IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

KATIE JOHN, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, et al.,

Defendants,

and

STATE OF ALASKA,

Defendant-Intervenor,

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STATE OF ALASKA,

Plaintiff,

and

ALASKA FISH AND WILDLIFE FEDERATION AND OUTDOOR COUNCIL, et al.,

Plaintiff-Intervenors,

vs.

KEN SALAZAR, Secretary of the Interior, et al.,

Defendants,

and

KATIE JOHN, et al.,

Defendant-Intervenors,

and

ALASKA FEDERATION OF NATIVES,

Defendant-Intervenor.

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- AND -

No. 3:05-cv-0006-HRH
(Consolidated with
No. 3:05-cv-0158-HRH)

O R D E R

Which Waters Have Federal Reserved Water Rights

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| LINCOLN PERATROVICH, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| UNITED STATES OF AMERICA, et al., | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |
| and | ) | |
| | ) | No. 3:92-cv-0734-HRH |
| STATE OF ALASKA, | ) | |
| | ) | |
| Defendant-Intervenor. | ) | |

These consolidated cases involve challenges to regulations that were promulgated by the Secretaries of Interior and Agriculture on January 8, 1999 (herein "the 1999 final rule"). The regulations primarily implemented a Ninth Circuit Court of Appeals' decision that the definition of "public lands" for purposes of Title VIII of the Alaska National Interest Lands Conservation Act includes navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine. See Alaska v. Babbitt, 72 F.3d 698, 703-04 (9th Cir. 1995). This decision addresses legal issues flowing from the Secretaries' application of the reserved water rights doctrine to broad categories of Alaskan waters.

## I. Background

The Alaska National Interest Lands Conservation Act (ANILCA) was enacted in 1980. Congress set forth four specific purposes of ANILCA, three of which have implication here:

(a) Establishment of units

In order to preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values, the units described in the following titles are hereby established.

(b) Preservation and protection of scenic, geological, etc., values

It is the intent of Congress in this Act to preserve unrivaled scenic and geological values associated with natural landscapes; to provide for the maintenance of sound populations of, and habitat for, wildlife species of inestimable value to the citizens of Alaska and the Nation, including those species dependent on vast relatively undeveloped areas; to preserve in their natural state extensive unaltered arctic tundra, boreal forest, and coastal rainforest ecosystems; to protect the resources related to subsistence needs; to protect and preserve historic and archeological sites, rivers, and lands, and to preserve wilderness resource values and related recreational opportunities including but not limited to hiking, canoeing, fishing, and sport hunting, within large arctic and subarctic wildlands and on freeflowing rivers; and to maintain opportunities for scientific research and undisturbed ecosystems.

(c) Subsistence way of life for rural residents

It is further the intent and purpose of this Act consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for which each conservation system unit is established, designated, or expanded by or pursuant to this Act, to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.

16 U.S.C. § 3101.

In order to allow rural residents to continue to engage in a subsistence way of life, Title VIII of ANILCA establishes a preference for customary and traditional uses of fish and wildlife by according a priority for the taking of fish and wildlife on public lands in Alaska for nonwasteful subsistence uses by rural Alaska residents. 16 U.S.C. §§ 3113 and 3114. We emphasize that the preference and priority created by ANILCA for subsistence uses by rural residents is not restricted geographically to the conservation system units created by ANILCA. Rather, and "[e]xcept as otherwise provided in [ANILCA] and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes." 16 U.S.C. § 3114 (emphasis added).

A "conservation system unit" (herein referred to as "CSU") is defined in section 102(4) of ANILCA as

> any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument including existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such unit, and any such unit established, designated, or expanded hereafter.

16 U.S.C. § 3102(4). Not included in this definition are national forests. Thus, there are lands withdrawn from public domain for specific purposes, such as Chugach National Forest and Tongass National Forest, which are not included in CSUs and, of course,

there are substantial unreserved federal lands (public domain), title to which is in the United States.

"Public lands" are defined in section 102(3) of ANILCA as:

> (3) ... land situated in Alaska which, after December 2, 1980, are Federal lands, except –
>
> (A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;
>
> (B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.] which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and
>
> (C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act [43 U.S.C. § 1618(b)].

16 U.S.C. § 3102(3). Federal lands are defined as "lands the title to which is in the United States after December 2, 1980." Id. § 3102(2). "Land" is defined as "lands, waters, and interests therein." Id. § 3102(1). These definitions do not apply to Title IX of ANILCA. Id. § 3102.

Section 805 of ANILCA charged the Secretaries with the responsibility of implementing the subsistence preference. 16 U.S.C. § 3115. However, Congress intended that the subsistence preference be effected by the State of Alaska through the implementation of a state law of general application consistent with Title VIII of ANILCA. Id. § 3115(d). The State of Alaska enacted and implemented a subsistence law that complied with Title VIII and

managed subsistence hunting and fishing throughout Alaska until 1989.

In 1989, the Alaska Supreme Court, in McDowell v. State, 785 P.2d 1 (Alaska 1989), invalidated the state subsistence law, thereby making the State noncompliant with ANILCA's rural preference requirement. The effect of McDowell was stayed until July 1, 1990, at which time the Secretaries assumed responsibility for the management of subsistence hunting and fishing on public lands.

This assumption of authority by the Secretaries did not have the effect of totally excluding the State from fish and game management. The priority established in Title VIII of ANILCA is triggered only if "it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in order to protect the continued viability of such populations, or to continue such uses[.]" 16 U.S.C. § 3114. Until a priority is deemed necessary, the State and federal fish and wildlife regulators such as the Secretaries of the Interior and Agriculture have concurrent jurisdiction over fish and game management in Alaska, even on federal lands.

In 1990, the Secretaries promulgated temporary regulations which adopted a definition of "public lands" for purposes of Title VIII of ANILCA that did not include navigable waters. See Temporary Subsistence Management Regulations for Public Lands in Alaska, 55 Fed. Reg. 27,114, 27,115 (June 29, 1990). The permanent regulations that were promulgated in 1992 also did not include

navigable waters within the definition of "public lands" for purposes of Title VIII. See 50 C.F.R. § 100.4 (1992).

The Secretaries' determination — that navigable waters were not included within the definition of "public lands" — generated a host of lawsuits, which were eventually consolidated. In the consolidated action, the State took the position that no navigable waters were public lands. The Katie John and Peratrovich plaintiffs took the position that all navigable waters were public lands either because of the navigational servitude or because of Congress' Commerce Clause powers. Late in the litigation, the Secretaries modified their position, arguing that some navigable waters were public lands by virtue of the reserved water rights doctrine. After extensive briefing and argument, this court held that "[f]or purposes of Title VIII, 'public lands' includes all navigable waterways in Alaska." John v. United States, Nos. A90-0484-CV (HRH), A92-0264-CV (HRH), 1994 WL 487830, at *18 (D. Alaska March 30, 1994). The court based its holding on the navigational servitude.

The Secretaries and the State appealed. On appeal, the Ninth Circuit Court of Appeals first "reject[ed] the argument that the navigational servitude is an 'interest ... the title to which is in the United States,' such that all navigable waters are public lands within the meaning of ANILCA." Alaska v. Babbitt, 72 F.3d 698, 703 (9th Cir. 1995) (Katie John I).[1] The circuit court also

[1]This opinion superseded an earlier opinion, Alaska v. Babbitt, 54 F.3d 549 (9th Cir. 1995).

"reject[ed] the argument that Congress expressed its intent to exercise its Commerce Clause powers to regulate subsistence fishing in all Alaskan navigable waters." Id. The circuit court then considered whether the Secretaries' interpretation of "public lands" based on the reserved water rights doctrine was a permissible construction of ANILCA. Id. The circuit court held

> to be reasonable the federal agencies' conclusion that the definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine. [It] also h[e]ld that the federal agencies that administer the subsistence priority are responsible for identifying those waters.

Id. at 703-04. The circuit court explained:

> The United States has reserved vast parcels of land in Alaska for federal purposes through a myriad of statutes. In doing so, it has also implicitly reserved appurtenant waters, including appurtenant navigable waters, to the extent needed to accomplish the purposes of the reservations. By virtue of its reserved water rights, the United States has interests in some navigable waters. Consequently, public lands subject to subsistence management under ANILCA include certain navigable waters.

Id. at 703 (footnote omitted).

In its conclusion, the circuit court "recogniz[ed] that [its] holding may be inherently unsatisfactory." Id. at 704. The circuit court explained that if it had "adopt[ed] the state's position that public lands exclude navigable waters," it would have "undermine[d] congressional intent to protect and provide the opportunity for subsistence fishing." Id. at 704. On the other hand, if the circuit court had "adopt[ed] Katie John's position, that public lands include all navigable waters," it would have

given "federal agencies control over all such waters in Alaska. ANILCA does not support such a complete assertion of federal control...." Id. The circuit court acknowledged that both "federal and state regulation" of navigable waters "is necessary,"[2] but also realized that attempting to find some balance between these two regulatory authorities was not a task for which courts were well-suited. Id. But, plainly, the circuit court believed that the reserved water rights doctrine was the best means for attempting to achieve a balance between state and federal management of fisheries, even if it were an imperfect means. As the circuit court observed, "[o]nly legislative action by Alaska or Congress [would] truly resolve the problem." Id. In the absence of a legislative solution, however, the task fell to the Secretaries to "determine promptly which navigable waters are public lands subject to federal subsistence management." Id.

Respectfully, the foregoing decision of the Ninth Circuit Court of Appeals was more imperfect and more unsatisfactory than that court realized. In focusing upon the "vast parcels of land in Alaska [reserved] for federal purposes," id. at 703, the circuit court overlooked the fact that the congressional purpose of preserving the subsistence way of life was not limited to those reserved lands — not limited to conservation system units. The preference for subsistence hunting and fishing expressly applies to

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[2]Presumably, the circuit court so states because of the McDowell decision, which had the effect of requiring separate fish and wildlife regimes in Alaska rather than the unified regime for subsistence hunting and fishing that Congress had intended.

all "public lands," not just CSUs created by ANILCA. The reserved water rights doctrine has no application to federal lands which are undisputedly public land, but are not reserved for any governmental purpose. But clearly Title VIII is to apply to such lands; and if Title VIII applies to uplands, where is the logic and the protection of the subsistence priority in navigable waters on or abutting such public lands? Moreover, in seeking to achieve what it perceived as a necessary balance between federal and state jurisdiction of fish and wildlife in Alaska, the circuit court failed to realize that Title VIII of ANILCA does not preempt state regulation, even as to federal lands.[3] Rather, the Secretaries' jurisdiction trumps state jurisdiction of federal lands only when it is necessary to effect the priority (as opposed to the preference) created by section 804 of ANILCA. 16 U.S.C. § 3114. The balance of federal and state jurisdiction which the circuit court sought was already in place and in operation. The State of Alaska regulated sport fishing, AS 16.05.330, and had its own free-standing subsistence hunting and fishing regime, AS 16.05.258, which operated in parallel with section 804 of ANILCA. 16 U.S.C. § 3114.

On remand from the Ninth Circuit Court of Appeals, this court vacated the portion of its March 30, 1994 order defining public lands and deemed that issue controlled by the Katie John I

[3]Some CSUs (e.g., some national parks) do foreclose state jurisdiction.

decision.[4] Following the decision in Katie John I, the Secretaries timely undertook rule-making proceedings to identify navigable waters in which the federal government had federal reserved water rights. On April 4, 1996, the Secretaries published an advance notice of proposed rule-making. See Subsistence Management Regulations for Public Lands in Alaska, Identification of Waters Subject to Subsistence Priority Regulation and Expansion of the Federal Subsistence Program & the Federal Subsistence Board's Authority, 61 Fed. Reg. 15,014 (April 4, 1996). Public hearings were held on the advance notice, and written comments were also invited. On December 17, 1997, the Secretaries published proposed regulations. See Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, C, & D, Redefinition to Include Waters Subjects to Subsistence Priority, 62 Fed. Reg. 66,216 (Dec. 17, 1997). Public hearings were held on the proposed regulations and the Secretaries also accepted written comments on the proposed regulations. However, promulgation and implementation of the final regulations were delayed by Congress through a series of appropriation act restrictions. On January 8, 1999, the final rule was published. See Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, C, & D, Redefinition to Include Waters Subject to Subsistence Priority, 64 Fed. Reg. 1276 (Jan. 8, 1999). The 1999 final rule became effective on October 1, 1999.

While the foregoing rule-making was underway, the consolidated Katie John litigation was essentially dormant. By early 2000, this

[4]Docket No. 229, Case No. A90-0484-CV (HRH).

court became convinced that the consolidated cases which dated back to the early 1990s should terminate and not become the vehicle for further litigation over the Secretaries' new regulations. In an order dated January 6, 2000, the court "readopt[ed] all of its rulings on the merits of plaintiffs' claims heretofore made"[5] and deemed those rulings final "for all purposes and to all parties."[6] Judgment was entered on January 7, 2000.[7]

The State appealed. The Ninth Circuit Court of Appeals voted to hear this second appeal en banc rather than by a three-judge panel. After oral argument, "[a] majority of the en banc court ... determined that the judgment rendered by the prior panel, and adopted by the district court, should not be disturbed or altered by the en banc court." John v. United States, 247 F.3d 1032, 1033 (9th Cir. 2001) (Katie John II).

Proposed amendments to the 1999 final rule were published on December 8, 2004. See Subsistence Management Regulations for Public Lands in Alaska, 69 Fed. Reg. 70,940 (Dec. 8, 2004). Following public comment, the amendments were published as a final rule on December 27, 2005. See Subsistence Management Regulations for Public Lands in Alaska, Subpart A, 70 Fed. Reg. 76,400 (Dec. 27, 2005). The current litigation was commenced prior to the publication of the 2005 final rule, and the challenges under

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[5]Order re Case Status at 2, Docket No. 268, Case No. A90-0484-CV (HRH).

[6]Id.

[7]Judgment, Docket No. 269, Case No. A90-0484-CV.

consideration here are to the 1999 final rule, not the 2005 final rule.

## II. The 1999 Final Rule

The 1999 final rule had several purposes, three of which are directly related to the "which waters" issues. First, the 1999 final rule "amend[ed] the scope and applicability of the Federal Subsistence Management Program in Alaska to include subsistence activities occurring on inland navigable waters in which the United States has a reserved water right and to identify specific Federal land units where reserved water rights exist." 64 Fed. Reg. at 1276. The 1999 final rule did not, however, separately list the specific water bodies that were public lands by reason of a federal reserved water right. Rather, the 1999 final rule "identifies Federal land units[8] in which reserved water rights exist." Id. More specifically, § ___.3 of the 1999 final rule provides that the federal subsistence regulations apply

> on all public lands including all non-navigable waters located on these lands, on all navigable and non-navigable water within the exterior boundaries of the following areas, and on inland waters adjacent to the exterior boundaries of the following areas:
>
> (1) Alaska Maritime National Wildlife Refuge;
> (2) Alaska Peninsula National Wildlife Refuge;
> (3) Aniakchak National Monument and Preserve;
> (4) Arctic National Wildlife Refuge;
> (5) Becharof National Wildlife Refuge;
> (6) Bering Land Bridge National Preserve;
> (7) Cape Krusenstern National Monument;
> (8) Chugach National Forest, excluding marine waters;

[8]Presumably the equivalent of "conservation system units" as defined by ANILCA. See 16 U.S.C. § 3102(4).

> (9) Denali National Preserve and the 1980 additions to Denali National Park;
> (10) Gates of the Arctic National Park and Preserve;
> (11) Glacier Bay National Preserve;
> (12) Innoko National Wildlife Refuge;
> (13) Izembek National Wildlife Refuge;
> (14) Katmai National Preserve;
> (15) Kanuti National Wildlife Refuge;
> (16) Kenai National Wildlife Refuge;
> (17) Kobuk Valley National Park;
> (18) Kodiak National Wildlife Refuge;
> (19) Koyukuk National Wildlife Refuge;
> (20) Lake Clark National Park and Preserve;
> (21) National Petroleum Reserve in Alaska;
> (22) Noatak National Preserve;
> (23) Nowitna National Wildlife Refuge;
> (24) Selawik National Wildlife Refuge;
> (25) Steese National Conservation Area;
> (26) Tetlin National Wildlife Refuge;
> (27) Togiak National Wildlife Refuge;
> (28) Tongass National Forest, including Admiralty Island National Monument and Misty Fjords National Monument, and excluding marine waters;
> (29) White Mountain National Recreation Area;
> (30) Wrangell-St. Elias National Park and Preserve;
> (31) Yukon-Charley Rivers National Preserve;
> (32) Yukon Delta National Wildlife Refuge;
> (33) Yukon Flats National Wildlife Refuge;
> (34) All components of the Wild and Scenic River System located outside the boundaries of National Parks, National Preserves or National Wildlife Refuges, including segments of the Alagnak River, Beaver Creek, Birch Creek, Delta River, Fortymile River, Gulkana River, and Unalakleet River.

Id. at 1286-87 (emphasis added).

"Public lands" are defined in the 1999 final rule as:

> (1) Lands situated in Alaska which are Federal lands, except–
>
> (i) Land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory

> of Alaska or the State under any other provision of Federal law;
>
> (ii) Land selections of a Native Corporation made under the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 et seq., which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and
>
> (iii) Lands referred to in section 19(b) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1618(b).
>
> (2) Notwithstanding the exceptions in paragraphs (1)(i) through (iii) of this definition, until conveyed or interim conveyed, all Federal lands within the boundaries of any unit of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Forest Monument, National Recreation Area, National Conservation Area, new National forest or forest addition shall be treated as public lands for the purposes of the regulations in this part pursuant to section 906(o)(2) of ANILCA.

Id. at 1288. "Federal lands" are defined in the 1999 final rule as "lands and waters and interests therein the title to which is in the United States, including navigable and non-navigable waters in which the United States has reserved water rights." Id. at 1287.

The 1999 final rule defines "inland waters" as

> those waters located landward of the mean high tide line or the waters located upstream of the straight line drawn from headland to headland across the mouths of rivers or other waters as they flow into the sea. Inland waters include, but are not limited to, lakes, reservoirs, ponds, streams, and rivers.

Id.

"Marine waters" are defined as

> those waters located seaward of the mean high tide line or the waters located seaward of the straight line drawn from headland to headland

> across the mouths of rivers or other waters as they flow into the sea.

Id.

In the "analysis of public comments" section of the 1999 final rule, the Secretaries provided some explanation for their assertion of federal subsistence jurisdiction as it related to the reserved water rights doctrine. They explained that they had asserted federal jurisdiction over "waters where the Federal government holds a reserved water right or holds title to the waters or submerged lands" and that "[a] federal water right exists in inland waters within or adjacent to Federal conservation units and national forests." Id. at 1279. The Secretaries further explained that they were not asserting federal jurisdiction over "marine waters in the Tongass Proclamation" because that issue was the subject of pending litigation between the State of Alaska and the United States over ownership of submerged lands within Tongass National Forest.[9] Id.

A second purpose of the 1999 final rule was to

> extend the Federal Subsistence Board's management to all Federal lands selected under the Alaska Native Claims Settlement Act and the Alaska Statehood Act and situated within the boundaries of a Conservation System Unit, National Recreation Area, National Conservation Area, or any new national forest or forest addition, until conveyed to the State of Alaska or an Alaska Native Corporation, as required by the Alaska National Interest Lands Conservation Act (ANILCA).

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[9]See Alaska v. United States, No. 128, Original.

Id. at 1276. The Secretaries explained that this extension of jurisdiction was based on section 906(o)(2) of ANILCA. Id. at 1280. This assertion of jurisdiction is encompassed in the regulatory definition of "public lands", which is quoted above. The Secretaries explained that the regulatory definition of "public lands" was intended to "clarif[y] that selected land will be treated as public lands until they are conveyed." Id.

The Secretaries delegated certain authority to the Federal Subsistence Board (FSB) in the 1999 final rule. The 1999 final rule "provide[s] the Federal Subsistence Board with authority to investigate and make recommendations regarding the possible existence of additional Federal reservations, Federal reserve water rights or other Federal interests, including those which attach to lands in which the United States has less than fee ownership." Id. at 1276 (emphasis added). Specifically, § ___.10(d)(4)(xviii) of the 1999 final rule provides that the FSB has the authority to

> [i]dentify, in appropriate specific instances, whether there exists additional Federal reservations, Federal reserved water rights or other Federal interests in lands or waters, including those in which the United States holds less than a fee ownership, to which the Federal subsistence priority attaches, and make appropriate recommendation to the Secretaries for inclusion of those interests within the Federal Subsistence Management Program.

Id. at 1290. One way the Secretaries envisioned that the FSB would use this authority was to "determine[] on a case-by-case basis" whether there are federal reserved water rights associated with certain Native allotments. Id. at 1279.

## III. The Current Litigation

As stated above, the current litigation involves challenges to the 1999 final rule. In Case No. 3:05-cv-0006-HRH, the plaintiffs are Katie John, Charles Erhart, the Alaska Inter-Tribal Council and the Native Village of Tanana. These plaintiffs are referred to collectively herein as the "Katie John plaintiffs." The defendants are the United States of America and the Secretaries of the Interior and Agriculture. The State of Alaska is a defendant-intervenor. The Katie John plaintiffs assert three claims: (1) that the federal defendants violated ANILCA by refusing to provide a subsistence priority for plaintiffs who reside in areas upstream or downstream from conservation system units (CSUs);[10] (2) that the federal defendants violated the Alaska Native Allotment Act and Title VIII of ANILCA by refusing to provide a subsistence priority on Native allotments;[11] and (3) that the federal defendants' restrictive application of the reserved water rights doctrine was arbitrary and capricious under the Administrative Procedure Act (APA).[12]

In Case No. 3:05-cv-0158-HRH, the State of Alaska is the plaintiff and the defendants are the Secretaries of the Interior and Agriculture. The Alaska Fish and Wildlife Federation and Outdoor Council (AOC), the Alaska Fish and Wildlife Conservation Fund, Michael Tinker, and John Conrad are plaintiff-intervenors.

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[10]Complaint at 17, Docket No. 1, Case No. 3:05-cv-0006-HRH.

[11]Id. at 17-18.

[12]Id. at 18.

These plaintiff-intervenors are referred to collectively herein as the "AOC intervenors." The Katie John plaintiffs and the Alaska Federation of Natives (AFN) are defendant-intervenors. The State of Alaska asserts four claims: (1) that the federal defendants violated ANILCA and the APA by failing to properly apply the reserved water rights doctrine;[13] (2) that the federal defendants violated ANILCA and the APA by unlawfully extending their authority to marine waters;[14] (3) that the federal defendants violated ANILCA and the APA by unlawfully extending their authority to selected-but-not-yet-conveyed lands;[15] and (4) that the federal defendants violated ANILCA and the APA by improperly extending their jurisdiction to waterways that have no connection to Federal lands, CSUs, or National Forests.[16] The AOC intervenors' complaint-in-intervention adopted the State's claims against the federal defendants.[17]

Also participating in this phase of the litigation are the plaintiffs[18] in Peratrovich v. United States, Case No. 3:92-cv-0734-

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[13]Complaint at 14-15, D.D.C. Docket No. 1.

[14]Id. at 15-16.

[15]Id. at 16-17.

[16]Id. at 17-18.

[17]Docket No. 55, Case No. 3:05-cv-0006-HRH.

[18]The original Peratrovich plaintiffs were Lincoln Peratrovich, J.K. Samuel, Shakan Kwaan, and Taanta Kwaan. In the briefing of issues now under consideration, the parties took up the question of whether or not the Peratrovich plaintiffs had standing. The court called for separate briefing on that issue. It developed that plaintiff J.K. Samuel was deceased, so he has been deleted as a party. The court declined to substitute George Samuel in J.K. Samuel's place. See Order re Motion to Substitute George Samuel (continued...)

HRH, who are referred to collectively herein as the "Peratrovich plaintiffs."[19] In their amended complaint,[20] the Peratrovich plaintiffs assert a single claim alleging that the federal defendants have failed to provide them with the priority for subsistence uses for which they are entitled under Title VIII. They seek to have the Secretaries amend the federal subsistence regulations to include all navigable waters within Tongass National Forest, and they rely upon the reserved water rights doctrine as the basis for requiring such an amendment.

At an April 24, 2006, status conference it was agreed by all of the parties to all three of the above-mentioned cases that two overarching issues were raised by these cases:

> (1) Did the Secretaries employ a proper administrative procedural process for determining the existence of reserved water rights within navigable waters for purposes of ANILCA? This issue is referred to by the parties as the "what process" issue.
>
> (2) What specific water bodies are "public lands" for purposes of ANILCA as a result of the Ninth Circuit Court's determination that public lands include navigable waters within which the Government has

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[18](...continued)
(July 16, 2009), Docket No. 234; Order re Motion to Substitute Franklin H. James, Sr. (July 16, 2009), Docket No. 235; and Order re Peratrovich Plaintiffs' Standing (Sept. 3, 2009), Docket No. 252; Case No. 3:05-cv-0006-HRH.

[19]In the course of the briefing on the "which waters" issue, the federal defendants argued that the Peratrovich plaintiffs did not have standing to pursue their claim. The court resolved the standing issue in the Peratrovich plaintiffs' favor in a separate order. See Order re Peratrovich Plaintiffs' Standing (Sept. 3, 2000), Docket No. 197, Case No. 3:92-cv-0734-HRH (The same order was entered at Docket No. 252 in Case No. 3:05-cv-0006-HRH).

[20]Docket No. 79, Case No. 3:92-cv-0734-HRH.

> reserved water rights? This issue is referred to by the parties as the "which waters" issue.

All of the conferees and the court agreed that the "what process" issue should be briefed and decided first; and, when that decision had been made, the "which waters" issue would be briefed and decided.

The court issued its "What Process" order on May 17, 2007,[21] in which it held "that the Secretaries' use of the rule-making process to identify federal reserved water rights for purposes of federal subsistence management was lawful and was a procedure authorized by law."[22] A briefing schedule was then established for the "which waters" phase of this litigation.[23] In their briefing, the parties were to address the following six substantive issues: (1) marine waters and tidally influenced waters, (2) waters bounded by non-federal land within the boundaries of federal reservations, (3) waters adjacent to federal reservations, (4) selected-but-not-yet-conveyed lands and appurtenant waters, (5) waters upstream or downstream of federal reservations, and (6) waters appurtenant to Native allotments.[24] The parties were to address these substantive issues by presenting test case waterways which implicated each

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[21]Docket No. 110, Case No. 3:05-cv-0006-HRH.

[22]Id. at 32.

[23]Docket No. 115, Case No. 3:05-cv-0006-HRH.

[24]Id. at 3.

issue.[25] The parties' briefing on the "which waters" phase of the litigation is now complete.[26]

## IV. Reserved Water Rights Doctrine

The reserved water rights doctrine was judicially created by the United States Supreme Court in Winters v. United States, 207 U.S. 564 (1908). Winters involved a priority dispute between irrigators and the Fort Belknap Indian Tribe over the waters of the Milk River in central Montana. The Court determined that in reserving land as an Indian reservation, the federal government had impliedly reserved sufficient water to fulfill the purpose of the reservation. Id. at 575-77. In 1955, the Supreme Court extended the reserved water rights doctrine to all federal reservations. See Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955). The essence of the doctrine is "that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." Cappaert v. United States, 426 U.S. 128, 138 (1976). However, the government "reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." Id. at 141.

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[25]Id.

[26]The various briefs of the parties are located in the record as follows: State of Alaska, Docket Nos. 134 and 169; United States (the Secretaries), Docket No. 167; Katie John plaintiffs, Docket Nos. 137 and 181; AFN, Docket No. 176; AOC Intervenors, Docket No. 147; and Peratrovich plaintiffs, Docket Nos. 150 and 188; Case No. 3:05-cv-0006-HRH.

> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. [Such] [i]ntent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.

Id. at 139. But, the Court has limited the doctrine to the water necessary to fulfill the primary purposes of the reservation. In United States v. New Mexico, 438 U.S. 696, 716-18 (1978), the Court held that in reserving Gila National Forest, the federal government reserved water only where necessary to preserve timber in the forest or to secure favorable water flows, but that the government did not reserve water for aesthetic, recreational, wildlife preservation, or stock watering purposes. While the Court recognized that the foregoing purposes might be secondary purposes of the reservation, they were not the primary purposes of the reservation, and the Court held that there was no intent by the federal government to reserve water for these secondary purposes. Id. at 714-18. In analyzing whether a federal reserved water right exists, the court must "carefully examine[] both the asserted water right and the specific purpose for which the land was reserved and conclude[] that without the water the purposes of the reservation would be entirely defeated." Id. at 700.

While the case law makes fairly clear how the court is to determine if a federal reserved water right exists, the case law says little about the nature of a federal reserved water right. But, there is nothing to suggest that a federal reserved water

right is somehow different from a water right acquired by an individual. The term "water right" "is frequently used to describe a mere usufructuary right or interest in a stream or other body of water, or the right to the use of another's premises for the conveyance of water."[27] This is how the dissent in Katie John II characterized a federal reserved water right, calling it "a usufructuary right to waters adjacent to" land owned by the United States. Katie John II, 247 F.3d at 1046-47 (Kozinski, Circuit Judge, dissenting). A usufructuary right is the "right to use and enjoy the fruits of another's property for a period without damaging or diminishing it, although the property might naturally deteriorate over time."[28] A water right has also been referred to as an incorporeal hereditament,[29] which is "[a]n intangible right in land, such as an easement."[30] Regardless of whether we call a water right a usufructuary right or an incorporeal hereditament, one thing is clear. A water right is not a right to the water itself. Rather, it is a right to use the water. Because it is not a right to the water itself, a water right does not have a geographical location. Rather, a water right is an aspect of the ownership of uplands that takes on a geographical feature only when water is withdrawn or the flow employed or when the holder of the right seeks to enforce the right against others who are appropriat-

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[27]78 Am. Jur. 2d Waters § 5 (2002).

[28]Black's Law Dictionary 1580 (8th ed. 2004).

[29]78 Am. Jur. 2d Waters § 5 (2002).

[30]Black's Law Dictionary 743 (8th ed. 2004).

ing or using water from the same water body. In this case, we are concerned with neither the appropriation nor the use of water from a water body nor are we concerned with the enforcement of a water right. Rather, the Secretaries were required to determine the extent of federal subsistence management jurisdiction by identifying navigable waters in which, as a matter of reserved water rights law, a federal reserved water right exists.

As the panel recognized in Katie John I, the reserved water rights doctrine is not very well suited to serve as a basis for allocating jurisdiction over navigable waters for purposes of fish management by state and federal authorities. Nevertheless, the Secretaries were given the job of using the doctrine to effect a proper balance between state and federal jurisdiction over the management of fisheries in navigable waters of Alaska. What the court must decide here is whether the Secretaries have properly employed federal reserved water rights law for purposes of achieving a reasonable division of jurisdiction between state regulation which applies to all Alaskans, and federal regulation which applies to public lands and all rural Alaskans in furtherance of one of the congressional purposes of ANILCA: perpetuating "the opportunity for rural residents [to] engage[] in a subsistence way of life[.]" 16 U.S.C. § 3101(c).

To that end, the parties debate the nuances of reserved water rights law as between cases involving Indian reservations and those involving other federal reservations. ANILCA deals with neither Indian reservation lands, Indians, nor Native Alaskans. The

circuit decisions require the Secretaries to determine which navigable waters in the State of Alaska are subject to federal reserved water rights;[31] and to the extent that such rights exist, the Secretaries' regulations will apply. What the reach of those water rights should be for purposes of ANILCA is the substance of disagreement between the parties in this case.

## V. Standard of Review

The court's scope of review is governed by the Administrative Procedure Act, 5 U.S.C. §§ 701-06. The pertinent part of section 706 provides that

> [t]he reviewing court shall —
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> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be —
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law....

5 U.S.C. § 706(2).

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[31]Federal reserved water rights can exist in non-navigable waters as well as navigable waters. See Cappaert, 426 U.S. at 138. However, the circuit court only directed the Secretaries to identify which navigable waters were subject to federal reserved water rights. See Katie John I, 72 F.3d at 700 & n.3.

There is considerable disagreement among the parties as to what standard of review applies to what claims. Although the court did not expressly so indicate in its order which set the briefing schedule for the "which waters" phase of this litigation, the court envisioned that it would be focusing on the legal issues that the parties had raised, as opposed to deciding issues of navigability or the evidence of federal reserved water rights as to the specific reservations listed in § ____.3(b) of the 1999 final rule. It was the court's view that in any decision it rendered on the "which waters" issues, it would be making legal rulings of general application. How those rulings should be applied to specific waters will presumably be addressed by the Federal Subsistence Board. The court is mindful that it imposed a requirement upon the parties to brief the legal issues in the context of "test waters," but in doing so, the court did not intend to decide whether the Secretaries had properly identified federal reserved water rights in any specific body of water. The final 1999 rule does not purport to do that. Rather, the court's purpose was to obtain some context within which to consider the broad categories of waters over which the parties disagreed. In short, the court is deciding legal issues, which are reviewed de novo. See Akiak Native Cmty. v. U.S. Postal Srvc. 213 F.3d 1140, 1144 (9th Cir. 2000).

To the extent that the issues before the court involve questions of statutory interpretation, those issues are also reviewed de novo. See Rodriguez v. Smith, 541 F.3d 1180, 1183 (9th Cir. 2008). Because the Secretaries administer ANILCA, the

court's "'analysis is governed by Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837[.]'" Id. (quoting Mujahid v. Daniels, 413 F.3d 991, 997 (9th Cir. 2005)). "Under the Chevron framework [the court] must 'first determine[] if Congress has directly spoken to the precise question at issue, in such a way that the intent of Congress is clear.'" Id. at 1184 (quoting Mujahid, 413 F.3d at 997). "'If 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. (quoting Chevron, 467 U.S. at 842-43). "Where, however, a statute is ambiguous or silent on a particular point, review of an agency's interpretation is limited to whether the agency's conclusion is based on a permissible construction of the statute." Saberi v. Commodity Futures Trading Comm'n, 488 F.3d 1207, 1212 (9th Cir. 2007). To determine whether an agency's construction of a statute is permissible, the court "'look[s] to the plain and sensible meaning of the statute, the statutory provision in the context of the whole statute and case law, and to the legislative purpose and intent'" and "take[s] into account the consistency of the agency's position over time." Natural Resources Defense Council v. U.S. E.P.A., 526 F.3d 591, 605 (9th Cir. 2008) (quoting Cuevas-Gaspar v. Gonzales, 430 F.3d 1013, 1022 (9th Cir. 2005)).

Finally, as to the standard of review, contrary to the State's contention, the Katie John and Peratrovich plaintiffs' claims are not "failure to act" claims reviewable under 5 U.S.C. § 706(1). In

Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 62 (2004), the Court explained that "a failure to act" as used in section 706(1) "is ... properly understood as a failure to take an agency action-that is, a failure to take one of the agency actions (including their equivalents) ... defined in ... § 551(13)." The agency actions listed in § 551(13) are rules, orders, licenses, sanctions, and relief. Id. An agency's "failure to promulgate a rule or to take some decision by a statutory deadline" is the type of discrete agency action that can be challenged under section 706(1). Id. Here, the Secretaries did not fail to promulgate a rule or take some other agency action. Rather, they promulgated a rule that the Katie John and Peratrovich plaintiffs allege failed to include every body of water in Alaska that has a federal reserved water right. The Katie John and Peratrovich plaintiffs do not seek to compel the Secretaries to take action; rather, they seek review of the validity of the final agency action that was taken, i.e., the 1999 final rule.

## VI. Marine and Tidally Influenced Waters

There are two broad legal issues that must be resolved as to to marine and tidally-influence waters. The first is whether the Secretaries' use of a headland-to-headland methodology for delineating marine waters and inland waters was lawful. The second is whether federal reserved water rights can exist in marine waters. Because the court's resolution of the second issue impacts its resolution of the first issue, the discussion begins with the

question of whether federal reserved water rights can exist in marine waters.

A. Federal Reserved Water Rights in Marine Waters

In § ___.3(b) of the 1999 final rule, the Secretaries expressly excluded the marine waters of Tongass and Chugach National Forests, but they did not expressly exclude other marine waters. To the extent that it was not clear that the Secretaries intended to exclude all marine waters in the 1999 final rule, in the 2005 final rule, the Secretaries clarified that "neither the 1999 regulations nor this final rule claims that the United States holds a reserved water right in marine waters as defined in the existing regulations."[32] 70 Fed. Reg. at 76,401 (emphasis added).

"Marine waters" for purposes of the 1999 final rule mean "those waters located seaward of the mean high tide line or the waters located seaward of the straight line drawn from headland to headland across the mouths of rivers or other waters as they flow into the sea." 64 Fed. Reg. at 1287. The Secretaries explained that

> [e]xtending the Winters doctrine assertion of reserved water rights to marine waters would be without precedent and would represent a considerable leap in reasoning. Instead of

[32]Although the 2005 final rule is not the subject of this litigation, the 2005 rule was intended, in part, to "clarif[y] the jurisdiction of the Federal Subsistence Management Program for certain coastal areas in Alaska in order to further define, in part, certain waters that may never have been intended to fall under the Subsistence Management Program jurisdiction." 70 Fed. Reg. at 76,400. To the extent that the 2005 rule is a clarification of the 1999 final rule, the court may consider it in its analysis. See, e.g., Clay v. Johnson, 264 F.3d 744, 749 (7th Cir. 2001).

> asserting a federal need to protect a given level of water in a stream or other freshwater body against diversions or other appropriations of the water that could significantly diminish that level, the federal government would be asserting a need to reserve part of the most abundant waters on the earth. Potential appropriation of such waters remains implausible to any degree that could substantially affect marine water quantity or levels at all but the most restricted of locations (such as some salt chucks).[33]

The Peratrovich plaintiffs argue that, as a matter of law, federal reserved water rights can exist in marine waters.[34] As all the parties acknowledge, no court has ever held that federal reserved water rights exist in marine waters. However, as the Peratrovich plaintiffs point out, the fact "[t]hat no previous court has come to grips with an issue does not relieve a present court, fairly confronted with the issue, of the obligation to do so." In re the General Adjudication of All Rights to Use Water in the Gila River System and Source, 989 P.2d 739, 745 (Ariz. 1999).

As a general proposition, the idea that federal reserved water rights could exist in marine waters runs counter to the underlying principles of the reserved water rights doctrine. The doctrine of reserved water rights grew out of disputes between potential users

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[33]Admin. Rec. at 1711-12, Tab 88, Vol. 4.

[34]The Peratrovich plaintiffs define "marine waters" as including "sea water, ocean water, salt water, and brackish water whether found in the open sea or tidally influenced areas." Supplemental Brief of Related Case Plaintiffs Peratrovich, et al., on the "Which Waters" Issue at 1, n.2, Docket No. 150, Case No. 3:05-cv-0006-HRH. "Marine waters" are generally understood to mean waters of or pertaining to the sea. In the discussion that follows, unless otherwise noted, any reference to "marine waters" is to the term as it is generally understood, not to how it is defined in the 1999 final rule.

of water in the arid West, where water was scarce. The doctrine was developed as a means of allocating a scarce resource among many users. In contrast, marine waters are abundant and generally are not appropriated for beneficial use. It is difficult to conceive of a situation in which marine waters would need to be allocated among users who wanted to put those waters to beneficial use. That said, the court is not prepared to conclude that, as a matter of law, federal reserved water rights cannot exist in marine waters.[35] However, the court is convinced that there is no legal basis for claiming federal reserved water rights in marine waters that were reserved as part of a national forest which was created pursuant to the Organic Administration Act of June 4, 1897.

The Peratrovich plaintiffs have framed their arguments to the contrary in the context of Tongass National Forest. The creation of Tongass National Forest began in 1902, when the Alexander Archipelago Forest Reserve was created by Executive Order, pursuant to the Forest Reserve Act of 1891. On September 10, 1907, Tongass National Forest was created by Executive Order, also pursuant to the Forest Reserve Act of 1891. In 1908, by Executive Order, Tongass National Forest and the Alexander Archipelago were combined under the name of Tongass National Forest. In 1909, by Executive Order, Tongass National Forest was expanded. The expansion was made pursuant to the Organic Administration Act of 1897. After the

[35]The court supposes without deciding that Congress could, in the course of reserving federal lands, express a primary purpose that would require the court to imply an intent to reserve marine waters as opposed to fresh water.

expansion, the Tongass included most of the mainland of Southeast Alaska, the Alexander Archipelago, and all of the seaward islands and waters out to a point 60 miles to the west of the southernmost point of the Alexander Archipelago.

The parties agree that the original purposes of the Tongass should be determined in accordance with the Organic Administration Act of 1897. In New Mexico, 438 U.S. at 718, the Supreme Court held that national forests created under the Organic Administration Act were reserved for only two primary purposes: "to preserve the timber [and] to secure favorable water flows[.]" The Court also held that there was no intent by the federal government to reserve water for any of the secondary purposes of the forest. Id. at 715.

The Peratrovich plaintiffs contend that, in the case of Tongass National Forest, marine waters are necessary to furnish a continuous supply of timber, and they submit evidence to support this contention.[36] The Peratrovich plaintiffs argue that this evidence shows that marine waters are necessary for trees to grow in a marine forest such as Tongass National Forest. Ignoring for the moment that this evidence was not part of the administrative record, it does not establish conclusively that marine water is necessary for the growth of trees in a marine forest. The evidence that the Peratrovich plaintiffs have submitted illustrates that the theory that decaying fish provide necessary nutrients to trees in

[36]See Exhibits 1-3, Related Case Peratrovich Plaintiffs' Supplemental Reply Brief on the "Which Waters" Issue and Notice of Continued Filing of Exhibits Attached to Peratrovich Supplemental Reply Brief in the "Which Waters" Issue, Docket Nos. 188-190, Case No. 3:05-cv-0006-HRH.

a marine forest is hypothetical and speculative, and more importantly, the theory has not been subjected to the give-and-take or testing of regulatory proceedings. In sum, the evidence provided by the Peratrovich plaintiffs simply does not establish that reserving marine water is necessary to fulfill one of the primary purposes of Tongass National Forest.

The Peratrovich plaintiffs next argue that because Tongass National Forest was expanded as part of ANILCA, it now has more than two primary purposes. In section 501(a)(2) of ANILCA, Tongass National Forest was expanded "by the addition of three areas, Kates Needle, Juneau Icefield, and Brabazon Range[.]" 16 U.S.C. § 539(a)(2). Section 501(b) provides that "lands added to the Tongass and Chugach National Forests by this section shall be administered by the Secretary in accordance with the applicable provisions of this Act and the laws, rules, and regulations applicable to the national forest system[.]" Id. § 539(b). In section 505(a) of ANILCA, the Secretary of Agriculture is directed to manage the forests in order "to maintain the habitats, to the maximum extent feasible, of anadromous fish and other food fish, and to maintain the present and continued productivity of such habitat when such habitats are affected by mining activities on national forest lands in Alaska." Id. § 539b(a). Thus, the Peratrovich plaintiffs argue that ANILCA added fisheries protection as a primary purpose of the Tongass. The Peratrovich plaintiffs further argue that marine water is necessary to fulfill this

purpose because anadromous fish need marine water as part of their life cycle.

This argument fails for two reasons. First, it is by no means clear that marine water, as opposed to fresh water, is necessary for the maintenance of habitat. Vegetation in or near streams and the integrity of stream beds generally and fresh water spawning grounds in particular do not require marine water. Second, "[i]n determining the scope of implied reserved water rights, a court may look only to the primary purpose of a reservation at the time the land was first reserved by the federal government, and may not consider other purposes later given to the reservation." Totemoff v. State, 905 P.2d 954, 963 (Alaska 1995) (citing New Mexico, 438 U.S. at 713-715). In determining whether federal reserved water rights can exist in the marine waters within a national forest generally, and Tongass National Forest specifically, the court may only consider the purposes for which the forest was originally reserved. Fisheries protection was not an original purpose of any forest, such as Tongass National Forest, that was reserved pursuant to the Organic Administration Act.

The Supreme Court has held that national forests which were created pursuant to the Organic Administration Act have two primary purposes, neither of which require marine water to fulfill. In the court's view, that is the end of the matter, at least as concerns whether the marine waters of Tongass National Forest have federal reserved water rights. However, because the parties have devoted

a fair amount of space to a disclaimer issue, the court will briefly address that issue.

In an original action before the United States Supreme Court, the State of Alaska sought a determination of its claim to all lands underlying marine waters in Southeast Alaska. See Alaska v. United States, No. 128, Original. As part of that litigation, the United States disclaimed title to certain marine waters within Tongass National Forest, and that disclaimer was accepted by the Court. See Alaska v. United States, 546 U.S. 413 (2006). The disclaimer provides that

> [p]ursuant to the Quiet Title Act, 28 U.S.C. § 2409a(e), and subject to the exceptions set out in paragraph (2), the United States disclaims any real property interest in the marine submerged lands within the exterior boundaries of the Tongass National Forest, as those boundaries existed on the date of Alaska Statehood.

Id. at 415. For purposes of the disclaimer, the term "marine submerged lands" means "'all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide.'" Id. at 416 (quoting 43 U.S.C. § 1301(a)(2)). There are four exceptions in paragraph (2) of the disclaimer:

> (a) any submerged lands that are subject to the exceptions set out in § 5 of the Submerged Lands Act, 67 Stat. 32 (43 U.S.C. § 1313);
> (b) any submerged lands that are more than three geographic miles seaward of the coastline;
> (c) any submerged lands that were under the jurisdiction of an agency other than the United States Department of Agriculture on the date of the filing of the complaint in this action;
> (d) any submerged lands that were held for military, naval, Air Force, or Coast Guard purposes on the date that Alaska entered the Union.

Id. at 415-16. Only exceptions (a) and (c) may have relevance here. As to exception (a), section 5 of the Submerged Lands Act, excepts from the transfer of title to the states "any rights the United States has in lands presently and actually occupied by the United States under claim of right," and lands "expressly retained by or ceded to the United States when the State entered the Union[.]" 43 U.S.C. § 1313(a). The disclaimer further limits the (a) exception by providing that

> [t]he exception set out in § 5(a) of the Submerged Lands Act, 67 Stat. 32 (43 U.S.C. § 1313(a)), for lands "expressly retained by or ceded to the United States when the State entered the Union" does not include lands under the jurisdiction of the Department of Agriculture unless, on the date Alaska entered the Union, that land was:
> (i) withdrawn pursuant to act of Congress, Presidential Proclamation, Executive Order, or public land order of the Secretary of Interior, other than Presidential Proclamation No. 37, 32 Stat. 2025, which established the Alexander Archipelago Forest Reserve; Presidential Proclamation of Sept. 10, 1907 (35 Stat. 2152), which created the Tongass National Forest; or Presidential Proclamations of Feb. 16, 1909 (35 Stat. 2226), and June 10, 1925 (44 Stat. 2578), which expanded the Tongass National Forest[.]

Id. at 416-17 (emphasis added). The parties disagree as to what effect this disclaimer has on whether there are federal reserved water rights in the marine waters of the Tongass.

The court concludes that the disclaimer and exception (c) to paragraph (2) of the disclaimer has nothing to do with the issues that are currently before the court. The task before the court is to determine whether the Secretaries properly identified the navigable waters in the State of Alaska in which the United States

has federal reserved water rights. The court's task is not to decide who has title to what submerged land. Who has title of the submerged land is irrelevant to the question of whether a federal reserved water right can exist for a navigable waterway. A federal reserved water right in navigable water does not depend upon the United States holding title to the submerged lands. What was necessary for purposes of the Secretaries' analysis was a navigable waterway and an upland reservation, a primary purpose of which required water.

In Katie John I, the Ninth Circuit Court of Appeals held that navigable waters fall within the scope of "public lands" for purposes of ANILCA because the United States had "interests in some navigable waters" "[b]y virtue of its reserved water rights[.]" Katie John I, 72 F.3d at 703. Plainly, the inclusion of navigable waters within the scope of "public lands" for purposes of federal subsistence management jurisdiction was not based on the United States having title to the submerged lands. The question of whether the United States has disclaimed title to lands underlying the marine waters of the Tongass is irrelevant to the question of whether a federal reserved water right can exist in marine waters.

As discussed above, the court concludes that federal reserved water rights do not exist in marine waters within a national forest created pursuant to the Organic Administration Act. The court cannot conceive of a situation in which marine waters would be necessary to fulfill either of the two purposes of such a forest. Moreover, when the Ninth Circuit mandated that the Secretaries

identify which waters in Alaska had federal reserved water rights, it did so for the purpose of effecting a balance between state and federal jurisdiction over fisheries in navigable waters. If federal reserved water rights were found to exist in the marine waters of southeast Alaska, as the Peratrovich plaintiffs urge, the result would be virtually the equivalent of holding, as this court originally did, that all navigable waters are public lands. It is that division of jurisdiction which the circuit court expressly disapproved of in Katie John I. This court feels constrained by extant reserved water rights law and the holding in Katie John I to conclude that the Secretaries' exclusion of all marine waters, including the marine waters of Tongass National Forest, was lawful and reasonable, despite the fact that this court continues to believe that the circuit court in Katie John I overlooked or was unaware of the balance which already existed as regards state and federal jurisdiction of fisheries. In Southeast Alaska (and perhaps elsewhere) exclusion of marine waters from public lands forecloses rural Alaskans from fishing in traditionally used, resource rich, and culturally significant waters as contemplated by Congress. See 16 U.S.C. §§ 3101(c), 3114.

B. Headland-to-Headland Issue

§ ____.3(b) of the 1999 final rule makes that rule applicable to all public lands including "inland waters adjacent to the exterior boundaries of [listed] areas." 64 Fed. Reg. at 1286-87. The Secretaries defined "inland waters" as

> [t]hose waters located landward of the mean high tide line or the waters located upstream

> of the straight line drawn from headland to headland across the mouths of rivers or other waters as they flow into the sea.

Id. at 1287 (emphasis added). In 2005, the Secretaries explained that because federal reserved water rights can exist in rivers and other inland waters, in identifying which navigable waters had such water rights, they had "to determine where the river ends and the sea begins." 70 Fed. Reg. at 76,402. The Secretaries further explained that

> [s]ome rivers are tidally influenced for a significant distance above their mouths. Although submerged lands under portions of rivers which are tidally influenced may be owned by the State or other entity, those stretches are still a part of the river and remain subject to potential Federal reservation of water rights.

Id. To make the determination of "where the river ends and the sea begins," the Secretaries used a headland-to-headland methodology. This methodology is expressed in the 1999 final rule in not only the definition of "inland waters" quoted above, but also in the definition of "marine waters" which is narrower than the ordinary meaning of that term. The 1999 final rule defines "marine waters" as

> [t]hose waters located seaward of mean high tide line or the waters located seaward of the straight line drawn from headland to headland across the mouths of rivers or other waters as they flow into the sea.

64 Fed. Reg. at 1287 (emphasis added).

The Secretaries take the position that, in using the headland-to-headland methodology to define marine and inland waters, they have not identified any federal reserved water rights in any

marine waters, although they have identified federal reserved water rights in tidally-influenced waters. They contend that federal reserved water rights can exist in tidally-influenced waters and that their use of the headland-to-headland methodology was reasonable. The State contends that the use of the headland-to-headland methodology was not reasonable because it has resulted in marine and tidally-influenced waters being converted into inland waters.

As an initial matter, the Secretaries argue that the State cannot challenge the use of the headland-to-headland methodology because the State did not timely object to the use of this methodology. "The APA requires that plaintiffs exhaust administrative remedies before bringing suit in federal court." Great Basin Mine Watch v. Hankins, 456 F.3d 955, 965 (9th Cir. 2006). In general, the court will not consider arguments that were not made before the agency. See Portland General Elec. Co. v. Bonneville Power Admin., 501 F.3d 1009, 1023 (9th Cir. 2007). The Secretaries argue that the State never specifically challenged the use of the headland-to-headland methodology in its comments on the proposed rule,[37] and thus they argue that the State has waived the right to raise this argument.

During the administrative process, the State never used the precise phrase "headland-to-headland" when objecting to the Secretaries' identification of federal reserved water rights in marine and tidally-influenced waters. The State however consis-

[37]See Admin. Rec. at 8440-42, Tab 352, Vol. 15.

tently stated that it believed that no federal jurisdiction exists in those waters.[38] These objections put the Secretaries on notice that, insofar as the "headland-to-headland" language in the proposed regulations included marine and/or tidally-influenced waters, the State was challenging the use of that methodology.

But even if the State did not raise the headland-to-headland issue during the administrative proceedings, the State still would not be deemed to have waived its right to challenge the use of this methodology. An issue is not considered waived for purposes of judicial review "if the agency had an opportunity to consider the issue [and t]his is true even if the issue was considered sua sponte by the agency or was raised by someone other than the petitioning party." PGE, 501 F.3d at 1024.

During the administrative process, the Katie John Policy Group[39] first recommended that

> [w]here a federal reservation with reserved water rights includes rivers or streams flowing into marine water, reserved water rights will apply to all waters above the mean high tide line. The freshwater influence will be

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[38]Id. at 8424-26 (State does not agree that federal reserved waters exist in marine waters); id. at 8440-42 (federal agencies do not adequately address the extent of federal jurisdiction over marine waters); id. at 8446-50 (objections to identification of federal reserved waters in marine waters); and id. at 8490 (objections to shellfish regulations because they will not apply in marine waters).

[39]The Katie John Policy Group was established "to assess the Katie John [I] decision and to begin planning for implementation of the decision[.]" Admin Rec. at 1688, Tab 88, Vol. 4. The Katie John Policy Group consisted of representatives from the Bureau of Indian Affairs, Minerals Management Service, Fish and Wildlife Service, National Park Service, Department of Agriculture, Bureau of Land Management, and Department of Interior. Id.

> considered dominant above the point of the mean high tide line and the channel of these waters will be more defined for management purposes.[40]

The policy group also noted that "[r]eserved water rights will not be asserted in marine waters except to the extent that the United States has already taken the position that submerged lands underlying marine waters reserved to the United States at the time of Alaska statehood meet the ANILCA definition of public lands."[41] Later, members of the policy group recommended that "[w]here a federal reservation with reserved water rights includes rivers or streams flowing into marine waters, reserved water rights will be asserted to the mouths of those rivers and streams, where the mouths are within the exterior boundaries of the reservation."[42] It was recommended that "[t]he mouth [be] defined by a line drawn between the termini of the headlands on either bank of the river. The fact that portions of the river are subject to tidal influence is not considered determinative of the extent of reserved water rights."[43] Based on the foregoing, it is plain that the Secretaries considered the appropriateness of applying the headland-to-headland methodology during the administrative process, and the court can consider whether the Secretaries' use of this methodology was reasonable.

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[40]Id. at 1700.

[41]Id. at 1716.

[42]Admin. Rec. at 1748-49, Tab 90, Vol. 4.

[43]Id. at 1749.

As to that question, the State argues that the use of the headland-to-headland methodology was not reasonable because it is contrary to two provisions of ANILCA. First, the State argues that the headland-to-headland methodology runs afoul of section 102(3)(A) of ANILCA which provides that "public lands" do not include "lands which have been confirmed to ... the State...." 16 U.S.C. § 3102(3)(A). The State contends that submerged lands underlying marine and tidally-influenced waters were confirmed to the State upon its entry into the Union. See Submerged Lands Act of 1953, 43 U.S.C. § 1311(a); Alaska Statehood Act, Pub. L. 85-508, § 6(m), 72 Stat. 339, 343 (1959).

This argument fails because, as discussed above, the existence of federal reserved water rights do not depend upon federal ownership of the land underlying waters in which it has claimed a federal reserved water right. In Arizona v. California, 373 U.S. 546, 595 (1962), the Court considered whether the United States held reserved water rights in the mainstream of the Colorado River. "Arizona argue[d] that the United States had no power to make a reservation of navigable waters after Arizona became a State[.]" Id. at 596. The Court rejected this argument because the United States has "broad powers ... to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3, of the Constitution." Id. at 597-98. The Court had "no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property." Id. at 598. If the federal government can reserve water rights in navigable

waters after statehood, then it follows that the federal government does not have to hold title to the lands underlying waters in which it claims federal reserved water rights.

Second, the State contends that the headland-to-headland methodology is contrary to section 103(a) of ANILCA, which provides that "the boundaries of areas added to the National Park, Wildlife Refuge and National Forest Systems shall, in coastal areas not extend seaward beyond the mean high tide line to include lands owned by the State of Alaska unless the State shall have concurred in such boundary extension...." 16 U.S.C. § 3103(a). The State contends that this statutory provision makes clear that marine and tidally-influenced waters are outside the boundaries of federal reservations and thus cannot be subject to federal reserved water rights because those rights cannot exist outside the boundaries of federal reservations.

A federal reserved water right exists in waters that are appurtenant to the federal reservation. Cappaert, 426 U.S. at 138. The State cites to cases which have characterized "appurtenant waters" as those "in", "on", "within", "under", or "not beyond the borders" of a reservation. See Colville Confederated Tribes v. Walton, 647 F.2d 42, 53 (9th Cir. 1981) (federal reserved water rights relate "to water use on a federal reservation") (emphasis added); Sierra Club v. Block, 622 F. Supp. 842, 862 (D. Colo. 1986) ("under the implied-reservation-of-water doctrine, it is implied from the Wilderness Act that Congress reserved water rights in the wilderness areas to the extent necessary to accomplish the purposes

specified in the Act") (emphasis added); Potlatch Corp. v. United States, 12 P.3d 1260, 1267-68 (Idaho 2000) (express federal reserved water right existed within the Hells Canyon reservation but no implied federal reserved water right existed beyond the borders of the federal reservation); United States v. City of Challis, 988 P.2d 1199, 1201 (Idaho 1999) (United States claimed federal reserved water rights within several National Forests in Idaho); Gila River General Adjudication, 989 P.2d at 748 (federal reserved water right doctrine applies to ground water as well as surface water, thereby implying that it applies to water under the reservation).

The fact that the headland-to-headland methodology may extend federal management jurisdiction to water outside the boundaries of a federal reservation does not make the Secretaries' use of this methodology unlawful or unreasonable. In Winters, 207 U.S. 564, the seminal federal reserved water rights case, the United States Supreme Court recognized a federal reserved water right in waters that bordered the federal reservation.[44] Fresh water necessarily invades marine waters on an outgoing tide, just as navigable river water becomes brackish with an incoming tide. Thus there is uncertainty as to where tidally influenced waters cease to serve

[44]The court is unpersuaded by the State's contention that we cannot look to cases involving federal reserved water rights on Indian reservations for purposes of evaluating the 1999 final rule because non-Indian reservations are governed by a different body of water rights jurisprudence than those governing Indian reservations. Given that the primary focus of Title VIII of ANILCA is the perpetuation of a subsistence lifestyle, it was not unreasonable for the Secretaries to look to what may arguably be a more generous take on federal reserved water rights.

the purposes of a federal reservation of land for purposes of reserved water rights. Given the circuit court's directive to achieve balance between state and federal management of fisheries, the Secretaries' definition of inland waters was, as a general proposition,[45] a reasonable way of deciding where a river ends and the sea begins: where federal jurisdiction under ANILCA ends and state jurisdictions begins.

In sum, on de novo review, the court concludes that the Secretaries' decision to exclude marine waters from the operation of the 1999 final rule was not unlawful. However, the court further concludes that the Secretaries' decision to employ the headland-to-headland methodology for purposes of determining the dividing line between marine and inland waters was, as a general proposition, reasonable and not arbitrary, capricious, an abuse of discretion, or otherwise unlawful.

## VII. Waters Bounded by Non-federal Land within Federal Reservations

Many CSUs surround State or privately owned lands (inholdings). § ____.3(b) of the 1999 final rule extends federal jurisdiction to "all public lands including ... all navigable and non-navigable water within the exterior boundaries" of the listed

[45]The court qualifies this holding out of concern that, when it comes to applying the 1999 final rule to specific water bodies, it may be apparent that the headland-to-headland methodology for determining the Secretaries' jurisdiction in fact unreasonably extends that jurisdiction into marine waters. That is, it may develop in the future that the headland-to-headland methodology incorporates navigable waters which cannot possibly include reserved waters, or it may develop that particular CSUs have been created for specific, primary purposes which require brackish or marine waters.

CSUs and national forests. 64 Fed. Reg. at 1286-87. In order to include all navigable waters within the exterior boundaries of CSUs and national forests within the scope of "public lands", the Secretaries necessarily had to determine that federal reserved water rights existed in all navigable waters physically located on non-federally owned lands within CSUs and national forests.[46]

In its 1995 issue paper, the Katie John Policy Group recommended that

> [a]dministrative jurisdiction over all inland water within the exterior boundaries of a federal reservation in Alaska with reserved water rights should generally be asserted. Any such assertion must, of course, be based on a determination that the inland waters are necessary to meet the purposes of the federal reservation. Although the federal government could take the narrower view that reserved water rights only attach where at least one side of the water body is in federal ownership, it is not required to make such a narrow interpretation. Inclusion of all inland water in a federal reservation containing reserved water rights is generally more practical, easier to administer and easier for the public to understand. Inclusion of all waters also prevents bifurcated fishery management within the boundaries of a federal reservation.[47]

The Secretaries adopted this recommendation, as reflected in the the comments section of the 1999 final rule. There, the Secretaries explained that they had included "waters on inholdings" within the boundaries of CSUs and national forests because "[w]e have

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[46]For purposes of this discussion, the court assumes, and no party has argued otherwise except as discussed below in the text, that the federal reservations listed in § ____.3(b) of the 1999 final rule include purposes that trigger the reservation of water rights in navigable waters.

[47]Admin. Rec. at 1698-1700, Tab 88, Vol. 4.

determined that a Federal reserve water right exists in those waters and that their inclusion is necessary for effective management of subsistence fisheries." 64 Fed. Reg. at 1279. In the 2005 final rule, the Secretaries again explained that assertion of jurisdiction over waters on inholdings was "necessary":

> As work began following the [Katie John I] decision to identify these waters, discussion centered on the problem of "checkerboard jurisdiction" (a complex interspersion of areas of State and Federal jurisdiction) as it occurred on rivers within Conservation System Units. Federal officials recognized that in order to provide a meaningful subsistence use priority that could be readily implemented and managed, unified areas of jurisdiction were required for both Federal land managers and the subsistence users. The problems associated with dual State and Federal management caused by the State's inability to take actions needed to implement the required subsistence use priority are difficult enough without imposing on that situation elaborate and scattered areas of different jurisdictions. Therefore, we determined in the January 1999 regulations that all waters within or adjacent to the boundaries of the areas listed in § ___.3(b) of those regulations were public lands. This determination provided both the land managers and the public with a means of identifying those waters that are public lands for purposes of the subsistence use priority.

70 Fed. Reg. at 76,401.

The State contends that the identification of federal reserved water rights in water on inholdings is unlawful for at least three reasons. First, the State argues that nothing in the reserved water rights doctrine allows the Secretaries to claim federal reserved water rights based on administrative convenience. While the State is correct that federal reserved water rights cannot exist simply because of the Secretaries' perception of what is

convenient for purposes of administrating ANILCA, that does not mean that a federal reserved water right cannot exist in navigable waters on inholdings. A federal reserved water right exists because water is necessary to fulfill the purpose of a federal reservation. Regardless of the administrative convenience factor, federal reserved water rights can exist in waters on inholdings.

The State next argues that claiming federal reserved water rights in waters on inholdings is wholly contrary to the fundamental legal precondition that only waters appurtenant to reserved federal lands can contain a federal reserved water right. The State is basically arguing that a federal reserved water right cannot exist in waters that do not touch federally owned land, even if the water is within the boundaries of a federal reservation, because such water is not "appurtenant" to reserved land.

This argument misperceives the flexibility of the reserved water rights doctrine. A federal reserved water right is premised on the concept that "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." Cappaert, 426 U.S. at 138. But, "appurtenant" does not necessarily mean "touching" or "bounded by" or even "adjoining." As a 1977 law review article noted "[n]o case defines or explains" "appurtenant", but it "probably means 'located' or

'bordering on,' possibly 'underlying,' possibly 'nearby.'"[48] And, as one court observed: "'A thing is deemed to be incidental or appurtenant when it is by right used with the land for its benefit, as in the case of a way, or water-course....'" Dermody v. City of Reno, 931 P.2d 1354, 1356 n.1 (Nev. 1997) (quoting Mattix v. Swepston, 155 S.W. 928, 930 (Tenn. 1913)). While a federal reserved water right is necessarily associated with some land, the water right itself has no geographic location.[49] Appurtenancy has to do with the relationship between reserved federal land and the use of the water, not the location of the water. The fact that a navigable water body is on only non-federal lands does not foreclose that water body from being appurtenant to associated federal land.

Lastly, the State argues that ANILCA expressly deems non-federally owned inholdings located within the exterior boundaries of CSUs as not being part of the unit and provides that such inholdings are not "public lands" for purposes of the Title VIII subsistence priority. Section 103(c) of ANILCA 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 December 2, 1980, are conveyed to the State, to any Native Corporation, or to any

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[48]Frank J. Trelease, Federal Reserved Water Rights Since PLLRC, 54 Denv. L.J. 473, 474 n.3 (1977).

[49]As discussed above, a water right has no geographic scope until it comes to appropriation or enforcement, and this litigation is not about appropriating water or enforcing federal reserved water rights.

> private party shall be subject to the regulations applicable solely to public lands within such units.

16 U.S.C. § 3103(c). This section of ANILCA plainly states that lands which have been conveyed to the State, a Native corporation, or a private individual, even if within a CSU, are not subject to the Secretaries' regulations.

Land totally surrounded by a federal reservation and owned by a third party is not public land for purposes of ANILCA and may not be regulated by the Secretaries. However, the United States' ability to reserve public lands and create reserved water rights as to such reserves is not conveyed away to third parties when the federal government conveys land which is or comes to be within a federal reservation. See Ariz. v. Calif., 373 U.S. 546, 597-98 (1962); Cal. Or. Power Co. v. Beaver Portland Cement Co., 294 U.S. 142, 162 (1935). When, as here, the federal government has retained its reserved water rights and/or the ability to create such rights in navigable waters, it retains an interest in the navigable waters on or appurtenant to those reserved lands sufficient to support ANILCA jurisdiction. Section 103(a) of ANILCA does not preclude the Secretaries from asserting federal reserved water rights in navigable waters physically located on non-federally owned lands within CSUs and national forests. The assertion of such rights may have more to do with enforcement, and as the court observes elsewhere, this is not a water rights enforcement action. But, because federal reserved water rights could reach waters on inholdings, it was not unreasonable for the

Secretaries to treat navigable waters on inholdings as appurtenant to the associated federal reserve. The fact that we deal here with lands totally surrounded by a federal reservation requiring water for one its primary purposes underscores the appropriateness of the Secretaries' assertion of a property interest in all waters within a federal reservation. The fact that the inholdings are by definition surrounded by public lands distinguishes this situation from the upstream/downstream issue discussed hereinafter. Here, as elsewhere, the reserved water rights doctrine is not a perfect vehicle for allocating jurisdiction of fisheries between the state and federal regulators; but, as to inholdings, the Secretaries' 1999 final rule is reasonable and not unlawful. The 1999 final rule is not a regulation of state or other third-party lands, for the rule is founded upon federally-owned reserved water rights which are public lands.

## VIII. Waters Adjacent to Federal Reservations

In the 1999 final rule, the Secretaries identified federal reserved water rights in "inland waters adjacent to the exterior boundaries" of the listed federal reservations. 64 Fed. Reg. at 1286-87. In the comments section of the 1999 final rule, the Secretaries explained that the inclusion of these waters "is necessary for effective management of subsistence fisheries." Id.

The regulations do not define "adjacent." During the administrative process, the Secretaries did not expressly define "adjacent" but "adjacent" waters were referred to as those

"adjoining" an inland water body.[50] The common meaning of "adjacent" is "not distant or far off" or "nearby but not touching[.]"[51] The common meaning of "[a]djoining" is "touching or bounding at some point[.]"[52] In 1999, after the final rule was promulgated, the Secretaries were asked "[w]hat exactly does the department mean by 'adjacent to the exterior boundary?'"[53] They explained that "'[i]nland waters adjacent to the exterior boundaries' means those portions of inland waterways (such as rivers or lakes) which form segments of the boundaries of the national petroleum reserve in Alaska, certain conservation system units, national recreation and conservation areas, and the national forest."[54] In the comment section of the 2005 amendments, the Secretaries added that "adjacent" meant "immediately adjacent." 70 Fed. Reg. at 76,403 ("the issuance of 'adjacent' has only been applied to inland rivers and lakes immediately adjacent to Federal areas. Those waters immediately adjacent provide some of the necessary waters for achieving the purposes for which each Federal area was established.").

"A court must defer to an agency's interpretation of its own regulations unless it is plainly erroneous." Nat'l Ass'n of Home Builders v. Norton, 340 F.3d 835, 843 (9th Cir. 2003). The

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[50]See Admin. Rec. at 1642-43, Tab 84, Vol. 4.

[51]Webster's Third New Int'l Dictionary 26 (1981).

[52]Id. at 27.

[53]Admin. Rec. at 10653, Tab 449, Vol. 19.

[54]Id. at 10653-54.

Secretaries have chosen to define "adjacent" somewhat more narrowly than the usual dictionary definition of that term. This definition is not a post hoc rationalization but rather is the definition that the Secretaries have consistently given the term. For purposes of the discussion here, the court will defer to the Secretaries' definition of "adjacent" and consider whether the identification of federal reserved water rights in waters immediately adjacent to and forming a segment of the exterior boundary of a federal reservation was reasonable and lawful.

The State first argues that the traditional reserved water rights doctrine cannot reach a water body beyond the boundaries of a federal reserve. The court has already rejected this argument in its discussion in Part VI.B of this decision.

But even if federal reserved water rights can exist in waters that are immediately adjacent to a federal reservation, which they can, the State argues that a federal reserved water right cannot be claimed in the entire width of any such water body. The State contends that the Secretaries should have considered whether a federal reserved water right in a more limited band of water next to a federal reservation would satisfy ANILCA objectives, as opposed to claiming a federal reserved water right in the entire width of an adjacent water body.

This argument again evinces misunderstanding of the flexibility of the reserved water rights doctrine which the Secretaries are obligated to employ in assessing the reach of ANILCA and balancing jurisdiction over navigable waters for purposes of fish management

by state and federal authorities. In the abstract, federal reserved water rights have no precise location as discussed in Part IV of this decision. Water necessary to effect the primary purposes of a federal reservation may or may not be "immediately" adjacent to the reserved land. Surely the appurtenant, incorporeal right of reserved water associated with a federal reservation, the primary purposes of which require water, includes both the flow and right to withdraw water from the far side of a water body as well as the near side of which is immediately adjacent to a federal reserve. The reserved water rights doctrine reasonably accommodates the Secretaries' final 1999 rule.

More importantly, Katie John I requires the Secretaries to employ the reserved water rights doctrine as the basis for allocating jurisdiction of fisheries management between state and federal authorities. Dividing rivers longitudinally would surely inject unacceptable complexities of management into both the state and federal regimes. As to navigable waters in which federal reserved water rights exist because the water is immediately adjacent to a federal reservation, there is a reasonable nexus between the bordering upland and the entire width of the river for purposes of ANILCA jurisdiction. The Secretaries' application of ANILCA to the entire width of the river effects a reasonable division of jurisdiction, especially in light of the Secretaries' decision on upstream/downstream jurisdiction, which is discussed below.

In concluding that the Secretaries' assertion of federal authority over the entire width of a river which is immediately adjacent to a federal reservation was reasonable, the court has kept in the mind the illustration offered by the State to show the contrary. As one of its test waters on this issue, the State discussed the portion of the Yukon River that is adjacent to the northern border of the Nowitna National Wildlife Refuge. The Yukon River flows from Canada on the east to the Bering Sea on the west. During its course, the Yukon River flows by and along, but largely outside of, the northern border of the Nowitna National Wildlife Refuge in central Alaska.[55] The Refuge's boundary is fixed on the south bank of the River, and the entire bank of the north side of the Yukon is non-federal, non-reserved lands. In the 1999 final rule, the Secretaries identified federal reserved water rights in the Nowitna National Wildlife Refuge, "[i]ncluding the portion of the Yukon River adjoining the boundary."[56] Because the north bank of the Yukon River is non-federal, non-reserved land, the State suggests that a person standing on the north bank of the Yukon River on state-owned, non-federal land who was fishing in the river would be subject to federal regulations.

The State's illustration is apt, but the State's conclusion is basically wrong. What the State suggests could happen; but the State's argument confuses the priority for rural residents which

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[55]See Exhibit 12, State of Alaska's Opening Brief on Which Waters Specifying Test Case Categories with Sample Water Bodies, Docket No. 134, Case No. 3:05-cv-0006-HRH.

[56]Admin. Rec. at 1726, Tab 88, Vol. 4.

the Secretaries' regulations may lead to with the more general preference that section 804 of ANILCA creates. 16 U.S.C. § 3114. As the Secretaries point out, unless there has been a specific closure of a fishery for non-federally qualified subsistence users, others may still take fish as permitted by state regulations. It is this concept that this court believes the circuit court may have misunderstood. For purposes of the issue under discussion, determining certain portions of a water body to be "public lands" for purposes of ANILCA does not preempt state management of fisheries unless it becomes necessary to implement the federal priority. In times of insufficient supply of fish for federal subsistence purposes, Congress obviously intended exactly that of which the State complains. See 16 U.S.C. § 3114. However, the point to be emphasized here is not the latter exceptional case situation, but rather the norm, which is that both state and federal regulators are successful in their management of resources such that there is sufficient supply for everyone. In those normal situations, the person on the north bank who is not a rural resident (he may be a resident of Anchorage, Alaska, or New York, New York) can fish in the Yukon River at the same time that the rural resident fishes from the south bank pursuant to federal subsistence regulations and the Secretaries' 1999 final rule.

Again, the court concludes that federal reserved water rights can and do exist in navigable waters beyond the boundaries of a federal reservation. The Secretaries reasonably applied the 1999 final rule to the entire width of a water body, which is immedi-

ately adjacent to a segment of reserved federal lands, the primary purposes of which require water.

IX. Waters Upstream or Downstream of Federal Reservations

In the 1999 final rule, the Secretaries did not identify federal reserved water rights in waters that were upstream or downstream of federal reservations. The reasons for this decision were set forth by the Katie John Policy Group in its final issue paper:

> Assertion of federal reserved water rights beyond the boundaries of a reservation raises additional issues. The federal agency asserting water rights beyond reservation boundaries would have to establish that those waters were needed for the purposes of the reservation and that those needs cannot be satisfied by waters within or adjacent to the reservation. This is a component of the reserved water rights doctrine itself and may be difficult to establish for the federal reservations in water plentiful Alaska.
>
> In addition, the United States has not generally claimed reserved water rights beyond the boundaries of a reservation. The United States has claimed water rights outside of the boundaries of a reservation where the water right is necessary to support rights reserved to Indians by treaty and where a reservation has been diminished in size but the Indians have been given continuing rights (such as to hunt and fish) in the area of the original reservation. In both of these situations the filings have generally been for instream flows to support fisheries at certain specified locations, that is, the reserved right is for a certain amount of water to flow between points A and B. Although these flow rights may have the effect of curtailing consumptive use with a junior priority date, either up or down stream of the site of the protected activity, the water rights are claimed for or are attached to specific sites.

> The situation in Alaska would not support either of these types of off reservation water rights claims for Indians. The United States has not entered into treaties with the Tribes in Alaska and so there are no treaty rights to be supported....
>
> In Alaska there do not appear to be areas that were formerly reserves where the United States has committed to preserving or guaranteeing a use of the area that would support a reserved water right. In most instances, areas of former Indian reservations are now included within current conservation system units where there exists a federal reserved water right sufficient to support subsistence management.
>
> In addition, assertion of reserved water rights up and down stream from a federal reservation would conflict with the parts of the Katie John decision holding that ANILCA did not extend subsistence fishing to all navigable waters in Alaska. Limiting assertion of reserved waters to waters within the exterior boundaries of a federal reservation is also in keeping with the Ninth Circuit's recognition that there would be bifurcation of fishery management between the United States and the State of Alaska.[57]

In the 2005 final rule, the Secretaries again explained that they had not identified federal reserved water rights in the waters upstream and downstream of federal reservations because they

> believe[d] that including all upstream and downstream reaches would constitute an overly broad interpretation of "Federal reserved waters." The Ninth Circuit Court in [Katie John I] found the government's interpretation that public lands for the purposes of the Title VIII priority include navigable waters in which the United States holds reserved water rights reasonable and thus upheld it. Consequently, we did not propose to add and are not adding those stretches of water to the Federal Subsistence Management Program's area of jurisdiction.

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[57]Admin. Rec. at 1704-1708, Tab 88, Vol. 4 (footnote omitted).

> A Federal reserved water right is a usufruct which gives the right to divert water for use on specific land or the right to guarant[ee] flow in a specific reach of a water course. As such, the water right does not affect the water downstream of the use area and does not have an effect on upstream areas except in times of shortage when a junior use may be curtailed. There is no shortage; therefore, up and downstream waters have not been included.

70 Fed. Reg. at 76,402.

If for no other reason than possible future consideration by the Federal Subsistence Board, the court feels a need to comment on the policy group's statement. The policy group's discussion appears to lack focus on the Secretaries' principal obligation, which is to implement Title VIII of ANILCA in furtherance of the congressional purpose of making it possible for rural Alaskans to continue a subsistence lifestyle. The day may come when the Secretaries will have to be concerned about water flows, both upstream and downstream from CSUs. Anadromous fish such as salmon require a good flow of water both up- and downstream to permit access to upper reaches of navigable waters to spawn and to exit them to mature. But given the constraints upon the Secretaries as a result of Katie John I, for the present time, the 1999 final rule correctly determines, as discussed above, that federal reserved water rights exist as to navigable waters within and immediately adjacent to (the court would say "abutting") CSUs.

The Secretaries' above 2005 explanation aptly focuses upon the circuit court's rejection in Katie John I of navigable waters as a basis for implementation of Title VIII of ANILCA. Today, that

holding is at the heart of the problem confronting the Secretaries in deciding how to address the Katie John plaintiffs' contentions that where reserved waters exist as to navigable water bodies, Title VIII of ANILCA should have application both upstream and downstream from the CSU in question.

Federal reserved water rights (the right to an amount of water necessary to fulfill the primary purposes of a federal reserve) can, of course, be enforced both up- and downstream. The Katie John plaintiffs argue that if federal reserved water rights can exist upstream and downstream of a federal reservation, then the Secretaries should have identified the waters in which such rights exist. The Katie John plaintiffs contend that the Katie John I decision left no discretion to the Secretaries as to the identification of federal reserved water rights. The Katie John plaintiffs insist that the Secretaries were required to identify all waters in which federal reserved water rights exist.

The court is reluctant to say that federal reserved water rights exist upstream or downstream of federal reserves, for federal reserved water rights have no geographic location except when it becomes necessary to enforce those rights. This is not an enforcement action. In this case, the proper question is whether the upstream or downstream waters are appurtenant to and necessary for the fulfillment of a primary purpose of a federal reservation. Here, we deal in the abstract with the identification of those public lands that are benefitted by federal reserved water rights. It is the CSU having a primary purpose requiring water that enjoys

a federal reserved water right. Such rights are one aspect (one of the bundle of rights) that make up the United States' ownership of uplands. Thus there is a fair argument that federal reserved water rights do not exist upstream or downstream of a federal reservation. The Secretaries' and the court have recognized that legal concept with respect to inholdings which contain navigable waters. The court concludes that navigable waters upstream and downstream of CSUs may one day be impacted by federal reserved water rights that are appurtenant to the CSU.

There is, however, a more fundamental problem with the Katie John plaintiffs' argument, which is best illustrated by consideration of the Katie John plaintiffs' "test water" on this issue, the Yukon River. As noted above, the Yukon River, which is a navigable river, flows from Canada on the east to the Bering Sea on the west. The Yukon River flows through or is adjacent to six CSUs: 1) the Yukon-Charley Rivers National Preserve, 2) the Yukon Flats National Wildlife Refuge, 3) the Nowitna Wildlife Refuge, 4) the Koyukuk National Wildlife Refuge, 5) the Innoko National Wildlife Refuge, and 6) the Yukon Delta National Wildlife Refuge. The Secretaries identified federal reserved water rights in the portion of the Yukon River within the exterior boundaries of these six CSUs and in inland waters adjacent to the exterior boundaries of these CSUs.

The Katie John plaintiffs argue that the Secretaries should have identified federal reserved water rights in the entire portion of the Yukon River that runs through the State of Alaska. One of the primary purposes of the Yukon River CSUs is the protection or

conservation of habitat for, and populations of, fish and wildlife. There can be no dispute that water is necessary for the protection and conservation of fish habitats. Because one of the most important fish in the Yukon is salmon, which are anadromous, the Katie John plaintiffs contend that upstream and downstream waters are necessary to protect the salmon. More specifically, they argue that downstream water is necessary because if a downstream user were to interfere with the ability of salmon to reach their spawning grounds within a CSU, this would defeat one of the primary purposes of that CSU. Likewise, the Katie John plaintiffs argue that if an upstream user were to interfere with the ability of a salmon to spawn, hatch, and return through the CSU to the sea, one of the primary purposes of the CSU would be defeated. In sum, the Katie John plaintiffs argue that the entire length of the Yukon River should be subject to federal subsistence jurisdiction because upstream and downstream water may be necessary to fulfill the purposes of the Yukon River CSUs.

What the Katie John plaintiffs argue here is what persuaded this court to hold that all navigable waters in Alaska were subject to the Title VIII priority. That decision was reversed by the Ninth Circuit Court of Appeals in Katie John I. Katie John I made it clear that something less than all navigable waters would have to serve as the basis for Title VIII regulation in order to achieve a balance between state and federal management of fisheries. Claiming federal reserved water rights in those navigable waters which are within or are immediately adjacent to a CSU plainly

achieves a balance between state and federal regulators, even if it is more limited than what this court believes Congress intended.

What the Katie John plaintiffs request here is defensible in terms of the purpose of section 101(c) of ANILCA, 16 U.S.C. § 3101(c), and may be necessary at some future time; but for the present, the Secretaries were obligated to apply Katie John I, and their application of Katie John I as to upstream and downstream waters was reasonable. The discussion of how water might be used on any particular CSU or how the need for that water might be enforced in a time of insufficient flow has little do to with the problem of which navigable waters are public lands for purposes of ANILCA. The fact that a federal reserved water right might some day be asserted at some distance point upstream or downstream from a CSU is certainly consistent with the reserved water rights doctrine. But as the court has repeatedly observed here, this litigation does not involve the enforcement of federal reserved water rights. Rather, the Secretaries' task was to determine the extent of federal jurisdiction for purposes of ANILCA. The Secretaries' handling of the upstream/downstream issue is a reasonable and lawful application of the reserved water rights doctrine for purposes of striking a balance between state and federal jurisdiction of fisheries in navigable waters in the spirit of Katie John I. The Secretaries' lawfully and reasonably concluded that at the present time federal water rights associated with reserved lands do not extend to waters upstream and downstream of federal reservations.

## X. Waters Appurtenant to Native Allotments

In the 1999 final rule, by § ____.10((d)(4)(xviii), the Secretaries delegated to the FSB the authority to

> [i]dentify, in appropriate specific instances, whether there exists additional Federal reservations, Federal reserved water rights, or other Federal interests in lands or waters, including those in which the United States holds less than a fee ownership, to which the Federal subsistence priority attaches, and make appropriate recommendation to the Secretaries for inclusion of those interests within the Federal Subsistence Management Program[.]

64 Fed. Reg. at 1290.[58] This delegation of authority was intended to address, in part, the issue of whether federal reserved water rights existed on Native allotments.[59] As the Secretaries explained in the comment section of the 1999 final rule, "[m]any Native allotments are within the boundaries of the Federal lands identified in § ___.3 of this rule, and therefore waters flowing through or adjacent to those allotments are subject to a Federal reserved water right and Federal subsistence jurisdiction." 64 Fed. Reg. at 1279. "However, Native allotments falling outside of the lands and

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[58]This provision of the Secretaries' 1999 final rule might have but did not quite address this court's concern that there are rural residents of Alaska entitled to preferential fishing rights under Title VIII of ANILCA whose opportunities to continue a subsistence way of life are limited because those rural residents, although they reside near a navigable water body, do not reside near navigable waters having federal reserved water rights. The court understands, however, that Katie John I probably does not permit the Secretaries to address this concern inasmuch as the circuit court has hitched the balancing process to reserved waters.

[59]Pursuant to the Alaska Allotment Act, individual Alaska natives were able to "acquire title to individual parcels of land important for traditional use and occupancy." Cohen's Handbook of Federal Indian Law 348 (Nell Jessup Newton et al. eds., 2005).

waters identified in § ___.3 are not included. Whether there are Federal reserved water rights associated with any of these small, scattered parcels would have to be determined on a case-by-case basis." Id.

The Katie John plaintiffs argue that the Secretaries should have identified federal reserved water rights on all Native allotments, as opposed to only identifying federal reserved water rights on allotments which are within the boundaries of a federal reservation. The Katie John plaintiffs argue that the Katie John I decision did not give the Secretaries any discretion but rather compelled them to identify all waters within Alaska in which the United States had a federal reserved water right.

As an initial matter, the Secretaries argue that the Katie John plaintiffs do not have standing to present this claim. "'[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" Witt v. Dep't of Air Force, 527 F.3d 806, 811 (9th Cir. 2008) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). "Second, [a] plaintiff must present a 'causal connection between the injury and the conduct complained of--the injury has to be fairly ... traceable to the challenged action of the defendant, and not ... the result of the independent action of some third party not before the court.'" Id. at 811-12 (quoting Lujan, 504 U.S. at 560). "Finally, 'it must be

"likely," as opposed to merely "speculative," that the injury will be 'redressed by a favorable decision.'" Id. at 812 (quoting Lujan, 504 U.S. at 560). The Secretaries contend that the Katie John plaintiffs have not shown an injury in fact. The Katie John plaintiffs have submitted a declaration from Charles Erhart to support this claim. Erhart owns an interest in a Native allotment that is located on the left bank of the Tanana River, near Eightmile Island.[60] The allotment is used for subsistence purposes.[61] But, because the allotment is on a stretch of the Tanana River that flows outside of a CSU, subsistence fishing activities along the allotment are regulated by the State under state law.[62]

The Secretaries argue that Erhart has not shown that he is a rural Alaska resident or a resident of an area that would be entitled to participate in the Title VIII priority on the waters at issue, and thus he cannot show that he has been injured in fact by the 1999 final rule. This argument is meritless. Erhart expressly states in his declaration that he is "a rural resident"[63] and there is no contrary evidence. Erhart's declaration establishes that he has an interest in a Native allotment that is outside a CSU and

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[60]See Declaration of Charles Erhart at 1, ¶¶ 3-4, 6, Docket No. 95.

[61]Id. at ¶ 3.

[62]Id. at ¶ 4.

[63]Id. at 2, ¶ 6.

that the Title VIII priority does not currently apply to the waters flowing past his allotment.[64]

Erhart's affidavit is sufficient to establish standing to bring the Katie John plaintiffs' Native allotment claim, which is brought pursuant to section 807(a) of ANILCA. Section 807 provides, in pertinent part, that "[l]ocal residents and other persons and organizations aggrieved by a failure of the State or the Federal Government to provide for the priority for subsistence uses ... may, upon exhaustion of any State or Federal (as appropriate) administrative remedies which may be available, file a civil action in the United States District Court for the District of Alaska to require such actions to be taken as are necessary to provide for the priority." 16 U.S.C. § 3117(a). Erhart's affidavit establishes that, as to the Native allotment in which he has an interest, the Secretaries have failed to provide a preference for subsistence uses and that he, as a rural resident, would be entitled to benefit from such a preference.

If Erhart is entitled to a subsistence preference, the Secretaries' denial of the same is an actual harm. Clearly that harm flows from the Secretaries' decision. An order of this court can remedy the harm by requiring the Secretaries to extend Title VIII of ANILCA to Native allotments that are outside any of the lands identified in § ____.3 of the 1999 final rule. Erhart

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[64] Id. at 1, ¶¶ 3-4.

therefore has standing to challenge the 1999 final rule as regard the Secretaries' treatment of Native allotments.[65]

As a further preliminary matter, it is important to note that the Secretaries treated Native allotments which are within the exterior boundaries of the federal reservations listed in § ____.3(b) in the same manner that they treated all inholdings, concluding that federal water rights have been reserved as to all navigable waters within the exterior boundaries of the listed federal reservations, regardless of who has title to the land adjoining the water. Allotments within a CSU are properly subjected to the Secretaries' 1999 final rule, not because of federal reserved water rights associated with the allotments per se, but rather because they are inholdings. See Part VII of this decision. The question raised by the Katie John plaintiffs as to Native allotments is whether the Secretaries should have, as a matter of law, identified federal reserved water rights appurtenant to Native allotments which are outside the boundaries of federal reservations.

As a final preliminary matter, the Katie John plaintiffs' argument that Katie John I required the Secretaries to identify all waters within Alaska in which the United States has a federal reserved water right misconstrues the circuit court's decision. Katie John I holds that "public lands" for purposes of Title VIII of ANILCA includes federal waters in which there are federal

[65]None of the Katie John plaintiffs are allotment applicants. As a consequence, this decision deals with Native allotments which have been granted.

reserved water rights. However, it is plain that the circuit court intended that the Secretaries look to the reserved water rights doctrine for purposes of striking a balance between state and federal jurisdiction over fisheries. That is what the Secretaries have undertaken to do.

The 1906 version of the Alaska Native Allotment Act provided:

> That the Secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of nonmineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allotee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres.

Act of May 17, 1906, Pub. L. 59-171, ch. 2469, 34 Stat. 197. In 1956, the Act was amended to provide, in relevant part:

> Section 1. ...That the Secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of vacant, unappropriated, and unreserved nonmineral land in the district of Alaska, or subject to the provisions of the Act of March 8, 1922 (42 Stat. 415, 48 U.S.C. 376-377), vacant, unappropriated, and unreserved land in Alaska that may be valuable for coal, oil or gas deposits, to any Indian, Aleut or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allotee and his heirs in perpetuity, and shall be inalienable and nontaxable unless otherwise

> provided by Congress. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres: Provided, That any Indian, Aleut, or Eskimo who receives an allotment under this Act, or his heirs, is authorized to convey by deed, with the approval of the Secretary of the Interior, the title to the land so allotted, and such conveyance shall vest in the purchaser a complete title to the land which shall be subject to restrictions against alienation and taxation only if the purchaser is an Indian, Aleut, or Eskimo native of Alaska who the Secretary determines is unable to manage the land without the protection of the United States and the conveyance provides for a continuance of such restrictions[.]

43 U.S.C. § 270-1 (repealed 1971)[66]. Thus, Alaska natives who have been granted Native allotments own the lands conveyed to them in fee, the only restrictions (not reservations) being that the lands are non-taxable unless authorized by Congress and the lands cannot be conveyed without approval from the Secretary of Interior. These restrictions upon taxation and alienation patently have nothing to do with water rights. There is no evidence in the record to suggest that either the allotment application itself or the Alaska Native Allotment Act effects a reservation of any water rights. As the Regional Solicitor explained,

> lands claimed or conveyed as Alaska Native allotments are not generally considered "federal reservations." The claimed or conveyed lands are not set aside for a specific federal purpose evidenced by a treaty, Indian reservation or other special reserved status. The

[66]In 1971, the Alaska Native Claims Settlement Act (ANCSA) extinguished aboriginal title and claims in Alaska and terminated the authority to establish allotments under the 1906 Act. 43 U.S.C. §§ 1603, 1617(a).

> lands are only "segregated," not reserved, by the filing of an allotment application, and once conveyed, they become private lands whose title is in the individual Native allotee, subject to restrictions on alienation and taxation.[67]

The Katie John plaintiffs argue that the federal government has a property interest in a Native allotment because of the restriction on alienation. As long as there is a restriction on alienation, the Katie John plaintiffs insist that the federal government retains an interest in the allotment land. What the circuit court said in Katie John I was that "[b]y virtue of its reserved water rights, the United States has interests in some navigable waters." 72 F.3d at 703 (emphasis added). Katie John I does not stand for the proposition that a restriction on alienation is the kind of interest which triggers application of Title VIII of ANILCA. The reason the circuit court selected the reserved water rights doctrine to address whether Title VIII applied to navigable water is that (1) there is a nexus between federal reserved water rights and fisheries and (2) using water rights as a reference point for purposes of dividing state and federal jurisdiction of the management of fisheries was deemed by the circuit court to effect a proper balance between resource management regimes. The restraint on alienation has nothing to do with fisheries management and is not at all instructive as regards the allocation of jurisdiction between state and federal resource managers.

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[67]Exhibit 1 at 6, Plaintiffs Katie John et al's Opening Brief on the "Which Waters" Issue, Docket No. 139, Case No. 05-cv-0006-HRH.

The Katie John plaintiffs also make much of the fact that the purpose of the Alaska Native Allotment Act was to protect critical lands used by Alaska Natives for purposes of hunting and fishing, see Olympic v. United States, 615 F. Supp. 990, 995 (D. Alaska 1985), and that these uses require water. While it is correct that at both the time the Alaska Native Allotment Act was passed in 1906 and when it was amended in 1956, Alaska Natives had aboriginal and hunting rights, those rights were extinguished by ANCSA. 43 U.S.C. § 1603. What the Katie John plaintiffs are entitled to enforce at this time is the statutory priority available to all rural residents as a consequence of Title VIII of ANILCA. For purposes of the 1999 final rule adopted by the Secretaries and for purposes of this litigation, the Katie John plaintiffs have to convince the court that there are federal reserved water rights retained by the United States on Native allotments which lie on navigable waters outside the boundaries of federal reservations. Harking back to aboriginal rights lends no support to the Katie John plaintiffs' contentions.

The Katie John plaintiffs further argue that because federal reserved water rights have been recognized in connection with Indian allotments, they should be recognized in connection with all Alaska Native allotments. The Dawes Act, 24 Stat. 388 (1887), and how allotments which were created pursuant to it have been treated have no application here. We are dealing here with allotments which were created pursuant to the Alaska Native Allotment Act, which had different purposes than the Dawes Act and which did not

involve lands that were ever part of an Indian reservation. Moreover, we are concerned here with the allocation of jurisdiction of fisheries management in navigable waters between state and federal regulators for purposes of effecting ANILCA for all rural residents of Alaska, not just Native allotment holders. What the Katie John plaintiffs urge would have the Secretaries treat Native rural residents differently from non-Native rural residents who own land outside of a CSU and on a navigable water body. Moreover, what the Katie John plaintiffs urge would result in the checkerboarding of jurisdiction along navigable waterways such that the applicable regulations (both state and federal) would differ as between private, non-Native lands, state lands, and federal public domain on the one hand, and each individual segment of a water body adjoining a 160-acre (or smaller) Native allotment.

In sum, the court rejects the Katie John plaintiffs' argument that federal reserved water rights exist on all Native allotments. The court concludes that the United States has no property interest in Native allotments and that there are no federal reserved water rights in navigable waters on or abutting conveyed Native allotments which lie outside the boundaries of federal reservations and are not immediately adjacent to the boundary of a federal reservation.[68] Because Native allotments do not give rise to waters that are public lands for purposes of federal subsistence jurisdiction, the Secretaries' delegation of authority to the FSB to decide which

[68] E.g., a Native allotment separated from a CSU by a navigable water body.

Native allotments falling outside the lands and waters identified in the 1999 final rule, although unnecessary, was lawful and reasonable.

XI. Selected-but-not-yet-Conveyed Lands and Appurtenant Waters

§ ____.3(b) of the 1999 final rule provides that federal subsistence regulations "apply on all public lands" within the 34 listed areas. 64 Fed. Reg. at 1286-87 (emphasis added). § ____.4 defines "public lands" as

> (1) Lands situated in Alaska which are Federal lands, except--
> (i) Land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;
> (ii) Land selections of a Native Corporation made under the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 et seq., which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and
> (iii) Lands referred to in section 19(b) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1618(b).
> (2) Notwithstanding the exceptions in paragraphs (1)(i) through (iii) of this definition, until conveyed or interim conveyed, all Federal lands within the boundaries of any unit of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Forest Monument, National Recreation Area, National Conservation Area, new National forest or forest addition shall be treated as public lands for the purposes of the regulations in this part pursuant to section 906(o)(2) of ANILCA.

Id. at 1288.

"Public lands" is a defined term in ANILCA. Section 102(3) of ANILCA defines "public lands" as:

> land situated in Alaska which, after December 2, 1980, are Federal lands, except –
>
> (A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;
>
> (B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.] which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and
>
> (C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act [43 U.S.C. 1618(b)].

16 U.S.C. § 3102(3).

Subsection (1) of the Secretaries' regulatory definition of "public lands" tracks the statutory definition of "public lands" word for word. Subsection (2) of the Secretaries' regulatory definition is not found in the statutory definition of "public lands." This regulatory addition to the statutory definition of "public lands"

> extends [federal] management to all Federal lands selected under the Alaska Native Claims Settlement Act and the Alaska Statehood Act and situated within the boundaries of a Conservation System Unit, National Recreation Area, National Conservation Area, or any new national forest or forest addition, until conveyed to the State of Alaska or an Alaska Native Corporation, as required by ... (ANILCA).

64 Fed. Reg. at 1276. In extending federal management jurisdiction to selected-but-not-yet-conveyed lands, the Secretaries correctly recognized that "selected lands do not fall within the definition of 'public lands' found in ANILCA[.]" Id. at 1280. However, the Secretaries explained that

> section 906(o)(2) [of ANILCA] states that "Until conveyed all federal lands within the boundaries of a conservation system unit, National Recreation Area, National Conservation Area, new national forest or forest addition, shall be administered in accordance with the laws applicable to such unit." (emphasis added). Since selected lands do fall within the definition of "Federal lands" in ANILCA and Title VIII of ANILCA is a law applicable to such units, the subsistence priority of Title VIII must be extended to those lands, pursuant to section 906(o)(2). The definition of "public lands or public land" found in § ____.4 of these regulations clarifies that selected lands will be treated as public lands until they are conveyed.

Id. at 1280. In other words, because selected-but-not-yet-conveyed lands within ANILCA CSUs remain "federal lands" and because they have not been conveyed, the Secretaries interpreted section 906(o)(2) of ANILCA as requiring them to treat such lands as "public lands" for purposes of Title VIII of ANILCA. Based on this interpretation, the Secretaries included selected-but-not-yet-conveyed lands within CSUs in their regulatory definition of "public lands" as an exception to the statutory exclusion of selected-but-not-yet-conveyed lands from the definition of "public lands."

The State argues that the Secretaries have, in effect, changed the statutory definition of "public lands" to include selected-but-

not-yet-conveyed lands and that the Secretaries had no authority to make such a change. The State contends that Congress, in defining "public lands," clearly intended to exclude selected-but-not-yet-conveyed lands from the reach of federal subsistence management jurisdiction.

As the Secretaries first point out, the 1999 final rule does not define selected-but-not-yet-conveyed lands as "public lands." Rather, the express language of the 1999 final rule provides that certain selected-but-not-yet-conveyed lands "shall be treated as public lands for the purposes" of Title VIII of ANILCA. The Secretaries seem to be suggesting that there is a difference between defining selected-but-not-yet-conveyed lands as "public lands" and treating them as such. For purposes of determining the reach of Title VIII of ANILCA, this is a distinction without a difference. Whether the Secretaries have defined some selected-but-not-yet-conveyed lands as public lands or are merely treating such lands as public lands, the Secretaries are asserting federal subsistence management jurisdiction over those lands. The question remains whether that assertion of jurisdiction is lawful and reasonable.

In answering that question it is important to recognize that this issue has nothing to do with the reserved water rights doctrine or the Katie John I decision. The extension of federal subsistence management jurisdiction at issue here is not limited to navigable waters nor is it based on the United States having a federal reserved water right in navigable waters. In determining

that selected-but-not-yet-conveyed lands within ANILCA CSUs must be treated as public lands for purposes of Title VIII jurisdiction, the Secretaries have extended federal jurisdiction to lands and waters that were not previously subjected to federal jurisdiction based on their interpretation of section 906(o), and not based on any direction from the circuit court.

The State argues that the Secretaries, in effect, expanded the statutory definition of "public lands" to include selected-but-not-yet-conveyed lands. "In determining whether the [Secretaries were] empowered to make such a change, we begin, of course, with the language of the statute." Board of Governors, Federal Reserve Sys. v. Dimension Financial Corp., 474 U.S. 361, 368 (1986). "If the statute is clear and unambiguous '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. (quoting Chevron, 467 U.S. at 842-43). "The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." Id.

In section 102(3) of ANILCA, Congress clearly and unambiguously excluded selected-but-not-yet-conveyed lands from the definition of the "public lands." 16 U.S.C. § 3102(3). At first blush, that would seem to end the discussion because when Congress has spoken on a matter, that is the end of the matter, for both the agency and the court. An agency may have the authority to fill gaps left by Congress, see River Runners for Wilderness v. Martin,

574 F.3d 723, 734 (9th Cir. 2009), but it does not have the authority to alter Congress' intent.

Here, the Secretaries not only had the statutory definition of "public lands" to consider; they also had to consider the Congressional direction given them in section 906(o)(2) of ANILCA. Section 906(o)(2) is in Title IX of ANILCA, which deals with the "Implementation of Alaska Native Claims Settlement Act and Alaska Statehood Act" and provides:

> Until conveyed, all Federal lands within the boundaries of a conservation system unit, National Recreation Area, National Conservation Area, new national forest or forest addition, shall be administered in accordance with the laws applicable to such unit.

43 U.S.C. § 1635(o)(2). The Secretaries contend that Title VIII of ANILCA is a "law" applicable to the units referred to in section 906(o), and thus the plain language of section 906(o)(2) requires that federal lands within CSUs that have been selected but not yet conveyed must be administered in accordance with Title VIII. The Secretaries insist that this means that they are required to apply the subsistence preference to selected-but-not-yet-conveyed lands. The Secretaries argue that to do otherwise would effectively write an exception into section 906(o)(2) that does not exist. If selected-but-not-yet-conveyed lands within a CSU are not subject to the Title VIII subsistence preference, then, according to the Secretaries, section 906(o) would effectively read that all federal lands shall be managed in accordance with the laws applicable to such units except for Title VIII of ANILCA.

Section 804 of ANILCA creates the preference for subsistence uses and expressly makes provision for the taking of fish "on public lands." "Public lands" by definition (section 102(3)) expressly exclude selected-but-not-yet-conveyed lands. Section 906(o)(2) provides that "Federal lands" which are within the boundaries of ANILCA CSUs are to be administered in accordance with all laws which are applicable to such units. There can be no doubt that selected-but-not-yet-conveyed lands are "federal lands" for purposes of section 906(o)(2). "Federal lands" are not statutorily defined for purposes of section 906(o)(2).[69] "'When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.'" Parussimova v. Mukasey, 555 F.3d 734, 740 (9th Cir. 2009) (quoting Smith v. United States, 508 U.S. 223, 228 (1993)). "Federal land" generally means "[l]and owned by the United States government."[70] Title to selected-but-not-yet-conveyed lands is still in the United States. Thus, the plain language of section 906(o)(2) provides that selected-but-not-yet-conveyed lands that are within the boundaries of ANILCA CSUs are to be administered in accordance with all laws which are applicable to such land units.

We have two provisions of ANILCA which, on the basis of the foregoing, appear to conflict. Section 906(o)(2) tells the

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[69]As set out above, "federal land" is defined in section 102 of Title I of ANILCA. See 16 U.S.C. § 3102(2). However, section 102 of Title I expressly provides that the definitions in Title I do not apply to Title IX, of which section 906(o)(2) is part.

[70]Black's Law Dictionary 893 (8th ed. 2004).

Secretaries to manage federal lands, which include selected-but-not-yet-conveyed lands, in accordance with Title VIII. Sections 804 and 102(3) read together tell the Secretaries that the subsistence preference created by Title VIII exists as to "public lands" which do not include selected-but-not-yet-conveyed lands.

This appearance of conflict vanishes when one considers the introductory clause of section 804. 16 U.S.C. § 3114. Section 804 applies to "public lands" as defined by § 102(3) "[e]xcept as otherwise provided in this Act[.]" Section 906(o)(2) is part of the "Act"; and as to selected-but-not-yet-conveyed lands, it provides "otherwise." The court concludes that Congress unambiguously provided that Title VIII applies to selected-but-not-yet-conveyed lands "within the boundaries of a conservation system unit, National Recreation Area, National Conservation Area, new national forest or forest addition[.]"[71] 43 U.S.C. § 1635(o)(2). Thus, the 1999 final rule lawfully and reasonably "treat[s]" selected-but-not-yet-conveyed lands as though they were "public lands" for purposes of Title VIII of ANILCA. 64 Fed. Reg. at 1288.

## XII. Conclusion

Based on the foregoing, the court concludes that:

(1) federal reserved water rights do not exist, as a matter of law, in marine waters that were reserved as part of a national forest which was created pursuant to the Organic Administration

[71]Whether or not such lands will continue to be subject to Title VIII of ANILCA post-conveyance is not before the court at this time. Once conveyed, such lands may be caught up in the reserved waters analysis for the balancing of state and federal jurisdiction of fish management.

Act, for which reason the Secretaries' exclusion of marine waters from the 1999 final rule was lawful;

(2) the Secretaries' use of the headland-to-headland methodology for purposes of defining where federal jurisdiction ends and state jurisdiction begins was, as a general proposition, lawful and reasonable;

(3) the Secretaries' identification of federal reserved water rights in waters bounded by non-federal land within federal reservations was lawful and reasonable;

(4) the Secretaries' identification of federal reserved water rights in waters that are adjacent to federal reservations was lawful and reasonable;

(5) the Secretaries lawfully and reasonably concluded that at the present time federal reserved water rights do not extend to waters upstream and downstream of federal reservations;

(6) the United States has not reserved water rights on Native allotments which lie outside the boundaries of federal reservations and are not immediately adjacent to the boundary of a federal reservation, for which reason the Secretaries' decision to defer identification of such rights was lawful and reasonable; and

(7) the Secretaries' interpretation of section 906(o)(2) of ANILCA was lawful and reasonable.

With the foregoing, the court has decided both the "what process" and the "which waters" issues. As to the latter, the court believes that it has resolved the legal issues raised by the Peratrovich, Katie John, and State plaintiffs in their respective

complaints. After ten days from the filing of this decision, the court intends entering a final judgment dismissing the plaintiffs' respective complaints in both the consolidated cases and the Peratrovich case.

DATED at Anchorage, Alaska, this 29th day of September, 2009.

/s/ H. Russel Holland
United States District Judge