Nos. 09-36122, 09-36125, 09-36127 (Consolidated)

In the
UNITED STATES COURT OF APPEALS
For the
NINTH CIRCUIT

KATIE JOHN, GERALD NICOLAI, ALASKA INTER-TRIBAL COUNCIL, AND NATIVE VILLAGE OF TANANA, *Plaintiff / Appellants*

v.

UNITED STATES OF AMERICA, KEN SALAZAR, Secretary of the Interior, and TOM VILSACK, Secretary of the United States Department of Agriculture, *Defendants / Appellees*

and

STATE OF ALASKA, *Defendant-Intervenor / Appellee*

STATE OF ALASKA,
Plaintiff / Appellant

and

ALASKA FISH AND WILDLIFE FEDERATION AND OUTDOOR COUNCIL, ALASKA FISH AND WILDLIFE CONSERVATION FUND, MICHAEL TINKER, and JOHN CONRAD,
Plaintiff-Intervenors / Appellants

v.

KEN SALAZAR, Secretary of the U.S. Department of the Interior, and TOM VILSACK, Secretary of the U.S. Department of Agriculture,
Defendants / Appellees,

and

KATIE JOHN, GERALD NICOLAI, ALASKA INTER-TRIBAL COUNCIL,
And NATIVE VILLAGE OF TANANA,
Defendant-Intervenors / Appellees

and

ALASKA FEDERATION OF NATIVES
Defendant-Intervenor / Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA
USDC Nos. 3:05-cv-00006-HRH, 3:05-cv-00158-HRH (Consolidated)

ANSWERING BRIEF OF DEFENDANT-INTERVENOR/APPELLEE STATE OF ALASKA

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2. Whether the District Court correctly upheld the Interior and Agriculture Secretaries' non-assertion of a federal reserved water right ("FRWR") in waters upstream and downstream of federal reservations.

3. Whether the District Court correctly upheld the Secretaries' non-assertion of FRWRs with respect to Alaska Native allotments.

4. Whether the District Court's "balancing" comments mattered.

STATEMENT IN RESPONSE TO KATIE JOHN PLAINTIFFS' CASE

In 1980, Congress passed the Alaska National Interest Lands Conservation Act ("ANILCA"),[2] which reserved many national conservation system units ("CSUs") in Alaska.[3] It also generally provided for a federal priority for

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[1] Plaintiff/Appellants Katie John, Charles Erhart, Alaska Inter-Tribal Council, and Native Village of Tanana, referred to collectively as the "Katie John Plaintiffs" in those appellants' opening brief.

[2] P.L. 96-487, 94 Stat. 2371.

[3] "Conservation system units" under ANILCA are National Parks and Preserves, National Wildlife Refuges, National Wild and Scenic Rivers, National trails, National Wilderness Preservation areas, and National Forest Monuments. ANILCA § 102(4), 16 U.S.C. § 3102(4). Many federal lands in Alaska are not CSUs. National Forests are not CSUs. [ER 6, 25] Unreserved public domain lands and lands administered by the U.S. Bureau of Land Management ("BLM") are not CSUs. [ER 12] The National Petroleum Reserve in Alaska is not a CSU.

subsistence hunting and fishing by rural residents, but only on federal "public lands." 16 U.S.C. §§ 3113-3114.

Fifteen years later, in *Katie John I*, this Court rejected Katie John's argument that "public lands" under ANILCA "include virtually all navigable waters, by virtue of the federal navigational servitude" and overturned the district court's "highly expansive" decision accepting that argument. *Alaska v. Babbitt*, 72 F.3d 698, 700-01 (9th Cir. 1995) ("*Katie John I*"), *adhered to en banc following remand in John v. United States*, 247 F.3d 1032 (9th Cir. 2001). This Court concluded: "If we were to adopt Katie John's position, that public lands include all navigable waters, we would give federal agencies control over all such waters in Alaska. ***ANILCA does not support such a complete assertion of federal control*** and the federal agencies do not ask to have that control." *Id*. at 704 (emphasis added).

Instead, the Court concluded that Congress "implicitly reserved appurtenant waters . . . to the extent needed to accomplish the purposes of the reservations," and, therefore, "[b]y virtue of its reserved water rights, the United States has

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P.L. 94-258, 90 Stat. 303 (enacted Apr. 5, 1976), amended P.L. 96-514, 94 Stat. 2964 (Dec. 12, 1980).

"ER" refers to the Katie John Plaintiffs' Excerpt of Record pages. "Supp. ER" refers to the State's Supplemental Excerpt of Record related to the Katie John Plaintiffs' appeal. Addenda materials are contained in the addenda to Katie John's Appellants' Brief filed May 14, 2010 or the State's Opening Brief filed June 4, 2010.

interests in ***some*** navigable waters." *Id.* at 700, 703 (emphasis added). The Court indicated the Secretaries of the Departments of Interior and Agriculture ("Secretaries") that administer the subsistence priority were responsible for identifying those waters. *Id.* at 703-04.

In response to the Secretaries' identification, Katie John now argues for an even more expansive definition of "public lands." She argues that Congress implicitly intended to reserve and assert federal control over all waters downstream and upstream of Alaska's national parks, refuges and other CSUs, giving as an example the entire Yukon River drainage, which drains most of interior Alaska. She argues that a purpose of CSUs is to protect fish and fish habitat, and since water flowing through the CSUs is a "biological necessity" for fish, FRWRs should exist upstream and downstream following the fish. [KJ Br. at 4-5]

Even though there is no support in ANILCA or FRWR law for such an expansive, unlimited assertion of reserved waters and federal jurisdiction, Katie John argues that the Secretaries are *mandated* to make such claims. Additionally, ignoring ANILCA and other statutes, she argues that Congress intended to create, and the Secretaries must assert, unlimited FRWRs in connection with thousands of Alaska Native allotments scattered throughout Alaska.

As the District Court correctly held, nothing in ANILCA, *Katie John I*, or other law supports such a complete assertion of federal control. [ER 3, 61-78, 86-

87] In its "which waters" decision, the District Court ruled that the Secretaries properly declined to declare FRWRs in waters upstream and downstream of federal reservations and, as a matter of law, Alaska Native allotments do not have FRWRs. [ER 59-65, 70-76]

The District Court reached the correct result for essentially the right reasons in rejecting Katie John's claims. However, elsewhere in its "which waters" decision it did not apply the correct analysis or reach the correct result, as explained in the State's opening appellant's brief, and some of its misperception invaded its discussion of Katie John's claims. Thus, certain statements in its 85-page "which waters" decision are incorrect or subject to being misconstrued, as Katie John does in her Statement of the Case and elsewhere in her brief.

In particular, Katie John builds on the District Court's confusion over the *existence* of a FRWR within a federal reservation and the possible need to *enforce* a FRWR at some future time off-site. [KJ Br. at 5] The District Court stated "The day may come when the Secretaries will have to be concerned about water flows, both upstream and downstream from CSUs." [ER 63] Katie John finds in this an "implicit proposition that a reserved water right that does not exist today can nonetheless spring into being" if there is a future enforcement need, and argues that this mandates a determination that FRWRs presently exist without limitation outside reserved lands. [KJ Br. 5] But she confuses the need sometimes to enforce

an in-reservation FRWR at locations upstream or downstream of that reservation if there is a water shortage, interruption or interference affecting water flow within the reservation – as was the case in *Cappaert v. United States*, 426 U.S. 128 (1976), and *Winters v. United States*, 207 U.S. 564 (1908), discussed *infra*. There is no authority for the proposition that upstream and downstream FRWRs exist today or that they may somehow spring into being in the future.

Regarding allotments, Katie John claims the District Court "disregarded the substantial federal interests in Alaska Native allotments" in holding that those allotments do not carry or give rise to FRWRs. [KJ Br. 6-7] To the contrary, the Court properly considered ANILCA, *Katie John I*, and the nature of Alaska Native allotments as private holdings owned by the allottees in fee, not federal reservations or former Indian reservation lands with FRWRs. [ER 73-76] Although the District Court also discussed the unworkable "checkerboarding of jurisdiction" which would result from a contrary holding [KJ Br. 6], that was not the primary basis of its holding.

While the District Court correctly rejected Katie John's arguments on upstream, downstream, and allottee FRWRs as meritless, it is not necessary to reach those merits because, as discussed below, whether to assert a FRWR in particular waters is a matter of unreviewable agency discretion. This Court can

affirm on any basis shown in the record, including this threshold issue incorrectly rejected by the court below. [ER 30-31]

RESPONSE TO KATIE JOHN'S STATEMENT OF FACTS

Katie John constructs a biased historical story to support her perspective. It is a story she compiles from secondary sources she selects, interprets and presents as "fact" without regard to context, nuance, or other interpretation. Ultimately, such "facts" are irrelevant to Katie John's appeal. The critical legal issues are whether agency choices not to assert the expansive FRWRs which Katie John advocates are subject to judicial review, whether FRWRs validly exist in waters distant from federal land reservations, and whether Alaska Native allotments give rise to FRWRs. Katie John presents virtually no facts pertinent to these issues. In addition, the materials Katie John presents to flavor her "facts" are not part of the administrative record in this Administrative Procedure Act ("APA") proceeding and are improper on that basis.[4]

Katie John's selective reliance on secondary sources, including Native rights advocates, for analysis of legislation and legislative history [KJ Br. 8-10] is particularly unavailing given her failure to address the pertinent legislation and primary legislative history. For example, she cites a Native rights advocate for the

[4] 5 U.S.C. § 706; *City of Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). The State objected to Katie John's use of the outside materials she again uses on appeal [Supp. ER at 2], but the District Court did not address that objection.

proposition that "the federal government has consistently acted to protect the hunting and fishing rights of Alaska Natives" and secondary sources on general history and intent of the Alaska Native Allotment Act of 1906. [KJ Br. 8] Yet she fails to mention the distinction between Alaska Native allotments,[5] which were "homesteads" created from unreserved public domain in Alaska that carries no FRWR, and 1887 Dawes Act Indian allotments,[6] which were carved many years earlier from established Indian Reservations in the contiguous United States and often carried with them the reserved water right of the reservation. She also fails to consider that the Alaska Native Claims Settlement Act ("ANCSA") explicitly extinguished "[a]ll aboriginal titles, if any, [and] all claims . . . of aboriginal right, title, use, or occupancy of land or water areas in Alaska," including any "fishing rights" that may have been held or referenced in the Alaska Statehood Act.[7] Subsequently, in enacting Title VIII of ANILCA, Congress provided the federal subsistence priority to Alaska rural Natives and non-Natives alike, giving no preference to Native practices or allotments.[8] Katie John's attempts to use pre-ANCSA conditions and aboriginal fishing practices to support her claims ignore ANCSA and ANILCA and are simply irrelevant.

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5 34 Stat. 197 (1906).

6 24 Stat. 388 (1887).

7 *Katie John I*, 72 F.3d at 700; *United States v. Atlantic Richfield Co*., 612 F.2d. 1132, 1134-36 (9th Cir. 1980).

8 *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 555 (1987); *Hoonah Indian Ass'n v. Morrison*, 170 F.3d 1223, 1228-29 (9th Cir. 1999).

Another crucial overarching fact that Katie John ignores – but which her Yukon River test case helps demonstrate – is the staggering, far-reaching effect that Congress surely did not intend if the Secretaries are compelled to expansively declare categorical FRWRs in waters downstream and upstream from ANILCA land reservations and in waters bordering all Alaska Native allotments. Starting in Canada, the Yukon River flows approximately 1,324 miles across Alaska to the Bering Sea. The Yukon River drainage, including the Yukon tributaries Katie John's claims would reach, covers fully 35% of Alaska, or 205,000 square miles, an area equaling the same land mass as the entire Pacific Northwest. [ER 222]

Further, much more than even the vast Yukon River drainage is implicated. If Katie John's unprecedented claim is extended to all other waters in Alaska downstream or upstream from the 34 federal reservations listed in the Secretaries' 1999 rulemaking (including non-CSUs),[9] many additional hundreds of thousands of miles of major waterways, their tributaries, other streams and lakes would become subjected to FRWRs and transmuted into Title VIII "public lands" subject to preemptive federal authority. This expansion would be exacerbated by giving

[9] *Final Rule*, 64 Fed. Reg. 1276, 1287 (Jan. 8, 1999) [ER 241]. The 34 reservations listed in the Secretaries' *Final Rule* at issue already cover roughly 170 million acres, which is about half of Alaska. ANILCA established approximately 104 million acres of those reservations, Cong. Rec. S 11119 (Aug. 18, 1980), and the rest were established pre-ANILCA.

FRWRs to thousands of individual allotments as "reservation" holdings (and also, by extension, to the waters downstream and upstream of them).[10]

Katie John's "factual" representation that *all* CSUs (and, by implication, all national purpose reservations in Alaska) have as a "primary purpose" protecting subsistence resources [KJ Br. 11] is also incorrect.[11]

Another critical point Katie John obscures is that "subsistence", as she broadly presents the term (including in the references and reports she cites outside the administrative record), is not as limited as the federal subsistence concept defined in ANILCA. Factually speaking, subsistence use of fish means the use of fish obtained for sustenance from all available sources other than commercial fisheries, including fish taken per State-regulated subsistence, sport, and other personal use fisheries. Thus, the general importance of "subsistence uses of Yukon River fisheries" [KJ Br. 12] does not equate with the unlimited expansion Katie John proposes for the federal subsistence program in waters beyond the boundaries of federal reservations contrary to ANILCA, the FRWR doctrine, and *Katie John I*.

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[10] As of August 9, 1995, before the Secretaries' *Final Rule* was issued, the Department of the Interior ("DOI") concluded that approximately 12,300 Alaska Native allotments "scattered" throughout Alaska had been conveyed or were under application. [ER 134, 233]

[11] *See* note 3 *supra*. In addition, by law no subsistence use is permitted in Glacier Bay National Park, Kenai Fjords National Park, Katmai National Park, or that portion of Denali National Park established as Mt. McKinley National Park prior to the passage of ANILCA. [ER 240-241] Subsistence is also not listed as a purpose in the Kenai NWR. [ER 130 n.5]

STANDARD OF REVIEW

Under the Administrative Procedure Act ("APA"), a reviewing court sets aside agency *action* that is contrary to law, was taken not in observance of proper procedure, or is arbitrary and capricious. 5 U.S.C. § 706(2). However, claims that the agency has *failed* to take some *specific* action desired by a plaintiff, such as the Secretaries' choices not to identify, assert or claim FRWRs in upstream/downstream waters or for Alaska Native allotments, are not subject to judicial review. *Heckler v. Chaney*, 470 U.S. 821 (1985); *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1478-82, 1484 (D.C. Cir. 1995); *Sierra Club v. Yeutter*, 911 F.2d 1405, 1414 (10th Cir. 1990).

Furthermore, a reviewing court may order an agency to take specific action it did not take only if there is a discrete legal mandate to take such action. *Norton v. Southern Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 62-64 (2004).

Katie John also relies on ANILCA section 807 (16 U.S.C. § 3117) [KJ Br. at 1], but that "judicial review" section does not provide a *standard* of review independent of the APA. It is well settled that a statute (e.g., ANILCA) may provide the mechanism for review, but the APA sets the scope of review. *See* 5 U.S.C. § 704; *Village of False Pass v. Clark*, 733 F.2d 605, 609-610 (9th Cir. 1984). Since ANILCA section 807 does not provide a standard of review, it does not change the APA standard of review set forth in 5 U.S.C. § 706.

In addition, ANILCA section 807 was designed to enable rural residents to challenge fish and game harvest or allocation actions. Its legislative history refers to the "failure to adequately restrict the harvest of a particular fish or wildlife population" as the kind of action to be addressed by this provision. S. Rept. 96-413, Nov. 14, 1979 at 272. Declaring expansive FRWRs on virtually every water body in Alaska lying downstream, upstream and outside of any federal reservation is not the kind of relief contemplated by section 807.

SUMMARY OF ARGUMENT

Katie John seeks to extend FRWRs, and federal subsistence control, to virtually all stretches of all rivers, streams, and lakes in Alaska, navigable and non-navigable, contrary to this Court's determination in *Katie John I* that ANILCA does not authorize "federal control . . . over all such waters." 72 F.3d at 704. She wants this Court to force the Secretaries to undertake this unprecedented rewriting and expansion of the FRWR doctrine as mandatory administrative action, where those federal authorities have no affirmative duty under the law to do so.

The Secretaries deliberately chose not to make unprecedented FRWR claims to non-appurtenant downstream and upstream waters, or in waters next to Alaska Native allotments, and they cannot be compelled to do so. They have unreviewable discretion not to assert these unprecedented claims. 5 U.S.C. § 701(a)(2). Additionally, non-assertion of FRWRs is agency inaction. No statute

imposes a discrete non-discretionary duty on the Secretaries to assert FRWRs in upstream/downstream and allotment waters. Hence, the APA does not authorize a reviewing court to compel the agency action Katie John desires. 5 U.S.C. § 706(1).

The District Court rejected Katie John's novel claims on the merits. It correctly concluded that based on *Katie John I* the Secretaries' determination that FRWRs and federal subsistence control do not extend to Alaska waters upstream and downstream of federal CSUs was reasonable. The law also does not allow a FRWR for Alaska Native allotments. FRWR law and ANILCA, including its water rights savings clause (16 U.S.C. §3207), do not authorize such expansive FRWRs, let alone require the Secretaries to assert them, and the clear statement rule further militates against them. Thus, it was not error for the Secretaries and District Court to deny them. The only error was in the District Court's suggestion that the Secretaries might later determine FRWRs exist in some of those areas.

The case law squarely provides that FRWRs exist only within reserved public lands such as the national refuges, parks and preserves constituting the CSUs reserved in ANILCA, and then only to the minimum extent necessary to fulfill the primary purposes of the reservations. Reservation boundaries are thus crucial in this case. They define and limit the areas to which a FRWR might possibly be shown to apply under federal law insofar as relevant to this case.

Katie John's attempt to leverage the "biological necessity" of water for fish passage downstream and upstream of national reservation lands into a FRWR existing outside of those lands fails. FRWRs have a direct nexus to specific reserved uplands; they are not free-floating or attached to migratory salmon. The possibility that a water diversion some day may impact the supply of water required within a reservation, leading to a possible future enforcement action outside the reservation, does not change the location of the onsite FRWR or otherwise support establishing upstream and downstream FRWRs.

In her argument on allotments, Katie John seeks to convert the determination of FRWRs applicable to this case into an Indian treaty matter – which it is not – and into an 1887 Indian General Allotment, or Dawes Act, Indian reservation "tribal" allotment case – which it also is not. The law relating to 19th-century treaties and Indian reservation allotments with and for non-Alaska Indians has nothing to do with the determination of which of "some" waters in Alaska possess a valid FRWR under ANILCA. Congress expressly extinguished aboriginal fishing, hunting and land rights in Alaska in 1971 in ANCSA. Several years later, in ANILCA Title VIII, Congress gave Alaska rural residents – Natives and non-Natives alike – the right to engage in the priority taking of fish and wildlife resources from federal "public lands." *Katie John I* held that Congress intended to include only those "certain" waters in which a FRWR actually exists. Pre-

ANILCA treaties and allotments with non-Alaska Indians have no bearing on this determination.

The expansive consequences Katie John seeks would effectively nullify the Ninth Circuit Court's determination in *Katie John I* that ANILCA federal subsistence jurisdiction could apply only to those certain waters shown to have been impliedly reserved by the United States in conjunction with CSUs in Alaska. They would revive, in another form, the expansive "navigational servitude" theory of federal subsidence jurisdiction that the Ninth Circuit rejected in *Katie John I* and also violate the Alaska Statehood Act,[12] the Submerged Lands Act,[13] and ANILCA and threaten to pre-empt the traditional management authority of Alaska and the other states over fish and game. That should not be allowed.

If allowed, the result Katie John seeks from this Court could also logically extend FRWRs to all river stretches and other waters upstream and downstream of all other national parks, preserves, refuges and other CSUs throughout the United States which also have as a primary purpose "the protection of habitat for, and populations of, fish and wildlife." [KJ Br. 11] That includes those CSUs outside Alaska containing fish and other aquatic wildlife, including birds, whose life cycles take them up and down rivers and between states and the United States and Canada

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[12] P.L. 85-508, 72 Stat. 339.

[13] *See esp*. 43 U.S.C. §§ 1301 (a) & (e), 1311 (a), 1314 (a); *United States v. California*, 436 U.S. 32, 33-37 (1978).

[*id*. at 11-15] – since those other national CSUs also "demand[] water as a biological necessity in order to be fulfilled" according to Katie John [*id*. at 11]. As the Alaska Regional Solicitor for the Department of the Interior (DOI) stated in an August 9, 1995 Memorandum the Katie John Plaintiffs cite on appeal:

> [T]his need [for minimum instream flows to protect fish "within the federal reservations"] is substantially similar to the situation in many parks and refuges in the lower 48 states. For this reason, we cannot agree that an assertion of off-reservation water rights in Alaska would have no implications for national parks and refuges in other states. In general, members of the Alaska Policy Group [a group of federal agency representatives assigned by the Secretaries to recommend implementation of the *Katie John* decision][14] were quite concerned that the assertion of off-reservation water rights for parks and refuges in Alaska could have precedent-setting effects in federal parks and refuges elsewhere in the country.[15]

ARGUMENT

I. NOTHING IN THE LAW MANDATES THAT THIS COURT OR THE SECRETARIES FIND FRWRS IN THE NOVEL AREAS KATIE JOHN DEMANDS.

A. The Secretaries Have Discretion to Decline to Assert Tenuous FRWR Claims.

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[14] The Secretaries' Alaska Policy Group convened and issued recommendations after the Ninth Circuit Court's first "Katie John" opinion filed on April 20, 1995 (54 F.3d 549) and before the same panel's issuance of a new opinion on December 19, 1995 (72 F.3d 698, referred to herein as *Katie John I*). The second opinion withdrew the prior opinion. 72 F.3d at 699. The main difference in the two opinions was a member of the panel filed a dissenting opinion in the second opinion, *Katie John I*. The two majority opinions were virtually identical.

[15] [ER 130-131 (emphasis in original)].

In *Katie John I*, this Court held that the federal subsistence priority provided by ANILCA Title VIII may only exist in "some specific navigable waters" in which it can be shown a FRWR exists. 72 F.3d at 704. It cautioned: "If we were to adopt Katie John's position, that public lands include all navigable waters, we would give federal agencies control over all such waters in Alaska. ANILCA does not support such a complete assertion of federal control." *Id*. at 703-04.

In this case, the District Court properly rejected Katie John's repackaging of the same arguments for upstream, downstream, and allottee FRWRs on the merits, as discussed below.

However, it is not necessary to reach the merits because Katie John challenges an unreviewable exercise of administrative discretion: the Secretaries' decision to not assert FRWRs in upstream/downstream waters and in waters associated with allotments. 5 U.S.C. § 701(a)(2); *Heckler*, 470 U.S. at 831-832.

Over the years, various private parties who would secure advantages if FRWRs were established in particular waters have asked federal courts to compel the United States to file claims or take other steps to establish FRWRs. The courts have rejected these attempts, citing the *Heckler* presumption that decisions not to assert claims are "committed to agency discretion" under 5 U.S.C. § 701(a)(2). In *Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990), the court held that the Forest Service's decision to not assert FRWRs in 24 National Wilderness areas

could be judicially reviewed only if it was shown to be "irreconcilable" with the Service's statutory obligation to protect wilderness and concluded it was not. 911 F.2d at 1414.

Similarly, in *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476 (D.C. Cir. 1995) the court ruled that the United States' decision not to assert instream flow water rights in off-reservation waters as sought by the Tribes was unreviewable. 56 F.3d at 1478-82, 1484.[16] The circuit court upheld the district court's finding that the U.S. had no "clear and undisputable" duty to assert such FRWR claims for the benefit of the Indians for whom the U.S. served as trustee. *Id*. at 1482.

Because this Court in *Katie John I* held that FRWRs exist in "some" but not all navigable waters in Alaska and gave the Secretaries responsibility to identify those waters for purposes of administering the federal subsistence priority, 72 F.3d at 704, and because ANILCA is non-specific on the subject of "which waters" contain FRWRs, the Secretaries' non-assertion of FRWRs in upstream/downstream waters and for allotments is not "irreconcilable" with ANILCA or this Court's decision. *Yeutter,* 911 F.2d at 1407-10, 1414. Although ANILCA § 804 directs that the Secretaries provide a subsistence priority "on public lands," it does not impose a clear, undisputable direction or duty compelling the Secretaries to assert novel FRWR theories to aggressively expand the scope of "public lands" as Katie

[16] The Tribe wanted the United States to assert "water rights in the Snake River basin beyond the Fort Hall Reservation's boundaries." 56 F.3d at 1478.

John now demands. *Shoshone*, 56 F.3d at 1482. Thus, the Secretaries' decision not to assert novel FRWR claims, regardless of whether it is considered agency action or agency failure to act, is an unreviewable exercise of agency discretion.[17]

B. Failure to Assert a FRWR Claim Constitutes Unreviewable Agency Inaction.

Katie John challenges agency inaction. She challenges "the Secretaries' ***failure*** to assert" FRWRs specifically in the areas she wants. [KJ Br. at 1, Issue 3 (emphasis added)][18] Her complaint, in the words of the APA, is over "agency action unlawfully withheld," also known as a "failure to act" claim. 5 U.S.C. § 706(1).

Judicial review of failure to act claims is limited to cases where "an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. Southern Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 64 (2004) (emphasis in original). APA § 706(1) authorizes a court only to compel "enforcement of a specific, unequivocal command" in the statute, and only to order a "precise, definite act . . . about which [an official] had no discretion whatever," similar to the

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[17] Although the District Court correctly dismissed Katie John's claims on the merits, it did not address the State's arguments on this threshold APA issue. This Court can affirm on any basis shown in the record.

[18] *See also* Aug. 9, 1995 Memo. of DOI Alaska Regional Solicitor (considering "(1) whether to *assert* upstream and downstream reserved water rights outside the boundaries of federal reservations in order to fulfill subsistence purposes of the reservations; and (2) whether to *assert* [FRWRs] for Alaska Native allotments adjacent to waterways.") [ER 128 (emphasis in original and added)].

"traditional . . . mandamus remedy." 542 U.S. at 63. *Id.* at 64. Where the agency is under a duty to act but no duty to act in a specific manner, the court may only compel an agency "to take action upon a matter, without directing *how* it shall act." *Id.* (emphasis in original; citations omitted). *Accord, Center for Biological Diversity v. Veneman*, 394 F.3d 1108, 1110-13 (9th Cir. 2005) (Under *SUWA*, the Forest Service's statutory duty to give special protection and status to wild and scenic rivers is not specific enough to allow an APA Section 706(1) action to compel the Service to consider 57 specific rivers for this protection).

Nothing in the general holding in *Katie John I* or in ANILCA requires the Secretaries or the District Court to find, assert, claim or declare FRWRs in Katie John's chosen waters. As in *SUWA*, the Court in *Katie John I* at most directed an agency "to take action upon a matter, without directing *how* it shall act." 542 U.S. at 63 (emphasis in original).

There being no discrete non-discretionary duty on the party of the Federal Defendants to assert FRWRs in upstream/downstream waters and allotment waters, the Katie John plaintiffs fail to state a viable APA claim.[19]

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[19] Although ultimately denying Katie John's claims on the merits, the District Court incorrectly characterized the non-assertion of FRWRS in upstream/downstream and allotment waters as being action rather than inaction, stating that the Secretaries promulgated a rule, but one which Katie John alleged left out bodies of water with FRWRs. [ER 31] But a decision to assert some FRWRs, and seek to establish these rights via rulemaking (action), does not turn a simultaneous choice not to assert other claims or rights (inaction) into "action".

II. KATIE JOHN'S ARGUMENTS FOR RADICALLY EXTENDING FRWRs UPSTREAM AND DOWNSTREAM OF CSUs TO VIRTUALLY ALL WATERS IN ALASKA ARE WITHOUT MERIT.

A. FRWRs Do Not Exist in Extensive Water Reaches Downstream and Upstream from Federally Reserved Land.

Citing *Winters v. United States*, 207 U.S. 564 (1908), and some subsequent FRWR cases, Katie John argues that when Congress reserves land, it implicitly reserves water rights necessary to carry out the primary purposes for which the land was set aside regardless of where the waters are located in relation to the reservation. [KJ Br. at 29-30] She argues that fish and wildlife conservation and subsistence fishing are two purposes of most of the federal refuges and other CSUs established or expanded under ANILCA, and because salmon and wildlife migrate and rural persons fish and hunt upstream and downstream from the reservations and not just within them, unlimited FRWRs must also exist upstream and downstream from those reservations. [*Id*. at 31-34] She uses the Yukon River as her example, but seeks to apply FRWRs in all rivers, streams and lakes in Alaska which partially pass through – or whose upstream or downstream tributaries pass through – any part of any of the 34 reservation units listed in the Secretaries' 1999 rulemaking. Since those reservations already cover half of Alaska,[20] and since

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Otherwise, any "inaction" claim could be converted into an "action" claim by simply pointing to some agency document in which the agency considered going further or doing otherwise than it did.

[20] *See* note 9 *supra*.

Katie John also apparently includes the oceans and anywhere else salmon swim or wildlife migrate [*id*. at 33-34], it is hard to imagine any water within Alaska's borders to which she would not extend FRWRs and the federal subsistence priority.

1. Katie John Ignores the Courts' Geographic Limitations on Appurtenant FRWRs.

No case law supports Katie John's expansive position, and she ignores the basic elements in the FRWR doctrine – first, the element requiring that a FRWR be appurtenant to a particular parcel of reserved land. The FRWR must exist within reservation boundaries, at least in the case of a national purpose reservation such as those established by ANILCA.

Winters, the first decision in which the Court developed the FRWR doctrine, involved an absolute necessity for specific quantities of water within the reservation. The water was needed for the basic survival of the Indian residents and officers and the irrigation of their crops within the Fort Belknap Indian Reservation, which had a "dry and arid character [and was] practically valueless" without water. 207 U.S. at 565-66, 576. The Reservation's boundaries expressly extended to "the middle of the main channel of Milk river," but the right to use the water was not expressly included. *Id*. An irrigation company, a cattle company and several individuals sought to divert the river flow to their own uses upstream. *Id*. at 568.

The lower court decree enjoined the defendants from constructing or maintaining dams or reservoirs on the Milk River "in any manner interfering with the use by the government of the United States or the Indians, ***upon*** *the Ft. Belknap Indian Reservation*, of 5,000 inches of" water. *Winters v. United States*, 148 Fed. 684, 685 (9th Cir. 1906), *aff'd*., 207 U.S. at 565, 578 (emphasis added). The Supreme Court affirmed, concluding the intent of the agreement was to provide habitable lands for dependent tribal members and that could not occur without an implied reservation of right to the water within the reservation to raise the crops on which the Indians and officers relied. *Id*. at 575-76.

Winters does not help Katie John's position. Katie John is not seeking a right to draw water from within reservation boundaries for use on reservation uplands, as in *Winters*. She is not seeking a water right within reservation boundaries at all. She seeks imposition of FRWRs in waters outside reservation boundaries – indeed, many miles outside. In *Winters*, it was necessary to protect and enforce the right to water within the reservation by preventing its diversion and depletion upstream, but that did not give the Indians and officers of the reservation the right to collect water from upstream, outside the reservation, let alone the right to take water from all upstream and downstream sources, wherever located. It did not change the location of the reserved right from where it belonged – in the reservation.

Also, the federal reservations under ANILCA and *Katie John I* at issue here are national interest reservations carved from the public domain. Unlike the situation in *Winters*, they are not Indian reservations created by treaty under dependent circumstances warranting interpretation of any ambiguities and implications in the tribes' favor. 207 U.S. at 576-77. Enactment of ANCSA in 1971 explicitly extinguished all claims of aboriginal right in Alaska – including any "aboriginal fishing rights" – in return for vast lands and other benefits granted Alaska Natives in ANCSA. *Katie John I*, 72 F.3d at 700, citing ANCSA at 43 U.S.C. § 1603(b); *Atlantic Richfield Co.*, 612 F.2d at 1134-36.

In addition, this Court has held that the *Winters* rule that "Indian legislation" should normally be construed liberally "for the benefit of dependent Indian tribes" does not apply to ANILCA, including its subsistence provisions, which were intended by Congress to apply to "both [rural] Natives and non-Natives." *Hoonah Indian Ass'n*, 170 F.3d at 1229 (emphasis in original). "There could not be a plainer declaration that Congress was not passing Indian legislation." *Id.*

The Secretaries understood these essential points. *See* Issue Paper and Recommendations of the *Katie John* Alaska Policy Group, dated June 15, 1995 [Supp. ER 25-27]. As the Alaska Regional Solicitor for the Department of the Interior also stated in her August 9, 1995 Memorandum:

> [We disagree with the Division of Indian Affairs] that ANILCA should be interpreted as remedial "Indian legislation" with its broad canons of

> statutory construction benefiting Indians (DIA memorandum at pps. 5-6), and that these broad rules of construction support off-reservation assertion of water rights. * * * Indeed, ANILCA has extremely broad purposes, including, of course, the establishment and enlargement of millions of acres of national parks, refuges, monuments, wild and scenic rivers, and national forest monuments in Alaska. [I]n attempting to discern what the Ninth Circuit actually intended regarding the scope of the United States' assertion of reserved water rights as a result of the Katie John decision, we note that the court decided the Katie John case in the context of a well-established reserved water rights doctrine and body of jurisprudence which has developed in connection with parks and refuges in the lower 48 states. In that context, we are unaware of any situation where the United States has ever asserted (or a court has held) that a park or refuge's instream flow needs require the reservation of federal water rights in rivers (or portions thereof) located outside the park or refuge boundaries.

[ER 132-133 (emphasis in original)].

Indeed, any extraterritorial assertion of FRWRs to pre-empt State control over its waters involves "a significant impingement of the States' traditional and primary power over land and water use" – thus invoking the "clear statement" rule. *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); *John*, 247 F.3d at 1044-46 (dissenting opinion). That rule of construction militates against Katie John's position and instead requires that the Court find that Congress expressed an "unmistakably clear" intent to extend FRWRs extraterritorially against sovereign state interests. *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 209 (1998); *John*, 247 F.3d at 1045. Congress made no such clear statement in ANILCA, or elsewhere.

Cappaert v. United States, 426 U.S. 128 (1976), another FRWR decision on which Katie John relies, also does not support her position. There, the Supreme Court found an in-flow FRWR for a national interest reservation after 40 acres were added to the Death Valley National Monument in Nevada under the American Antiquities Preservation Act. This acreage was added expressly to give "special protection" to a unique variety of desert pupfish "found nowhere else in the world." *Id.* at 132. The fish was found in Devil's Hole, a rare 65-foot by 10-foot pool within a deep cavern located entirely within that reservation. The pool was fenced off by the National Park Service for scientific study and preservation. *Id.* at 131-134, 141-142. The intent of protecting the pool and "peculiar race of desert fish" within it was so instrumental to the reservation's purpose that the Court concluded reservation of the pool was itself "explicit". *Id*. at 132, 140.

Sixteen years after the President reserved Devil's Hole, the Cappaerts began pumping substantial quantities of groundwater 2 ½ miles from Devil's Hole for their ranch. *Id*. at 133. That caused a lowering of the pool of water within the reservation, which threatened the spawning ability and existence of the unique fish for which the reservation had been created. *Id*. at 133-34, 141.

The Supreme Court upheld the lower court's injunction against the Cappaerts' unrestrained pumping, but only after emphasizing that the injunction was carefully tailored to curtail their off-reservation pumping to the minimum

extent necessary to preserve the on-reservation "water level ***at Devil's Hole***" necessary to the survival of those extraordinary fish. *Id*. at 141 (emphasis added) & 143 n.7.

Cappaert does not support Katie John's theory that FRWRs exist upstream and downstream of the reservations in this case. The Supreme Court emphasized that the reserved right it was protecting was to the "pool" of "surface water" lying within the reservation, not a FRWR to groundwater or to any water lying outside the reservation. *Id*. at 142-43. Protecting that water level from "subsequent diversion, whether the diversion is of surface or groundwater" or from outside the reservation, did not change the location of the federal water right being protected. *Id*. Although enforcement off-reservation may be necessitated by the flowing nature of water, the FRWR exists in the pool of on-reservation water. The ability to enforce the FRWR against diversion does not fix or establish the FRWR within distant off-reservation waters.[21]

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[21] This clarification also answers Katie John's "hydrolic connectivity" argument. [KJ Br. 42] The fact water also flows underground does not place FRWRs everywhere underground water flows, especially outside the reservation (or even under the reservation). As the Supreme Court observed in *Cappaert*, "No cases of this Court have applied the doctrine of implied reservation of water rights to groundwater." 426 U.S. at 142. Katie John also quotes from *Colville v. Confederated Tribes v. Walton*, 647 F.2d 42, 45 (9th Circuit 1981), but as this Court stated there in the highlighted portion which Katie John omits: "The No Name hydrological system, consisting of an underground aquifer and the [No Name] creek, ***is located entirely on the Colville*** **[Indian]** ***Reservation***." (Emphasis added.) Katie John's additional quotation lifted out of context from the "clear

Katie John also cites *United States v. Alaska*, 423 F.2d 764 (9th Cir. 1970). [KJ Br. 30] But that was a case over ownership of the bed of a large lake lying within the Kenai National Moose Range (now Kenai NWR) reserved before statehood. 423 F.2d at 765-68. It was not a FRWR case, which is different. *Arizona v. California*, 373 U.S. 546, 597-98 (1963). In any event, the lake in that case lay ***within*** the Kenai Moose Range, not somewhere downstream or upstream of it, 423 F.2d at 765-66, and, despite the "semi-aquatic" interests of the moose the court found fascinating, title to the lakebed (or waters) was not allowed to follow the moose as they left the refuge, *id*. at 767.

In addition, it is significant that *Katie John I*, in which this Court adopted the FRWR doctrine, was decided in the context of Katie John's fishing near the confluence of the Copper River and Tanada Creek "***within***" and "***in the midst of***" the Wrangell-St. Elias National Park, not somewhere outside that reservation. 72 F.3d at 700, 704.

2. Katie John Misinterprets and Misapplies the "Specific Primary Purpose" Element Required to Establish a FWRW.

A second element of the test for establishing a FRWR is the "specific primary purpose" element. Katie John misinterprets and misapplies this element. She cites the Supreme Court's latest FRWR decision, *United States v. New Mexico*,

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statement rule" opinion in *Solid Waste Agency*, 531 U.S. 159 (2001), is also misplaced and not helpful to her FRWR position.

438 U.S.696 (1978), for the proposition that "the Court's approach [in *Winters*] has been applied in subsequent cases to a broad spectrum of federal reservations of land." [KJ Br. at 30] However, *New Mexico* is most notable for the Court's emphasis on the FRWR doctrine's *limitations* and its strict interpretation of the doctrine, particularly as applied to non-Indian reservations. That includes the requirement that the proponent for a FRWR must establish that the water is necessary to fulfill a specific primary purpose, and not just some "secondary" or permissive purpose, of the reservation of land. *New Mexico*, 438 U.S. at 702-03; *Sierra Club*, 659 F.2d at 206.

In *New Mexico*, which involved a national forest reservation, the Court emphasized that whether a FRWR exists at all, and if so to what extent, depends on Congress' ***intent***, and under the Court's "implied-reservation-of-water doctrine" the Court will construe that intent in such a manner "that Congress reserved 'only that amount of water necessary to fulfill the purpose of the reservation, *no more*.'" 438 U.S. at 698, 700 (quoting *Cappaert*, 426 U.S. at 141) (emphasis added). *New Mexico* also directs that the intent to reserve a FRWR exists only "to fulfill the very purposes" for which the reservation was created and not some "secondary use of the reservation," *id*. at 702, and then only where "the specific purposes for which the land was reserved . . . would be entirely defeated" without it. *Id*. at 700 (discussing *Winters* and *Cappaert*). In *Winters*, the water right was essential to

human survival on the Indian reservation (207 U.S. at 565-66, 576), and in *Cappaert* protecting the unique pool for the "peculiar race of desert fish" was so instrumental to the reservation's purpose that the Court concluded Congress' intent to reserve the pool was "explicit" (426 U.S. at 132, 140) On the other hand, in *New Mexico*, the Court held that Congress, in setting aside the Gila National Forest from other public lands, did not intend to reserve any water within the Forest for aesthetic, environmental, recreational, "fish-preservation", or "wildlife-preservation" purposes also allowed within the Forest. *Id*. at 705-708.

In *Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir. 1981), the Circuit Court found "totally without merit" plaintiff's claim that FLPMA[22] "conferred by implication federal reserved water rights in waters appurtenant to lands managed by the Bureau of Land Management." 659 F.2d at 205. Discussing and applying "the controlling principles" in *New Mexico* and *Cappaert*, the court concluded that because FLPMA applies to lands administered by the BLM and those lands constitute public domain rather than reserved lands, no FRWRs could be intended by FLPMA. *Id*. at 205-06. It agreed with the Federal Government's analysis, applicable here, that:

> Under the controlling decisions of the Supreme Court, the distinction between reservation and unreserved public lands is fundamental. *Reserved rights attach only to the former, and then only when water is necessary to fulfill the primary purpose of the reservation. No water is reserved for uses*

[22] Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 *et seq*.

> *that are merely permissive on a reservation.* A fortiori, then, no reserved rights arise under [FLPMA], for no reservation of land is affected.

Id. at 206 (emphasis added).[23] The purposes of the reservations at issue are discussed further in the next subsection.

B. ANILCA Plainly Limits Any FRWRs for Conservation System Units to Waters Within a Reservation and for the Reservation's Primary Purpose, Contrary to Katie John's Novel Downstream/Upstream Claims.

Nothing in ANILCA or in any other legislation regarding the CSUs addressed by Katie John's appeal favors finding an upstream or downstream FRWR by implication. Certainly by the time Congress passed ANILCA in 1980, it knew its power to reserve water rights ***expressly*** and would have sought to expressly reserve FRWRs in waters upstream or downstream of the reservations it created had it intended that unprecedented result.

Instead, the only reference to FRWRs anywhere in ANILCA is in the Act's savings clause, § 1319(1), which prescribes that "***nothing in this Act*** shall be construed . . . as affecting in any way law governing appropriation *or* ***use of***, *or* ***Federal right to, water*** on lands within the State of Alaska." 16 U.S.C. § 3207 (emphasis added). In *Sierra Club v. Watt*, 659 F.2d at 206, the D.C. Circuit found

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[23] In an analysis pertinent to the "failure to act" nature of Katie John's challenge (*see* discussion *supra* at page 18-20), the Circuit Court also questioned the "propriety of a court order directing the United States to assume a particular posture" and ruled that the district court "did not err when it declined" to do so. 659 F.2d at 205-06.

that a virtually identical water rights savings clause in FLPMA precluded finding any FRWRs. At the very least, this same restrictive clause in ANILCA precludes reading the Act as stretching the FRWR doctrine to entire lengths of rivers outside the reservations explicitly established by ANILCA.

Citing ANILCA §§ 301-304 generally (16 U.S.C. § 668dd note) – and the Yukon Flats National Wildlife Refuge ("NWR") in particular (ANILCA § 302(9)(B)(iv)) – Katie John argues that one of the purposes given by Congress for establishing the refuge units in ANILCA Title III was: "(iv) to ensure . . . water quality and necessary water quantity ***within the refuge***." [KJ Br. 32 (emphasis added)] Identical or virtually identical language appears in other ANILCA sections designating refuges. S*ee, e.g.*, ANILCA §§ 302(3)((B)(iv), 302(4)(B)(iv), 303(6)(B)(iv), 303(7)(B)(iv).

However, Congressional intent to reserve a specific *right* to water through that general language is unclear – unlike the compelling circumstances and "explicit" intent expressed for the pool addressed in *Cappaert*. 426 U.S. at 132, 140.

Moreover, if that language Katie John cites created a FRWR, it is, by its ***express*** terms, for the sole purpose of ensuring water quality and "***necessary***" water quantity "***within the refuge***." It does not demonstrate that Congress intended to reserve rights in extraterritorial water or intended an unlimited

extension of federal subsistence jurisdiction. To the contrary, ANILCA's expressed purpose of establishing CSUs to provide various protections ***within*** designated units supports the conclusion that those protections and any federal jurisdiction relying on reserved rights ends at the reservation boundaries Congress drew.

For other ANILCA units, Katie John's claims for upstream and downstream FRWRs are even weaker. Although she represents that "Congress repeated these same purposes" in creating National Parks and Preserves in ANILCA Title II, §§ 201-202 [KJ Br. 32], that is not the case. In addition, several of those parks (Kenai Fjords National Park, Katmai National Park, Glacier Bay National Park, and most of Denali National Park) ***prohibit*** any subsistence taking or use within their boundaries. ANILCA §§ 201-203 (16 U.S.C. §§ 410hh-1 and 410hh-2); [ER 240]. Hence, there could be no justification for the Secretaries to declare FRWRs for federal subsistence fishing upstream and downstream of those parks (or even within them).

Different, quite general purposes also exist for the Steese Conservation Area and White Mountain Recreation Area created under ANILCA Title IV for BLM administration in accordance with FLPMA (which implies no FRWRs, *Sierra Club*, 659 F.2d at 205-06); for the National Forest additions and National Forest Monuments established under Title V; for the Wild and Scenic Rivers located

within and outside of the National Park System and the National Wildlife Refuge System (Title VI); and for the designated National Wilderness areas (Title VII). As earlier noted, the two large national forests in Alaska, the Tongass covering most of Southeast Alaska and the Chugach covering much of Southcentral Alaska, are not listed as CSUs in ANILCA and their FRWR purposes are timber and timber watershed preservation, not the fish-preservation purpose which is the premise of Katie John's upstream/downstream argument. [ER 6, 25]; *New Mexico*, 438 U.S. at 705-708.

In addition, paragraph (iii) of ANILCA's refuge purpose sections lists the opportunity for continued subsistence uses by local residents in the refuges as a permissive use, insofar as "consistent with the purposes set forth in subparagraphs (i) [conservation] and (ii) [fulfilling international treaties]," and paragraph (iv) of those sections evidences Congress intended "water quality and quantity" as a refuge purpose "for the purposes set forth in ***paragraph (i)***" of that section, which is "to ***conserve*** fish and wildlife populations and habitats in their natural diversity." *See, e.g.*, ANILCA §§ 302(9)(B) (i) & (iii), 303(7)(B)(i) & (iii) (emphasis added).[24]

[24] *Accord*, ANILCA § 101(c), providing "the opportunity for rural residents engaged in a subsistence way of life to continue to do so" insofar as "*consistent* with . . . the *purposes* for which *each conservation system unit* is established . . . ." 16 U.S.C. 3101(c) (emphasis added).

Katie John I held that the subsistence use preference provided by Title VIII of ANILCA applies to waters, as federal "public lands", in which the United States already holds a FRWR as a result of its separate reservations of "parcels of land." 72 F.3d at 703. But the provision favoring subsistence use on "public lands", including reserved lands and waters, once reserved, can not fairly be bootstrapped into a primary purpose of the reservation justifying a FRWR itself, and certainly not one extending such FRWRs as exist within the reservation to outside waters upstream or downstream of those reservations. As was held in *Sierra Club v. Watt*, "*No water is reserved for uses that are merely permissive* [even] *on a reservation*." 659 F.2d at 206 (emphasis added); *Accord, New Mexico*, 438 U.S. 696. As the Secretaries also concluded, "the scope of reserved water rights (in refuges, for example) is determined by reference *to the refuge purposes set forth in Title III of ANILCA, not Title VIII* . . . ." [ER 132 n.11 (emphasis added)]

Thus, Katie John's "purpose" arguments [KJ Br. 17-18, 31-43] actually relate to only one title (Title III) of ANILCA, regarding refuges, and the chief purpose she seeks to use to argue for downstream and upstream FRWRs, subsistence, is a secondary, permissive use for those refuges.[25]

C. The Yukon River Example Does Not Support Katie John's Claim.

[25] And even one of those, the very popular Kenai National Wildlife Refuge in south-central Alaska, does not list subsistence as a purpose of the refuge, even secondarily. [ER 130]

Katie John chooses the Yukon River as "illustrative" of her unprecedented assertion that the Court must compel the Secretaries to assert FRWRs in waters far outside federally reserved lands. But the Yukon and its uplands stand on their own facts. In fact, the Secretaries *did* assert FRWRs over most of the Yukon River. They declared a FRWR for subsistence use within the three reaches of the Yukon River which flow through the Yukon Flats NWR, the Yukon Delta NWR, and the Yukon-Charley National Preserve. Taken together, those three reaches constitute over half (677 miles) of the Yukon River flowing within Alaska (1,324 miles). Two other NWR units, the Nowitna NWR and the Innoko NWR, border on the near bank of about 280 miles of the Yukon River, though the River itself flows outside of those reservations. The Secretaries asserted FRWRs in these sections as well. They declined to assert FRWRs only in about 367 miles of the Yukon River covering five sections flowing ***between*** CSUs.[26]

The Secretaries' failure to act as Katie John wants in the case of those additional 367 miles of the Yukon River is consistent with applicable law. Among the reasons already stated, Congress expressly and plainly listed only "water quality and necessary water quantity ***within*** the refuge" among the purposes of

[26] The 367 miles to which the Secretaries did not assert FRWRs flow (heading downstream) between: (1) the Yukon-Charley National Preserve and Yukon Flats NWR; (2) the Yukon Flats NWR and Nowitna NWR; (3) the Nowitna NWR and Innoko NWR; (4) separate sections of the Innoko NWR unit; and (5) the Innoko NWR and the Yukon Delta NWR, and so upstream and downstream of those units.

those refuge units,[27] so the geographic extent of any FRWR that may exist in relation to those units is limited, at the very least, to waters inside those units. Otherwise, Katie John's novel claims would extend FRWRs (and claims of preemptive Federal jurisdiction) to hundreds of miles of the Yukon River far removed from federal reservations – contrary to the requirements for FRWRs enunciated by the Supreme Court in *New Mexico* and *Cappaert.*

There is also no merit in Katie John's attempt to imply FRWRs for subsistence fishing in these Yukon River miles lying upstream and downstream of the CSUs based on international treaty arrangements between the United States and Canada regarding the conservation and harvest control of Yukon River Chinook salmon. [KJ Br. 38-39] She ignores that the United States' treaty power is complete, *Missouri v. Holland*, 252 U.S. 416 (1920), and in no way dependent on a FRWR "property interest", subsistence, or Title VIII of ANILCA for its authority or enforcement – especially outside the reservations chosen by Congress. By ANILCA's terms, the permissive subsistence opportunity is made subject to fulfilling those treaty obligations. Subsistence harvests of Chinook salmon serve to diminish those salmon stocks, not conserve them, and have actually had to be curtailed to endeavor to fulfill those treaty arrangements in recent years. There is no legal or factual justification for using an international Chinook salmon

[27] S*ee* ANILCA §§ 302(3)((B)(iv), 302(6)(B)(iv), 302(9)(B)(iv) & 303(7)(B)(iv) (emphasis added).

conservation treaty to imply FRWRs to harvest all types of fish downstream and upstream of the federal reservations, which only list the fulfillment of international treaty obligations regarding fish conservation within those reservations as a purpose (and only as to one species of fish on one river).

Thus, none of Katie John's various "fish purpose" arguments – which are purposes for the reservations themselves, and then only as to some of the reservations at issue – show an express or implied intent to reserve waters running downstream and upstream of the reservation boundaries actually provided by Congress, or show that the Secretaries erred in declining to assert FRWRs in those distant waters. The FRWR doctrine does not extend to waterways miles downstream or upstream from ANILCA's conservation purpose reservations, on the Yukon River or elsewhere.

D. Katie John's Unprecedented Downstream/Upstream Theory Relies on Additional Inapplicable Sources Involving Different Rights.

Katie John also cites (without analysis) four court opinions and a June 6, 1995 Memorandum of an Assistant Solicitor of the Division of Indian Affairs ("DIA") to the Interior Department's *Katie John* Alaska Policy Group[28] for her contention that FRWRs exist off-reservation in stream flows where "necessary to

[28] As earlier noted, the Alaska Policy Group was a group of federal agency representatives assigned by the Secretaries to recommend implementation of the *Katie John I* decision. [Supp. ER 5-9]

maintain fish, fish habitat, and other federal purposes." [KJ Br. 36-37] However, those court opinions are inapplicable, and the view of the DIA Assistant solicitor was rejected.

Federal Power Commission v. Oregon, 349 U.S. 435 (1960), concerned the jurisdiction of the Commission to license a water power project (dam) on lands located within several federal Power Site Reserves. It did not mention FRWRs, and in no way supports Plaintiffs' position regarding off-reservation FRWRs.

United States v. Walker River Irrigation District, 104 F.2d 334 (9th Cir. 1939), like *Winters*, involved an Indian reservation in an arid area dependent on taking water from a non-navigable stream within its borders. 104 F.2d at 335. The court enjoined upstream users who sought to interfere with the flow of water to the reservation, but only in the specified amount needed on the reservation. *Id*. at 340.

United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), is another Indian reservation case. *Adair* concerned the Klamath Indians' 1864 treaty water rights associated with fishing and hunting. By treaty the Klamath Tribe relinquished all aboriginal claim to some 12 million acres of its ancestral domain in return for exclusive use and occupancy of an 800,000 acre reservation established by the treaty. 723 at 1398, 1413-14. The court found a FRWR within that treaty limited to the location of the reserved lands:

> [T]he [United States] Government and the Tribe intended to reserve a quantity of the water flowing ***through the reservation*** not only for the

> purpose of supporting Klamath agriculture, but also for the purpose of maintaining the Tribe's treaty right to hunt and fish ***on reservation lands***.

723 F.2d at 1410 (emphasis added). The court enjoined persons outside the reservation from interfering with sufficient water flow to the reservation area to satisfy the Klamath tribe members surviving reservation rights. *Id*. at 1411.[29]

Muckleshoot Indian Tribe v. Trans-Canada Enterprises, Ltd., 713 F.2d 455 (9th Cir. 1983), also cited by Katie John, concerned an Indian reservation through which navigable waters flowed in which the Tribe apparently had a right to fish, but that was not a FRWR case and the submerged lands and waters were clearly within the reservation boundaries. 713 F.2d at 457-58.

The DIA Assistant Solicitor's assertion quoted by the Katie John Plaintiffs [KJ Br. at 37] was rejected by the federal agency *Katie John* Alaska Policy Group as also inapplicable to this case, for good reason. As the Alaska Regional Solicitor concluded in her August 9, 1995, Memorandum in response:

> [W]e are unaware of any circumstance elsewhere where the United States has asserted that a park or refuge reserved water right extends outside the park or refuge boundaries in order to maintain instream flows in a portion of the watercourse located outside the boundaries. While Indian water rights

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[29] In *Adair* (and some other Indian treaty cases) the situation was complicated by facts under which tribal members later ceded possession and ownership of most of their reservation lands, while retaining the right to hunt and fish within those lands. 723 F.2d 1397-98, 1408-1419. Therefore, the "reservation" rights which survived in *Adair,* after rights to otherwise possess and enjoy the lands had been terminated, were the fishing and hunting rights which had been retained in that land, and for which a FRWR was implied. *Id.* at 1411-12.

> have been asserted more extensively based on specific treaty and Indian reservation purposes, this is not the case, to our knowledge, with respect to any forest, park or refuge reserved rights. * * *
>
> [T]he cases cited in the DIA [Division of Indian Affairs] memorandum regarding the United States' off-reservation water rights assertions on behalf of Indian tribes in the lower 48 states (at pps. 5-6) are distinguishable from the situation of federal reservations in Alaska. In every case we are familiar with involving an off-reservation assertion of water rights on behalf of an Indian tribe, the assertion was necessary to protect specific treaty or Indian reservation hunting and fishing rights, including sites located on former Indian reservation lands where Indian fishing rights survived the termination of the reservation. These situations do not exist in Alaska where the federal reservations for which water rights are being asserted under the Katie John decision are parks, refuges, forests, etc. which are subject to a different body of water rights jurisprudence.

[ER 131-132 incl. n.8] That reasoning is consistent with *Adair* and the Katie John Alaska Policy Group's Issue Paper and Recommendations. [Supp. ER 25-27 (citing *Adair* and *Katie John I*)].

Katie John also cites *Arizona v. California*, 376 U.S. 340, 344 (1964), and two general hornbook references for what she claims is the "settled" proposition that FRWRs may be drawn from water sources located anywhere outside of a federal reservation if doing so fulfills "the purposes of the federal reservation" [KJ Br. 18, 46]

But those sources do not support Katie John's claim. The Court's *Arizona* decree in 1964, stemming from the Court's opinion a year earlier in *Arizona v. California*, 373 U.S. 546 (1963), provides only that certain quantities of water be allocated annually to certain land areas, including four specified Indian

reservations. 376 U.S. at 344. However, Katie John alleges that one of those Indian reservations, the Cocopah Reservation, "does not border the Colorado River and is located several miles from the river." [KJ Br. at 45] But she again provides no factual support, and the Court's 1964 and 1963 *Arizona* opinions contain no facts supporting that representation or address the location of that reservation.[30]

Instead, Katie cites *Getches on Water Law in a Nutshell* and *Beck on Waters and Water Rights* and adds that, according to them, "apparently" FRWRs may exist in waters away from the reserved land. [KJ Br. 46] But both of those commentators, apparently repeating each other, base their obvious conjecture on that point solely on the same assumption Katie John makes that a portion of the Cocopah Indian Reservation as it exists today is located a couple of miles from the Colorado River.[31]

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[30] Instead, the Supreme Court only discussed water rights for those reservation Indians in that arid land in the context of the Colorado River Indian Reservation, through which the Colorado River clearly flows. 373 U.S. at 599.

[31] Beck, citing his understanding as to that one portion of the Cocopah Indian Reservation (which he nowhere supports), only states it "*suggests*" that "reserved rights *may* be *drawn* from water sources that do not traverse or border on reservations." 4 WATERS AND WATER RIGHTS § 37.01(b)(3) at 37-15 n.77 & accompanying text (Beck 1991 ed. 2004 Repl. Vol. (emphasis added)). Getches notes that under those Indian treaty promises water was delivered by an irrigation canal "several" years before the Court's 1963 decision. Getches, WATER LAW IN A NUTSHELL, 324-25 (3d ed. 1997). In its decision the Court emphasized confirmation of the water rights for the Indians in that case by extensive Congressional appropriations to finance and maintain substantial irrigation projects benefitting those reservations. 373 U.S. at 598-99.

Even if that conjecture is taken at face value, the situation with respect to supplying water for use upon those Indian reservation lands is very different than that presented here. The FRWRs at issue here do not involve drawing water upon uplands, with or without sophisticated canals or other irrigation systems, treaty promises, or Indian reservations. If some remnant of the Cocopah Indian Reservation now removed from the Colorado River has a FRWR to water from that river, it would be an unusual situation very different than this case presents. It would not justify the wholesale expansion of FRWRs and "public lands" into extensive waters downstream and upstream from CSU lands involving very different histories and purposes and "a different body of water rights jurisprudence." [ER 131-132]

Therefore, as the Secretaries recognized, Katie John's expansive FRWR claims are contrary to FRWR law regarding ANILCA CSU reservations and to *Katie John I*'s express limitations.

E. The Secretaries' Erroneous Positions on "Adjacent Waters" and "Inholdings" Do Not Justify Katie John's Erroneous "Downstream/Upstream" Position.

Katie John argues that the Secretaries' and District Court's extension of the FRWR doctrine to (1) waters located outside of but "adjacent to" ANILCA CSUs and (2) private inholdings within the exterior boundaries of those CSUs "that do not touch federal lands" is inconsistent with their non-extension of the doctrine to

waters running downstream and upstream of those reservations. [KJ Br. at 43-44, 46]

However, there is a vast difference between asserting a FRWR in waters immediately next to a federal reservation or within CSU boundaries, on the one hand, and extending the doctrine miles and miles downstream and upstream of CSUs so as to effectively encompass all waters in Alaska, and the State's position (set out in its Opening Brief) is the Secretaries and District Court erred by extending the FRWR doctrine into adjacent waters and private inholdings which Congress chose to exclude from the CSUs. Any inconsistency works against the Secretaries' erroneous extension of FRWRs into those areas and does not support Katie John's position.

F. Katie John's Downstream/Upstream Claims Would Radically Extend Federal Control Contrary to *Katie John I* and the FRWR Doctrine.

Katie John's argument that the Secretaries must assert FRWRs in downstream and upstream waters is nothing more than a repackaging of her previous attempts – rejected by this court in *Katie John I* – to extend Federal control to virtually all waters in Alaska. 72 F.3d at 704. Cumulatively, the federal CSUs contain some reach of virtually every river and lake system in Alaska. For example, headwater tributaries of the extensive Susitna River run within the Denali National Park and Preserve, the upper Kenai River and lakes run within the Kenai

NWR, headwaters of the Mulchatna River are located within Lake Clark National Park and Preserve, and some tributary headwaters of the Kuskokwim River system arise in Denali National Park and Preserve and lower reaches of that River flow through the Yukon Delta NWR. *DeLorme*, *Alaska Atlas & Gazetteer*, at pp. 92-93, 82, 69-71, 66-67, 57-58, 100-104, 130-131 (2004 ed.).

If the Court accepts Katie John's argument, it will enable claims of Federal preemption to virtually every river system, and tributary thereto, in the State. Such an overreach is neither compelled nor authorized by ANILCA or the FRWR doctrine and is clearly contrary to the limitations envisioned by *Katie John I*. The DOI Regional Solicitor correctly concluded that "the Ninth Circuit Court meant something less than entire navigable river systems when it contemplated the assertion of reserved water rights for the parks, refuges, and other federal reservations in Alaska." [ER 133] There is no "necessity", biological or otherwise, which supports a FRWR extending throughout the 1,324 miles of the Yukon River in Alaska, and throughout all other Alaska rivers, streams and lakes, as Katie John seeks.

III. ALASKA NATIVE ALLOTMENTS DO NOT HAVE A FRWR.

Another unprecedented argument which Katie John advances is to expand FRWRs to Alaska Native allotments. She improperly intertwines and misconstrues the 1906 Alaska Native Allotment Act with (1) a provision of the 1887 Indian

General Allotment Act, or "Dawes Act," authorizing allotments of former Indian reservation lands outside Alaska and (2) the *Winters* water rights doctrine, under which the courts have held that water rights attached to those Dawes Act allotments of former Indian reservation lands.

Katie John first argues that the federal government retained an interest in Alaska Native allotments by making them inalienable and nontaxable until otherwise provided by Congress. [KJ Br. at 47-50] The Secretaries' analysis of this issue was correct and supports their decision not to assert thousands of FRWRS related to individual allotments. As the DOI Alaska Regional Solicitor correctly said in 1995:

> [L]ands 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 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 allottee, subject to restrictions on alienation and taxation.
>
> We also are concerned that the United States' interest in conveyed Alaska Native allotments does not meet the basic ANILCA definition of public lands. The United States holds neither legal nor equitable title to these allotments. *See* D. Case, Alaska Native and American Laws, at 152 (Univ. Alaska, 1984). While an Alaska Native allotment is subject to restrictions on alienation and taxation, these are not interests in land "the title to which is in the United States" as required by the definition of public lands in ANILCA. 16 U.S.C. § 3102(3).

[ER 133-134]

Katie John next argues that the Secretaries "ignored" the "well-established rule that federally reserved water rights attach to allotments as a matter of law." KJ Br. at 50-51. However, Alaska Native allotments are not Dawes Act allotments of former Indian reservation lands, which may succeed to a portion of the *Winters* water rights associated with the reservation.[32] Nor are they the subject of special legislation that Congress occasionally has enacted for a specified tribe and members to acquire "agricultural lands", where the U.S. has sought FRWRs to enable them to use those lands for agriculture.[33] These allotments are completely different – legally and factually – from Alaska Native Allotments, which are not "reservations" that may include a FRWR.

The 1906 Alaska Native Allotment Act, like another provision of the Dawes Act, authorized the Secretary of the Interior to allot up to 160 acres of nonmineral public domain land to a qualified Alaska Native, which, in the terms of the Alaska act, "shall be deemed the homestead of the allottee." 34 Stat. 197.[34] The title of

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[32] It is well-established that Dawes Act allotments may succeed to a portion of the *Winters* water rights ***associated with the former reservation***. *See, e.g.*, *United States v. Anderson*, 736 F.2d 1358, 1362-63 (9th Cir. 1984); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 50 (9th Cir. 1981); *Adair*, 723 F.2d at 1415-16.

[33] *See, e.g.*, KJ Exh. 21, regarding the 1904 Absentee Wyandotte Indians legislation, 33 Stat. 519. [ER 207-210]

[34] In *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976), a decision cited by the Katie John Plaintiffs, the Ninth Circuit Court concluded that the 1906 Alaska Native Allotment Act was based on section 4 of the 1887 General Allotment Act, 25 U.S.C. § 334, providing for allotments from the public domain to Indians not on

the 1906 Act was also "An Act Authorizing the Secretary of the Interior to allot ***homesteads*** to the natives of Alaska." *Id.* (emphasis added). Alaska Native allotments have been properly characterized as homesteads. *Aguilar v. United States*, 474 F.Supp. 840, 845 (D. Alaska 1979). "Homesteads" and homesteaders acquire no water rights associated with their use and occupancy of land previously public domain or public lands. *Anderson*, 736 F.2d 1358, 1362-63 (9th Cir. 1984).

Thus, it is significant that Katie John relies on a series of inapposite Dawes Act cases involving the transfer of *Winters* waters rights from an Indian reservation to the individual Indian allotments carved out of that reservation.[35] Those cases involve wholly different case law and principles having no relevance or bearing on this "which waters" Alaska case. Unlike the allotments discussed in those cases, Alaska Native allotments are not derived from a previous Indian reservation and, therefore, cannot succeed to any *Winters* waters right associated with an Indian reservation nor satisfy the long-established measure of a *Winters* right, which is the

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a reservation, rather than provisions of the 1887 Act providing for Indian allotments from reservation lands. 529 F.2d at 140.

[35] [KJ Br. at 50 (*citing United States v. Powers*, 305 U.S. 527 (1939) (former Crow Reservation lands), and *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) (former Yakima Reservation lands). In *Powers*, although remaining allotments abutted the two streams in which the court implied a FRWR, the reservation itself (and surviving FRWR) had included those "non-navigable streams *within* the Crow Creek Reservation." 305 U.S. at 528-30 (emphasis added).

amount of water needed to irrigate "practically irrigable acreage" on the reserved lands. *Arizona v. California*, 373 U.S. 546, 600-01 (1963).

The case law cited by Katie John demonstrates that Alaska Native allotments are not "reservations." She argues that, since Alaska Native allotments are restricted lands initially held in trust by the United States, those allotments are federally reserved lands with an associated FRWR. However, the purpose of the restrictions on allotments – and the continuing federal interest in them – has nothing to do with water or a necessity for water rights. Instead, the allotments are restricted (and the United States retains a limited interest) in order to prevent allottees "from improvidently disposing of allotted lands." *United States v. Bowling*, 256 U.S. 484, 487 (1921). S*ee also United States v. Ramsey*, 271 U.S. 467, 470 (1926); *Heckman v. United States*, 224 U.S. 413 (1912). A limitation on improvident disposition reserves no water and needs no FRWR to make it effective.

In the Dawes Act cases involving an allotment derived from Indian reservation lands, the new owner of the allotment (usually a non-Indian) also obtained the associated *Winters* water right from the original reservation. *Adair*, 723 F.2d at 1417; *Colville*, 647 F.2d at 50. If Katie John's new theory prevails and an Alaska Native allotment is sold, what part of the FRWR transfers with the allotment? Furthermore, does the new owner also acquire property rights in the

associated waterway hundreds of miles downstream or upstream under Katie John's upstream/downstream FRWR theory? Such an unauthorized, unprecedented, and impractical mixing of legal apples and oranges, if adopted by the Court and forced on the Secretaries and the State, would yield an administrative and legal entanglement that the Secretaries properly rejected. [ER 133-135]

Katie John also attempts to invoke the history of aboriginal hunting and fishing interests as a basis for infusing a FRWR into these thousands of Alaska allotments spread throughout Alaska. [KJ Br. 53-54] However, as previously shown, all aboriginal rights and claims as may have existed in Alaska, including claims to fishing rights, were expressly extinguished 39 years ago by ANCSA.

Katie John, however, asserts that was not the case. She claims that although ANCSA expressly repealed the Alaska Native Allotment Act of 1906 (43 U.S.C. § 1617(a)), it did not extinguish existing allotments or allotments under application at the time of that repeal. [KJ Br. 53] However, that argument fails since, as shown by Katie John's own citation of legislative history [KJ Br. 52], the purpose of the Alaska allotment act was to provide "homes" to individual Alaska Natives in areas they had "used and occupied," rather than to recognize aboriginal claims to title or create reservations or reserve water rights.

A 1955 opinion of the Department of Interior Solicitor squarely supports the position of the Secretaries and the State that off-reservation Indian allotments do ***not*** have FRWRs. *See* Memorandum Opinion of the Department of Interior Solicitor No. M-36289, Aug. 19, 1955. [Supp. ER 3-4] That opinion correctly distinguishes between Indian allotments arising out of *Winters* reservation rights and Dawes Act section 4 Indian allotments carved from the public domain. It provides, in the last paragraph:

> After rather extensive search no case has been found where an Indian allotment on the public domain, never a part of an Indian reservation, has been held to have a reservation water right. There would be no basis for extending the reservation right to such a case. The theory of the Winters doctrine (207 U.S. 564), is based on a right belonging to the Indian tribe which was not given up when the reservation was created by treaty or otherwise.

Katie John relies on a poorly reasoned June 11, 1976 informal memorandum of an Associate Solicitor for Indian Affairs to support her arguments there is a "well-established rule that federally reserved water rights attach to allotments as a matter of law" and that the Secretaries' position is "inconsistent with DOI's long-standing position that the reserve waters doctrine applies to public domain allotments." [KJ Br. 51, 54] The Associate Solicitor misread *Cappaert*, which had just been decided by the U. S. Supreme Court, and the memorandum appears to

reflect the Division of Indian Affairs' position for purposes of pending litigation. [ER 205-06, attached as Exhibit 20 to Katie John's brief][36]

In any event, the Division of Indian Affairs' position on that subject was squarely rejected, with sound, detailed reasoning, in relation to *Katie John I* at pages 6-8 of the August 9, 1995 Memorandum from the Alaska Regional Solicitor to the DOI Solicitor.

The Alaska Regional Solicitor properly concluded that the Secretaries should not, and were not required to, assert such an "extreme result" in their assertions of FRWRs in response to that court decision. That 1995 Memorandum [ER 133-135] clearly and persuasively refutes Katie John's core arguments.[37]

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[36] Katie John also cites a terse July 8, 1976 Memorandum she attaches as Exhibit 19 to her brief [ER 204], but it contains no analysis.

[37] Katie John also asserts without support that Congress enacted the Alaska Native Allotment Act in 1906 to remove any doubt over the 1887 General Allotment Act's application to the Territory of Alaska. [KJ Br. at 48] However as was concluded in *Pence*, 529 F.2d at 140, the 1906 Alaska Act, providing for Alaska Native "homesteads" from vacant, unappropriated and unreserved lands, was based on the "non-reservation" allotment section, 25 U.S.C. § 334, of the General Allotment Act, rather than the "reservation Indian" sections of that 1887 Act. The 1906 Alaska Act (even as later amended) makes no provision for allotments created out of pre-existing Indian reservations**,** as does the 1887 General Act. Katie John's contention to the contrary [KJ Br. 51] is unavailing, since the pertinent consideration in relation to Congressional intent to reserve Indian water rights is based on the continuing "reserved rights" aspect of the General Act's "reservation trust" allotments, as contrasted to the Alaska Act's "homestead" allotments. *United States v. City of Tacoma*, 332 F.3d 574. 579 (9th Cir. 2003), and *United States v. Newmont USA Ltd*., 504 F.Supp.2d 1050, 1067 (E.D. Wash. 2007), two cases Katie John cites, are distinguishable because they involved reservation trust allotments and did not involve any issue of FRWRs. ANILCA Section

The novel Katie John theory regarding Alaska Native allotments (especially coupled with her equally novel downstream/upstream theories) would convert every river, stream and lake in Alaska bordered by (yet lying outside of)[38] an allotment (of which there are up to 12,300) [ER 134] into "public lands" subject to federal preemptive authority under Title VIII. As this Court stated in *Katie John I,* "ANILCA does not support such a complete assertion of federal control . . . ." 72 F.3d at 704.

Surely, if Congress had intended such a complete extension of FRWRs, it would have made that intent clear in either ANCSA, where it instead extinguished aboriginal claims and repealed the Alaska Native Allotment Act of 1906, or ANILCA (enacted just nine years later), where it instead addressed expedited procedures for allotments pending before that repeal, without changing their terms, and included a savings clause prescribing that "nothing in this Act shall be construed . . . as affecting in any way law governing appropriation *or use of, or*

905(a)(1) (43 U.S.C. § 1634(a)(1)), which Katie John also cites, provided only for expedited approval of some Indian allotments under the 1906 Alaska Act, and no greater or different right than that Act provided. Contrary to another of Katie John's characterizations [KJ Br. 52], that Act never "set aside" lands for Alaska Natives [ER 133]; it only allowed Alaska Natives "not residing on [or having] a reservation" to apply and prove up on up to 160 acres of land (not water) upon proof of "substantially continuous use and occupancy," like a homestead [KJ Br. 47-48].

[38] Beds of navigable waters would be excluded upon survey, according to standard U.S. Survey Manual practices, before conveyance to the allottee, and thus lie outside the allotment.

Federal right to, water on lands within the State of Alaska." 16 U.S.C. § 3207 (emphasis added).

IV. THE DISTRICT COURT'S COMMENTS ABOUT THE FRWR DOCTRINE'S USE TO "STRIKE A BALANCE" BETWEEN GOVERNMENTAL INTERESTS WERE JUSTIFIED BUT UNNECESSARY TO DENYING THE KATIE JOHN PLAINTIFFS' CLAIMS.

Using "sound bites" rather than complete quotes, Katie John also objects to comments the District Court made about the *Katie John I* circuit court "believ[ing] that the reserved water rights doctrine was the best means for attempting to achieve a balance between state and federal management of fisheries" [ER 11], "intend[ing] that the Secretaries look to the reserved water rights doctrine for purposes of striking [that] balance" [ER 73], and similar comments in its "which waters" decision. [KJ Br. 26-27, 56] They contend that such comments reflect "re-balancing" the FRWRs doctrine in a manner ignoring ANILCA's intent in favor of state interests in fisheries management. [*Id*. at 26-29, 56]

However, the District Court's comments are supported by *Katie John I*, in which this Court expressly applied the FRWR doctrine and stated that as a result the United States has a title interest in "some navigable waters" but not "all such waters" as Katie John requested, "requiring federal and state management of navigable waters." 72 F.3d at 703-04. A proper application of the law should

resolve the issues on appeal, rather than Katie John's characterizations about court comments unnecessary to denying her claims under the law.

CONCLUSION

The Secretaries had sound legal reasons for not asserting FRWRs upstream and downstream of the actual boundaries of those reservations created by Congress or in the case of the thousands of very small Native allotments scattered throughout Alaska. There is no mandate in the law compelling the Secretaries to assert FRWRs in unusual locations where they chose not to and Congress did not specifically direct them to.

Accordingly, those inactions by the Secretaries and rulings of the District Court appealed by the Katie John Plaintiffs should be upheld and affirmed by this Court.

Respectfully submitted this 20th day of August, 2010.

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STATEMENT OF RELATED CASES

To the State's knowledge there are no related cases pending in this Court.

s/ Michael W. Sewright

9th Circuit Case Number(s) Nos. 09-36122, 09-36125, 09-36127 (Consolidated)

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