim for relief. See, *e.g.*, *Alabama* v. *Texas*, 347 U.S. 272, 273 (1954) (per curiam) (denying leave to file bill of complaint when the State's case was without merit); *Massachusetts* v. *Missouri*, 308 U.S. 1, 15-17 (1939) (same). That is the proper course here as well.

a. Alaska primarily seeks to prevent EPA from exercising its Section 404(c) authority; its alternative claims for monetary relief are secondary. Br. in Support of Compl. 33. Alaska thus asserts that the Final Determination is "not in accordance with law" and "arbitrary" and "capricious" because it violates the Statehood Act and the Cook Inlet Land Exchange Act. Compl. ¶¶ 181-186. Alaska also argues that those two statutes amount to contracts and that the Final Determination breached their terms. Compl. ¶¶ 176-177. But whether treated as a claim of statutory or contractual

breach, Alaska's theory is without merit: Nothing in the Statehood Act or the Cook Inlet Land Exchange Act precludes EPA's exercise of its authority under Section 404(c) of the CWA.[6]

Alaska's claims center on Section 6(*i*) of the Statehood Act, which provides, *inter alia*, that the grants conveyed by the Act "shall include mineral deposits" and that "[m]ineral deposits in such lands shall be subject to lease by the State as the State legislature may direct." Statehood Act § 6(*i*), 72 Stat. 342; see Cook Inlet Land Exchange Act § 12(d)(1), 89 Stat. 1153 (providing that lands conveyed under that Act "shall be regarded for all purposes as if conveyed to the State under and pursuant to section 6" of the Statehood Act); see Br. in Support of Compl. 14, 24-25. Based on that language, Alaska contends (Compl. ¶ 133) that the State "was being given the regulatory power to use its new lands—when it deemed it appropriate—for mining purposes." And the State appears to further contend that, as a result, EPA cannot exercise its Section 404(c) authority with respect to the Pebble deposit. See Compl. ¶¶ 135, 138. Those contentions are without merit.

Section 6(*i*) cannot reasonably be read as a limitation of generally applicable federal regulatory authority over the conveyed lands. The bare grant of mineral deposits alone cannot be so understood; it simply conveys ownership, just as the Act elsewhere does for the lands

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[6] There is a presumption that statutes enacted by Congress do not create contracts, see *National R.R. Passenger Corp.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-467 (1985), and the burden of overcoming the presumption is on the party claiming a contract, *id.* at 466. For purposes of this response to Alaska's motion, however, we assume that these statutory provisions constitute contracts.

themselves. And the instruction that the deposits "shall be subject to lease by the State as the State legislature may direct" merely clarifies the State's *leasing* authority and identifies the legislature as the entity that shall decide how that authority is to be exercised. That clarification makes sense when considered alongside the rest of Section 6(*i*), which prohibits the State from selling its mineral rights. See S. Rep. No. 1028, 83d Cong., 2d Sess. 32 (1954) (explaining this purpose of Section 6(*i*)); see also *State* v. *Lewis*, 559 P.2d 630, 640 (Alaska) (describing Section 6(*i*) as containing "restrictions on alienation of mineral rights"), appeal dismissed and cert. denied, 432 U.S. 901 (1977). But the sentence in question does not address the regulation of mining itself or the protection of affected waters—let alone displace other federal law on those subjects.

Indeed, the Court has already interpreted the phrase "subject to lease by the State as the State legislature may direct" and rejected an argument analogous to Alaska's here. See *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 625, 629-631 (1989). Section 6(*i*) was modeled after language in the Jones Act of 1927 (also known as the School Lands Act), Act of Jan. 25, 1927, ch. 57, 44 Stat. 1026, as amended, which conveyed mineral lands to every State that would otherwise have received those lands on admission to the Union but for their mineral character (about a dozen States total). See 43 U.S.C. 870(b) (providing, *inter alia*, that "[t]he coal and other mineral deposits in such lands * * * shall be subject to lease by the State as the State legislature may direct, the proceeds and rentals and royalties therefrom to be utilized for the support or in aid of the common or public schools"); see *ASARCO*, 490 U.S. at 626, 628. The plaintiffs in *ASARCO* argued that the phrase "as the State

legislature may direct" allowed Arizona to lease the minerals without regard to other federal statutory requirements. 490 U.S. at 629 (citation omitted). This Court disagreed, stating that "this language is properly viewed as authorizing the States to regulate the methods by which mineral leases are made and to specify any additional terms in those leases that are thought necessary or desirable," while still complying with other applicable law. *Id.* at 631; see *ibid.* ("Given the preceding restrictions on the *sale* of minerals in [the provision], Congress may have thought it necessary to emphasize that *leases* were subject to no such novel limitations.").

Alaska argues that the Statehood Act overrides the CWA because the former is a "'specific provision[] applying to a very specific situation,' while the Clean Water Act 'is of general application.'" Compl. ¶ 146 (quoting *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974)). But Section 6(*i*)'s text contains no express limitation on federal regulatory authority, and the two statutes readily can—and therefore should—be harmonized. See *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1624 (2018) ("When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both.'") (quoting *Mancari*, 417 U.S. at 551). Nor is the Statehood Act obviously more specific to this situation than Section 404 of the CWA. The Statehood Act confirms Alaska's authority to lease the mineral deposits in granted lands but does not address the regulation of mining activity or of protected waters that may be affected. The CWA, by contrast, addresses the specific activity at issue: the

discharge of dredged or fill material into waters of the United States.[7]

Without any foothold in the statutory text, Alaska emphasizes the purpose of the Statehood Act's land grants and the recognized need to provide the new State with revenue. Br. in Support of Compl. 4-5, 25-27. But that general aim cannot supply text that is absent in the grant itself. Again, this Court's school-lands precedent is instructive. In *Case* v. *Bowles*, 327 U.S. 92 (1946), the State of Washington argued that lands conveyed under its enabling act "for the support of common schools," *id.* at 95 (citation omitted), should be exempt from federal price-control legislation, *id.* at 100. The Court rejected that contention, reasoning that "[n]o part of all the history concerning these grants * * * indicates a purpose on the part of Congress to enter into a permanent agreement with the States under which States would be free to use the lands in a manner which would conflict with valid legislation enacted by Congress in the national interest." *Ibid.* So too here.

Nor does Alaska's vague claim to be "the exception, not the rule," Compl. ¶¶ 1, 142 (citations omitted), provide a basis to infer a statutory or contractual obligation to refrain from applying federal law to the Pebble deposit. True, Congress has sometimes expressly legislated

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[7] By their terms, the prohibition and restriction in the Final Determination are limited to the disposal of dredged or fill material into "waters of the United States," *Final Determination* ES-15 to ES-16, and so necessarily accord with this Court's definition of that term in *Sackett* v. *EPA*, 143 S. Ct. 1322 (2023). To the extent Alaska argues that EPA's CWA authority is limited to "waters that are 'navigable in fact,'" Compl. ¶ 153 (citation omitted), a majority of the Court did not adopt that view last Term in *Sackett*. See 143 S. Ct. at 1337-1341; *id.* at 1362-1363, 1366-1367 (Kavanaugh, J., concurring in the judgment).

special terms for Alaska. See *Sturgeon* v. *Frost*, 577 U.S. 424, 430-431, 433-441 (2016) (interpreting ANILCA). But Congress did not do so in Section 6(*i*), and this Court has never suggested that broad regulatory exemptions for Alaska should be inferred from silence. Cf. *Sturgeon* v. *Frost*, 139 S. Ct. 1066, 1084-1085, 1087 (2019) (noting that ANILCA's statutory exemption of certain Alaska lands from National Park Service regulations is not an exemption from "generally applicable regulations," including "regulatory powers * * * exercised by the EPA, Coast Guard, and the like"). Indeed, the fact that the provision at issue was derived from the Jones Act indicates that Congress had precisely the opposite intention: to place Alaska "on an equal but not a favored footing with other public land states with respect to the disposition of mineral lands." *Trustees for Alaska* v. *Alaska*, 736 P.2d 324, 337 (Alaska 1987), cert. denied, 486 U.S. 1032 (1988).

Alaska's interpretation of Section 6(*i*) is rendered all the more implausible by the State's failure to articulate the scope of its novel preclusion-of-federal-regulation theory. May Alaska override EPA's regulatory judgment whenever the State believes that a proposed mining project on state land is "appropriate" (Compl. ¶ 133)? Or is Section 6(*i*) triggered here based only on Alaska's assertion (Compl. ¶ 135) that this particular Section 404(c) determination "effectively prevents any mining from ever occurring on the Pebble deposit"? Does Alaska now believe that Section 404 of the CWA is wholly inapplicable to lands conveyed under the Statehood Act, such that Alaska's lessee, PLP, need not even obtain a discharge permit from the Corps?[8] What about

[8] But see p. 11, *supra*. Alaska has previously agreed in litigation that Section 404's permitting requirements "apply to a mining

other provisions of federal environmental and conservation law? For that matter, must any other federal regulatory regime that affects mining of the lands in question—such as health, safety, or financial-reporting requirements—give way? Alaska does not say, and Section 6(*i*)'s text would provide no guidance.

If the Statehood Act and Cook Inlet Land Exchange Act are treated as contracts, background principles of contract interpretation make Alaska's expansive reading even less reasonable. Under the "unmistakability" doctrine, "a contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an Act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power." *United States* v. *Winstar Corp.*, 518 U.S. 839, 878 (1996) (plurality opinion). Thus, in the absence of any *stated* intention to exempt Alaska from application of the CWA—or any other federal statute—a court cannot infer that Congress made a contractual commitment to do so. See *id.* at 876-879.

Alaska's invocation (Compl. ¶ 178) of an implied "covenant of good faith and fair dealing" does not advance its position either. Even assuming that such a duty could apply here, the covenant does not operate in a vacuum, but "must attach to a specific substantive obligation, mutually assented to by the parties." *Alaska* v. *United States*, 35 Fed. Cl. at 704. Because Alaska cannot show that Congress specifically undertook to exempt the State's mineral deposits from application of

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project that might be proposed for the Pebble deposit." 14-cv-97 D. Ct. Doc. 19, at ¶ 4, *Pebble Ltd. P'ship* v. *EPA* (D. Alaska May 30, 2014).

federal regulatory law—or to maximize the revenue that Alaska might earn from those deposits—Alaska could have had no reasonable expectation that could be frustrated by the CWA's application to the granted lands. See *ibid.* Nor can Alaska show that the Final Determination deprives the State of all (or even a substantial portion) of the benefits of the mineral rights conveyed by Section 6(*i*) when those rights are considered in the aggregate, let alone that EPA's action deprives the State of all of the benefits of the conveyed lands. Cf. 14-cv-97 D. Ct. Doc. 188, at 39-40, *Pebble Ltd. P'ship* v. *EPA* (D. Alaska Aug. 18, 2014) (explaining that Alaska indicated in 1977 that it was selecting the lands containing the Pebble deposit for numerous reasons in addition to mineral potential, including "accessibility, possible future settlement, close proximity to Lake Iliamna and 'high fisheries values'") (citation omitted).

In sum, Alaska alleges no plausible basis to conclude that the State or its lessee has the right to mine lands conveyed via the Statehood Act without complying with generally applicable federal law. Because the central theory of Alaska's case is insubstantial, the Court should not entertain its complaint.[9]

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[9] Alaska's arbitrary-and-capricious claim under the APA is limited to the assertion that EPA gave insufficient "weight" to Alaska's rights under the Statehood Act and the Cook Inlet Land Exchange Act, Compl. ¶¶ 148-150, 186; see Br. in Support of Compl. 28, and therefore does not appear to be materially distinct from its claim that the Final Determination violated those statutes. In contrast, PLP argues as amicus that the Final Determination is infirm because EPA allegedly "refuse[d] to count the cost"—meaning, the "economic consequences"—of its action. Northern Dynasty Amicus Br. 21-23. Even putting aside that Alaska does not present the same challenge, PLP's assertion would not be a basis for setting aside the Final Determination. While EPA's regulations have long interpreted

b. Alaska's alternative request for compensation for breach of contract or a taking provides further reason for this Court to deny leave to file the complaint, because the statutory waiver of the United States' sovereign immunity on which Alaska relies to assert those claims (Compl. ¶ 174) applies only in the CFC.

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983). That principle is no less applicable when the plaintiff is a State. *California* v. *Arizona*, 440 U.S. 59, 61-62 (1979); see *Kansas* v. *United States*, 204 U.S. 331, 342-343 (1907) (dismissing original action based on sovereign immunity). A corollary of that principle is that when the United States does waive its immunity, it "may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted." *Tohono*, 563 U.S. at 317 (citation omitted); see *Minnesota* v. *United States*, 305 U.S. 382, 388 (1939) ("[I]t rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought.").

Section 404(c) to permit the agency to focus only on environmental effects, see 44 Fed. Reg. 58,076, 58,078 (Oct. 9, 1979), EPA analyzed economic costs in this instance as part of an alternative justification for its action. *Final Determination* § 4.4; see EPA, *Consideration of Potential Costs Regarding the Clean Water Act Section 404(c) Final Determination for the Pebble Deposit Area, Southwest Alaska* (Jan. 2023) ("*Consideration of Potential Costs*"). In particular, EPA considered the net value of the minerals that would be produced if the Pebble deposit were mined, as well as the potential for job creation and tax revenue in the State. *Consideration of Potential Costs* 6, 64-73.

For nearly the first 70 years of the Republic, there was no judicial mechanism for seeking money damages from the United States, and aggrieved claimants' only recourse was a private bill in Congress. See *Mitchell*, 463 U.S. at 212. To make monetary compensation more accessible, Congress created the Court of Claims in 1855 and authorized it to enter final judgments in 1863. See *id.* at 213. The current version of the Tucker Act confers jurisdiction on "[t]he United States Court of Federal Claims," the successor to the Court of Claims, to hear claims "against the United States founded either upon the Constitution * * * or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort," 28 U.S.C. 1491(a); see 28 U.S.C. 171(a)—subject to appeal to the Federal Circuit, 28 U.S.C. 1295(a)(3).

This Court has construed Section 1491(a) as a waiver of the United States' sovereign immunity in the CFC. *Mitchell*, 463 U.S. at 212. And Congress deliberately chose not to extend that waiver to suits brought in federal district courts if the amount in controversy exceeds $10,000. See 28 U.S.C. 1346(a)(2); *United States* v. *Sherwood*, 312 U.S. 584, 590-591 (1941). This Court has accordingly explained that "[t]he CFC is the only judicial forum for most nontort requests for significant monetary relief against the United States." *Tohono*, 563 U.S. at 313.

In *California* v. *Arizona*, however, the Court stated that "once Congress has waived the Nation's sovereign immunity, it is far from clear that it can withdraw the constitutional jurisdiction of this Court over such suits." 440 U.S. at 65; see *id.* at 65-66. That case involved a claim asserted by California against the United States under the Quiet Title Act, which vests district courts

with exclusive jurisdiction over, and waives the United States' immunity with respect to, quiet-title claims. 28 U.S.C. 1346(f), 2409a. Invoking the Quiet Title Act's legislative history and the canon of constitutional avoidance, the Court determined that the statute's grant of "exclusive original jurisdiction" to "[t]he district courts," 28 U.S.C. 1346(f), could "readily be construed" to "confine jurisdiction to the federal courts and to exclude the courts of the States," but not to foreclose this Court's original jurisdiction. *California* v. *Arizona*, 440 U.S. at 66-67.

The circumstances of this case are quite distinct from those of *California* v. *Arizona*. In that case, California sought to quiet title to submerged and formerly submerged lands on its border with Arizona, and this Court was the only forum in which California could sue Arizona. 440 U.S. at 60-61. But the United States, as principal riparian owner, was a necessary party—and if the United States could not be joined, California would be without a forum. *Id.* at 60-63. Here, by contrast, it is undisputed that Alaska *does* have an alternative forum for its claims, and the Court should deny leave to file in this Court for that reason and others explained above. See pp. 15-18, *supra*. If the Court follows that course, there will be no need to decide whether, under the rationale of *California* v. *Arizona*, the Tucker Act should be construed to allow monetary claims against the United States in this Court—considering the Appropriations Clause of the Constitution, Art. I, § 9, Cl. 7, and the long history of Congress's vesting jurisdiction over such claims in a specialized tribunal, see p. 30, *supra*. At the very least, these considerations further support declining to hear Alaska's claims in this

Court, out of deference to Congress's choice to designate an alternative forum.

II. IF THE MOTION FOR LEAVE TO FILE THE BILL OF COMPLAINT IS GRANTED, THE COURT SHOULD ALLOW FOR THE FILING OF A DISPOSITIVE MOTION

If the Court concludes, contrary to our submission, that Alaska's claims warrant allowing the State to proceed in this Court rather than in a district court or the CFC, it should permit the defendants to file a motion to dismiss before referring the case to a Special Master. See, *e.g.*, *Texas* v. *New Mexico*, 571 U.S. 1173 (2014); *New Hampshire* v. *Maine*, 530 U.S. 1272 (2000); see also Sup. Ct. R. 17.2 (providing that the Federal Rules of Civil Procedure may be used as guides for the conduct of original actions).

CONCLUSION

The motion for leave to file should be denied. If the Court grants the motion, it should permit the defendants to file a motion to dismiss.

Respectfully submitted.

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