Docket No. 09-36122 (L), 09-36125, 09-36127

In the

United States Court of Appeals

For the

Ninth Circuit

KATIE JOHN, CHARLES ERHART,
ALASKA INTER-TRIBAL COUNCIL and NATIVE VILLAGE OF TANANA,

Plaintiffs-Appellants,

and

ALASKA FISH AND WILDLIFE CONSERVATION FUND,
ALASKA FISH AND WILDLIFE FEDERATION AND OUTDOOR COUNCIL,
JOHN CONRAD and MICHAEL TINKER,

Plaintiffs-Intervenors / Appellants,

v.

UNITED STATES OF AMERICA,
MIKE JOHANNS and KEN SALAZAR, Secretary of the Interior,

Defendants-Appellees,

ALASKA FEDERATION OF NATIVES,

Defendant-Intervenor / Appellee.

Appeal from a Decision of the United States District Court for the District of Alaska,
No. 05-CV-00006 · Honorable H. Russel Holland

BRIEF OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Appellant Alaska Inter-Tribal Council states that there is no parent corporation and no subsidiary corporation. No publicly held company owns 10 percent or more of its stock.

Appellant Native Village of Tanana states that there is no parent corporation and no subsidiary corporation. No publicly held company owns 10 percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 16 U.S.C. § 3117, and entered final judgment on October 22, 2009. Katie John, Charles Erhart, the Alaska Inter-Tribal Council and the Native Village of Tanana (collectively, "the Katie John Plaintiffs") filed a timely appeal on December 21, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES ON APPEAL

1. Whether the District Court incorrectly accorded *Chevron* deference to the interpretation by the Secretaries of the Interior and Agriculture (the "Secretaries") of the common law doctrine of federal reserved water rights, instead of applying a more exacting standard of review?

2. Whether the District Court improperly interpreted *Katie John I* as requiring the Secretaries to balance state and federal jurisdiction over fisheries when identifying the navigable waters in Alaska that are subject to the mandatory subsistence regime established in Title VIII of the Alaska National Interest Lands Conservation Act of 1980 ("ANILCA")?

3. Whether the District Court improperly deferred to the Secretaries' failure to assert federally reserved water rights in navigable waters running upstream and downstream from ANILCA's various Conservation System Units, despite implicitly concluding, as a matter of law, that such rights do exist?

4. Whether the District Court erred in concluding that no federally reserved water rights exist with respect to Alaska Native allotments created under the Alaska Native Allotment Act of 1906?

STATEMENT OF THE CASE

Under Title VIII of ANILCA, Congress established a priority in times of shortage for subsistence hunting and fishing on all federal "public lands," covering all federal "lands, waters, and interests therein." Pub. L. No. 96-487, Title VIII, §§ 801-815, 94 Stat. 2374 (codified in part at 16 U.S.C. §§ 3102(1)-(3), 3114). Fifteen years ago this Circuit held that "the definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved waters rights doctrine." *Alaska v. Babbitt* (*Katie John I*), 72 F.3d 698, 703-04 (9th Cir. 1995), *adhered to en banc following remand sub nom. John v. United States* (*Katie John II*), 247 F.3d 1032 (9th Cir. 2001) (per curiam). "Consequently, public lands subject to subsistence management under [Title VIII of] ANILCA include certain navigable waters." *Id*. at 703. This Circuit then charged the Secretaries with the task of "identifying those [federally reserved] waters" in Alaska. *Id.* at 704.

On January 8, 1999, the Secretaries published a final rule (the "1999 Rule") purporting to identify the "navigable waters" in the State of Alaska, "in which the United States has an interest by virtue of the reserved water rights doctrine." *Id.* at

703-04; *see* ER 230, 240-242, 64 Fed. Reg. 1276, 1286-88 (effective Oct. 1, 1999). However, the rule excluded from the scope of this doctrine waters running upstream and downstream from ANILCA's Conservation System Units ("CSUs") and waters appurtenant to Alaska Native allotments created by the Alaska Native Allotment Act of 1906.[1]

In January 2005, Appellants Katie John *et al*. brought suit under 16 U.S.C. § 3117, challenging the Secretaries' two exclusions. ER 269-288. The suit was consolidated with *Alaska v. Norton*, Dkt. No. 32, a complaint by the State of Alaska challenging the Secretaries' procedures for determining the existence of federally reserved water rights in Alaska. In May 2007, the District Court eventually rejected the State's challenges and sustained the Secretaries' decision-making process. ER 88-119. The proceedings then turned to the issue of "which waters" the United States has an interest in by virtue of the federal reserved water rights doctrine, and therefore are subject to Title VIII's subsistence fishing priority under *Katie John I*. Appellants argued that ANILCA's express purposes in creating or expanding the various CSUs, including the maintenance of anadromous salmon stocks and the fulfillment of the U.S.-Canada Pacific Salmon Treaty, required the reservation of federal water rights in rivers running upstream and

[1] Ch. 2469, § 1, 34 Stat. 197 (amended by Act of August 2, 1956, ch. 891, § 1(a)-(e), 70 Stat. 954, repealed by Pub. L. No. 92-203, § 18(a), 85 Stat. 710 (1971); formerly codified at 43 U.S.C. § 270-1 to 270-3, transferred from 48 U.S.C. §§ 357-357(b)).

downstream from the CSUs, and that Congress's purpose in setting aside Alaska Native allotments similarly required the reservation of rights in waters appurtenant to those allotments. Appellants argued that, given the purposes of the CSUs and the allotments, "it follows that courts must conclude that 'without the water the purposes of the reservation would be entirely defeated.'" *Katie John I*, 72 F.3d at 703 (quoting *United States v. New Mexico*, 438 U.S. 696, 700 (1978)).

In January 2008, the District Court upheld the Secretaries' construction of the federally reserved water rights doctrine, incorrectly applying a deferential, instead of a more proper plenary, standard of review, even though the doctrine's nature as a federal common law doctrine and its admitted lack of statutory pedigree should have made any such deference inappropriate.

The court acknowledged that ANILCA's overall purposes include "'providing the opportunity for rural residents engaged in a subsistence way of life to continue to do so,'" ER 5 (quoting 16 U.S.C. § 3101(c)), and that the subsistence priority established in Title VIII "is *not* restricted geographically to the conservation system units created by ANILCA," ER 6 (emphasis in original), but rather extends categorically to "'the taking on *public lands* of fish and wildlife.'" *Id*. (quoting 16 U.S.C. § 3114) (emphasis added). Despite this broad reading of ANILCA's purposes, the District Court accepted the Secretaries' rationale for refusing to assert federal reserved water rights over upstream/downstream waters

on the basis that such rights are only enforced "'in times of shortage when a junior use may be curtailed,'" which shortage, per the Secretaries' logic (and which the District Court adopted) currently does not exist in Alaska. ER 63 (quoting 70 Fed. Reg. at 76,402). The District Court agreed that while "[t]he day may come when the Secretaries will have to be concerned about water flows, both upstream and downstream from CSUs," such as to protect anadromous fish, "for the present time" excluding such water rights is correct "given the constraints upon the Secretaries as a result of *Katie John I*." *Id*. While recognizing that "[w]hat 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)," the District Court inexplicably concluded only that this approach "may be necessary at some future time." ER 67 (emphasis added). Tellingly, the District Court did not cite any authority for its implicit proposition that a reserved water right that does not exist today can nonetheless spring into being when the right becomes enforceable at a time of shortage "one day" in the future.

The District Court again rejected the contention that this Court's decision in *Katie John I* "required" the Secretaries to identify all federally reserved waters in Alaska when it considered the water rights attached to allotments. ER 72. Here, again, the District Court reasoned that the Secretaries could identify something less than all reserved waters because "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.*" ER 73 (emphasis added). The District Court disregarded the substantial federal interest in Native allotments, concluding that it does not give rise to federally reserved water rights because "restrictions upon taxation and alienation patently have nothing to do with water rights." ER 74. The District Court did not rely either on distinguishing purposes of the Alaska Native Allotment Act, or on distinguishing law to support its view that Alaska Native allotments should be treated differently from other Indian allotments with respect to reserved water rights. Instead, it focused on the *consequences* of a ruling in favor of Katie John *et al.*:

> [W]e 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.

ER 77. It did not cite to any aspect of the *Katie John I* decision, or to any aspect of Title VIII or ANILCA's "public lands" definition, as supporting the inclusion or exclusion of public lands based upon such policy considerations.

Finally, the District Court failed to recognize that allotments associated with aboriginal use and occupancy rights were expressly preserved by the Alaska Native Claims Settlement Act of 1971 ("ANCSA"), Public Law 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. §§ 1601, *et seq*., § 1617(a)), even as it correctly noted that aboriginal fishing rights elsewhere were extinguished by that same legislation. ER 76 (citing 43 U.S.C. § 1603). [2]

For all the flaws outlined above, and further analyzed below, the District Court's ruling must be reversed.

STATEMENT OF FACTS

A. The Legal and Historical Background

Alaska Native people have practiced their customary and traditional subsistence activities since time immemorial. Nearly all of the more than two hundred small Native villages in Alaska are located along the coast or on major

[2] Appellants do not appeal the District Court's ruling on inland waters surrounded entirely by non-federal lands within CSUs, ER 49-55. Indeed, the District Court correctly stated the law with respect to appurtenant waters when addressing this issue. As the District Court explained, when the Supreme Court held "'*appurtenant* water . . . [is reserved] to the extent needed to accomplish the purpose of the reservation,'" ER 50 (emphasis added) (quoting *Cappaert v. United States*, 426 U.S. 128, 138 (1976)), it made clear that "'appurtenant' does not necessarily mean 'touching' or 'bounded by' or even 'adjoining.'" *Id*. at 51.

Appellants also do not challenge the District Court's rulings on marine and tidally influenced waters, ER 31-49, waters adjacent to CSUs, ER 55-61, or waters appurtenant to federal lands that have been selected but not yet conveyed to Native corporations under ANCSA, ER 78-85.

rivers. The proximity to water reflects the dependence of Natives on the harvest of fish stocks for sustenance and as the basis for their traditional way of life.

Fish is the *most* dominant and intensely used food source for Alaska Natives. Robert Wolf, *Myths: What Have You Heard?*, 21 ALASKA FISH & GAME 17 (Nov.-Dec. 1989). Since continued subsistence opportunities are "essential to Native physical, economic, traditional and cultural existence," 16 U.S.C. § 3111(c), the federal government has consistently acted to protect the hunting and fishing rights of Alaska Natives. *See generally*, DAVID S. CASE & DAVID A. VOLLUCK, ALASKA NATIVES AND AMERICAN LAWS 257-315 (2d ed. 2002).

In the early 1900s Congress concluded that the only way to ensure protection for Alaska Natives' food supplies and continuation of their way of life was to provide a means for Alaska Natives to obtain title to some of their lands. *See e.g.*, *Pence v. Kleppe*, 529 F.2d 135, 141 (9th Cir. 1976). Accordingly, Congress adopted the Alaska Native Allotment Act of 1906, and thereby granted Alaska Natives the opportunity to obtain title to their subsistence lands in order "to protect the lands which they used and occupied from encroachment by non-Natives." *Olympic v. United States*, 615 F.Supp. 990, 995 (D. Alaska 1985). The Alaska Native Allotment Act provided up to 160 acres of unappropriated land to individual Natives and placed restrictions on the title conveyed so that the lands could not be alienated or taxed. Since fish is the most dominant and intensely used

food source for Alaska Natives, allotments were typically selected on rivers to secure continued fisheries practices.

Upon Alaska's admission to the Union in 1958, the fishing rights of Alaska Natives, including their rights to fish in navigable waters of the State, were expressly reserved by Congress for its own disposition. *See Metlakatla Indian Cmty v. Egan*, 369 U.S. 45, 56-58 (1962); *Organized Village of Kake v. Egan*, 369 U.S. 60, 62-63 (1962). With enactment of ANCSA, Congress extinguished Alaska Native hunting and fishing rights based on aboriginal title, 43 U.S.C. § 1603(b), while simultaneously making clear its intent to continue federal protection for Alaska Native hunting and fishing rights.[4] Congress furthered that purpose in 1980 by enacting ANILCA, and thereby impressing all federal "public lands" in Alaska with a preference for "subsistence" uses of fish and wildlife over all other uses. 16 U.S.C. §§ 3111-3126. While protection of the subsistence way of life of Alaska Natives was the driving concern behind Title VIII of ANILCA, Congress in the end accommodated the State by enlarging the subsistence use preference to all "rural residents." *See Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 313 n.1 (9th Cir. 1988).

[4] The ANCSA Conference Committee Report stated: "The Conference Committee expects both the Secretary [of the Interior] and the State to take any action necessary to protect the subsistence needs of the Natives." H. CONF. REP. NO. 746, 92d Cong., 1st Sess. 37 (1971), *reprinted in* 1971 U.S. Code Cong. & Admin. News 2247, 2250.

Initially, ANILCA's subsistence priority was to be effected by the State of Alaska through implementation of a state law of general applicability that protected rural subsistence activities on all lands and waters, not just federal lands and waters. 16 U.S.C. § 3115(d). Although the State enacted such a law, in 1989 the Alaska Supreme Court invalidated Alaska's law, compelling the Secretaries to step in to the breach in order to protect subsistence activities. *McDowell v. State*, 785 P.2d 1 (Alaska 1989). In the wake of *McDowell*, the Secretaries initially adopted a subsistence-management program only covering federal public lands in Alaska, and excluding fisheries in most navigable waters. *See* 55 Fed. Reg. 27114, 27115 (June 29, 1990). The Secretaries' failure to extend the subsistence priority to fisheries in navigable waters resulted in litigation that culminated in this Circuit's holding in *Katie John I* 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." 72 F.3d at 703-04. The instant appeal challenges the Secretaries' failure to extend the subsistence priority to all such waters.

B. The Yukon River

The existence of federal reserved waters depends upon the primary purposes for which Congress sets aside a given parcel of federal land. For this reason, the District Court instructed the parties to place their claims in a factual context by reference to specific "test case waterways." ER 214. In the litigation below,

Appellants Katie John, *et al*., chose the Yukon River to illustrate that upstream and downstream waters are necessary to fulfill Congress's purposes in setting aside six CSUs along the Yukon, including to protect migrating salmon. For consistency, Appellants also place their arguments here within that framework.

1. Overview

The Yukon River originates in British Columbia and flows over 2,300 miles through Alaska to its mouth on the Bering Sea. Along the way, it flows through or adjacent to one National Preserve (Yukon Charley) and five National Wildlife Refuges (Yukon Flats, Nowitna, Koyukuk, Innoko and Yukon Delta), all created by ANILCA. ER 136.

All six CSUs along the Yukon River have among their express primary purposes the protection of habitat for, and populations of, fish and wildlife. *All* of these CSUs also include as a primary purpose the protection of "the viability of subsistence resources." ANILCA, Pub. L. No. 96-487, Title III, §§ 301-303, 94 Stat. 2371 (uncodified); 16 U.S.C. §668dd notes. These twin primary purposes have a common denominator: each purpose demands water as a biological necessity in order to be fulfilled. Put differently, without water none of these primary purposes can be met. *See* Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, *Federal Water Rights of the National Park Service*, 86 I.D. 553, 573 (1979).

2. Subsistence Uses of Yukon River Fisheries

Residents of the Yukon River drainage have long relied upon fish for food and other subsistence uses. Salmon comprises the bulk of the fish harvested for subsistence purposes. Indeed, the Yukon River is the largest source of native chinook and chum salmon in North America. ER 222. "The fishery resources are the cornerstone to the indigenous peoples of the Yukon and others." *Id*. Over sixty Alaskan villages, most of them economically depressed, depend heavily upon Yukon River salmon resources, both for their nutritional survival and as a source of cash. *Id*. Unemployment generally exceeds sixty percent in these villages, and commercial fishing provides a vital source of income, both to the fisherman and through fish processing jobs. *Id*. This cash income, in turn, is essential for conducting subsistence activities and is used to purchase boats, gas, nets, and related gear. In these mixed subsistence-cash economies, subsistence fishing, hunting and gathering provides a major part of the local food supply. *Id.*

3. Yukon River Salmon Uses and Stocks

There are eight unique fisheries along the Yukon River, two of which have priority over all other fisheries: subsistence fisheries in Alaska and First Nations fisheries in the Yukon Territory. ER 158. Other consumptive uses of the resource, such as commercial uses, personal uses and sport fisheries in Alaska, together with domestic, sport/recreational and commercial fisheries in the Yukon Territory, have

no priority, nor hierarchy, and are managed accordingly. *Id.* Genetic stock identification methodology indicate that approximately fifty percent of the adult chinook salmon that return to the Yukon River originate in Canada, mostly in the Yukon Territory and some in northern British Columbia, while fifty percent originate in Alaska. ER 164. It is assumed that thirty percent or more of Yukon River fall chum salmon originate in Yukon Territory waters. *Id.* According to the *Yukon River Salmon Agreement Handbook*, the majority of the first run of salmon migrating up the Yukon River in May is presumed to be Canadian-origin chinook heading for spawning grounds in the Yukon Territory. Canadian-origin salmon spawn and/or rear throughout the River's tributaries and streams in the Yukon Territory.

4. The Life Cycle of the Yukon River Salmon

As was demonstrated below, all salmon in the Yukon River are anadromous. They spawn in the headwaters, tributaries and mainstem of the River. As smolt they migrate to the Pacific Ocean where they mature and spend the bulk of their adult life. After several years, they return to their river or stream of origin, spawn and die. Absent a sufficient quantity of water in the streams and rivers that provide habitat and migratory routes for fish residing in or passing through the various Yukon River Refuges, resident and anadromous fish cannot survive, much less survive to be harvested by qualified rural subsistence users. Water is

necessary at every stage in the fish lifecycle and without water, aquatic life, including fish, simply cannot exist.

5. Salmon and the U.S.-Canada Pacific Salmon Treaty

In 1985, the United States and Canada signed the Pacific Salmon Treaty to address interception of salmon originating in one Nation by the fisheries of the other Nation. 16 U.S.C. §§ 3631 *et seq*. The Treaty dealt with Yukon River stocks by incorporating a Memorandum of Understanding ("MOU") in which both Nations agreed to continue Yukon River negotiations in order to properly address its unique characteristics.

The Yukon River Salmon Agreement was formally adopted on December 4, 2002, by American and Canadian executive orders. ER 145. Negotiated immediately after the devastating 2000 chinook salmon run, this Agreement is now Chapter VIII of the Pacific Salmon Treaty. *Id*. Funds necessary to address American obligations under the Agreement are authorized through the Yukon River Salmon Act of 2000. Pub. L. No. 106-450, Title II, § 201, 114 Stat. 1941 (codified at 16 U.S.C. §§ 5701- 5727).

The Yukon River Salmon Agreement represents a powerful commitment by the United States to manage Yukon River salmon fisheries so as to ensure sufficient spawning salmon are available to meet escapement requirements and to provide harvests according to the harvest sharing arrangements. ER 152-53. Under

the Agreement, the United States is required to ensure effective conservation and management of Yukon River stocks of various salmon species including Canadian-origin chinook (King), chum (dog), and coho (silver). The federal government is also responsible for ensuring that enough salmon reach Canada to spawn, and Canada is responsible for ensuring that enough salmon leave Canada after spawning occurs.

C. Alaska Native allotments situated at fish sites on the Yukon River

Several hundred Alaska Native allotments are located along the Yukon River and its tributaries. This is because Native allotments were primarily selected for their proximity to water and frequently incorporated family fish camps. ER 188. Fishing sites are usually located at or very near fish camps to facilitate ready checking of gear and transport of harvested fish for processing. *Id.* According to a 1987 study, most of the approximately 131 Native households in the Village of Tanana (located on a stretch of the Yukon River that runs in between two CSUs) participated in salmon fishing, 91% of households used salmon, and the per capita harvest of salmon averaged 1,600 pounds per person. ER 187.

STANDARD OF REVIEW

The District Court's legal conclusions, *i.e.*, its application of the federal reserved waters doctrine—which requires a reviewing court to examine the specific purpose for which the land was reserved and conclude that without water

the purposes of the reservation would be entirely defeated—is reviewed *de novo*. *See Akiak Native Cmty. v. U.S. Postal Srvc.*, 213 F.3d 1140, 1144 (9th Cir. 2000).

SUMMARY OF THE ARGUMENT

I. The District Court erred in applying a deferential standard of review to the Secretaries' construction of the federally reserved waters doctrine. Deference to the agencies under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), was not appropriate because the application of the "reserved water rights doctrine," *Katie John I*, 72 P.2d at 703-04, does not involve the interpretation of any statute whose administration has been entrusted to the Secretaries. To the contrary, the interpretation and application of the reserved waters doctrine is a creature of federal "common law," created by the federal courts, which are therefore exclusively competent to delimit it in an authoritative way in any specific case. *Morris v. Commodity Futures Trading Comm'n*, 980 F.2d 1289, 1293 (9th Cir. 1992).

II. The District Court erred in concluding that the Secretaries' role was to "achieve a balance between state and federal management of fisheries . . . ." ER 11. This misreading of *Katie John I* led to the District Court's erroneous conclusion that the question before it was whether the Secretaries "properly employed federal reserved water rights law for purposes of achieving a reasonable division of jurisdiction" between state and federal regulation. ER 27. This Court

never directed the agencies to make a selection of reserved waters based upon a weighing of federal interests against state interests for purposes of balancing those interests. Congress already struck the balance when it enacted the mandatory subsistence regime established in Title VIII and, by tying that regime to "public lands," applied it to all waters where the government holds a reserved water right.

III. Under the reserved waters doctrine, Congress implicitly reserves water whenever it sets aside land for primary purposes that require water. In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether Congress intended to reserve unappropriated and available water. "Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." *Cappaert v. United States*, 426 U.S. 128, 139 (1976). When assessing the assertion of a federal reserved water right, courts 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." *United States v. New Mexico*, 438 U.S. 696, 700 (1978).

ANILCA has two expressly stated primary purposes: (1) establishing national conservation lands, and (2) protecting subsistence resources and uses. In addition, each of the CSUs set aside, redesignated, or expanded by ANILCA requires water to carry out its stated purposes: (1) "to conserve fish and wildlife

populations and habitats in their natural diversity[,] including . . . salmon," (2) to fulfill "international treaty obligations" such as arise under the U.S.-Canada Pacific Salmon Treaty, (3) "to provide . . . the opportunity for continued subsistence uses by local residents," and (4) "to ensure . . . water quality and necessary water quantity within the refuge." ANILCA, Pub. L. No. 96-487, Title III, § 302; 16 U.S.C. § 668dd notes. The Secretaries and the District Court both failed to undertake the required examination of these purposes. Had they done so, they would have determined that upstream and downstream waters are a biological necessity both in fact and in law, because without such in-stream flows of water each of the purposes of the refuges would be defeated. This is acutely demonstrated by the refuges' primary purpose to protect migrating salmon and to carry out the United States' related treaty obligations to assure passage of healthy salmon stocks to Canada.

The Secretaries' determination to limit federal reserved waters only to waters adjacent to or within public uplands is irreconcilable with settled case law holding that federal reserved water rights may be drawn from water sources that do *not* traverse, border or abut a federal reservation, so long as those water rights are necessary to fulfill the purposes of the federal reservation. *See, e.g.*, *Arizona v. California*, 376 U.S. 340, 344 (1964).

IV. The Secretaries and the District Court failed to recognize that the federal government has an "interest" in Native allotments by virtue of the government's comprehensive system of federal control, including most notably by the statutory provision that Alaska Native allotments set aside from the public domain "shall be inalienable and nontaxable until otherwise provided by the Congress." 43 C.F.R. § 2561.0-5(b). This restriction on alienation constitutes a significant federal interest in the allotments sufficient to constitute "public lands" under ANILCA, triggering the reserved waters doctrine.

Indeed, it has long been established that federally reserved water rights attach to allotments as a matter of law, *United States v. Powers*, 305 U.S. 527 (1939); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), and in this key respect there is no basis for making a distinction between Alaska Native allotments and other allotments. To the contrary, it is settled that courts are to treat allotments the same regardless of the statute from which they originate, and regardless of whether they were created from former reservation land or from land previously in the public domain. FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 16.03[2] (2005 ed.) (hereinafter "COHEN").

Congress's primary purpose under the Alaska Native Allotment Act was to set aside lands in order to protect Native hunting and fishing activities. *Pence v. Kleppe*, 529 F.2d 135, 141 (9th Cir. 1976). It follows inexorably that sufficient

water was necessarily reserved to protect those hunting and fishing activities—activities which, absent water, would be destroyed. This conclusion is particularly compelled by the rule that legislation enacted for the benefit of Indians must be interpreted liberally in their favor.

The Secretaries' avoidance of any decision-making on the issue of whether federal reserved water rights attach to Alaska allotments, and the District Court's categorical ruling against such rights, are at odds with the Interior Department's long-standing position that the reserved waters doctrine applies to public domain allotments so long as the reservation of water is "necessary to accomplish the purposes for which" Congress authorized the allotments. There was accordingly no basis to carve out a special "Alaska Native allotment" exception to this general rule, particularly in light of *Katie John I*'s unqualified directive to the Secretaries to use the reserved waters doctrine to determine all "those waters" that are embraced as "public lands" under ANILCA.

ARGUMENT

I. THE SECRETARIES' INTERPRETATION OF THE JUDICIALLY-CREATED RESERVED WATER RIGHTS DOCTRINE IS NOT ENTITLED TO *CHEVRON* DEFERENCE.

Leaving aside its eventual result on the merits, the District Court's analysis suffers from a fatal and fundamental flaw that alone warrants reversal: despite initially stating that "legal issues" must be reviewed *de novo*, ER 29 (citation

omitted), the District Court reviewed the Secretaries' definition of the scope of the government's reserved water rights under a *deferential* standard. In doing so the Court invoked *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), on the erroneous premise that the Secretaries' authority to "administer ANILCA" included the delegation of authority to the Secretaries to choose which reserved waters to cover under the regulation and which waters not to cover under the regulation. ER 29. This was wrong. *Chevron* deference does not apply here because the issue before the District Court—the "reserved water rights doctrine," *Katie John I*, 72 P.2d at 703-04—does not involve the interpretation of any statute whose administration was entrusted to the Secretaries; rather, the interpretation and application of the federal reserved water rights doctrine is a pure creature of the Supreme Court's common law jurisprudence.

By the Supreme Court's own admonition, *Chevron* only applies "[w]hen a court reviews an agency's construction of the statute which it administers . . . ." *Chevron*, 467 U.S. at 842. In such cases, courts defer "to an executive department's construction of a statutory scheme it is entrusted to administer," *id.* at 844, because "those with great expertise and charged with responsibility for administering [a statute] would be in a better position to do so" than the courts. *Id.* at 865. The Supreme Court has elsewhere affirmed that "agency expertise is one of the principal justifications behind *Chevron* deference." *Pension Benefit Guar.*

Corp. v. LTV Corp., 496 U.S. 633, 651-52 (1990). This Court has agreed. *See Monex Int'l. Ltd. v. Commodity Futures Trading Comm'n*, 83 F.3d 1130, 1133 (9th Cir. 1996) ("[W]here the question to be decided involves matters within the particular expertise of the agency, the agency's conclusions are reviewed under a reasonableness or rational basis standard" (citing *Morris v. Commodity Futures Trading Comm'n*, 980 F.2d 1289, 1293 (9th Cir. 1992))).

Equally well-settled is the converse principle, that "judicial deference is not necessarily warranted where *courts* have experience in the area and are fully competent to decide the issue." *Morris*, 980 F.2d at 1293. (emphasis added). In *Morris*, this Court noted that "judicial deference [is] not required in areas where 'the courts have special competence, *i.e.*, the common law or the constitutional law.'" *Id.* (quoting *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 915 (3d Cir. 1981)). "'In those situations, the more probing *de novo* standard is appropriate.'" *Monex*, 83 F.3d at 1133 (quoting *Morris*, 980 F.2d at 1293). As the Supreme Court held long before *Chevron*,

> [S]ince the Commission professed to dispose of the case solely upon its view of the result called for by the application of canons of contract construction employed by the courts, and did not in any wise rely on matters within its special competence, the Court of Appeals was fully justified in making its own independent determination of the correct application of the governing principles.

Tex. Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263, 270 (1960).

Most other circuits agree. *See, e.g., Melton v. Pasqua*, 339 F.3d 222, 224 (4th Cir. 2003) ("When reviewing the final order of an administrative tribunal, we undertake a *de novo* review of either legal questions or the application of law to the facts when resolution of those issues is regularly undertaken by courts of general jurisdiction."); *MBH Commodity Advisors, Inc. v. Commodity Futures Trading Comm'n*, 250 F.3d 1052, 1066 (7th Cir. 2001) (applying a *de novo* standard of review to an agency's decision on "issues that courts commonly encounter"); *Nat'l Min. Ass'n v. Sec'y of Labor*, 153 F.3d 1264, 1267 (11th Cir. 1998) ("[W]e need not defer to issues beyond the agency's expertise."); *see also Colorado Pub. Utils. Comm'n v. Harmon*, 951 F.2d 1571, 1579 (10th Cir. 1991) (not deferring on issue of preemption); *Lynch v. Lyng*, 872 F.2d 718, 724 (6th Cir. 1989) (not deferring on issue of statute's effective date); *Maloley v. R.J. O'Brien & Assocs., Inc.*, 819 F.2d 1435, 1440-41 (8th Cir. 1987) (emphasizing that there is no reason for judicial deference where the question at bar falls outside the area generally entrusted to the agency).

Against this jurisprudential backdrop, the District Court's decision to accord deference to the Secretaries' limiting construction of the federal reserved water rights doctrine—which was devised by the Supreme Court in 1908 and, as the District Court acknowledged, is anchored exclusively in federal common law—was reversible error. ER 24. It is not just that the federal reserved water rights

doctrine is an area in which "courts have experience . . . and are fully competent to decide the issue." *Monex*, 83 F.3d at 1133 (quoting *Morris*, 980 F.2d at 1293); that analysis of this doctrine "is regularly undertaken by courts of general jurisdiction," *Melton*, 339 F.3d at 224; or that it gives rise to "issues that courts commonly encounter." *MBH Commodity Advisors, Inc.*, 250 F.3d at 1066. The reserved rights doctrine is federal *common law* created by the federal courts, which are therefore *exclusively* competent to delimit it in an authoritative way in any specific case.

Here, the 1999 Rule did not purport to construe any term found in ANILCA. To the contrary, in *Katie John I* this Court had already definitively defined ANILCA's term "public lands," and the Secretaries role was then simply to carry out *this Court's directive* to identify "those navigable waters in which the United States has an interest *by virtue of the reserved water rights doctrine*." 72 F.3d at 704 (emphasis added). ANILCA itself does not even mention the reserved water rights doctrine.

Recall that the Secretaries' original 1992 Rule did not include *any* navigable waters in the regulatory definition of "public lands" covered by the subsistence priority, let alone make reference to the reserved water rights doctrine. ER 8-9. It was only in the context of the ensuing *Katie John I* litigation that the Secretaries adopted the new position that ANILCA's definition of "public lands" could

encompass "*some* navigable waters . . . by virtue of the reserved water rights doctrine." ER 9 (emphasis in original). This Court found this position reasonable and held 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," even while recognizing that application of the doctrine in this context would be "inherently unsatisfactory"—since customary and traditional subsistence fishing occurs in other navigable waters as well. *Katie John I*, 72 F.3d at 703-04. Although this Court's deference to the Secretaries' litigating position regarding the proper definition of "public lands" was arguably justified,[5] the Secretaries' ensuing application of the reserved water rights doctrine in a subsequent Rule was certainly not entitled to *Chevron* deference because that Rule was only enacted by virtue of this Court's directive to the Secretaries simply to apply the doctrine in Alaska.[6]

[5] In *Katie John II*, three members of this Court disagreed with the propriety of according any deference to the Secretaries' litigating position. Judge Tallman, concurring in the *en banc* affirmation of *Katie John I* and joined by Judges Tashima and W. Fletcher, wrote: "The agency possesses no expertise, however, that qualifies it to determine whether the rural subsistence priority applies to navigable waters. The issue 'is a pure question of statutory construction for the courts to decide.'" 247 F.3d 1032, 1038 (9th Cir. 2001) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987)). This holds even more true with respect to the 1999 Rule, which the Secretaries enacted pursuant to this Court's directive.

[6] Nor was the 1999 Rule entitled to *Chevron* deference as "an agency's interpretation of its own regulations." ER 56 (citation omitted). As noted above, the Secretaries enacted the 1999 Rule only to effect this Court's ruling in *Katie John I*, *not* to interpret the previous 1992 Rule, which, it bears reiterating, categorically excluded *all* navigable waters from the definition of public lands.

"Because the issue presented [here, the application of the reserved water rights doctrine] is a question of pure law and does not implicate agency expertise in any meaningful way, [this Court] need not defer under *Chevron*[.]" *Magna-Pizano v. INS*, 200 F.3d 603, 611 n.11 (9th Cir. 1999).

Because the District Court applied a largely deferential standard of review, instead of "the more probing *de novo* standard," the Order must be reversed for that reason alone. *Monex*, 83 F.3d at 1133 (internal citation omitted).

II. THE DISTRICT COURT'S DECISION TO RE-"BALANCE" FEDERAL INTERESTS UNDER THE WATER RIGHTS DOCTRINE WITH STATE INTERESTS IN FISHEREIES MANAGEMENT IS CONTRARY TO THIS COURT'S MANDATE IN *KATIE JOHN I*.

This Circuit squarely held in *Katie John I* that the "reserved water rights doctrine" is the touchstone for determining the existence of federally protected subsistence fishing rights in Alaska. *Katie John I*, 72 F.3d at 703-04. That doctrine exists to assure that federal lands set aside by Congress for particular purposes will at all times have sufficient water necessary to fulfill those purposes. The District Court agreed that under the doctrine, "federal reserved water rights can and do exist in navigable waters beyond the boundaries of a federal reservation." ER 60. But the court stopped short of applying that law to Alaska Native allotments and to upstream and downstream waters that are necessary to fulfill the purposes of ANILCA on the mistaken assumption that *Katie John I* required the Secretaries to "achieve a balance between state and federal

management of fisheries." ER 11; *see also* ER 12 ("a necessary balance"), ER 27 ("a reasonable division"), ER 66 ("achieve a balance"), ER 67 ("for purposes of striking a balance"). This misreading of *Katie John I* led directly to the court's erroneous conclusion that the question before it was whether the Secretaries "properly employed federal reserved water rights law for purposes of achieving a reasonable division of jurisdiction" between state and federal regulation. ER 27.

But this Court never directed the agencies to make their selection of reserved waters based on a division of state and federal interests. That division had already been undertaken by Congress when it enacted the mandatory subsistence regime established in Title VIII. Because Congress already undertook that division, the Secretaries were directed by this Court simply to go forward and identify "those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine." *Katie John I*, 72 F.3d at 704. The Secretaries' decision to engage in a second level "balancing" in order to cut off federally reserved waters at the border of every CSU is contrary to this Court's instruction, contrary to ANILCA, and in excess of agency authority.

The District Court upheld the Secretaries' limited interpretation based on a misreading of this Court's statement that both "federal and state regulation" of navigable waters "is necessary" given ANILCA's terms. ER 11 (citing *Katie John I*, 72 F.3d at 704); *see also* ER 6 ("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.'") (emphasis and alterations in original) (citing 16 U.S.C. § 3114). But that statement does not direct a re-"balancing" of state and federal interests over a straight-forward application of the reserved waters doctrine; it simply reflects the fact that ANILCA's subsistence priority does not apply to navigable waters where there are no federally reserved water rights, and that ANILCA preempts state jurisdiction on public lands *only* when doing so is necessary to effect the subsistence priority. 16 U.S.C. § 3114. Even then, the State continues to regulate sport fishing, AS 16.05.330, and has its own free standing subsistence hunting and fishing regime, AS 16.05.258, which operates in tandem with § 3114 of ANILCA. In sum, nothing in this Court's *Katie John I* opinion authorized the Secretaries to modify the reserved waters doctrine in order to re-"balance" federal and state interests, and the District Court's conclusion otherwise is an independent reason for reversing the judgment below.

Over twenty years ago this Court struck down the State of Alaska's improper narrowing of the subsistence priority as "tak[ing] away what Congress has given" to rural Alaskans, because by interpreting ANILCA to "protect commercial and sport fishing interests" over subsistence users. *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 318 (9th Cir. 1988). With their narrow

interpretation of the reserved waters doctrine, the Secretaries have replicated the State's poor record and limited the subsistence opportunities that Congress intended to protect.

III. A PROPER APPLICATION OF THE RESERVED WATERS DOCTRINE REQUIRES UPSTREAM AND DOWNSTREAM WATERS IN ORDER TO FULFILL ANILCA'S PURPOSES.

A. When Congress Sets Aside Land, Congress Implicitly Reserves Water Rights Necessary to Carry Out the Primary Purposes For Which the Land Was Set Aside.

A reservation of water for federal purposes is authorized by the Commerce Clause, U.S. CONST. Art. I, § 8, cl. 3, and the Property Clause, U.S. CONST. Art. IV, § 3, cl. 2. Congress exercises its power to reserve waters whenever it sets aside land for purposes that require water. Such reservations of water are implied if they are not expressed, and are reserved as of the date of the reservation of land, regardless of whether enforcement of the right is required at that time.

The reserved water rights doctrine dates back more than a century to the Court's decision in *Winters v. United States*, 207 U.S. 564 (1908). There, the Supreme Court considered whether the Government implicitly reserved water rights for the Fort Belknap Indian Reservation despite making no express reservation of such water rights in the statute setting aside the lands. *Id*. at 576. Faced with "a conflict of implications," the Court reasoned that the interpretive rule of resolving from the standpoint of the Indians any ambiguities in agreements

and treaties between the Government and Indian tribes "should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement [between the Indian tribe and the Government] and the other impair or defeat it." *Id.* at 576-77. The Court thus found an implicit reservation of water sufficient to meet the needs of the Indians for whom the land was reserved despite the absence of explicit language to that effect. *Id.*

Although *Winters* involved land set aside for an Indian reservation, the Court's approach has been applied in subsequent cases to a broad spectrum of federal reservations of land. *See, e.g. United States v. New Mexico,* 438 U.S. 696, 717-18 (1978) (applying doctrine to national forests); *Cappaert v. United States*, 426 U.S. 128, 141-42 (1976) (applying doctrine to national monument); *Arizona v. California*, 373 U.S. 546, 601 (1963) *overruled on other grounds by California v. United States*, 438 U.S. 645 (1978) (applying doctrine to refuges, national forests, and recreation areas); *United States v. Alaska*, 423 F.2d 764, 766-67 (9th Cir. 1970) (applying doctrine to Kenai National Moose Range). *Cappaert* contains the most succinct statement of the controlling principle:

> 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. Intent is inferred if the previously unappropriated waters are *necessary to accomplish the purposes for which the reservation was created.*

426 U.S. at 139 (emphasis added).

The significance of this inquiry into the purpose of the reservation of land is underscored by the Court's careful limitation on the quantity of reserved water to "only that amount . . . necessary to fulfill the purpose of the reservation, no more." *Id.* at 141. As a result, when the Supreme Court has engaged in this analysis, "it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated." *New Mexico,* 438 U.S. at 700.

B. When Congress Set Aside Conservation System Units in ANILCA it Reserved Water Rights in Waters Running Upstream and Downstream From Those CSUs Because Such Rights Are "Necessary to Fulfill the Purpose of the [ANILCA] Reservations."

ANILCA has two expressly stated primary purposes: (1) establishing national conservation lands, and (2) protecting subsistence resources and uses. These twin paramount goals are apparent from the congressional purposes set forth in the statute, 16 U.S.C. § 3101, where Congress expressed its primary intent to preserve and protect "certain lands and waters" for "present and future generations," 16 U.S.C. § 3101(a)-(b), and "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so." *Id.* at § 3101(c). In furtherance of its goal of protecting the subsistence way of life, Congress in Title VIII required that subsistence fishing and hunting be accorded a priority over all other uses of fish and wildlife on "public lands" in Alaska. 16 U.S.C. §§ 3111-3126; *Katie John I*, 72 F.3d at 700.

Turning to the CSUs themselves, Congress in ANILCA set aside, redesignated, or expanded some two dozen CSUs, all of which require water to carry out their stated purposes. For instance, in setting aside the Yukon Flats National Wildlife Refuge, Congress declared that the Refuge was created (1) "to conserve fish and wildlife populations and habitats in their natural diversity[,] including . . . salmon," (2) to fulfill "international treaty obligations" such as arise under the U.S.-Canada Pacific Salmon Treaty, (3) "to provide . . . the opportunity for continued subsistence uses by local residents," and (4) "to ensure . . . water quality and necessary water quantity within the refuge." ANILCA, Pub. L. No. 96-487, Title III, §§ 301-304; 16 U.S.C. § 668dd notes. Congress repeated these same purposes in twelve of the thirteen National Parks and Preserves addressed in the Act, *e.g.*, Pub. L. No. 96-487, Title II, §§ 201-202 (codified at 16 U.S.C. §§ 410hh-410hh-1), and in fifteen of the sixteen Refuges addressed in the Act. *E.g.*, Title III, §§ 301-304; 16 U.S.C. § 668dd notes.

Congress's statements of purpose constitute reservations of water as a matter of federal law, because water is absolutely "necessary" for fish and wildlife habitat (most especially salmon), to comply with international treaties, to support subsistence uses, and to ensure water quality and quantity. These primary purposes all have a common denominator: each demands water as a biological necessity in order to be fulfilled. Put differently, without water none of these

primary purposes can be met. The Secretaries and the District Court both failed to undertake the required examination of these purposes. Had they done so, they would have determined that water is a biological necessity both in fact and in law, as without water each of the purposes of the refuges would be defeated. Indeed, as we next will show, proper application of the reserved waters doctrine establishes that upstream and downstream waters are *critically necessary* to fulfill the purposes of ANILCA's CSUs and Alaska Native allotments since without water the purposes of both would be defeated.

1. Fulfilling the purpose set forth in ANILCA "to conserve fish and wildlife populations and habitats . . . including . . . salmon" requires upstream and downstream waters.

Water is biologically necessary to support fish, and it is necessary throughout the geographic range in which fish journey during their various life stages. This is particularly true of salmon—the core of the Alaska Natives' subsistence way of life—because salmon are anadromous and their health inside a refuge thus demands a wide array of habitats above and below each refuge as salmon move through their life cycle. Each life stage of a salmon, from preservation of eggs embedded upstream within the gravel beds of tributaries to adults migrating out to the ocean and then returning back to their home streams to spawn, requires water in sufficient quantities and of sufficient quality. Water is not merely "necessary," but absolutely critical, for spawning, egg incubation, juvenile

rearing and migration to the ocean, and passage back to natal streams for spawning. Thus, fulfilling ANILCA's stated purpose of conserving salmon (and other "fish and wildlife populations and habitats in their natural diversity") in all of these CSUs requires as a necessity a federally reserved water right upstream and downstream from each CSU. Title III, § 302; 16 U.S.C. § 668dd notes.

To limit a federally reserved water right to the boundaries of a refuge or other CSU, as the Secretaries did, is tantamount to saying that the life cycle of the salmon population for which the CSUs were created occurs entirely within the federal reserved waters bounded by each CSU. But obviously that is not so. It is simply impossible to have a viable habitat for salmon *within* a CSU unless the water habitat is protected continuously upstream and downstream of the CSU as far as the migratory patterns of the salmon demand. Without a federal water right to protect and maintain habitat throughout the run of a river coursing through a CSU, the declared congressional purpose of the CSU to protect fish and fish habitat would be defeated. To borrow from *Cappaert*, upstream and downstream water is absolutely "necessary to accomplish the purposes for which [each ANILCA] reservation was established." 426 U.S. at 139. Accordingly, ANILCA must impress each river running through its CSUs with a reserved right in upstream and downstream waters.

The District Court in effect recognized the presence of such a right, even as it upheld the Secretary's regulation. It accepted the biological necessity of water to the maintenance of fish and fish habitat in the CSUs, acknowledging that "[a]nadromous 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." ER 63 (emphasis added); *see also*, ER 66 ("[T]here can be no dispute that water is necessary for the protection and conservation of fish habitats."). But the court then stopped short, reasoning that "[*t*]*he day may come* when the Secretaries will have to be concerned about water flows, both upstream and downstream from CSUs," ER 63 (emphasis added), adding "that navigable waters upstream and downstream of CSUs *may one day* be impacted by federal reserved water rights that are appurtenant to the CSU[s]," ER 65 (emphasis added), and ultimately limiting its ruling to "*the present time*." ER 63 (emphasis added).

That was error. A federally reserved water right is a property right, as this Court in *Katie John I* squarely held. It is a federally-owned "interest" in "water." That being the case, it does not somehow spring into being at some indefinite time in the future, when "the day may come" that the Secretary decides he needs to use it; if it exists then to be used, it exists now, *today*. The District Court fundamentally confused the *exercise* of a right in the future with the *existence* of the right today.

The District Court's limitation cannot be squared with either the reserved water rights doctrine or the express purpose of ANILCA to protect and conserve fish and fish habitat. If upstream and downstream water rights are necessary for the fulfillment of a CSU's primary purpose, and if they have been retained to be exercised at some future time, then by definition they must exist today. The District Court recognized as much in the context of finding such rights applicable to inholdings. There, the court held that "[w]hen, as here, the federal government has retained its reserved water rights . . . it retains an interest in the navigable waters on or appurtenant to those reserved lands sufficient to support ANILCA jurisdiction." ER 54. Nowhere in the case law is there support for the proposition that the *existence* of a federally reserved water right turns on scarcity. The United States need not wait until an ejectment action becomes necessary before it may identify its retained—and therefore currently existing—rights.

This conclusion is supported by a host of decisions that uphold claims to water rights in stream flows where water is necessary to maintain fish, fish habitat, and other federal purposes. *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 444-45 (1960) (power); *United States v. Walker River Irrigation Dist.*, 104 F.2d 334, 340 (9th Cir. 1939) (agriculture and power); *United States v. Adair*, 723 F.2d 1394, 1412-14 (9th Cir. 1983) (fishing); *Muckleshoot Indian Tribe v. Trans-Canada Enters., Ltd.*, 713 F.2d 455, 457-58 (9th Cir. 1983) (fishing). Indeed, given the

weight of such precedent, the Interior Department's Division of Indian Affairs informed the Alaska Policy Group that, because the United States was consistently asserting off-reservation reserved water rights elsewhere, it should likewise do so here:

> [T]he position taken by the issue paper is contrary to the position that the United States, based, on the recommendations of this Department, is taking in litigation in the lower 48 for Indian reservations. In the Snake River Basin Adjudication in Idaho, for example, the United States has filed water right claims on behalf of the Nez Perce for all off-reservation water courses that provide necessary habitat for anadromous fish for which the Nez Perce have treaty fishing rights. Many of these water right claims are to water courses that are not within or adjacent to the reservation or usual and accustomed fishing places; the determinative factor is whether the water course provides habitat necessary for spawning, rearing, or migration.

ER 217 (internal citation omitted).

Given the United States assertion of off-reservation water rights to protect fish and fish habitat elsewhere, and the absence of any indication from this Court in *Katie John I*, or from Congress in ANILCA, that the reserved water rights doctrine should be interpreted differently here, the Secretaries and the District Court were required to use the same determinative factor in assessing whether off-reservation water courses are biologically necessary to provide habitat necessary for spawning, rearing or migration.

2. Accomplishing Congress's purpose "to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats" requires upstream and downstream waters.

The United States has an international treaty obligation to Canada to manage Yukon River salmon stocks to ensure that sufficient spawning salmon are available to meet escapement requirements and to provide harvests according to a set of controlling harvest-sharing arrangements. ER 175. Chapter VIII of the Pacific Salmon Treaty obligates the United States to rebuild programs for Canadian-origin Chinook stock and for maintenance of existing salmon habitat. *Id*. This treaty obligation was negotiated on the premise, based on genetic stock identification, that fifty percent of the adult chinook salmon that return to the Yukon River and swim through the Yukon's six federal CSUs actually originate in Canada. ER 164.

Thus, in addition to water's necessity to the survival of salmon in all their life cycles, free flowing water is biologically necessary as the medium in which salmon must travel from the ocean to their spawning grounds in the Yukon Territory and British Columbia. For Canadian-bound salmon stock, water for passage is absolutely necessary throughout the entire stream flow in which the stock journeys during its migration. Accordingly, because each Yukon River CSU was established, in part, to "fulfill the international treaty obligations of the United States" to deliver salmon to Canada, ANILCA impresses the river running through those CSUs with a reserved right to upriver and downriver streamflows. Title III,

§ 302; 16 U.S.C. § 668dd notes. Without such upstream and downstream flows, this critical purpose of each CSU would be defeated.

The District Court never examined ANILCA's treaty purposes, even though the Secretaries conceded "there can be no doubt that reservation of waters adjacent to the Nowitna [National Wildlife Refuge] are also necessary to fulfill treaty obligations with respect to the Yukon River." ER 126. That was error. Reserved water rights in in-stream waters necessary to fulfill the United States' international salmon treaty obligations to Canada are at least as necessary, if not more so, than the rights that have been adjudicated elsewhere as necessary to fulfill off-reservation Indian treaty fishing rights.

3. The purpose of providing for the opportunity for continued subsistence uses requires upstream and downstream waters in order for that purpose to be fulfilled.

ANILCA's express primary purposes include the protection of the "subsistence way of life," 16 U.S.C. § 3101(c), and Congress in Title VIII addressed the important question of how *all* "public lands," not just those in various management systems, should be used to protect that way of life. Congress declared that "the continuation of the opportunity for subsistence uses by rural residents of Alaska . . . on the public lands . . . is essential to Native physical, economic, traditional, and cultural existence . . . ." 16 U.S.C. § 3111(1). Congress also declared that "the opportunity for subsistence uses of resources on public and

other lands in Alaska is threatened by the increasing population of Alaska . . . ." *Id.* at § 3111(3). Additionally, given "the national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska," *id.* at § 3111(5), Congress declared that it was prioritizing as Title VIII's "purpose" "the opportunity for rural residents engaged in a subsistence way of life to do so." *Id.* at § 3112(1).

Rural residents have long relied on fish as a mainstay of their diet, and most "'customary and traditional' fishing occurs primarily on navigable waters." *Katie John II*, 247 F.3d 1032, 1036 (9th Cir. 2001) (Tallman, J., concurring) (citing *Native Village of Quinhagak v. United States*, 35 F.3d 388, 393 (9th Cir. 1994) ("Most subsistence fishing (and most of the best fishing) is in the large navigable waterways rather than in the smaller non-navigable tributaries upstream and lakes where fisherman [sic] have access to less fish."). Thus, courts have long recognized that fishing has sustained Alaska's Native populations since time immemorial. *Metlakatla Indian Cmty. v. Egan*, 369 U.S. 45, 46 (1962) ("Long before the white man came to Alaska, the annual migrations of salmon from the sea into Alaska's rivers to spawn served as a food supply for the natives."); *see also Organized Village of Kake v. Egan*, 369 U.S. 60, 66 (1962) ("[F]ishing rights are of vital importance to Indians in Alaska."); *United States v. Alexander*, 938

F.2d 942, 945 (9th Cir. 1991) ("Many Alaska natives who are not fully part of the modern economy rely on fishing for subsistence. If their right to fish is destroyed, so too is their way of life."); *Williams v. Babbitt*, 115 F.3d 657, 664 (9th Cir. 1997) ("[F]ishing . . . is an integral and time-honored part of native subsistence culture.").

The District Court concluded that "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)," but it failed to apply the federal reserved waters doctrine to fulfill that purpose. ER 67. That was error. Given the crucial role that fish play in customary and traditional subsistence uses, it defies logic to conclude that, when Congress indicated an intent to protect subsistence fishing in all federal waters, it meant only the limited subsistence fishing that occurs within or adjacent to the boundaries of ANILCA's various CSUs.

4. <u>The purpose to ensure water quality and necessary water quantity within a refuge requires upstream and downstream waters in order for the purpose to be fulfilled.</u>

Water is necessary to ensure water quality and necessary quantity "to the *maximum extent* practicable and in a manner consistent with the purposes set forth in paragraph (i) [to conserve fish and wildlife populations and habitats in their natural diversity]," and it is necessary throughout the entire stream flow of a river that flows upstream or downstream from a CSU. Title III, § 302; 16 U.S.C. §

668dd notes. This conclusion is compelled by the unassailable fact that navigable waters are part of hydrologically-connected systems of stream flow—there can be no water at point B unless it flows first from point A.

The hydrolic connectivity of a water right off a reservation was recognized in *Cappeart*, where the Court affirmed a decree enjoining *Cappaert's* groundwater pumping to the extent that the pumping interfered with a prior federal reservation of hydrologically-connected surface water necessary to support a rare fish. 426 U.S. 128, 147 (1976). In *Colville Confederated Tribes v. Walton*, this Circuit likewise recognized federal reserved water rights in a "hydrological system, consisting of an underground aquifer and . . . creek." 647 F.2d 42, 45 (9th Cir. 1981); *Cf. Solid Waste Agency of Northern Cook Country v. United States Army Corps of Eng'rs*, 531 U.S. 159, 167 (2001) ("Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparately bound up with the 'waters' of the United States.'" (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985))). It is simply impossible to ensure water quality and necessary water quantity *within* a CSU unless water is protected in the stream flow continuously upstream from the CSU. Without a right to use water to maintain water quality and necessary water quantity throughout the stream regardless of CSU boundaries, the declared purpose of the CSU to ensure water quality and quantity would be defeated. ANILCA, therefore,

impresses each river running through ANILCA's CSUs with a reserved right for uses outside and inside each CSU because doing so is necessary to ensure water quality and necessary water quantity.

In sum, each of ANILCA's purposes requires a reservation of waters that run upstream and downstream from the various CSUs, and without such water rights each of the CSUs primary purposes would be defeated. By failing to examine each of these purposes to determine whether upstream and downstream waters are necessary to fulfill those purposes, and by improperly using a "balancing" analysis, the District Court, like the Secretaries, failed to follow the *Katie John I* mandate.

C. The Secretaries Improperly Interpreted the Reserved Waters Rights Doctrine in Other Respects.

The Secretaries' rulemaking construed reserved water rights as extending only to those waters within or adjacent to a CSU. By this reasoning, even if a water right exists in a CSU at point A, it is non-existent while flowing from point A (the end of one CSU) to point B (the beginning of the next CSU) until the water arrives at point B, at which point the water right springs back into existence. In other words, the Secretaries' position is that a reserved water right exists only in waters actually next to or contiguous to the Federal reservations—even on the Yukon River where there exist six different CSUs.

The Secretaries' position is irreconcilable with its defense of water rights pertaining to that portion of the Yukon River that runs adjacent to the Nowitna

Refuge on one side of the river, but abuts non-federally owned lands on the opposite side of the river. In its briefing on the Nowitna, the Secretaries argreed that, given Congress's purposes, "even if no portion of the Yukon River was within the boundary of the Nowitna [National Wildlife Refuge], that would not preclude a Federal reservation of unappropriated water in the adjacent Yukon River if those waters were necessary for the purposes of the reservation." ER 125. "Thus, if the United States holds a [Federally Reserved Water Right] in any amount of the waters of the Yukon River adjacent to the Nowitna [National Wildlife Refuge], the Secretaries have properly concluded that the entire river adjacent to the refuge are public lands." ER 127. That concession cannot be squared with the Secretaries' approach to upstream and downstream waters.

The Secretaries' determination to limit federal reserved water rights only to waters adjacent to or within CSUs is also irreconcilable with settled case law that the Secretaries concede stands for the proposition that federal reserved water rights may be drawn from water sources that do not traverse, border or abut a federal reservation, so long as those water rights are necessary to fulfill the purposes of the federal reservation. ER 124. For example, in the series of cases beginning with *Arizona v. California*, the Court addressed federal reserved water rights in the Colorado River associated with various reservations, including national forests, national parks, national monuments, public springs and waters, public mineral hot

springs and five Indian reservations, including the Cocopah reservation. 373 U.S. 546, 595 (1963) *overruled on other grounds by California v. United States*, 438 U.S. 645 (1978). The Court examined the specific purposes for which each reservation was reserved, concluded that those purposes primarily included agriculture, and held that the statute and executive orders which established the reservations therefore necessarily reserved water sufficient to carry out those agricultural purposes. *Id.*; *Arizona v. California*, 376 U.S. 340, 344 (1964). This award included water for the Cocopah Reservation, which does not border the Colorado River and is located several miles from the river. *Arizona v. California*, 376 U.S. at 344.

In *Cappaert*, the Supreme Court addressed federal claims to federal reserved water rights in groundwater that was being depleted by off-reservation pumping in wells located up to two and one-half miles away from the Devil's Hole Monument. 426 U.S. 128, 133 (1976). Finding that a primary purpose of the Monument was to preserve a small aquifer-fed pool holding a unique desert fish, the Court held that the United States can protect the pool's water from diversion, regardless of the location of that diversion miles away from the reservation, because it owns a reserved right to the water in the aquifer. *Id.* at 142-43.

Arizona and *Cappaert* establish that water "appurtenant" to reserved lands does not refer to some physical attachment or adjacency of the water to the

reservation, but instead refers to the legal doctrine that attaches water rights, wherever located, to land to the extent necessary to fulfill the primary purposes for which Congress created the reservation. As Professor Getches explains:

> The reserved water rights doctrine holds that the government impliedly withdrew its consent to creation of private rights each time it earmarked public lands for a specific federal purpose to the extent necessary to fulfill that purpose. Thus, the fact that a reservation was detached from water sources does not prove an absence of intent to reserve waters some distance away. *Judicial references to such rights being "appurtenant" to reserved lands apparently refer not to some physical attachment of water to land, but to the legal doctrine that attaches water rights to land to the extent necessary to fulfill reservation purposes.*

DAVID H. GETCHES, WATER LAW 349-50 (4th ed. 2009) (emphasis added); *see also* 4 WATERS AND WATER RIGHTS § 37.01(b)(3) (Robert E. Beck ed., 1991 ed., repl. vol. 2004) ("[R]eserved rights may be drawn from water sources that do not traverse or border on reservations.").

While the Secretaries and the District Court apply this principle to federal reserved water rights associated with inholdings that do not touch federal lands, they fail to apply the same principle to upstream and downstream waters that are far more necessary to support ANILCA's express purposes. In failing to do so, the Secretaries incorrectly interpret the federally reserved water rights doctrine to undercut the very purposes that Congress intended to protect.

IV. THE SECRETARIES FAILED TO APPLY THE FEDERALLY RESERVED WATERS DOCTRINE TO ALASKA NATIVE ALLOTMENTS.

The District Court's application of the federal reserved waters doctrine to Alaska Native allotments is a question of law to be reviewed *de novo*. *See Akiak Native Cmty v. U.S. Postal Serv.*, 213 F.3d 1140, 1144 (9th Cir. 2000).

A. The Federal Government's Interest In Alaska Native Allotments Brings Allotments into the Definition of Public Lands for Purposes of ANILCA

As is true on Indian lands throughout the United States, the federal government maintains a comprehensive system of federal control—to the exclusion of the State and other private parties—over Alaska Native allotments. This control alone constitutes a federal interest in the allotments sufficient to meet ANILCA's definition of "public lands." Because the United States has an "interest" in Alaska Native allotments, the Secretaries were required to apply the reserved waters doctrine to them pursuant to the *Katie John I* mandate.

Alaska allotments were created by the Alaska Native Allotment Act of 1906.[7] This Act provided that Native Indians, Aleuts and Eskimos not residing on a reservation or whose Tribe had no reservation were entitled to a 160-acre allotment of unsurveyed or otherwise unappropriated land upon proof of

[7] Ch. 2469, § 1, 34 Stat. 197 (amended by Act of August 2, 1956, ch. 891, § 1(a)-(e), 70 Stat. 954, repealed by Pub. L. No. 92-203, § 18(a), 85 Stat. 710 (1971); formerly codified at 43 U.S.C. § 270-1 to 270-3, transferred from 48 U.S.C. §§ 357-357(b).

"substantially continuous use and occupancy" of the land for five years. *Id.* Passed after the General Allotment Act of 1887 (also known as the Dawes Act),[8] the Act resolved lingering judicial questions over whether the General Allotment Act applied to Alaska Natives. *See Pence v. Kleppe*, 529 F.2d 135, 140 (9th Cir. 1976) ("[B]ecause a number of lower courts found that Alaska Natives were not within the definition of 'Indian,' there was doubt whether the General Allotment Act did apply to them. Thus Congress moved in 1906 to eliminate this doubt by passing the Alaska Native Allotment Act.").

The Alaska Native Allotment Act specified that allotments withdrawn from the public domain for Alaska Natives "shall be inalienable and nontaxable until otherwise provided by Congress." 34 Stat. 197; *see also*, 43 U.S.C. § 270-1 (1970); 43 C.F.R. §2561.1. ANILCA subsequently approved most Alaska Native allotment applications pending prior to the passage of ANCSA and provided that the Secretary "shall issue trust certificates therefore." 43 U.S.C. §1634(a)(1)(A). Accordingly, the United States has an interest in these allotments because of their restricted fee status. Indeed, as one court in this Circuit previously recognized, "one of the government's interests in allotted lands is a *property interest*." *United States v. Newmont USA Ltd.*, 504 F.Supp.2d 1050, 1067 (E.D. Wash. 2007)

[8] Ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. § 331 *et seq.*) (§§ 331-333 repealed 2000).

(emphasis added) (citing *United States v. City of Tacoma*, 332 F.3d 574, 579 (9th Cir. 2003)).

The federal government's restriction on alienation is one of the most significant incidents of federal ownership—total and absolute control over the transfer of any possessory interest. Pursuant to both the Alaska Native Allotment Act and the implementing regulations, the United States' restraint on alienation makes the land utterly inalienable, and not even taxable or subject to be leased or pledged, unless the Secretary approves. 43 C.F.R. § 2561.0-5(b). This federal restraint on alienation prohibits the unconsented sale, gift, exchange or transfer of an allotment or any interest therein, and the federal government by this interest comprehensively regulates and controls all such transactions. *See* 25 C.F.R. § 152.17-32. The protection against taxation is among the most important elements of the federal government's restraint on alienation, because "[i]n the area of state taxation, . . . the power to tax involves the power to destroy.'" *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819)).

The District Court simply disregarded these federal interests over allotments lands characterizing them as having "nothing to do with water rights." ER 74. But that misses the point for purposes of ANILCA's "public lands" definition that there is a federal "interest" in Native allotments. If that is so, and if water is necessary to

fulfill the purposes of the allotments, then there exist federally reserved water rights necessary to carry out those purposes.

B. The Secretaries Ignored the Well-Established Rule that Federally Reserved Water Rights Attach to Allotments as a Matter of Law.

It is well-established that the federal reserved water rights doctrine set forth by the Supreme Court in *Winters* extend as a matter of law to allotments. The Supreme Court first recognized that water rights attach to allotments in *United States v. Powers*, 305 U.S. 527 (1939). There, the Court considered allotments created under the General Allotment Act, and set aside from lands originally reserved by the federal government for the Crow Indian Reservation but later sold to non-Indians. *Id.* at 531. The Court refused to permit non-Indian diversions of water bound for the allotments, emphasizing that the original purpose of the allotments was "settlement by individual Indians upon designated tracts where they could make homes with exclusive right of cultivation," and "[w]ithout water productive cultivation has always been impossible." *Id.* at 533. Because water was necessary for the original purpose of the allotments, water rights had been reserved. *Id.*

This Circuit similarly found reserved water rights attach to allotments in *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981). There, the allotted land in question had originally been reserved to "provide a homeland for the Indians to maintain their agrarian society" and to preserve the Tribe's access to

its traditional salmon and trout fishing grounds. *Id.* at 47-48. Because access to traditional fishing grounds was the purpose of the original reservation of land, the court determined that the reservation of water for the development and maintenance of fishing grounds was necessarily implied. *Id.* at 48.

The District Court ignored this controlling precedent when it determined that the treatment of allotments created under the Dawes Act has "no application here." ER 76. There is simply no basis for making such a distinction. Rather, it is well established that courts are to treat Indian allotments the same regardless of the statute from which they originate, and regardless of whether they were created from former reservation land or from land that previously was a part of the public domain. This is because all allotments are subject to the same restrictions as those created by the General Allotment Act of 1887. COHEN at § 16.03[2]. Indeed, as noted previously, the Alaska Native Allotment regime was only established due to uncertainties over the reach of the original General Allotment Act.

This principle of identical treatment also applies to water rights appurtenant to allotments—as the Government itself has recognized elsewhere. For instance, in 1976 the Associate Solicitor for Indian Affairs reversed an earlier conclusion that allottees possess no water rights on off-reservation allotments, concluding that "off-reservation allotments are entitled to water rights" because farming was the primary purpose for issuing allotments and the water necessary to farm

successfully was therefore reserved. ER 205, Memorandum from the Assoc. Solicitor, Indian Affairs, to Deputy Solicitor (June 11, 1976). In all cases, the key inquiry is whether the reservation of water is necessary to fulfill the purposes of the allotment.

As we show next, this inquiry into the purpose of Alaska allotments leads inexorably to the conclusion that water rights were reserved for the allotments at the time the Alaska Native Allotment Act was passed.

C. The Secretaries Failed to Examine the Purposes for Which Congress Set Aside Lands for Alaska Natives Under the Alaska Native Allotment Act.

Congress's purpose in the Alaska Native Allotment Act was to protect Alaska Natives' traditional subsistence use and occupancy of particular lands and waters. As this Court noted in *Pence*, the House Committee on Public Lands stated that:

> The necessity for this legislation arises from the fact that Indians in Alaska . . . live in villages and small settlements along the streams where they have their little homes upon land to which they have no title, nor can they obtain title under existing laws. . . . Some one [sic] who regards that particular spot as a desirable location for a home can file upon it for a homestead, and the Indian or Eskimo, as the case may be, is forced to move and give way to his white brother. This has in some instances already worked severe hardship upon these friendly and inoffensive natives to the shame of our own race . . .

529 F.2d at 141 (quoting H.R. Rep. No. 3295, 59th Cong. 1st Sess. (1906)). This Court's reference to this dire reality facing Alaska Natives echoed an earlier report

that President Roosevelt forwarded to Congress in 1905 detailing the problems facing Alaska Natives:

> [The Alaska Natives'] country is being overrun; their natural food supply, never overabundant in this north land, is being taken from them; the large game is being slaughtered and driven to a distance, and the waters depleted of fish . . . . All of these conditions they are themselves helpless to meet . . . . [T]he fact that . . . they have advanced their own interests unaided, does not mean that they have no needs, nor that the Government can through persistent neglect gain immunity from the fulfillment of its moral obligations.

S. Doc. No. 106, 58-106, at 2-3 (1905) (quoting report of G.T. Emmons).

Faced with this harsh reality, Congress concluded that the only way to protect Alaska Natives' traditional subsistence way of life and sources of food was to secure a means for them to obtain title to their subsistence lands, and thereby "to enable Alaska Natives to protect the lands which they used and occupied . . . ." *Olympic v. United States*, 615 F.Supp. 990. 995 (D. Alaska 1985). Although the District Court below casually dismissed the Act's primary purpose of protecting the lands which Alaska Natives used and occupied for hunting and fishing—stating that the Alaska Native Claims Settlement Act extinguished aboriginal fishing rights—the court failed to note that allotments associated with such use and occupancy rights were expressly preserved by that same Act. ER 76; *see* 43 U.S.C. § 1617(a). Significantly, nowhere in the record or in the briefing below did the Secretaries ever assert the categorical position that no reserved waters exist appurtenant to Alaska Native allotments.

Given Congress's primary purpose to protect Alaska Natives' hunting and fishing by authorizing the issuance of federally restricted allotments, it follows inexorably that sufficient water was necessarily reserved to protect those hunting and fishing activities—activities which, absent water, would be destroyed. This conclusion is particularly compelling given the rule of construction that legislation enacted for the benefit of Indians must be interpreted liberally in their favor. *United States v. Orr Water Ditch Co.*, 600 F.3d 1152, 1159 (9th Cir. 2010) (citing *Winters*, 207 U.S. at 576-77).

D. The Secretaries' Position is Inconsistent With Assertions of Federal Reserved Water Rights for Public Domain Allotments Elsewhere.

The Secretaries' avoidance of any decision-making on the issue of whether federal reserved water rights attach to Alaska Native allotments, and the District Court's categorical ruling against such rights, are each at odds with the Interior Department's long-standing position that the reserved waters doctrine applies to public domain allotments so long as the reservation of water is "necessary to accomplish the purposes for which" Congress authorized the allotments. *See* ER 204, Memorandum from Solicitor to all Assoc. Solicitors, Reg'l Solicitors, and Field Solicitors (July 8, 1976) (the conclusion that Indian allotments on the public domain do not have reserved water rights "conflicts with the position taken by this

Office in currently existing litigation and, hence, the last paragraph of the subject Solicitor's Opinion is hereby withdrawn").

Indeed, the United States routinely asserts *Winters* reserved water rights for public domain allotments in other contexts. For example, in the Yakima River adjudication the federal government successfully asserted that the reserved water rights doctrine applies to all off-reservation public domain allotments created under the Indian Appropriation Act of 1884, ch. 180, 23 Stat. 76, 96. *See State of Washington, Dep't of Ecology v. Acquavella*, No. 77-2-01484-5 (Wash. Super. Ct. Sept. 1, 1994) (holding federal reserved water rights are created by implication wherever the United States withdraws land from the public domain in order to fulfill a federal purpose).[9] There was simply no reasoned basis for the Secretaries' decision here to cast aside this long-standing approach in favor of a case-by-case determination of water rights reserved by the Alaska Native Allotment Act, and there was no reasoned basis for the District Court's categorical denial of any water rights whatsoever appurtenant to such allotments.

[9] *See also* Act of Apr. 28, 1904, ch. 1767, 33 Stat. 519; ER 207-11, Memorandum from the Office of the Reg'l Solicitor to Area Dir., Bureau of Indian Affairs (April 23, 1993) (discussing Act of Apr. 28, 1904, ch.1767, 33 Stat. 519).

E. The District Court Failed to Honor This Court's Instructions to the Secretaries in *Katie John I*.

This Court's directive to the Secretaries in *Katie John I* was clear—use the federally reserved water rights doctrine to determine "those waters," not *some portion* of those waters—that are included within the definition of "public lands." *Katie John I*, 72 F.3d 698, 704 (9th Cir. 1995). Despite this explicit directive, the Secretaries inexplicably carved out a special rule for Native allotments, namely to postpone any decision until a later time. This judgment appears to have been made, in part, on the basis of an erroneous legal opinion from the Alaska Regional Solicitor to the effect that, despite its clear command, *Katie John I* "does not require [the Secretaries to] address the Native allotment question *at this time*." ER 133, Memorandum from Reg'l Solicitor Lauri Adams to Solicitor John Leshy (Aug. 9, 1995) (emphasis added). The District Court went further and categorically found *no* federally reserved waters associated with allotments, although it also justified its decision by reasoning that "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*." ER 73 (emphasis added). As we have argued elsewhere, neither *Katie John I* nor the reserved rights doctrine supports such a limited interpretation of the Secretaries' mandate.

CONCLUSION

For the foregoing reasons, the Katie John Appellants respectfully request that this Court: (1) reverse the order of the District Court, (2) hold as a matter of law that the federal reserved waters doctrine extends to all waters necessary to fulfill the purposes of ANILCA, including waters upstream and downstream from ANILCA's CSUs and waters appurtenant to Alaska Native allotments, and (3) remand to the Secretaries with an order to identify those waters and extend to them ANILCA's Title VIII priority.

Respectfully submitted this 14th day of May 2010.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 13,958 words.

STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

ADDENDUM

ADDENDUM INDEX

Alaska Native Allotment Act of 1906, ch. 2469, § 1, 34 Stat. 197 (amended by Act of August 2, 1956, ch. 891, § 1(a)-(e), 70 Stat. 954, repealed by Pub. L. No. 92-203, § 18(a), 85 Stat. 710 (1971); formerly codified at 43 U.S.C. § 270-1 to 270-3, transferred from 48 U.S.C. §§ 357-357(b).

CHAP. 2469 –An Act Authorizing the Secretary of the Interior to allot homesteads to the natives of Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. 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 missed 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 allottee 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.

Approved, May 17, 1906.

Former 43 U.S.C. § 270-1 to 270-3, repealed by the Alaska Native Claims Settlement Act, P.L. 92-203, with a savings clause for any allotment application pending before the Department of Interior on the effective date of the Act, December 18, 1971.

43 U.S.C. § 270-1

The Secretary of the Interior is 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 Alaska, or subject to the provisions of sections 270-11 and 270-12 of this title, vacant, unappropriated, and unreserved lands 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 Alaska, 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 allottee and his heirs in perpetuity; and shall be inalienable and nontaxable until otherwise provided by Congress: Provided, That any Indian, Aleut, or Eskimo, who receives an allotment under this section, 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. 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.

43 C.F.R. § 2561.0-2

§ 2561.1 Applications.

(a) Applications for allotment properly and completely executed on a form approved by the Director, Bureau of Land Management, must be filed in the proper office which has jurisdiction over the lands.

(b) Any application for allotment of lands which extend more than 160 rods along the shore of any navigable waters shall be considered a request for waiver of the 160-rod limitation (see Part 2094 of this chapter).

(c) If surveyed, the land must be described in the application according to legal subdivisions and must conform to the plat of survey when possible. If unsurveyed, it must be described as accurately as possible by metes and bounds and tied to natural objects. On unsurveyed lands, the application should be accompanied by a map or approved protracted survey diagram showing approximately the lands included in the application.

(d) An application for allotment shall be rejected unless the authorized officer of the Bureau of Indian Affairs certifies that the applicant is a native qualified to make application under the Allotment Act, that the applicant has occupied and posted the lands as stated in the application, and that the claim of the applicant does not infringe on other native claims or area of native community use.

(e) The filing of an acceptable application for a Native allotment will segregate the lands. Thereafter, subsequent conflicting applications for such lands shall be rejected, except when the conflicting application is made for the conveyance of lands pursuant to any provision of the Alaska Native Claims Settlement Act.

(f) By the filing of an application for allotment the applicant acquires no rights except as provided in paragraph (e) of this section. If the applicant does not submit the required proof within six years of the filing of his application in the proper office, his application for allotment will terminate without affecting the rights he gained by virtue of his occupancy of the land or his right to make another application.

§ 2561.2 Proof of use and occupancy.

(a) An allotment will not be made until the lands are surveyed by the Bureau of Land Management, and until the applicant or the authorized officer of the Bureau of Indian Affairs has made satisfactory proof of substantially continuous use and occupancy of the land for a period of five years by the applicant. Such proof shall be made on a form approved by the Director, Bureau of Land Management, and filed in the proper land office. If made by the applicant, it must be signed by him, but if he is unable to write his name, his mark or thumb print shall be impressed on the statement and witnessed by two persons. This proof may be submitted with the application for allotment if the applicant has then used and occupied the land for five years, or may be made at any time within six years after the filing of the application when the requirements have been met.

The Alaska National Interest Lands Conservation Act of 1980 (ANILCA), Pub. L. No. 96-487, Title II, §§ 201-203, 94 Stat. 2371-2551 (codified at 16 U.S.C. §§ 140hh-401hh-2):

16 U.S.C. § 410hh

§ 410hh. Establishment of new areas

The following areas are hereby established as units of the National Park System and shall be administered by the Secretary under the laws governing the administration of such lands and under the provisions of this Act:

(1) Aniakchak National Monument, containing approximately one hundred and thirty-eight thousand acres of public lands, and Aniakchak National Preserve, containing approximately three hundred and seventy-six thousand acres of public lands, as generally depicted on map numbered ANIA-90,005, and dated October 1978. The monument and preserve shall be managed for the following purposes, among others: To maintain the caldera and its associated volcanic features and landscape, including the Aniakchak River and other lakes and streams, in their natural state; to study, interpret, and assure continuation of the natural process of biological succession; to protect habitat for, and populations of, fish and wildlife, including, but not limited to, brown/grizzly bears, moose, caribou, sea lions, seals, and other marine mammals, geese, swans, and other waterfowl and in a manner consistent with the foregoing, to interpret geological and biological processes for visitors. Subsistence uses by local residents shall be permitted in the monument where such uses are traditional in accordance with the provisions of subchapter II of chapter 51 of this title.

(2) Bering Land Bridge National Preserve, containing approximately two million four hundred and fifty-seven thousand acres of public land, as generally depicted on map numbered BELA-90,005, and dated October 1978. The preserve shall be managed for the following purposes, among others: To protect and interpret examples of arctic plant communities, volcanic lava flows, ash explosions, coastal formations, and other geologic processes; to protect habitat for internationally significant populations of migratory birds; to provide for archeological and paleontological study, in cooperation with Native Alaskans, of the process of plant and animal migration, including man, between North America and the Asian Continent; to protect habitat for, and populations of, fish and wildlife including, but not limited to, marine mammals, brown/grizzly bears, moose, and wolves; subject to such reasonable regulations as the Secretary may prescribe, to continue reindeer grazing use, including necessary facilities and equipment, within the areas which on January 1, 1976, were subject to reindeer grazing permits, in accordance with sound range management practices; to protect the viability of subsistence resources; and in a manner consistent with the foregoing, to provide for outdoor recreation and environmental education activities including public access for recreational purposes to the Serpentine Hot Springs area. The Secretary shall permit the continuation of customary patterns and modes of travel during periods of adequate snow cover within a one-hundred-foot right-of-way along either side of an existing route from Deering to the Taylor Highway, subject to such reasonable regulations as the Secretary may promulgate to assure that such travel is consistent with the foregoing purposes.

(3) Cape Krusenstern National Monument, containing approximately five hundred and sixty thousand acres of public lands, as generally depicted on map numbered CAKR-90,007, and dated October 1979. The monument shall be managed for the following purposes, among others: To protect and interpret a series of archeological sites depicting every known cultural period in arctic Alaska; to provide for scientific study of the process of human population of the area from the Asian Continent; in cooperation with Native Alaskans, to preserve and interpret evidence of prehistoric and historic Native cultures; to protect habitat for seals and other marine mammals; to protect habitat for and populations of, birds, and other wildlife, and fish resources; and to protect the viability of subsistence resources. Subsistence uses by local residents shall be permitted in the monument in accordance with the provisions of subchapter II of chapter 51 of this title.

(4)(a) Gates of the Arctic National Park, containing approximately seven million fifty-two thousand acres of public lands, Gates of the Arctic National Preserve, containing approximately nine hundred thousand acres of Federal lands, as generally depicted on map numbered GAAR-90,011, and dated July 1980. The

park and preserve shall be managed for the following purposes, among others: To maintain the wild and undeveloped character of the area, including opportunities for visitors to experience solitude, and the natural environmental integrity and scenic beauty of the mountains, forelands, rivers, lakes, and other natural features; to provide continued opportunities, including reasonable access, for mountain climbing, mountaineering, and other wilderness recreational activities; and to protect habitat for and the populations of, fish and wildlife, including, but not limited to, caribou, grizzly bears, Dall sheep, moose, wolves, and raptorial birds. Subsistence uses by local residents shall be permitted in the park, where such uses are traditional, in accordance with the provisions of subchapter II of chapter 51 of this title.

(b) Congress finds that there is a need for access for surface transportation purposes across the Western (Kobuk River) unit of the Gates of the Arctic National Preserve (from the Ambler Mining District to the Alaska Pipeline Haul Road) and the Secretary shall permit such access in accordance with the provisions of this subsection.

(c) Upon the filing of an application pursuant to section 3164(b) and (c) of this title for a right-of-way across the Western (Kobuk River) unit of the preserve, including the Kobuk Wild and Scenic River, the Secretary shall give notice in the Federal Register of a thirty-day period for other applicants to apply for access.

(d) The Secretary and the Secretary of Transportation shall jointly prepare an environmental and economic analysis solely for the purpose of determining the most desirable route for the right-of-way and terms and conditions which may be required for the issuance of that right-of-way. This analysis shall be completed within one year and the draft thereof within nine months of the receipt of the application and shall be prepared in lieu of an environmental impact statement which would otherwise be required under section 102(2)(C) of the National Environmental Policy Act [42 U.S.C.A. § 4332(2)(C)]. Such analysis shall be deemed to satisfy all requirements of that Act and shall not be subject to judicial review. Such environmental and economic analysis shall be prepared in accordance with the procedural requirements of section 3164(e) of this title. The Secretaries in preparing the analysis shall consider the following—

(i) Alternative routes including the consideration of economically feasible and prudent alternative routes across the preserve which would result in fewer or less severe adverse impacts upon the preserve.

(ii) The environmental and social and economic impact of the right-of-way including impact upon wildlife, fish, and their habitat, and rural and traditional lifestyles including subsistence activities, and measures which should be instituted to avoid or minimize negative impacts and enhance positive impacts.

(e) Within 60 days of the completion of the environmental and economic analysis, the Secretaries shall jointly agree upon a route for issuance of the right-of-way across the preserve. Such right-of-way shall be issued in accordance with the provisions of section 3167 of this title.

(5) Kenai Fjords National Park, containing approximately five hundred and sixty-seven thousand acres of public lands, as generally depicted on map numbered KEFJ-90,007, and dated October 1978. The park shall be managed for the following purposes, among others: To maintain unimpaired the scenic and environmental integrity of the Harding Icefield, its outflowing glaciers, and coastal fjords and islands in their natural state; and to protect seals, sea lions, other marine mammals, and marine and other birds and to maintain their hauling and breeding areas in their natural state, free of human activity which is disruptive to their natural processes. In a manner consistent with the foregoing, the Secretary is authorized to develop access to the Harding Icefield and to allow use of mechanized equipment on the icefield for recreation.

(6) Kobuk Valley National Park, containing approximately one million seven hundred and ten thousand acres of public lands as generally depicted on map numbered KOVA-90,009, and dated October 1979. The park shall be managed for the following purposes, among others: To maintain the environmental integrity of the natural features of the Kobuk River Valley, including the Kobuk, Salmon, and other rivers, the boreal forest, and the Great Kobuk Sand Dunes, in an undeveloped state; to protect and interpret, in cooperation with Native Alaskans, archeological sites associated with Native cultures; to protect migration routes for the Arctic caribou herd; to protect habitat for, and populations of, fish and wildlife including but not limited to caribou, moose, black and grizzly bears, wolves, and waterfowl; and to protect the viability of subsistence resources. Subsistence uses by local residents shall be permitted in the park in accordance with the provisions of subchapter II of chapter 51 of this title. Except at such times when, and locations where, to do so would be inconsistent with the purposes of the park, the Secretary shall permit aircraft to continue to land at sites in the upper Salmon River watershed.

(7)(a) Lake Clark National Park, containing approximately two million four hundred thirty-nine thousand acres of public lands, and Lake Clark National

Preserve, containing approximately one million two hundred and fourteen thousand acres of public lands, as generally depicted on map numbered LACL-90,008, and dated October 1978. The park and preserve shall be managed for the following purposes, among others: To protect the watershed necessary for perpetuation of the red salmon fishery in Bristol Bay; to maintain unimpaired the scenic beauty and quality of portions of the Alaska Range and the Aleutian Range, including active volcanoes, glaciers, wild rivers, lakes, waterfalls, and alpine meadows in their natural state; and to protect habitat for and populations of fish and wildlife including but not limited to caribou, Dall sheep, brown/grizzly bears, bald eagles, and peregrine falcons.

(b) No lands conveyed to the Nondalton Village Corporation shall be considered to be within the boundaries of the park or preserve; if the corporation desires to convey any such lands, the Secretary may acquire such lands with the consent of the owner, and any such lands so acquired shall become part of the park or preserve, as appropriate. Subsistence uses by local residents shall be permitted in the park where such uses are traditional in accordance with the provisions of subchapter II of chapter 51 of this title.

(8)(a) Noatak National Preserve, containing approximately 6,477,168 acres of public lands, as generally depicted on map numbered NOAT-90,004, and dated July 1980 and the map entitled “Noatak National Preserve and Noatak Wilderness Addition” dated September 1994. The preserve shall be managed for the following purposes, among others: To maintain the environmental integrity of the Noatak River and adjacent uplands within the preserve in such a manner as to assure the continuation of geological and biological processes unimpaired by adverse human activity; to protect habitat for, and populations of, fish and wildlife, including but not limited to caribou, grizzly bears, Dall sheep, moose, wolves, and for waterfowl, raptors, and other species of birds; to protect archeological resources; and in a manner consistent with the foregoing, to provide opportunities for scientific research. The Secretary may establish a board consisting of scientists and other experts in the field of arctic research in order to assist him in the encouragement and administration of research efforts within the preserve.

(b) All lands located east of centerline of the main channel of the Noatak River which are—

(1) within

(A) any area withdrawn under the Alaska Native Claims Settlement Act for selection by the village of Noatak, and

(B) any village deficiency withdrawal under section 11(a)(3)(A) of such Act which is adjacent to the area described in subparagraph (i) of this paragraph,

(2) adjacent to public lands within a unit of the National Park System as designated under this Act, and

(3) not conveyed to such Village or other Native Corporation before the final conveyance date, shall, on such final conveyance date, be added to and included within, the adjacent unit of the National Park System (notwithstanding the applicable acreage specified in this paragraph) and managed in the manner provided in the foregoing provisions of this paragraph. For purposes of the preceding sentence the term "final conveyance date" means the date of the conveyance of lands under the Alaska Native Claims Settlement Act, or by operation of this Act, to the Village of Noatak, or to any other Native Corporation which completes the entitlement of such Village or other Corporation to conveyance of lands from the withdrawals referred to in subparagraph (1).

(9) Wrangell-Saint Elias National Park, containing approximately eight million one hundred and forty-seven thousand acres of public lands, and Wrangell-Saint Elias National Preserve, containing approximately four million one hundred and seventy-one thousand acres of public lands, as generally depicted on map numbered WRST-90,007, and dated August 1980. The park and preserve shall be managed for the following purposes, among others: To maintain unimpaired the scenic beauty and quality of high mountain peaks, foothills, glacial systems, lakes, and streams, valleys, and coastal landscapes in their natural state; to protect habitat for, and populations of, fish and wildlife including but not limited to caribou, brown/grizzly bears, Dall sheep, moose, wolves, trumpeter swans and other waterfowl, and marine mammals; and to provide continued opportunities, including reasonable access for mountain climbing, mountaineering, and other wilderness recreational activities. Subsistence uses by local residents shall be permitted in the park, where such uses are traditional, in accordance with the provisions of subchapter II of chapter 51 of this title.

(10) Yukon-Charley Rivers National Preserve, containing approximately one million seven hundred and thirteen thousand acres of public lands, as generally depicted on map numbered YUCH-90,008, and dated October 1978. The preserve shall be managed for the following purposes, among others: To maintain the environmental integrity of the entire Charley River basin, including streams, lakes and other natural features, in its undeveloped natural condition for public benefit

and scientific study; to protect habitat for, and populations of, fish and wildlife, including but not limited to the peregrine falcons and other raptorial birds, caribou, moose, Dall sheep, grizzly bears, and wolves; and in a manner consistent with the foregoing, to protect and interpret historical sites and events associated with the gold rush on the Yukon River and the geological and paleontological history and cultural prehistory of the area. Except at such times when and locations where to do so would be inconsistent with the purposes of the preserve, the Secretary shall permit aircraft to continue to land at sites in the Upper Charley River watershed.

§ 410hh-1. Additions to existing areas

The following units of the National Park System are hereby expanded:

(1) Glacier Bay National Monument, by the addition of an area containing approximately five hundred and twenty-three thousand acres of Federal land. Approximately fifty-seven thousand acres of additional public land is hereby established as Glacier Bay National Preserve, both as generally depicted on map numbered GLBA-90,004, and dated October 1978; furthermore, the monument is hereby redesignated as “Glacier Bay National Park”. The monument addition and preserve shall be managed for the following purposes, among others: To protect a segment of the Alsek River, fish and wildlife habitats and migration routes, and a portion of the Fairweather Range including the northwest slope of Mount Fairweather. Lands, waters, and interests therein within the boundary of the park and preserve which were within the boundary of any national forest are hereby excluded from such national forest and the boundary of such national forest is hereby revised accordingly.

(2) Katmai National Monument, by the addition of an area containing approximately one million and thirty-seven thousand acres of public land. Approximately three hundred and eight thousand acres of additional public land is hereby established as Katmai National Preserve, both as generally depicted on map numbered 90,007, and dated July 1980; furthermore, the monument is hereby redesignated as “Katmai National Park”. The monument addition and preserve shall be managed for the following purposes, among others: To protect habitats for, and populations of, fish and wildlife including, but not limited to, high concentrations of brown/grizzly bears and their denning areas; to maintain unimpaired the water habitat for significant salmon populations; and to protect scenic, geological, cultural and recreational features.

(3)(a) Mount McKinley National Park, by the addition of an area containing approximately two million four hundred and twenty-six thousand acres of public land, and approximately one million three hundred and thirty thousand acres of

additional public land is hereby established as Denali National Preserve, both as generally depicted on map numbered DENA-90,007, and dated July 1980 and the whole is hereby redesignated as Denali National Park and Preserve. The park additions and preserve shall be managed for the following purposes, among others: To protect and interpret the entire mountain massif, and additional scenic mountain peaks and formations; and to protect habitat for, and populations of fish and wildlife including, but not limited to, brown/grizzly bears, moose, caribou, Dall sheep, wolves, swans and other waterfowl; and to provide continued opportunities, including reasonable access, for mountain climbing, mountaineering and other wilderness recreational activities. Subsistence uses by local residents shall be permitted in the additions to the park where such uses are traditional in accordance with the provisions in subchapter II of chapter 51 of this title.

(b) The Alaska Land Use Council shall, in cooperation with the Secretary, conduct a study of the Kantishna Hills and Dunkle Mine areas of the park as generally depicted on a map entitled "Kantishna Hills/Dunkle Mine Study Area", dated October 1979, and report thereon to the Congress not later than three years from December 2, 1980. The study and report shall evaluate the resources of the area, including but not limited to, fish and wildlife, public recreation opportunities, wilderness potential, historic resources, and minerals, and shall include those recommendations respecting resources and other relevant matters which the Council determines are necessary. In conjunction with the study required by this section, the Council, in consultation with the Secretary, shall compile information relating to the mineral potential of the areas encompassed within the study, the estimated cost of acquiring mining properties, and the environmental consequences of further mineral development.

(c) During the period of the study, no acquisition of privately owned land shall be permitted within the study area, except with the consent of the owner, and the holders of valid mining claims shall be permitted to operate on their claims, subject to reasonable regulations designed to minimize damage to the environment: *Provided, however,* That such lands or claims shall be subject to acquisition without the consent of the owner or holder if the Secretary determines, after notice and opportunity for hearing, if such notice and hearing are not otherwise required by applicable law or regulation, that activities on such lands or claims will significantly impair important scenic, wildlife, or recreational values of the public lands which are the subject of the study.

§ 410hh-2. Administration; hunting and subsistence uses; admission fees

Subject to valid existing rights, the Secretary shall administer the lands, waters, and interests therein added to existing areas or established by the foregoing

sections of this subchapter as new areas of the National Park System, pursuant to the provisions of sections 1 and 2 to 4 of this title, as amended and supplemented, and, as appropriate, under section 3201 of this title and the other applicable provisions of this Act: *Provided, however*, That hunting shall be permitted in areas designated as national preserves under the provisions of this Act. Subsistence uses by local residents shall be allowed in national preserves and, where specifically permitted by this Act, in national monuments and parks. Lands, waters, and interests therein withdrawn or reserved for the former Katmai and Glacier Bay National Monuments are hereby incorporated within and made a part of Katmai National Park or Glacier Bay National Park, as appropriate. Any funds available for the purposes of such monuments are hereby made available for the purposes of Katmai National Park and Preserve or Glacier Bay National Park and Preserve, as appropriate. Notwithstanding any other provision of law, no fees shall be charged for entrance or admission to any unit of the National Park System located in Alaska.

ANILCA, Pub. L. No. 96-487, Titles I, VIII, §§ 101-102, 801-815, 94 Stat. 2374 (codified at 16 U.S.C. §§ 3101-3102, 3111-3125):

§ 3101. Congressional statement of purpose

(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.

(d) Need for future legislation obviated

This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.

§ 3102. Definitions

As used in this Act (except that in titles IX and XIV the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.], and the Alaska Statehood Act)—

(1) The term “land” means lands, waters, and interests therein.

(2) The term “Federal land” means lands the title to which is in the United States after December 2, 1980.

(3) The term “public lands” means 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 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.

(4) The term "conservation system unit" means 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 units, and any such unit established, designated, or expanded hereafter.

(5) The term "Alaska Native Claims Settlement Act" means "An Act to provide for the settlement of certain land claims of Alaska Natives, and for other purposes", approved December 18, 1971 (85 Stat. 688), as amended.

(6) The term "Native Corporation" means any Regional Corporation, any Village Corporation, any Urban Corporation, and any Native Group.

(7) The term "Regional Corporation" has the same meaning as such term has under section 3(g) of the Alaska Native Claims Settlement Act.

(8) The term "Village Corporation" has the same meaning as such term has under section 3(j) of the Alaska Native Claims Settlement Act.

(9) The term "Urban Corporation" means those Native entities which have incorporated pursuant to section 14(h)(3) of the Alaska Native Claims Settlement Act.

(10) The term "Native Group" has the same meaning as such term has under sections 3(d) and 14(h)(2) of the Alaska Native Claims Settlement Act.

(11) The term "Native land" means land owned by a Native Corporation or any Native Group and includes land which, as of December 2, 1980, had been selected under the Alaska Native Claims Settlement Act by a Native Corporation or Native Group and had not been conveyed by the Secretary (except to the extent such selection is determined to be invalid or has been relinquished) and land referred to in section 19(b) of the Alaska Native Claims Settlement.

(12) The term "Secretary" means the Secretary of the Interior, except that when such term is used with respect to any unit of the National Forest System, such term means the Secretary of Agriculture.

(13) The terms "wilderness" and "National Wilderness Preservation System" have the same meaning as when used in the Wilderness Act (78 Stat. 890) [16 U.S.C.A. § 1131 et seq.].

(14) The term "Alaska Statehood Act" means the Act entitled "An Act to provide for the admission of the State of Alaska into the Union", approved July 7, 1958 (72 Stat. 339), as amended.

(15) The term "State" means the State of Alaska.

(16) The term "Alaska Native" or "Native" has the same meaning as the term "Native" has in section 3(b) of the Alaska Native Claims Settlement Act.

(17) The term "fish and wildlife" means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or part thereof.

(18) The term "take" or "taking" as used with respect to fish or wildlife, means to pursue, hunt, shoot, trap, net, capture, collect, kill, harm, or attempt to engage in any such conduct.

§ 3111. Congressional declaration of findings

The Congress finds and declares that—

(1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence;

(2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses;

(3) continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska, with resultant pressure on subsistence resources, by sudden decline in the populations of some wildlife species which are crucial subsistence resources, by increased accessibility of remote areas containing subsistence resources, and by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management;

(4) in order to fulfill the policies and purposes of the Alaska Native Claims

Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents; and

(5) the national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska require that an administrative structure be established for the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska.

§ 3112. Congressional statement of policy

It is hereby declared to be the policy of Congress that—

(1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands; consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for each unit established, designated, or expanded by or pursuant to titles II through VII of this Act, the purpose of this subchapter is to provide the opportunity for rural residents engaged in a subsistence way of life to do so;

(2) nonwasteful subsistence uses of fish and wildlife and other renewable resources shall be the priority consumptive uses of all such resources on the public lands of Alaska when it is necessary to restrict taking in order to assure the continued viability of a fish or wildlife population or the continuation of subsistence uses of such population, the taking of such population for nonwasteful subsistence uses shall be given preference on the public lands over other consumptive uses; and

(3) except as otherwise provided by this Act or other Federal laws, Federal land managing agencies, in managing subsistence activities on the public lands and in protecting the continued viability of all wild renewable resources in Alaska, shall cooperate with adjacent landowners and land managers, including Native Corporations, appropriate State and Federal agencies, and other nations.

§ 3113. Definitions

As used in this Act, the term “subsistence uses” means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct

personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade. For the purposes of this section, the term—

(1) "family" means all persons related by blood, marriage, or adoption, or any person living within the household on a permanent basis;

(2) "barter" means the exchange of fish or wildlife or their parts, taken for subsistence uses—

(A) for other fish or game or their parts; or

(B) for other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature.

§ 3114. Preference for subsistence uses

Except as otherwise provided in this Act 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. Whenever 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, such priority shall be implemented through appropriate limitations based on the application of the following criteria:

(1) customary and direct dependence upon the populations as the mainstay of livelihood;

(2) local residency; and

(3) the availability of alternative resources.

§ 3115. Local and regional participation

(a) Establishment of subsistence resources regions, local advisory committees, and regional advisory councils; membership, duties, and authority of regional advisory councils

Except as otherwise provided in subsection (d) of this section, the Secretary in consultation with the State shall establish—

(1) at least six Alaska subsistence resource regions which, taken together, include all public lands. The number and boundaries of the regions shall be sufficient to assure that regional differences in subsistence uses are adequately accommodated;

(2) such local advisory committees within each region as he finds necessary at such time as he may determine, after notice and hearing, that the existing State fish and game advisory committees do not adequately perform the functions of the local committee system set forth in paragraph (3)(D)(iv) of this subsection; and

(3) a regional advisory council in each subsistence resource region.

Each regional advisory council shall be composed of residents of the region and shall have the following authority:

(A) the review and evaluation of proposals for regulations, policies, management plans, and other matters relating to subsistence uses of fish and wildlife within the region;

(B) the provision of a forum for the expression of opinions and recommendations by persons interested in any matter related to the subsistence uses of fish and wildlife within the region;

(C) the encouragement of local and regional participation pursuant to the provisions of this subchapter in the decisionmaking process affecting the taking of fish and wildlife on the public lands within the region for subsistence uses;

(D) the preparation of an annual report to the Secretary which shall contain—

(i) an identification of current and anticipated subsistence uses of fish and wildlife populations within the region;

(ii) an evaluation of current and anticipated subsistence needs for fish and wildlife populations within the region;

(iii) a recommended strategy for the management of fish and wildlife populations within the region to accommodate such subsistence uses and needs; and

(iv) recommendations concerning policies, standards, guidelines, and regulations to implement the strategy. The State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of this subsection may provide advice to, and assist, the regional advisory councils in carrying out the functions set forth in this paragraph.

(b) Assignment of staff and distribution of data

The Secretary shall assign adequate qualified staff to the regional advisory councils and make timely distribution of all available relevant technical and scientific support data to the regional advisory councils and the State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of subsection (a) of this section.

(c) Consideration of reports and recommendations of regional advisory councils

The Secretary, in performing his monitoring responsibility pursuant to section 3116 of this title and in the exercise of his closure and other administrative authority over the public lands, shall consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses. The Secretary may choose not to follow any recommendation which he determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If a recommendation is not adopted by the Secretary, he shall set forth the factual basis and the reasons for his decision.

(d) Supersedure by enactment and implementation of State laws governing State responsibility; consideration of recommendations by State rulemaking authority

The Secretary shall not implement subsections (a), (b), and (c) of this section if the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 3113, 3114, and 3115 of this title, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility pursuant to this subchapter for the taking of fish and wildlife on the public lands for subsistence uses. Laws establishing a system of local advisory committees and regional advisory councils consistent with this section shall provide that the State rulemaking authority shall consider the advice and recommendations of the regional councils concerning the taking of fish and wildlife populations on public lands within their respective regions for subsistence uses. The regional councils may present recommendations, and the evidence upon which such recommendations are based, to the State rulemaking authority during the course of the administrative proceedings of such authority. The State rulemaking authority may choose not to follow any recommendation which it determines is not supported by substantial evidence presented during the course of its administrative proceedings, violates recognized principles of fish and wildlife conservation or would be detrimental to the satisfaction of rural subsistence needs. If a recommendation is not adopted by the State rulemaking authority, such authority shall set forth the factual basis and the reasons for its

decision.

(e) Reimbursement to State; limitation; report to Congress

(1) The Secretary shall reimburse the State, from funds appropriated to the Department of the Interior for such purposes, for reasonable costs relating to the establishment and operation of the regional advisory councils established by the State in accordance with subsection (d) of this section and the operation of the State fish and game advisory committees so long as such committees are not superseded by the Secretary pursuant to paragraph (2) of subsection (a) of this section. Such reimbursement may not exceed 50 per centum of such costs in any fiscal year. Such costs shall be verified in a statement which the Secretary determines to be adequate and accurate. Sums paid under this subsection shall be in addition to any grants, payments, or other sums to which the State is entitled from appropriations to the Department of the Interior.

(2) Total payments to the State under this subsection shall not exceed the sum of $5,000,000 in any one fiscal year. The Secretary shall advise the Congress at least once in every five years as to whether or not the maximum payments specified in this subsection are adequate to ensure the effectiveness of the program established by the State to provide the preference for subsistence uses of fish and wildlife set forth in section 3114 of this title.

§ 3116. Federal monitoring; reports to State and Congressional committees

The Secretary shall monitor the provisions by the State of the subsistence preference set forth in section 3114 of this title and shall advise the State and the Committees on Natural Resources and on Merchant Marine and Fisheries of the House of Representatives and the Committees on Energy and Natural Resources and Environment and Public Works of the Senate annually and at such other times as he deems necessary of his views on the effectiveness of the implementation of this subchapter including the State's provision of such preference, any exercise of his closure or other administrative authority to protect subsistence resources or uses, the views of the State, and any recommendations he may have.

§ 3117. Judicial enforcement

(a) Exhaustion of administrative remedies; civil action; parties; preliminary injunctive relief; other relief; costs and attorney's fees

Local 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

set forth in section 3114 of this title (or with respect to the State as set forth in a State law of general applicability if the State has fulfilled the requirements of section 3115(d) of this title) 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. In a civil action filed against the State, the Secretary may be joined as a party to such action. The court may grant preliminary injunctive relief in any civil action if the granting of such relief is appropriate under the facts upon which the action is based. No order granting preliminary relief shall be issued until after an opportunity for hearing. In a civil action filed against the State, the court shall provide relief, other than preliminary relief, by directing the State to submit regulations which satisfy the requirements of section 3114 of this title; when approved by the court, such regulations shall be incorporated as part of the final judicial order, and such order shall be valid only for such period of time as normally provided by State law for the regulations at issue. Local residents and other persons and organizations who are prevailing parties in an action filed pursuant to this section shall be awarded their costs and attorney's fees.

* * * * *

(c) Section as sole Federal judicial remedy

This section is the sole Federal judicial remedy created by this subchapter for local residents and other residents who, and organizations which, are aggrieved by a failure of the State to provide for the priority of subsistence uses set forth in section 3114 of this title.

§ 3118. Park and park monument subsistence resource commissions

(a) Appointment of members; development of subsistence hunting program; annual review of program

Within one year from December 2, 1980, the Secretary and the Governor shall each appoint three members to a subsistence resources commission for each national park or park monument within which subsistence uses are permitted by this Act. The regional advisory council established pursuant to section 3115 of this title which has jurisdiction within the area in which the park or park monument is located shall appoint three members to the commission each of whom is a member of either the regional advisory council or a local advisory committee within the region and also engages in subsistence uses within the park or park monument. Within eighteen months from December 2, 1980, each commission shall devise and recommend to the Secretary and the Governor a

program for subsistence hunting within the park or park monument. Such program shall be prepared using technical information and other pertinent data assembled or produced by necessary field studies or investigations conducted jointly or separately by the technical and administrative personnel of the State and the Department of the Interior, information submitted by, and after consultation with the appropriate local advisory committees and regional advisory councils, and any testimony received in a public hearing or hearings held by the commission prior to preparation of the plan at a convenient location or locations in the vicinity of the park or park monument. Each year thereafter, the commission, after consultation with the appropriate local committees and regional councils, considering all relevant data and holding one or more additional hearings in the vicinity of the park or park monument, shall make recommendations to the Secretary and the Governor for any changes in the program or its implementation which the commission deems necessary.

(b) Implementation of subsistence hunting program

The Secretary shall promptly implement the program and recommendations submitted to him by each commission unless he finds in writing that such program or recommendations violates recognized principles of wildlife conservation, threatens the conservation of healthy populations of wildlife in the park or park monument, is contrary to the purposes for which the park or park monument is established, or would be detrimental to the satisfaction of subsistence needs of local residents. Upon notification by the Governor, the Secretary shall take no action on a submission of a commission for sixty days during which period he shall consider any proposed changes in the program or recommendations submitted by the commission which the Governor provides him.

(c) Subsistence uses prior to implementation of subsistence hunting program

Pending the implementation of a program under subsection (a) [So in original. Probably should be “subsection (b)”] of this section, the Secretary shall permit subsistence uses by local residents in accordance with the provisions of this subchapter and other applicable Federal and State law.

§ 3119. Cooperative agreements

The Secretary may enter into cooperative agreements or otherwise cooperate with other Federal agencies, the State, Native Corporations, other appropriate persons and organizations, and, acting through the Secretary of State, other nations to effectuate the purposes and policies of this subchapter.

§ 3120. Subsistence and land use decisions

(a) Factors considered; requirements

In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency—

(1) gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to section 3115 of this title;

(2) gives notice of, and holds, a hearing in the vicinity of the area involved; and

(3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

(b) Environmental impact statement

If the Secretary is required to prepare an environmental impact statement pursuant to section 4332(2) (C) of Title 42, he shall provide the notice and hearing and include the findings required by subsection (a) of this section as part of such environmental impact statement.

(c) State or Native Corporation land selections and conveyances

Nothing herein shall be construed to prohibit or impair the ability of the State or any Native Corporation to make land selections and receive land conveyances pursuant to the Alaska Statehood Act or the Alaska Native Claims Settlement Act.

(d) Management or disposal of lands

After compliance with the procedural requirements of this section and other

applicable law, the head of the appropriate Federal agency may manage or dispose of public lands under his primary jurisdiction for any of those uses or purposes authorized by this Act or other law.

* * * * *

§ 3124. Regulations

The Secretary shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this subchapter.

§ 3125. Limitations and savings clauses

Nothing in this subchapter shall be construed as—

(1) granting any property right in any fish or wildlife or other resource of the public lands or as permitting the level of subsistence uses of fish and wildlife within a conservation system unit to be inconsistent with the conservation of healthy populations, and within a national park or monument to be inconsistent with the conservation of natural and healthy populations, of fish and wildlife. No privilege which may be granted by the State to any individual with respect to subsistence uses may be assigned to any other individual;

(2) permitting any subsistence use of fish and wildlife on any portion of the public lands (whether or not within any conservation system unit) which was permanently closed to such uses on January 1, 1978, or enlarging or diminishing the Secretary's authority to manipulate habitat on any portion of the public lands;

(3) authorizing a restriction on the taking of fish and wildlife for nonsubsistence uses on the public lands (other than national parks and park monuments) unless necessary for the conservation of healthy populations of fish and wildlife, for the reasons set forth in section 3126 of this title, to continue subsistence uses of such populations, or pursuant to other applicable law; or

(4) modifying or repealing the provisions of any Federal law governing the conservation or protection of fish and wildlife, including the National Wildlife Refuge System Administration Act of 1966 (80 Stat. 927; 16 U.S.C. 668dd-jj), the National Park Service Organic Act (39 Stat. 535, [So in original. Probably should be a semicolon] 16 U.S.C. 1, 2, 3, 4), the Fur Seal Act of 1966 (80 Stat. 1091; 16 U.S.C. 1187) [16 U.S.C.A. § 1151 et seq.], the Endangered Species Act of 1973 (87 Stat. 884; 16 U.S.C. 1531-1543), the Marine Mammal Protection Act of 1972 (86 Stat. 1027; 16 U.S.C. 1361-1407), the Act entitled “An Act for the Protection of the Bald Eagle”, approved June 8, 1940 (54 Stat. 250; 16 U.S.C. 742a-754) [16 U.S.C.A. § 668 et seq.], the Migratory Bird Treaty Act (40 Stat.

755; 16 U.S.C. 703-711), the Federal Aid in Wildlife Restoration Act (50 Stat. 917; 16 U.S.C. 669-669i), the Magnuson-Stevens Fishery Conservation and Management Act (90 Stat. 331; 16 U.S.C. 1801-1882), the Federal Aid in Fish Restoration Act (64 Stat. 430; 16 U.S.C. 777-777k), or any amendments to any one or more of such Acts.

43 U.S.C. § 1634

§ 1634. Alaska Native allotments

(a) Approval of applications for certain lands; lands containing coal, oil, or gas; nonmineral lands; lands within National Park System; protests; voluntary relinquishment of application

(1)(A) Subject to valid existing rights, all Alaska Native allotment applications made pursuant to the Act of May 17, 1906 (34 Stat. 197, as amended) which were pending before the Department of the Interior on or before December 18, 1971, and which describe either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve--Alaska (then identified as Naval Petroleum Reserve No. 4) or within Fort Davis (except as provided in subparagraph (B)) are hereby approved on the one hundred and eightieth day following December 2, 1980, except where provided otherwise by paragraph (3), (4), (5), or (6) of this subsection, or where the land description of the allotment must be adjusted pursuant to subsection (b) of this section, in which cases approval pursuant to the terms of this subsection shall be effective at the time the adjustment becomes final. The Secretary shall cause allotments approved pursuant to this section to be surveyed and shall issue trust certificates therefor.

ANILCA, Pub. L. No. 96-487, Title III, §§ 301-303, 94 Stat. 2371 (1980) (Title III of ANILCA is not codified)

Sec. 301. For purposes of this title—

(1) The term "existing", if used in referring to any unit of the National Wildlife Refuge System in the State, means the unit as it existed on the day before the date of enactment of the Alaska Native Claims Settlement Act except as specifically modified by section 12(b)(1) of Public Law 94-204 and section 1432(c) of this Act.

(2) The term "refuge" means—

(A) any unit of the National Wildlife Refuge System established by section 302 or 303 of this Act;

(B) any existing unit of the National Wildlife Refuge System in Alaska not included within any unit referred to in subparagraph (A);

(C) any unit of the National Wildlife Refuge System established in Alaska after the date of the enactment of this Act; or

(D) any addition to any unit described in subparagraphs (A), (B), or (C) above.

Sec. 302. The following are established as units of the National Wildlife Refuge System:

(1) ALASKA PENINSULA NATIONAL WILDLIFE REFUGE.—(A) The Alaska Peninsula National Wildlife Refuge shall consist of the approximately three million five hundred thousand acres of public lands as generally depicted on the map entitled "Alaska Peninsula National Wildlife Refuge", dated October 1979 and shall include the lands on the Alaska Peninsula transferred to and made part of the refuge pursuant to section 1427 of this Act.

(B) The purposes for which the Alaska Peninsula National Wildlife Refuge is established and shall be managed include—

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, brown bears, the Alaska Peninsula caribou herd, moose, sea otters and other marine mammals, shorebirds and other migratory birds, raptors, including bald eagles and peregrine falcons, and salmonoids and other fish;

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii) above, the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(2) BECHAROF NATIONAL WILDLIFE REFUGE.—(A) The Becharof National Wildlife Refuge shall consist of the approximately one million two hundred thousand acres of public lands generally depicted on the map entitled "Becharof National Wildlife Refuge", dated July 1980.

(B) The purposes for which the Becharof National Wildlife Refuge is established and shall be managed include—

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, brown bears, salmon, migratory birds, the Alaskan Peninsula caribou herd and marine birds and mammals;

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(3) INNOKO NATIONAL WILDLIFE REFUGE.—(A) The Innoko National Wildlife Refuge shall consist of the approximately three million eight hundred and fifty thousand acres of public lands generally depicted on the map entitled "Innoko National Wildlife Refuge", dated October 1978.

(B) The purposes for which the Innoko National Wildlife Refuge is established and shall be managed include—

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, waterfowl, peregrine falcons, other migratory birds, black bear, moose, furbearers, and other mammals and salmon;

(ii) to fulfill international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(4) KANUTI NATIONAL WILDLIFE REFUGE.—(A) The Kanuti National Wildlife Refuge shall consist of the approximately one million four hundred and thirty thousand acres of public lands generally depicted on the map entitled "Kanuti National Wildlife Refuge", dated July 1980.

(B) The purposes for which the Kanuti National Wildlife Refuge is

established and shall be managed include—

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, whitefronted geese and other waterfowl and migratory birds, moose, caribou (including participation in coordinated ecological studies and management of the Western Arctic caribou herd), and furbearers;

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(5) KOYUKUK NATIONAL WILDLIFE REFUGE.—(A) The Koyukuk National Wildlife Refuge shall consist of the approximately three million five hundred and fifty thousand acres of public lands generally depicted on the map entitled "Koyukuk National Wildlife Refuge", dated July 1980.

(B) The purposes for which the Koyukuk National Wildlife Refuge is established and shall be managed include—

(i) to conserve the fish and wildlife populations and habitats in their natural diversity including, but not limited to, waterfowl and other migratory birds, moose, caribou (including participation in coordinated ecological studies and management of the Western Arctic caribou herd), furbearers, and salmon;

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(6) NOWITNA NATIONAL WILDLIFE REFUGE.—(A) The Nowitna National Wildlife Refuge shall consist of the approximately one million five hundred

and sixty thousand acres of public lands generally depicted on a map entitled "Nowitna National Wildlife Refuge", dated July 1980.

(B) The purposes for which the Nowitna Antional Wildlife Refuge is established and shall be managed include—

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, trumpeter swans, white-fronted geese, canvasbacks and other waterfowl and migratory birds, moose, caribou, martens, wolverines and other furbearers, salmon, sheefish, and northern pike;

(ii) to fulfill international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(7) SELAWIK NATIONAL WILDLIFE REFUGE.—(A) The Selawik National Wildlife Refuge shall consist of the approximately two million one hundred and fifty thousand acres of public land generally depicted on the map entitled "Selawik National Wildlife Refuge", dated July 1980. No lands conveyed to any Native Corporation shall be considered to be within the boundaries of the refuge; except that if any such corporation desires to convey any such lands, the Secretary may acquire such lands with the consent of the owner and any such acquired lands shall become public lands of the refuge.

(B) The purposes for which the Selawik National Wildlife Refuge is established and shall be managed include—

(i) to conserve the fish and wildlife populations and habitats in their natural diversity including, but not limited to, the Western Arctic caribou herd (including participation in coordinated ecological studies and management of these caribou), waterfowl, shorebirds and other migratory birds, and salmon and sheefish;

(ii) to fulfill international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses

by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(C) The Secretary shall administer the refuge in such a manner as will permit reindeer grazing uses, including the construction and maintenance of necessary facilities and equipment within the areas, which on January 1, 1976, were subject to reindeer grazing permits.

(8) TETLIN NATIONAL WILDLIFE REFUGE.—(A) The Tetlin National Wildlife Refuge shall consist of the approximately seven hundred thousand acres of public land as generally depicted on a map entitled "Tetlin National Wildlife Refuge", dated July 1980. The northern boundary of the refuge shall be a line parallel to, and three hundred feet south, of the centerline of the Alaska Highway.

(B) The purposes for which the Tetlin National Wildlife Refuge is established and shall be managed include—

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, waterfowl, raptors and other migratory birds, furbearers, moose, caribou (including participation in coordinated ecological studies and management of the Chisana caribou herd), salmon and Dolly Varden;

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents;

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge; and

(v) to provide, in a manner consistent with subparagraphs (i) and

(ii), opportunities for interpretation and environmental education, particularly in conjunction with any adjacent State visitor facilities.

(9) YUKON FLATS NATIONAL REFUGE.—(A) The Yukon Flats National Wildlife Refuge shall consist of approximately eight million six hundred and thirty thousand acres of public lands as generally depicted on the map entitled "Yukon Flats National Wildlife Refuge", dated July 1980.

(B) The purposes for which the Yukon Flats National Wildlife Refuge is established and shall be managed include—

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, canvasbacks and other migratory birds, Dall sheep, bears, moose, wolves, wolverines and other furbearers, caribou (including participation in coordinated ecological studies and management of the Porcupine and Fortymile caribou herds) and salmon;

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

Sec. 303. The following areas, consisting of existing refuges and the additions made thereto, are established or redesignated as units of the National Wildlife Refuge System:

(1) ALASKA MARITIME NATIONAL WILDLIFE REFUGE.—(A) The Alaska Maritime National Wildlife Refuge shall consist of eleven existing refuges, including all lands (including submerged lands), waters and interests therein which were a part of such refuges and are hereby redesignated as subunits of the Alaska Maritime National Wildlife Refuge; approximately four hundred and sixty thousand acres of additional public lands on islands, islets, rocks, reefs, spires and designated capes and headlands in the coastal areas and adjacent seas of Alaska, and an undetermined quantity of submerged lands, if any, retained in Federal ownership at the time of statehood around Kodiak and Afognak Islands, as generally depicted on the map entitled "Alaska Maritime National Wildlife Refuge", dated October 1979, including the—

(i) Chukchi Sea Unit—including Cape Lisburne, Cape Thompson, the existing Chamisso National Wildlife Refuge, and all other public lands on islands, islets, rocks, reefs, spires, and designated capes and headlands in the Chukhi Sea, but excluding such other offshore public lands within the Bering Land Bridge National Preserve. That portion of the public lands on Cape Lisburne shall be named and appropriately identified as

the "Ann Stevens-Cape Lisburne" subunit of the Chukchi Sea Unit;

(ii) Bering Sea Unit—including the existing Bering Sea and Pribilof (Walrus and Otter Islands) National Wildlife Refuges, Hagemeister Island, Fairway Rock, Sledge Island, Bluff Unit, Besboro Island, Punuk Islands, Egg Island, King Island, and all other public lands on islands, islets, rocks, reefs, spires and designated capes and headlands in the Bering Sea;

(iii) Aleutian Islands Unit—including the existing Aleutian Islands and Bogoslof National Wildlife Refuges, and all other public lands in the Aleutian Islands;

(iv) Alaska Peninsula Unit—including the existing Simeonof and Semidi National Wildlife Refuges, the Shumagin Islands, Sutwik Island, the islands and headlands of Puale Bay, and all other public lands on islands, islets, rocks, reefs, spires and designated capes and headlands south of the Alaska Peninsula from Katmai National Park to False Pass including such offshore lands incorporated in this unit under section 1427; and

(v) Gulf of Alaska Unit—including the existing Forrester Island, Hazy Islands, Saint Lazaria and Tuxedni National Wildlife Refuges, the Barren Islands, Latax Rocks, Harbor Island, Pye and Chiswell Islands, Ragged Natoa, Chat, Chevel, Granite and Middleton Islands, the Trinity Islands, all named and unnamed islands, islets, rocks, reefs, spires, and whatever submerged lands, if any, were retained in Federal ownership at the time of statehood surrounding Kodiak and Afognak Islands and all other such public lands on islands, islets, rocks, reefs, spires and designated capes and headlands within the Gulf of Alasks, but excluding such lands within existing units of the National Park System, Nuka Island and lands within the National Forest System except as provided in section 1427 of this Act.

(B) The purposes for which the Alaska Maritime National Wildlife Refuge is established and shall be managed include—

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to marine mammals, marine birds and other migratory birds, the marine resources upon which they rely, bears, caribou and other mammals;

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent wit the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents;

(iv) to provide, manner consistent with subparagraphs (i) and (ii), a program of national and international scientific research on marine resources; and

(v) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(C) Any lands acquired pursuant to section 1417 of this Act shall be included as public lands of the Alaska Maritime National Wildlife Refuge.

(2) ARCTIC NATIONAL WILDLIFE REFUGE.—(A) The Arctic National Wildlife Refuge shall consist of the existing Arctic National Wildlife Range including lands, waters, interests, and whatever submerged lands, if any, were retained in Federal ownership at the time of statehood and an addition of approximately nine million one hundred and sixty thousand acres of public lands, as generally depicted on a map entitled "Arctic National Wildlife Refuge, dated August 1980.

(B) The purposes for which the Arctic National Wildlife Refuge is established and shall be managed include—

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, the Porcupine caribou herd (including participation in coordinated ecological studies and management of this herd and the Western Arctic caribou herd), polar bears, grizzly bears, muskox, Dall sheep, wolves, wolverines, snow geese, peregrine falcons and other migratory birds and Arctic char and grayling;

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(3) IZEMBEK NATIONAL WILDLIFE REFUGE.—(A) The existing Izembek

National Wildlife Range including the lands, waters and interests of that unit which shall be redesignated as the Izembek National Wildlife Refuge.

(B) The purpose for which the Izembek National Wildlife Refuge is established and shall be managed include—

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, waterfowl, shorebirds and other migratory birds, brown bears and salmonoids;

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(4) KENAI NATIONAL WILDLIFE REFUGE.—(A) The Kenai National Wildlife Refuge shall consist of the existing Kenai National Moose Range, including lands, waters, interests, and whatever submerged lands, if any, were retained in Federal ownership at the time of statehood, which shall be redesignated as the Kenai National Wildlife Refuge, and an addition of approximately two hundred and forty thousand acres of public lands as generally depicted on the map entitled "Kenai National Wildlife Refuge", dated October 1978, excluding lands described in P.L.O. 3953, March 21, 1966, and P.L.O. 4056, July 22, 1966, withdrawing lands for the Bradley Lake Hydroelectric Project.

(B) The purposes for which the Kenai National Wildlife Refuge is established and shall be managed, include—

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, moose, bears, mountain goats, Dall sheep, wolves and other furbearers, salmonoids and other fish, waterfowl and other migratory and nonmigratory birds;

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge;

(iv) to provide in a manner consistent with subparagraphs (i) and (ii),

opportunities for scientific research, interpretation, environmental education, and land management training; and

(v) to provide, in a manner compatible with these purposes, opportunities for fish and wildlife-oriented recreation.

(5) KODIAK NATIONAL WILDLIFE REFUGE.—(A) The Kodiak National Wildlife Refuge shall consist of the existing Kodiak National Wildlife Refuge, including lands, waters, interests, and whatever submerged lands, if any, were retained in Federal ownership at the time of statehood, which is redesignated as the Kodiak Island Unit of the Kodiak National Wildlife Refuge, and the addition of all public lands on Afognak and Ban Islands of approximately fifty thousand acres as generally depicted on the map entitled "Kodiak National Wildlife Refuge", dated October 1978. The described public lands on Afognak Island are those incorporated in this refuge from section 1427 of this Act.

(B) The purposes for which the Kodiak National Wildlife Refuge is established and shall be managed include—

(i) to conserve fish and wildlife populations habitats in their natural diversity including, but not limited to, Kodiak brown bears, salmonoids, sea otters, sea lions and other marine mammals and migratory birds;

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(6) TOGIAK NATIONAL WILDLIFE REFUGE.—(A) The Togiak National Wildlife Refuge shall consist of the existing Cape Newenham National Wildlife Refuge, including lands, waters, and interests therein, which shall be redesignated as a unit of the Togiak National Wildlife Refuge, and an addition of approximately three million eight hundred and forty thousand acres of public lands, as generally depicted on the map entitled "Togiak National Wildlife Refuge", dated April 1980.

(B) The purposes for which the Togiak National Wildlife Refuge is established and shall be managed include—

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, salmonoids, marine birds and mammals, migratory birds and large mammals (including their restoration to historic levels);

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(7) YUKON DELTA NATIONAL WILDLIFE REFUGE.—(A) The Yukon Delta National Wildlife Refuge shall consist of the existing Clarence Rhode National Wildlife Range, Hazen Bay National Wildlife Refuge, and Nunivak National Wildlife Refuge, including lands, waters, interests, and whatever submerged lands, if any, were retained in Federal ownership at the time of statehood, which shall be redesignated as units of the Yukon Delta National Wildlife Refuge and the addition of approximately thirteen million four hundred thousand acres of public lands, as generally depicted on the map entitled "Yukon Delat National Wildlife Refuge", dated April 1980.

(B) The purposes for which the Yukon Delta National Wildlife Refuge is established and shall be managed include—

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, shorebirds, seabirds, whistling swans, emperor, white-fronted and Canada geese, black brant and other migratory birds, salmon, muskox, and marine mammals;

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) to ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

(C) Subject to such reasonable regulations as the Secretary may prescribe,

reindeer grazing, including necessary facilities and equipment, shall be permitted within areas where such use is, and in a manner which is, compatible with the purposes of this refuge.

(D) Subject to reasonable regulation, the Secretary shall administer the refuge so as to not impede the passage of navigation and access by boat on the Yukon and Kuskokwim Rivers.

Sec. 304. (a) Each refuge shall be administered by the Secretary, subject to valid existing rights, in accordance with the laws governing the administration of units of the National Wildlife Refuge System, and this Act.

(b) In applying section 4(d) of the National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd) with respect to each refuge the Secretary may not permit any use, or grant easements for any purpose described in such section 4(d) unless such use (including but not limited to any oil and gas leasing permitted under paragraph (2) or purpose is compatible with the purposes of the refuge. The Secretary shall prescribe such regulations and impose such terms and conditions as may be necessary and appropriate to ensure that activities carried out under any use or easement granted under any authority are so compatible.

(c) All public lands (including whatever submerged lands, if any, beneath navigable waters of the United States (as that term is defined in section 1301(a) of title 43, United States Code) were retained in Federal ownership at the time of statehood) in each National Wildlife Refuge and any other National Wildlife Refuge System unit in Alaska are hereby withdrawn, subject to valid existing rights, from future selections by the State of Alaska and Native Corporations, from all forms of appropriation or disposal under the public land laws, including location, entry and patent under the mining laws but not from operation of mineral leasing laws.

(d) The Secretary shall permit within units of the National Wildlife Refuge System designated, established, or enlarged by this Act, the exercise of valid commercial fishing rights or privileges obtained pursuant to existing law and the use of Federal lands, subject to reasonable regulation, for campsites, cabins, motorized vehicles, and aircraft landings directly incident to the exercise of such rights or privileges: Provided, That nothing in this section shall require the Secretary to permit the exercise of rights or privileges or use of the Federal lands directly incident to such exercise, which he determines, after conducting a public hearing in the affected locality, to be inconsistent with the purposes of a unit of the National Wildlife Refuge System as described in this section and to be a significant expansion of commercial fishing activities within such unit beyond the level of

such activities during 1979.

(e) Where compatible with the purposes of the refuge unit, the Secretary may permit, subject to reasonable regulations and in accord with sound fisheries management principles, scientifically acceptable means of maintaining, enhancing, and rehabilitating fish stock.

(f)(1) The Secretary is authorized to enter into cooperative management agreements with any Native Corporation, the State, any political subdivision of the State, or any other person owning or occupying land which is located within, or adjacent or near to any national wildlife refuge. Each cooperative management agreement (herein-after in this section referred to as an "agreement") shall provide that the land subject to the agreement shall be managed by the owner or occupant in a manner compatible with the major purposes of the refuge to which such land pertains including the opportunity for continuation of subsistence uses by local rural residents.

(2) Each agreement shall—

(A) set forth such uses of the land subject to the agreement which are compatible with the management goals set forth in subsection (f)(1);

(B) permit the Secretary reasonable access to such land for purposes relating to the administration of the refuge and to carry out the obligations of the Secretary under the agreement;

(C) permit reasonable access to such land by officers of the State for purposes of conserving fish and wildlife;

(D) set forth those services or other consideration which the Secretary agrees to provide the owner or occupant in return for the owner or occupant entering into the agreement, which services may include technical and other assistance with respect to fire control, trespass control, law enforcement, resource and land use planning the conserving of fish and wildlife and the protection, maintenance and enhancement of any special values of the land subject to the agreement;

(E) set forth such additional terms and conditions as the Secretary and the owner or occupant may agree to as being necessary and appropriate to carry out the management goals as set forth in subsection (f)(1); and

(F) specify the effective period of the agreement.

(g)(1) The Secretary shall prepare, and from time to time, revise, a comprehensive conservation plan (hereinafter in this subsection referred to as the "plan") for each refuge.

(2) Before developing a plan for each refuge, the Secretary shall identify and describe—

(A) the populations and habitats of the fish and wildlife resources of the refuge;

(B) the special values of the refuge, as well as any other archeological, cultural, ecological, geological, historical, paleontological, scenic, or wilderness value of the refuge;

(C) areas within the refuge that are suitable for use as administrative sites or visitor facilities, or for visitor services, as provided for in sections 1305 and 1306 of this Act;

(D) present and potential requirements for access with respect to the refuge, as provided for in title XI; and

(E) significant problems which may adversely affect the populations and habitats of fish and wildlife identified and described under subparagraph (A).

(3) Each plan shall—

(A) based upon the identifications and the descriptions required to be made under paragraph (2)—

(i) designate areas within the refuge according to their respective resources and values;

(ii) specify the programs for conserving fish and wildlife and the programs relating to maintaining the values referred to in paragraph (2)(B), proposed to be implemented within each such areas; and

(iii) specify the uses within each such area which may be compatible with the major purposes of the refuge; and

(B) set forth those opportunities which will be provided within the refuge for fish and wildlife-oriented recreation, ecological research, environmental education and interpretation of refuge resources and values, if such recreation, research, education, and interpretation is compatible with the purposes of the refuge.

(4) In preparing each plan and revisions thereto, the Secretary shall consult with the appropriate State agencies and Native Corporations, and shall hold public hearings in such locations in the State as may be appropriate to insure that residents of local villages and political subdivisions of the State which will be primarily affected by the administration of the refuge concerned have opportunity to present their views with respect to the plan or revisions.

(5) Before adopting a plan for any refuge, the Secretary shall issue public notice of the proposed plan in the Federal Register, make copies of the plan available at each regional office of the United States Fish and Wildlife Service and provide opportunity for public views and comment on the plan.

(6) With respect to refuges established, redesignated, or expanded by section 302 or 303 the Secretary shall prepare plans for—

(A) not less than five refuges within three years after the date of the enactment of this Act;

(B) not less than ten refuges within five years after such date;

(C) all refuges within seven years after such date. With respect to any refuge established in the State after the date of the enactment of this Act, the Secretary shall prepare a plan for the refuge within two years after the date of its establishment; and

(D) in the case of any refuge established, redesignated, or expanded by this title with respect to which a wilderness review is required under this Act, at the same time the President submits his recommendation concerning such unit under such section to the Congress, the Secretary shall submit to the appropriate committees of the Congress the conservation plan for that unit.

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen Moore