

The *Katie John* Litigation: A Continuing Search for Alaska Native Fishing Rights After ANCSA

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INTRODUCTION

This essay tells the story of the struggle by upper Ahtna people to protect their way of life and their access to a traditional fishery in modern Alaska. Because of the perseverance of Katie John, Doris Charles, other Ahtna people, and the larger Alaska Native community, their right to fish at a traditional fishing site survives. It is a battle that continues to this day—after nearly thirty-five years of litigation in various forums and in successive related cases that illustrate the complex legal and political issues. The rich history, culture, and modern activism of the Ahtna people motivate the litigation to protect an important local fishery, and along with it, the subsistence fishing rights of all rural Alaska Natives. The latest legal chapter is centered on a peculiar case about a moose hunter, a hovercraft, and the jurisdiction of the National Park Service over navigable waters within the boundaries of Park units. This also is a story that will never end, for population pressures, commercial fishing interests, government indifference, and hostility forever have the potential to diminish or undermine long-standing rights.¹

Katie John and Doris Charles were upper Ahtna Indians who, along with their families and other Ahtna people, relied on the abundant Copper River salmon fishery for food as well as cultural and spiritual sustenance.² Indeed, the rich food sources of the region were the primary reason why the Ahtna

1. There are five cases central to the topic at hand. The Katie John trilogy consists of: *John v. United States (Katie John III)*, 720 F.3d 1214 (9th Cir. 2013); *John v. United States (Katie John II)*, 247 F.3d 1032 (9th Cir. 2001); *State of Alaska v. Babbitt (Katie John I)*, 72 F.3d 698 (9th Cir. 1995). The hovercraft/Park Service cases are: *Sturgeon v. Frost (Sturgeon II)*, 139 S. Ct. 1066 (2019); *Sturgeon v. Frost (Sturgeon I)*, 136 S. Ct. 1061 (2016).

2. These and other background facts in this section are taken from *Katie John et al. v. Alaska*, No. A85-698 Civil, Order on Cross Motions for Summary Judgment (D. Alaska Jan. 19, 1990), and also from the “Petition for Rulemaking by the Secretaries of Interior and Agriculture that Navigable Waters and Federal Reserved Waters are ‘Public Lands’ Subject to Title VIII of ANILCA’s Subsistence Priority” (filed by Mentasta Village Council, Native Village of Quinhagak, Native Village of Goodnews Bay, Alaska Federation of Natives, Alaska Intertribal Council, RurAL CAP, Katie John, Doris Charles, Louie Smith and Annie Cleveland, July 15, 1993) [hereinafter *Public Lands Petition*]. The Secretaries responded to the petition with a proposed rule. *Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, C, and D, Redefinition To Include Waters Subject to Subsistence Priority*, 62 Fed. Reg. 66216 (proposed Dec. 17, 1997) (to be codified at 50 C.F.R. pt. 100).

people settled in and protected their rights to the territory.³ “Non-Native explorers traveling in the Copper Basin at the end of the 19th century noted the [importance] of territorial boundaries.”⁴ Both Katie and Doris established Native allotments at a location at the confluence of the Copper River and Tanada Creek, known in Ahtna as *natelde*, or “roasted salmon place” in English.⁵ Ahtna occupation of the area extends back at least two thousand years, and evidence of indigenous occupation of the area may go back as far as 12,000 years.⁶ “The entire site became known as Batzulnetas after the American military explorer Lt. Henry A. Allen named it for the chief or *kaska*e and shaman *Bets’ulnii Ta’* or ‘Father of Someone Respects Him.’”⁷ While Lt. Allen lived to tell the tale of his journey through the Ahtna territory, the first Russian explorers who arrived in the late Eighteenth Century were all killed by the Ahtna in battle.⁸ The region’s rich natural beauty and abundant food resources make it easy to understand why the Ahtna people diligently protected the area from unwanted incursions. A modern Ahtna leader eloquently described his conception of the territory:

The headwaters country can be thought of, not simply as a set of separate or distinct historical sites, but as a country. Not in the sense of a nation-state but as multidimensional space consisting of people, animals, plants, earth, water, and air. It is a terrain that is lived in and lived with. From Wilson Justin’s point of view, the headwaters country is not just a physical place, a ‘street address,’ but an ‘idea,’ an ‘area’ integral to a people’s identity and existence.⁹

3. See generally WILLIAM E. SIMEONE, ALONG THE ALTS’E’ TNAEY-NAL’CINE TRAIL: HISTORICAL NARRATIVES, HISTORICAL PLACES 16–17 (Mount Sanford Tribal Consortium in Cooperation with the National Park Service, 2014), <https://www.nps.gov/wrst/learn/historyculture/upload/Along-the-A-N-Trail-508-compliant.pdf> [<https://perma.cc/XU9Y-8R3S>] (documenting history of Ahtna region).

4. *Id.* at 8.

5. JAMES KARI, TATL’AHWT’AENN NENN’: THE HEADWATERS PEOPLE’S COUNTRY NARRATIVES OF THE UPPER AHTNA ATHABASKANS 1 n.1 (Alaska Native Language Center ed., Katie John & James Kari trans., 1986). It was renowned for its sockeye salmon fishery and was reputed to be the best fishing site in the Upper Ahtna Region. REPORT OF INVESTIGATION FOR BATZULNETAS BLM AA-10714A AHTNA, INC. 4 (Bureau of Indian Affairs, ANCSA Office, Anchorage, AK 1993). This document is a report on the application for certification of the area as an historic site under ANCSA. Native allotments are discussed *infra* notes 43–46.

6. See KARI, *supra* note 5, at 1 n.1.

7. SIMEONE, *supra* note 3, at 20.

8. See KARI, *supra* note 5, at 75.

9. SIMEONE, *supra* note 3, at 9.

After the United States acquired Russia's claimed rights to Alaska in 1867,¹⁰ non-Natives from the lower forty-eight states and territories began to occupy parts of Alaska and the change in traditional lifeways and the economy accelerated greatly.¹¹ All were dismayed when the State of Alaska adopted regulations in the early 1960s that closed the upper Copper River fishery to any harvest, and although some fishing occurred despite the regulations, Alaska's increasing regulatory zeal caused significant harm to the Ahtna.¹² The closure of the Batzulnetas fishery sparked resistance to restrictions on traditional fishing rights that continues to this day.

This essay traces the legal dispute from its beginning to the most recent events.¹³ Part I discusses the legal history of Alaska Native rights to land and the use of resources prior to 1971. Part II covers the Alaska Native Claims Settlement Act (ANCSA),¹⁴ and the federal statutes enacted in the 1970s to accommodate some aspects of Native subsistence uses. Part III reviews ANILCA's cooperative federalism regime, and how the Katie John trilogy protected subsistence fishing after the State of Alaska dropped out of the program. Part IV considers the recent ruling in *Sturgeon v. Frost*, and its critical footnote two that preserved federal agency authority to manage subsistence fisheries on nearly sixty percent of Alaska's inland waters.¹⁵ The article concludes with a brief look at the durability of the *Katie John* trilogy and some options for legislative change.

The legal arguments and many court cases discussed, of course, must be viewed through the lens of colonialism. That is, although the United States government may have intended to deal fairly with Alaska Native interests under federal law, the fact remains that indigenous peoples in the United States were not given the choice whether to opt into the dominant system. The federal government asserted executive, legislative, and judicial power over them simply by acquiring Russia's rights to the territory that is now the

10. Treaty Concerning the Cession of Russian Possessions in North America by His Majesty the Emperor of All the Russias to the United States of America, Russ.-U.S., *ratified* May 28, 1867, 15 Stat. 539 [hereinafter Treaty of Cession]; *see also* HUBERT HOWE BANCROFT, HISTORY OF ALASKA: 1730-1885 600-01 (1886).

11. *See* VLADIMIR GSOVSKI ET AL., RUSSIAN ADMINISTRATION OF ALASKA AND THE STATUS OF THE ALASKA NATIVES, 81st Cong., 2d sess., S. Doc. No. 152, 45, 50-51 (1950).

12. *See* Katie John et al. v. Alaska, No. A85-698 Civil, Order on Cross Motions for Summary Judgment at 2 (D. Alaska Jan. 19, 1990).

13. Many of these issues are covered in some detail in one of my prior articles. Robert T. Anderson, *Sovereignty and Subsistence: Native Self-Government and Rights To Hunt Fish and Gather After ANCSA*, 33 ALASKA L. REV. 187 (2016) [hereinafter Anderson]. I rely on many of the key sources cited in that article.

14. 43 U.S.C. §§ 1601-1629(h) (2018).

15. *Sturgeon v. Frost*, 139 S. Ct. 1066, 1080 n.2 (2019).

State of Alaska. This assertion of power is backed by the coercive power of the government.

I. ALASKA NATIVE PROPERTY RIGHTS UP TO 1971

From time immemorial, indigenous occupants (Alaska Natives) occupied the area now known as Alaska. They lived according their own systems of governance and custom unaffected by western society. This lasted until Russian influence commenced in the coastal areas, and change began in greater degrees after the United States acquired Russia's interests in the area by treaty in 1867. Article III of the Treaty of Cession from Russia states that "[t]he uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country."¹⁶

The foundational rules governing indigenous lands rights were established by Congress in 1790 in the first Indian Trade and Intercourse Act, which precluded the transfer of Indian land without the consent of the United States government.¹⁷ In 1823, the Supreme Court adopted international law's doctrine of discovery and applied it to reject the validity of land transfers from tribes to private citizens while England remained in control of United States territory prior to the American Revolution.¹⁸ The Marshall Court explained that indigenous tribes have a "legal as well as just claim to retain possession of [the lands]" they historically occupied.¹⁹ A more robust description was made in *Cherokee Nation v. Georgia*, where the Court stated that "[t]he Indians are acknowledged to have an unquestionable, and heretofore an unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government."²⁰ This

16. *United States v. Alaska*, 422 U.S. 184, 192 n.13 (1975) (quoting Treaty of Cession, *supra* note 10, at art. I) ("By the Treaty of Cession in 1867 Russia ceded to the United States 'all the territory and dominion now possessed (by Russia) on the continent of America and in the adjacent islands.' The cession was effectively a quitclaim. It is undisputed that the United States thereby acquired whatever dominion Russia had possessed immediately prior to cession."); Treaty of Cession, *supra* note 10, at art. III; *see also* DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS* 24–26 (3d ed. 2012) (The Case and Voluck treatise is the most comprehensive treatment of Alaska Native legal rights).

17. Act of July 22, 1790, ch. 133, 1 Stat. 137, 138. That rule remains in force today. 25 U.S.C. § 177 (2018).

18. *Johnson v. McIntosh*, 21 U.S. 543, 588 (1823). *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.02[1]–[2], at HANDBOOK OF FEDERAL INDIAN LAW 9–18 (Nell Jessup Newton ed., 2012) [hereinafter HANDBOOK OF FEDERAL INDIAN LAW] (explaining the origins and development of this policy).

19. *McIntosh*, 21 U.S. at 574.

20. 30 U.S. 1, 2 (1831).

property ownership doctrine, known as aboriginal title or original Indian title, was also said to be “as sacred as the fee simple of the whites.”²¹ For example, the United States successfully brought an ejectment action against a railroad trespassing on tribal aboriginal lands even though the tribal property right is not “based upon a treaty, statute, or other formal government action.”²²

Prior to adoption of ANCSA in 1971, Alaska Natives possessed unextinguished aboriginal title, which included hunting, fishing and gathering rights.²³ For example, in *Tlingit & Haida Indians v. United States*,²⁴ the Court of Claims ruled that the tribes located in Southeast Alaska had demonstrated the existence of their aboriginal title.²⁵ The Court held that the Tlingit and Haida tribal lands had been taken by the United States action such that compensation was owed pursuant to a special jurisdictional act passed by Congress which allowed compensation for the taking of aboriginal title.²⁶ The Department of the Interior reached a similar conclusion in a decision when it recognized the continued existence of aboriginal fishing rights of Alaska Natives.²⁷

Congress blocked treaty-making with Indian tribes in 1871,²⁸ leaving little time for such dealings making with Alaska Natives had there been a perceived need to do so.²⁹ Early federal legislation dodged the issue of Native land rights through a series of statutory disclaimers that continued through

21. *Mitchel v. United States*, 34 U.S. 711, 746 (1835).

22. *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 347 (1941). Because the railroad conceded that it had no enforceable right to the land and had issued a quitclaim deed to the United States on the day the suit was filed, the Supreme Court ruled that the case should proceed to an accounting for the value of the land while the railroad was in trespass, subject to the factual proof of tribal occupancy of the area. *Id.* at 358–60; *see also* Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 34–35 (1947).

23. *Tlingit & Haida Indians v. United States*, 177 F. Supp. 452, 461–63 (Ct. Cl. 1959); *cf.* *Native Vill. of Eyak v. Blank*, 688 F.3d 619, 623 (9th Cir. 2012) (assuming existence of aboriginal title in Outer Continental Shelf of Alaska but rejecting claim based on lack of exclusive use).

24. 177 F. Supp. at 456.

25. *Id.*

26. *Id.* at 453–54 (citing Act of June 19, 1935, ch. 275, 49 Stat. 388 (1935)).

27. *Aboriginal Fishing Rights in Alaska*, 57 Interior Dec. 461, 474, 476 (1942) (“The Indian who has been forbidden from fishing in his back yard has not thereby lost his aboriginal title thereto. I conclude that aboriginal occupancy establishes possessory rights in Alaskan waters and submerged lands, and that such rights have not been extinguished by any treaty, statute, or administrative action.”).

28. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (2018)).

29. Most treaties in the lower forty-eight states had been prompted by pressures from white settlers to encroach upon aboriginal Indian territories. In 1880 and 1890, the non-Native populations were 430 and 6,698, respectively. ROBERT D. ARNOLD, *ALASKA NATIVE LAND CLAIMS* 71 (1976).

the Alaska Statehood Act in 1958.³⁰ Thus, in 1884, Congress passed an Organic Act for Alaska,³¹ which established a civil government for the district of Alaska with the laws of Oregon made applicable.³² With respect to Alaska Natives, Congress provided that “the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.”³³ A historian writing in 1886 stated that “it is probable that the natives would be only too glad to be left alone as severely in the future as they have been in the past.”³⁴ Congress provided a criminal code for Alaska in 1899,³⁵ and a year later extended mining laws to Alaska, while withholding application of general public land laws.³⁶ Like the Organic Act of 1884, later statutes provided that Alaska Natives were not to be disturbed in their use and occupancy of land.³⁷ Territorial courts, as well as the Solicitor of the Department of the Interior, treated this Act as confirming that Alaska Natives held unextinguished aboriginal rights to the land and to hunt and fish.³⁸

Like the treatment of Alaska Native rights to property, Native rights to hunt, fish, and gather were also provided special protection in some cases

30. Alaska Statehood Act of 1958, Pub. L. No. 85–508, 72 Stat. 339.

31. Act of May 17, 1884, ch. 53, 23 Stat. 24. Section 2 of the Organic Act provided for an appointed Governor, while remaining provisions of the Act called for the appointment of judges and commissioners. *Id.* § 2, at 24.

32. *Id.* § 7, at 25–26.

33. *Id.* § 8, at 26. In *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), the Supreme Court held that the Organic Act did not recognize or confirm Native ownership for Fifth Amendment Takings Clause purposes but merely preserved aboriginal title for later disposition. 348 U.S. at 278.

34. BANCROFT, *supra* note 10, at 722.

35. Act of Mar. 3, 1899, ch. 429, 30 Stat. 1253.

36. Act of June 6, 1900, ch. 786, § 26, 31 Stat. 321, 329.

37. *Id.* § 27, at 330; *United States v. Atl. Richfield Co.*, 435 F. Supp. 1009, 1014–15 (D. Alaska 1977) (citations omitted) (“The second Organic Act, for example, provided that Natives ‘shall not be disturbed in the possession of any lands now actually in their use and occupancy . . .’”).

38. *United States v. Cadzow*, 5 Alaska 125, 132 (D. Alaska 1914); *United States v. Berrigan*, 2 Alaska 442, 449–50 (D. Alaska 1905) (explaining that the Organic Act of 1900 rendered “void all attempts to dispossess [Natives of their land] by deed or contract.”); *Aboriginal Fishing Rights in Alaska*, 57 Interior Dec. 461, 474 (1942); *see also* CASE & VOLUCK, *supra* note 16, at 66 (“If one reads article III of the 1867 treaty and all of the cases together, the most satisfactory legal conclusion is that prior to ANCSA the Alaska Natives held their lands in Alaska by right of aboriginal possession.”). The idea that the Treaty of Cession eliminated Native aboriginal title runs afoul of the rule that federal acts extinguishing tribal powers, immunities, or property rights must clearly express such an intent. *See Herrera v. Wyoming*, 139 S. Ct. 1686, 1698 (2019) (“If Congress seeks to abrogate treaty rights, ‘it must clearly express its intent to do so.’”) (citation omitted); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790–91 (2014).

through exemptions from general government regulations.³⁹ Alaska Natives were thus exempted from the ambit of several wildlife conservation measures adopted by Congress prior to statehood.⁴⁰ For example, Congress limited the taking of fur seals but exempted Native hunting for food, clothing, and boat-manufacture.⁴¹ Other similar accommodations or preferences were included in a host of other statutes.⁴²

In addition, individual Alaska Natives could acquire title to land from the United States pursuant to the Alaska Allotment Act of 1906,⁴³ which was intended to provide a way for individual Alaska Natives to acquire title to individual parcels of land important for traditional use and occupancy.⁴⁴ “Title to up to 160 acres of land would be granted if individual applicants could demonstrate continuous use and occupancy for five years.”⁴⁵ Both Katie John and Doris Charles selected land at Batzulnetas and received allotments through the administrative process.⁴⁶

“The question of extinguishing Alaska Native aboriginal claims picked up steam following World War II, after which Alaska’s population increased dramatically.”⁴⁷ By 1943, though, the establishment of reservations for Alaska Natives by the Roosevelt Administration prompted Anthony Dimond, Alaska’s delegate to Congress, to propose massive transfers of federal land to the Territory of Alaska so as to preclude the establishment of new Indian reservations under the IRA.⁴⁸ The largest of these was set aside as the Venetie Indian Reservation in 1943 for the Gwich’in People, now living primarily in Venetie and Arctic Village.⁴⁹

39. The obvious difference is the lack of treaty-based rights due to the end of treaty-making in 1871. *See supra* notes 25–36 and accompanying text.

40. *See, e.g.*, Act of July 1, 1870, ch. 189, 16 Stat. 180, 180.

41. *Id.* § 1, at 180.

42. *See* Anderson, *supra* note 13, at 195.

43. Act of May 17, 1906, ch. 2469, 34 Stat. 197 (repealed by Alaska Native Claims and Settlement Act, 85 Stat. 688 (1971) (codified at 43 U.S.C. § 1617 (2018))).

44. *See generally* Allotment of Land to Alaska Natives, 71 Interior Dec. 340, 342–43 (1964) (canvassing prior administrative interpretations of the Act); CASE & VOLUCK, *supra* note 16, at 117–19; HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 18, § 4.07[3][b][iv], at 338–40.

45. Allotment of Land to Alaska Natives, 71 Interior Dec. at 354–55, 357; *see* Akootchook v. United States, 271 F.3d 1160, 1162 (9th Cir. 2001).

46. Public Lands Petition, *supra* note 2, at 4–5; *see* REPORT OF INVESTIGATION FOR BATZULNETAS, *supra* note 5, at 4–5, 17.

47. Anderson, *supra* note 13, at 198. The population grew from 59,278 in 1929 to 128,643 in 1950 and then to 226,167 by 1960. U.S. DEP’T. OF COM., BUREAU OF THE CENSUS, 1 CENSUS OF POPULATION pt. 3, Alaska, at 3–7 tbl.1 (1960); *see also* ARNOLD, *supra* note 29, at 71 (noting that most of the increase was caused by non-Native immigration).

48. Richard H. Bloedel, *The Alaska Statehood Movement* 95 (May 9, 1974) (unpublished Ph.D. dissertation, University of Washington) (on file with the University of Washington Library).

49. *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 523–24 (1998).

Hearings on statehood took place at several locations around Alaska in 1945. Secretary of the Interior Harold Ickes spoke in favor of dealing with Native aboriginal claims, stating that “the ancestral claims of the Native population should be affirmed, delineated, or extinguished with compensation.”⁵⁰ The first bill introduced in the post-war period provided for statehood but did not include any reference to Native aboriginal rights, causing the Department of the Interior, led by Secretary Julius Krug, to propose amendments requiring the state and its people to disclaim any interest in land owned or held by any Native.⁵¹ The upshot was that statehood bills again failed in the 80th and 81st Congresses.

For the most part, however, non-Native Alaskans were not prepared or willing to deal with Native claims to aboriginal title:

During this period of economic growth, the Natives were growing increasingly aware of their rights and asked repeatedly for the protection of reservations. Their petitions were ignored No one wanted to talk about the claims. This issue was a highly emotional Pandora’s box: to open it would let out bigotry and greed and fears that were inappropriate in a group of people petitioning for admission to the democratic United States of America.⁵²

It was in this context that Congress considered a number of approaches to the extinguishment of Alaska Native land claims. Some of these would have provided for Alaska Natives to sue the United States for money damages for the loss of aboriginal lands, while others provided for the confirmation of title to relatively small amounts of land in and around the Native villages.⁵³ The effort to extinguish Alaska Native claims to aboriginal title paused a bit when the Supreme Court decided *Tee-Hit-Ton Indians v. United States*, in which the Court held that aboriginal title, unrecognized by Congress, was not subject to the just compensation clause of the Fifth Amendment.⁵⁴ The Court stated that, “There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or

50. Bloedel, *supra* note 48, at 123–24.

51. *Id.* at 192–94 (describing the disclaimer as “copied from . . . Arizona, New Mexico, and other recent states”).

52. MARY CLAY BERRY, *THE ALASKA PIPELINE: THE POLITICS OF OIL AND NATIVE LAND CLAIMS* 25 (1975).

53. See Anderson, *supra* note 13, at 198–201 (describing various approaches and citing sources).

54. 348 U.S. 272, 284–85 (1955).

authority to accord legal rights, not merely permissive occupation.”⁵⁵ The Court’s majority (over three dissenters) found such explicit recognition lacking, but did not rule that aboriginal title did not exist and appeared to assume just the opposite.⁵⁶ Nevertheless, Congress did not have the political will to deal with the issue before statehood, so it once again deferred the question.

Article 4 of the Statehood Act⁵⁷ provided that the state must disclaim any right to the property of Alaska Natives (including fishing rights) and that such property remained under the “absolute jurisdiction and control of the United States. . . .”⁵⁸ Corresponding language appears in the Alaska Constitution as required by the Statehood Act.⁵⁹ Section 6(b) of the Statehood Act granted the State of Alaska the right to select

within twenty-five years after the admission of Alaska into the Union, . . . not to exceed one hundred and two million five hundred and fifty thousand acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection.⁶⁰

The state’s efforts to take full advantage of its land allocation was frustrated until Native aboriginal claims were settled.

As the new state began its land selection process, Alaska Natives objected to many selections prompting the federal government to suspend transfer of public lands to Alaska on the ground that they were not “vacant, unappropriated, and unreserved” as required by the Statehood Act.⁶¹ Native leader Willie Hensley explained that at the convention creating the Alaska

55. *Id.* at 278–79 (citing *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 101 (1949)). The Court concluded that there was no such congressional recognition, but implicit in its ruling was acknowledgement that Alaska Natives did have aboriginal title claims. *Id.* at 275 (“The Court of Claims . . . held that petitioner was an identifiable group of American Indians residing in Alaska; that its interest in the lands prior to purchase of Alaska by the United States in 1867 was ‘original Indian title’ or ‘Indian right of occupancy’.”).

56. *Id.* at 290–91.

57. Alaska Statehood Act, Pub. L. No. 85-508, § 4, 72 Stat. 339, 339 (1958).

58. *Id.*

59. ALASKA CONST. art. XII, § 12 (“The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission. The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States. They further agree that no taxes will be imposed upon any such property, until otherwise provided by the Congress. This tax exemption shall not apply to property held by individuals in fee without restrictions on alienation.”).

60. Alaska Statehood Act § 6(b). Other subsections of § 6 provided for roughly another million acres in state selections or grants. *See BERRY, supra* note 52, at 28–33.

61. Alaska Statehood Act § 6(b).

Federation of Natives he wrote the position paper “arguing that there was not ‘public land’ in Alaska. It was all Native land unless there had been a previous taking by the federal government for federal use. And if there had, then we [Natives] were owed compensation.”⁶²

As the State of Alaska began to select lands, Native villages protested to the Secretary of the Interior that the lands chosen were not vacant and unoccupied, but were used and occupied for aboriginal purposes.⁶³ The first protests occurred in 1961 when Alaska proposed establishing a recreations area on land near the Alaska Native Village of Minto—land that was important for Native hunting and fishing activities. Minto leaders filed a protest over the selection with the Department of the Interior, which effectively precluded transfers of land to the State.⁶⁴ Secretary of the Interior Stewart Udall informally suspended the issuance of patents and tentative approvals of state selections in 1966,⁶⁵ and on January 12, 1969, Secretary Udall imposed a formal freeze on further patenting or approval of applications for public lands in Alaska pending the settlement of Native claims.⁶⁶ An effort by the State to set aside the land freeze was rejected by the Ninth Circuit in *Alaska v. Udall*.⁶⁷

In 1966, state officials complained that as a result of the protests, the state had received only three million acres of its land grant.⁶⁸ This was a serious problem for the new State of Alaska, because “[a]t the time, the infant state was an economic basket case, running a deficit government with little revenue . . . just about 226,000 people, and very little private land to tax.”⁶⁹ “Pressure to resolve Native claims in Alaska also came from the state and from oil companies wishing to exploit the state’s newly discovered petroleum resources.”⁷⁰ “Oil development could not progress as long as Native claims clouded state authority to lease lands or transfer rights to the companies, [and hindered] . . . federal capacity to authorize construction of the Trans-Alaska

62. WILLIAM L. IGGIAGRUK HENSLEY, FIFTY MILES FROM TOMORROW: A MEMOIR OF ALASKA AND THE REAL PEOPLE 157 (2009).

63. ARNOLD, *supra* note 29, at 100–03.

64. *Id.*

65. CASE & VOLUCK, *supra* note 16, at 74.

66. CASE & VOLUCK, *supra* note 16, at 74 n.106; *See* Public Land Order 4582, 34 Fed. Reg. 1025 (1969).

67. 420 F.2d 938, 940 (9th Cir. 1969).

68. ARNOLD, *supra* note 29, at 112.

69. HENSLEY, *supra* note 62, at 136.

70. HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 18, § 4.07[3][b][i]; *see* BERRY, *supra* note 52, at 123, 163–214; HENSLEY, *supra* note 62, at 151.

Pipeline[, necessary] to transport the oil.”⁷¹ Willie Hensley, who was serving in the State Legislature, as well as part of the Native land claims leadership effort, explained that “Alaska’s government and everyone else who had a stake in the new state’s success were doing everything in their power to get us [Natives] out of the way.”⁷²

Another important question was whether the State would have authority to regulate Native aboriginal hunting and fishing rights—disclaimers certainly indicated that such regulation was reserved to the United States. In March 1959, the Secretary of the Interior issued regulations under authority of the White Act,⁷³ permitting Angoon to operate three fish traps during the 1959 season and Kake four.⁷⁴ “The following year the Secretary authorized permanent operation of these trapsites and specified one additional site for Angoon and five more for Kake for possible future authorization.”⁷⁵

State officials denied that the federal government had authority to exempt the Native fishers from state regulations and arrested Native fishermen for violating Alaska’s anti-fish trap law. In the course of upholding state authority over off-reservation fishing,⁷⁶ the United States Supreme Court said that the aboriginal rights disclaimer⁷⁷ “was intended to preserve unimpaired the right of any Indian claimant to assert his claim, whether based on federal law, aboriginal right, or simply occupancy, against the Government. Appellants’ claims are ‘property (including fishing rights)’ within § 4.”⁷⁸ The Court nevertheless held that the State possessed regulatory authority over the exercise of aboriginal fishing rights—at least for conservation purposes.⁷⁹

71. HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 18, § 4.07[3][b][i]; *see* Native Vill. of Allakaket v. Hickel, No. 706-70, 1 Env’tl. L. Rptr. 65021 (D.D.C. Apr. 1, 1970) (enjoining the issuance of permits for the construction of trans-Alaska pipeline over Native-claimed lands); ARNOLD, *supra* note 29, at 137–47; *see also* BERRY, *supra* note 52, at 123.

72. HENSLEY, *supra* note 62, at 137.

73. White Act, Pub. L. No. 582, 43 Stat. 464 (codified as amended at 48 U.S.C. §§ 221–28 (1926)).

74. Alaska Commercial Fisheries: Revision of Regulations, 24 Fed. Reg. 2053, 2069 (Mar. 19, 1959).

75. Organized Vill. of Kake v. Egan, 369 U.S. 60, 61–62 (1962) (citing 25 C.F.R. (1961 Supp.) pt. 88).

76. *Id.*

77. Alaska Statehood Act, Pub. L. No. 85-508, § 4, 72 Stat. 339, 339 (1958).

78. *Organized Vill. of Kake*, 369 U.S. at 67.

79. *Id.* at 76. The Court’s reasoning was based in part on a now discredited case, *Ward v. Race Horse*, which held that Montana’s entry into the Union defeated certain tribal treaty rights. 163 U.S. 504 (1896). In 1999, the Supreme Court stated, “But *Race Horse* rested on a false premise. As this Court’s subsequent cases have made clear, an Indian tribe’s treaty rights to hunt, fish, and gather on state land are not irreconcilable with a State’s sovereignty over the natural resources in the State.” *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204

The disclaimer was said to relate only to interference with aboriginal property rights. The exercise of state regulatory jurisdiction over aboriginal fishing rights—at least with respect to the fish trap prohibition—was allowed.

But it was the State’s inability to obtain clear title to land under the Statehood Act, and the injunction against building the trans-Alaska oil pipeline, that pushed Congress to extinguish aboriginal land claims.

II. THE ALASKA NATIVE CLAIMS SETTLEMENT ACT

The Alaska Native Claims Settlement Act (ANCSA) in 1971 was undoubtedly the most important event in the history of Alaska Native people since 1867. If one views it from the perspective of the state and of the oil companies’ intent on development at Prudhoe Bay, ANCSA was a resounding success. It unequivocally extinguished all claims to aboriginal title in Alaska and also all claims for past damages based on trespass to Native aboriginal title. It also provided substantial compensation for Alaska Natives in the form of cash and land that was transferred to newly-created Native corporations.⁸⁰ According to the *Tee-Hit-Ton* case, whatever property interests Natives held under aboriginal title were not protected by the Fifth Amendment’s just compensation clause.⁸¹ Rather, compensation for extinguishment was something done out of a sense of fairness and justice.

ANCSA was silent on the status of Native powers of self-government, though the Supreme Court would later interpret the silence as fatal to the treatment of Native corporation lands as Indian country.⁸² ANCSA’s affirmative elimination of aboriginal hunting and fishing rights has had devastating effects on Native subsistence uses and has made it extremely

(1999). *Race Horse* was explicitly repudiated by the Court in *Herrera v. Wyoming*. 139 S. Ct. 1686, 1697 (2019) (“To avoid any future confusion, we make clear today that *Race Horse* is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood.”).

80. See *infra* text accompanying notes 87–94.

81. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 290–91 (1955). For a historical critique of *Tee-Hit-Ton*, see Joseph William Singer, *Erasing Indian Country: The Story of Tee-Hit-Ton Indians v. United States*, in *INDIAN LAW STORIES* 229–59 (Goldberg et al. eds., 2011).

82. *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 534 (1998). Indian country is defined in 18 U.S.C. § 1151 to include reservations, allotments and dependent Indian communities. As the *Venetie* Court noted, “[g]enerally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States.” *Native Vill. of Venetie*, 522 U.S. at 527 n.1.

difficult for Native tribes to have a role in co-management of subsistence resources.⁸³

The situation faced by Alaska Natives with respect to their aboriginal claims in the 1960s differed little from that faced by Indian tribes that entered into “agreements” with the United States in the late nineteenth and early twentieth centuries.⁸⁴ Alaska Natives had some say in the terms of the settlement of their land claims and were skilled at using the system to maximize their economic share of the pie as their claims were settled.⁸⁵ They did not, however, have a veto and could not postpone the inevitable for too long. The non-Natives, the oil companies, and the State of Alaska were not going to go away, and the Native community fought for the best bargain it could get. Aboriginal claims would be settled, State land selections would proceed, and the trans-Alaska pipeline would be authorized and built.⁸⁶

The question of how much land and money would be provided in compensation for the extinguishment would be decided by Congress after some consultation with Alaska Natives. In the end, the settlement has been praised by many in terms of the amounts of land and money awarded,⁸⁷ but others have decried the failings with respect to tribal sovereignty and protection of hunting, fishing, and gathering rights.⁸⁸ ANCSA extinguished aboriginal title and any claims based on aboriginal title and also expressly extinguished “any aboriginal hunting or fishing rights that may exist.”⁸⁹ In exchange, Alaska Natives born by December 18, 1971, were to become stockholders in one of thirteen regional corporations and in one of more than 200 village corporations, according to their place of residence or origin.⁹⁰ The monetary settlement was nearly a billion dollars to the corporations to be shared pursuant to a complicated formula,⁹¹ and the land settlement ended up

83. In contrast, the Indian tribes of western Washington, by virtue of their treaty, had the right to harvest up to one-half of the available harvest free of state jurisdiction. *See* HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 18, §§ 18.03–18.04 (discussing regulatory jurisdiction over on-and-off reservation fishing and hunting rights).

84. *See, e.g.,* Hagen v. Utah, 510 U.S. 399, 401–08 (1994) (considering the effect of a federal statute that unilaterally removed land from the Uintah Indian reservation).

85. *See* HENSLEY, *supra* note 62, at 134–45 (describing Native organization and mobilization to assert land claims in Washington, D.C. and Alaska).

86. *See* BERRY, *supra* note 52, at 123.

87. CHARLES F. WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 235–36 (2005).

88. *Id.* at 239 (asserting that ANCSA was “termination in disguise”). *See generally* THOMAS R. BERGER, VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION 26–33, 155–71 (1985) (sharply criticizing the Settlement and suggesting alternatives).

89. 43 U.S.C. § 1603(b) (2018). *See* Inupiat Cmty. of the Arctic Slope v. United States, 230 Ct. Cl. 647, 657 (1982) (holding that the Settlement Act extinguished the right to sue for trespass).

90. 43 U.S.C. §§ 1606–07 (2018).

91. 43 U.S.C. § 1605(a) (2018).

at about 45.7 million acres.⁹² The latter figure was much larger than the ten million acres originally recommended in a Report commissioned by the Senate and much more in line with Alaska Native wishes.⁹³ Key to the Native success on the quantity of land was that President Nixon expressed support in early 1971 for a settlement that included 40 million acres of land and a billion dollars in cash.⁹⁴

However, the State's early (and protested) land selections were retroactively approved so that many valuable lands at Prudhoe Bay and elsewhere became off limits to Native corporation land selections. That was accomplished in the broad extinguishment section: "All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any."⁹⁵ In addition, State institutional interests were favored by another section requiring the transfer of at least 1,280 acres from Village Corporations to any "Municipal Corporation in the Native village or to the State in trust for any Municipal Corporation established in the Native village in the future."⁹⁶

The nearly fifty years since ANCSA's passage have seen one major restructuring of the Act through the so-called 1991 amendments and other more "technical amendments" adopted by nearly every Congress for the following thirty-five years.⁹⁷ The major change came when the Native community persuaded Congress in 1988 to indefinitely extend the federal restrictions on the sale of corporate stock, which were set to expire in 1991.⁹⁸ Congress explained in its findings that "Natives have differing opinions as to whether the Native Corporation, as originally structured by the Alaska Native Claims Settlement Act, is well adapted to the reality of life in Native villages and to the continuation of traditional Native cultural values."⁹⁹ Since the

92. CASE & VOLUCK, *supra* note 16, at 171.

93. ARNOLD, *supra* note 29, at 126–36 (discussing U.S. FED. FIELD COMM. FOR DEV. PLANNING IN ALASKA, ALASKA NATIVES AND THE LAND (U.S. G.P.O. 1968)).

94. *Id.* at 139–40.

95. 43 U.S.C. § 1603(a) (2018).

96. 43 U.S.C. § 1613(c)(3) (2018). This section was amended to allow an amount less than 1,280 acres to be transferred. *See also* CASE & VOLUCK, *supra* note 16, at 174–75 (discussing other encumbrances of the land under ANCSA).

97. CASE & VOLUCK, *supra* note 16, at 185–98.

98. 43 U.S.C. §§ 1606(h), 1607(c) (2018); H.R. 278, 100th Cong. (1988); *see Jimerson v. Tetlin Native Corp.*, 144 P.3d 470, 474 (Alaska 2006) (holding that "no exception applies for transfer of ANCSA stock back to a Native corporation in exchange for stock in a newly created corporation.").

99. H.R. 278. § 2(4). The Senate Report elaborated on dissatisfaction with parts of ANCSA:

major structural change in the nature and length of the restrictions on alienation of the stock originally issued in 1971, there have been some incremental changes in the original settlement act, but the basic structure of state-chartered corporate land-ownership under the federal scheme adopted by Congress in ANCSA remains intact. Native corporations are now authorized to issue new stock to Alaska Natives born after 1971, and many have done so, although apparently only in the form of life-estate stock.¹⁰⁰ It thus appears that ANCSA's structure will remain intact.

ANCSA did not provide any statutory protection for Native hunting, fishing, and gathering rights on lands important for subsistence purposes. Some earlier versions of proposed legislation provided some protection on public and Native lands.¹⁰¹ When the Senate and the House could not agree on the terms, all protections were dropped, and the conference report simply expressed the conviction that "Native peoples's interest in and use of subsistence resources" could be safeguarded by the Interior Secretary's "exercise of his existing withdrawal authority" to "protect Native subsistence needs and requirements . . . [t]he Conference Committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives."¹⁰²

After ANCSA, Congress continued to afford some federal protection to subsistence rights:

In addition to the problems already discussed, a number of Native witnesses who appeared before the Committee testified that they and many other Alaska Natives, particularly those who live in isolated rural villages who participate in the subsistence hunting, fishing and gathering economy, feel that the social and human values embodied in the corporate form of organization frequently conflict with traditional Native values and Alaska's traditional Native cultures.

S. REP. NO. 100-201, at 21 (1987), *as reprinted in* 1987 U.S.C.C.A.N. 3269, 3272.

Other amendments to ANCSA implementation provided for protection from state and local taxation and certain forms of involuntary loss. *See, e.g.*, 43 U.S.C. § 1636(d) (2018) (automatic land bank protections for unleased and undeveloped corporation land).

100. *See* Maude Blair, *Issuing New Stock in ANCSA Corporations*, 33 ALASKA L. REV. 273, 281 (2016). The Calista Corporation has a very informative website describing their stock issuance program. CALISTA CORP., <https://www.calistacorp.com/shareholders/shareholder-portal/descendant-enrollment-information/> [<https://perma.cc/DL6E-XTA2>] (last visited Sept. 16, 2019).

101. *See* H.R. REP. NO. 92-746, at 2250 (1971) (Conf. Rep.), *as reprinted in* 1971 U.S.C.C.A.N. 2247, 2250.

102. *Id.* The President had the authority under the Pickett Act to withdraw lands for public purposes, which presumably could have included a withdrawal for subsistence purposes. Pickett Act, ch. 421, Pub. L. No. 61-302, 36 Stat. 847 (1910) (repealed 1976).

- The Marine Mammal Protection Act of 1972 (MMPA),¹⁰³ exempted from the moratorium on taking marine mammals any Alaska Native “who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean,”¹⁰⁴
- The Trans-Alaska Oil Pipeline Act imposed strict liability for any harm to the subsistence resources of Natives or others.¹⁰⁵
- The Endangered Species Act (ESA) presumptively exempted subsistence uses by Natives and “any non-[N]ative permanent resident of an Alaskan native village” from its coverage.¹⁰⁶
- The 1978 Fish and Wildlife Improvement Act authorized the Secretary “to assure that the taking of migratory birds and the collection of their eggs, by the indigenous inhabitants of the State of Alaska, shall be permitted for their own nutritional and other essential needs.”¹⁰⁷

However, events in the lands conservation movement that had been spawned with ANCSA soon yielded an opportunity for increased subsistence protections—at least on the federal lands and perhaps even to even more.

III. ANILCA’S COOPERATIVE FEDERALISM REGIME AND ITS FAILURE: THE *KATIE JOHN* TRILOGY PROTECTS SUBSISTENCE FISHING.

Dissatisfaction with the lack of protection for subsistence uses by Alaska Natives led Congress to legislate a subsistence preference for all rural residents of Alaska in 1980 via the Alaska National Interest Lands Conservation Act (ANILCA).¹⁰⁸ ANILCA was primarily a massive land conservation statute—setting aside massive areas as National Parks, Monuments, Wildlife Refuges and other areas, while also expanding existing areas previously set aside—all to be known as conservation system units

103. 16 U.S.C. § 1371 (2018).

104. *Id.* § 1371(b). *See generally* Didrickson v. U.S. Dep’t of the Interior, 982 F.2d 1332, 1342 (9th Cir. 1992) (interpreting Native handicrafts exception favorably to Alaska Natives); United States v. Clark, 912 F.2d 1087, 1090 (9th Cir. 1990) (rejecting handicraft exception where a “substantial portion” of the animal was wasted); People of Togiak v. United States, 470 F. Supp. 423, 429–30 (D.D.C. 1979) (holding that the federal exception to MMPA preempts state regulation of walrus hunting).

105. 43 U.S.C. § 1653(a)(1) (2018).

106. 16 U.S.C. § 1539(e)(1) (2018).

107. 16 U.S.C. § 712(1) (2018).

108. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980) (subsistence provisions codified at 16 U.S.C. §§ 3111–3126 (2018)). *See generally* HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 18, § 4.07[3][c][ii], at 345–52.

(CSUs).¹⁰⁹ The lands set aside in ANILCA combined with previously set-aside federal land in Alaska is now approximately 225 million out of a total of 365 million acres.¹¹⁰ The conservation purposes of ANILCA were in tandem with the subsistence protection provisions in Title VIII of the statute, which were adopted “to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.”¹¹¹ The congressional findings specific to Title VIII stated that the subsistence provisions were necessary “in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act.”¹¹² Congress accordingly “invoke[d] 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[.]”¹¹³

ANILCA thus served as a partial substitute for the rights extinguished in ANCSA, providing a priority for subsistence uses on the “public lands”¹¹⁴ by rural residents of Alaska.¹¹⁵ Although the rural priority applied only to public lands, Title VIII gave the State power to manage subsistence uses on federal public lands, “if the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference,

109. In 16 U.S.C. § 3102 (2018), Congress defined the phrase:

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.

110. CAROL HARDY VINCENT ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 7 (2017).

111. 16 U.S.C. § 3101(c) (2018).

112. 16 U.S.C. § 3111(4) (2018).

113. *Id.*

114. 16 U.S.C. § 3102(1)–(3) (2018) (“The term ‘land’ means lands, waters, and interests therein. . . . The term ‘Federal land’ means lands the title to which is in the United States after December 2, 1980. . . . The term ‘public lands’ means land situated in Alaska which, after December 2, 1980, are Federal lands . . .”).

115. *See* 16 U.S.C. § 3114 (2018) (“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.”); *see also*, 16 U.S.C. § 3111(1) (2018) (subsistence uses “essential to Native physical, economic, traditional, and cultural existence”).

and participation specified in [ANILCA].”¹¹⁶ Anticipating the enactment of ANILCA, Alaska adopted a subsistence priority statute in 1978.¹¹⁷ Although the preference was not initially restricted to rural Alaskans, regulations adopted in 1982 brought state law into compliance with ANILCA’s rural priority.¹¹⁸ In 1982, the Secretary of the Interior certified the state government’s program, and it was empowered to manage fish and game on federal lands.¹¹⁹ As a result, “Alaska’s 1978 subsistence priority statute became operative as to all state lands and to virtually all federally owned lands in Alaska.”¹²⁰ This plan was conceived with the clear understanding that federal law would provide the subsistence priority rule on all federal lands and that the State of Alaska by adopting its identical subsistence use priority for all non-federal lands could obtain unified jurisdiction over all lands—although subject to federal judicial oversight.¹²¹

In a great surprise to all parties involved in the ANILCA process, the State of Alaska became legally unable to manage the subsistence priority for rural residents. The Alaska Supreme Court ruled that the State was disabled from implementing a “rural” subsistence priority by the equal access provisions of the Alaska Constitution.¹²² Federal District Judge Holland had handled the

116. 16 U.S.C. § 3115(d) (2018). If the state chooses not to participate, the management obligations default to the federal government: “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.” *Id.* Title VIII is a classic example of cooperative federalism in which the federal government sets certain standards but allows state administration if it agrees to certain conditions—here, adopting a statewide rural subsistence priority.

117. *Bobby v. Alaska*, 718 F. Supp. 764, 767 (D. Alaska 1989).

118. *Id.*

119. *Id.*

120. *Id.* The only exceptions were federal areas not open to any subsistence uses under federal law, e.g., Denali National Park. 16 U.S.C. § 410hh-1(3)(a) (2018) (allowing subsistence uses in the additions to the Park made in ANILCA, but not in the original Park boundaries).

121. 16 U.S.C. § 3117 (2018) (“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.”).

122. *McDowell v. State*, 785 P.2d 1, 1 (Alaska 1989) (holding the rural priority for subsistence fishing and hunting unconstitutional under sections 3, 15, and 17 of article VIII of the Alaska Constitution).

first round of the *Katie John* litigation while the State remained in compliance¹²³ and explained the aftermath of the State's *McDowell* decision:

In consideration of the fact that the Alaska Legislature would be in the session in the spring and early summer of 1990, the State of Alaska sought and obtained a stay of the operative effect of the *McDowell* decision. The Alaska Legislature failed to resolve the dilemma posed by the fact that Title VIII of ANILCA absolutely required a rural limitation in order for Alaska's subsistence law to qualify as a substitute for the federal subsistence scheme, whereas the Alaska Constitution prohibited such a residency requirement. Owing to the seriousness of this constitutional dilemma, the governor of the State of Alaska convened a special session of the legislature to take up the subsistence problem in June of 1990. Like the general session, the special session failed to find a solution to the problem.

In the meantime, the State of Alaska proceeded in the state superior court to obtain a determination of whether the exclusion of the rural preference provision of Alaska's subsistence law vitiated the entire state law or was severable. On June 20, 1990, the superior court ruled that the rural limitation was severable from the remaining portions of Alaska's subsistence law, and that the remainder of AS 16.05.258 was viable.

In the meantime, the Secretary, anticipating that he would be called upon to implement ANILCA as to federal lands, took action to promulgate temporary regulations for subsistence hunting and fishing in the State of Alaska. . . . The Secretary's regulations became effective July 1, 1990, the date the *McDowell* decision was to be effective. Citing the shortness of time available for deliberation and the possibility for "chaos" if the State were able to reinstitute its program, the Secretary in substance adopted the former state subsistence hunting and fishing program. The Secretary's implicit wish that the State would find a solution to its constitutional problem was not, nor has it yet been, fulfilled.¹²⁴

Most concerning to Katie John and Doris Charles was the fact that these "temporary regulations" applied only to fishing activity on non-navigable waters located within federal lands. The *Katie John* litigation before Judge Holland began with a petition to the newly-created Federal Subsistence Board asking that the temporary rules adopted in 1990 be modified to include the

123. See *Katie John, et al. v. Alaska*, No. A85-698 Civil, Order on Cross Motions for Summary Judgment at 24-25 (D. Alaska Jan. 19, 1990).

124. *John v. United States*, Nos. A90-0484-CV (HRH), A92-0264-CV (HRH), 1994 WL 487830, at *4 (D. Alaska Mar. 30, 1994) (citations omitted).

waters at Bazulnetas as “public lands” and thus covered by the federal subsistence priority.¹²⁵ The Board rejected the request because the rivers in question were found to be navigable as a matter of federal law.¹²⁶ The Petitioners filed suit in 1990 and amended their complaint in 1991.¹²⁷ While the case was pending, the temporary regulations became permanent.¹²⁸ The Katie John plaintiffs in 1993 filed a Petition for Rulemaking asking that the definition of “public lands” be changed to include all navigable waters in Alaska based on the navigational servitude, with a secondary argument based on the federal reserved rights doctrine.¹²⁹

The Department of the Interior examined the arguments, and after a long period of consideration the United States agreed to change its position in the litigation. “Prior to oral argument before the district court, the federal agencies agreed with the state. But at oral argument, those agencies modified their position, arguing that public lands include those navigable waters in which the federal government has an interest under the reserved water rights doctrine.”¹³⁰ Judge Holland ruled that all navigable waters in Alaska are “public lands” because of the navigational servitude and rejected the federal reserved waters argument.¹³¹

The Ninth Circuit reversed and ruled that only navigable waters subject to the reserved rights doctrine were public lands.¹³² The Court looked to the definition as set out by the Supreme Court: “public lands are lands, waters, and interests therein, the title to which is in the United States.”¹³³

The United States has reserved vast parcels of land in Alaska for federal purposes through a myriad of statutes. In doing so, it has also implicitly reserved appurtenant waters, including

125. See Letter from Robert T. Anderson, Attorney for Petitioners Katie John, Doris Charles and Mentasta Vill. Council to Richard Pospahala, Fed. Subsistence Bd. (Sept. 7, 1990) (on file with author).

126. Letter from Walter Stieglitz, Chairman Fed. Subsistence Bd., to Robert T. Anderson, Native Am. Rights Fund (Oct. 17, 1990) (on file with author).

127. See *John*, 1994 WL 487830, at *11.

128. Alaska National Interest Lands Conservation Act, 57 Fed. Reg. 22,940 (May 29, 1992) (codified at 50 C.F.R. pt. 100).

129. See Public Lands Petition, *supra* note 2.

130. *Katie John I*, 72 F.3d 698, 701 (9th Cir. 1995).

131. *John*, 1994 WL 487830, at *14 (footnotes omitted) (“The court declines to use the reserved water rights doctrine as a means of determining the geographic scope of the Title VIII. Although the court does not reject the notion that the reserved water rights doctrine could have some application in this case, or that it could be of primary importance in a subsistence case in some other location in Alaska, the court concludes that the geographic scope of Title VIII is better determined by use of the navigational servitude, as being more compatible with the findings and policies of Title VIII of ANILCA.”).

132. *Katie John I*, 72 F.3d at 704.

133. *Id.* at 702 (citing *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 548 n.15 (1987)).

appurtenant navigable waters, to the extent needed to accomplish the purposes of the reservations. By virtue of its reserved water rights, the United States has interests in some navigable waters. Consequently, public lands subject to subsistence management under ANILCA include certain navigable waters.¹³⁴

In other words, because the United States has interests in the reserved navigable waters, they were public lands for purposes of subsistence fishing in Title VIII. The Court remanded the case for the federal agencies to determine which waters to include as within a new rule.¹³⁵

Federal reserved waters were identified in a proposed rule published in 1997.¹³⁶ The proposed federal regulations took effect in 1999,¹³⁷ after several years in which Congress passed appropriations riders that postponed their effective date.¹³⁸ The final appropriations rider explicitly directed that the Proposed Rule become effective if the State of Alaska had not amended its constitution to comply with ANILCA's requirements.¹³⁹ Because the remand requirements were met, Judge Holland ordered the case dismissed. The State of Alaska appealed to the Ninth Circuit, which granted the State's request for an en banc hearing.¹⁴⁰ The State brought Chief Justice John Roberts, then in

134. *Katie John I*, 72 F.3d at 703–04 (“For these reasons, we hold to be reasonable the federal agencies’ conclusion that the definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine. We also hold that the federal agencies that administer the subsistence priority are responsible for identifying those waters.”).

135. *Id.*

136. Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, C, and D, Redefinition to Include Waters Subject to Subsistence Priority, 62 Fed. Reg. 66,216 (proposed Dec. 17, 1997) (to be codified at 50 C.F.R. pt. 100). “The Secretaries published an Advance Notice of Proposed Rulemaking (ANPR) (61 FR 15014) on April 4, 1996, and during May and June held ten public hearings around Alaska to solicit comments on the Advance Notice.” *Id.* at 66,217.

137. Fish and Wildlife Service, 64 Fed. Reg. 1276 (Jan. 8, 1999) (codified as amended at 50 C.F.R. pt. 100 (2016)).

138. Omnibus Consolidated and Rescissions Appropriations Act of 1996, Pub. L. No. 104-134, § 336, 110 Stat. 1321 (1996); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 317, 110 Stat. 3009 (1996); Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, § 316(a), 111 Stat. 1543, 1592 (1997). Ultimately, however, the State failed to act, and Congress directed that the federal regulations should take effect. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, Div. A, § 101(e), § 339(a)(1) and § 339(b)(2), 112 Stat. 2681, 2681-295–96 (repealing prior restriction on effective date of regulation).

139. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 § 339(b)(2), 112 Stat. at 2681-296.

140. *John v. United States (Katie John II)*, 247 F.3d 1032, 1033 (9th Cir. 2001).

private practice, on to its legal team, and after extensive briefing the en banc panel issued a decision so brief that it can be quoted in its entirety:

Before this en banc court are the district court's opinion and judgment entered pursuant to our court's mandate in *Alaska v. Babbitt* [citations omitted]. A majority of the active judges voted to hear the appeal en banc rather than by a three-judge panel. The en banc court has now reviewed the briefs and heard oral argument on this appeal. A majority of the en banc court has determined that the judgment rendered by the prior panel, and adopted by the district court, should not be disturbed or altered by the en banc court.¹⁴¹

After a vigorous public debate and several extensions of time from the Supreme Court, Governor Tony Knowles directed his legal team not to file a petition for certiorari.¹⁴² The Katie John plaintiffs and their counsel believed that the litigation was over and the issues settled, i.e., there would be subsistence management on federal reserved waters in Alaska. Not so fast.

The State of Alaska challenged the new rule in litigation commenced in 2005—arguing that too many waters had been included. On the merits, the Ninth Circuit considered whether the 1999 rule accurately determined which waters were subject to federal reserved waters and thus public lands for purposes of Title VIII.¹⁴³

The opinion contains a detailed history of the all the litigation as well as the tortured history of the State of Alaska's efforts to comply with the federal subsistence priority. The court concluded with these remarks:

In reaching our decision, we recognize that we and the Secretaries have been working with imperfect tools. *Katie John I* was a problematic solution to a complex problem, in that it sanctioned the use of a doctrine ill-fitted to determining which Alaskan waters are "public lands" to be managed for rural subsistence priority under ANILCA. But *Katie John I* remains the law of this circuit, and we, like the Secretaries, must apply it as best we can.

141. *Id.*

142. See Frank Norris, *Chapter 9(E): Implementing the Federal Subsistence Fisheries Program*, Chapter of *Alaska Subsistence: National Park Service Management History*, U.S. DEP'T OF THE INTERIOR (Mar. 15, 2013) https://permanent.access.gpo.gov/gpo81701/Norris2002_Subistence.pdf [<https://perma.cc/FCH8-UPL2>] ("Knowles decided, on August 27[, 2001], that the state would not appeal the Katie John case to the U.S. Supreme Court. It was up to the legislature, he noted, to allow Alaskans to vote on a constitutional amendment that would let the State of Alaska, once again, manage subsistence resources in a unified statewide system.").

143. *John v. United States (Katie John III)*, 720 F.3d 1214, 1229 (9th Cir. 2013). Judge Canby was a member of the panel as a replacement for Betty B. Fletcher who participated in oral argument but passed away shortly thereafter.

We conclude that, in the 1999 Rules, the Secretaries have applied *Katie John I* and the federal reserved water rights doctrine in a principled manner. It was reasonable for the Secretaries to decide that: the “public lands” subject to ANILCA’s rural subsistence priority include the waters within and adjacent to federal reservations; and reserved water rights for Alaska Native Settlement allotments are best determined on a case-by-case basis.¹⁴⁴

While the court criticized the use of the reserved rights doctrine to determine the waters included in the public lands definition, the court might have added that a better solution would have been to rely on the expansive federal control over waters rooted in the navigational servitude. That solution would have provided the federal government with unified subsistence fisheries management unless and until the State of Alaska complied with the original cooperative federalism agreement it brokered when ANILCA was passed in 1980. Judge Holland correctly identified that doctrine as providing the best solution to this complicated and unanticipated problem in the decision reversed by the Ninth Circuit in *Katie John I*.¹⁴⁵ The panel was bound by the decisions in *Katie John I* and *Katie John II* which rejected the navigational servitude argument. Once again the litigation appeared to be at an end. No one could have known that a sport-hunter on a hovercraft would jeopardize the *Katie John* trilogy.

IV. *STURGEON V. FROST* AND SUBSISTENCE FISHING

Because the Supreme Court twice denied review in the *Katie John* litigation, and the Ninth Circuit sitting en banc affirmed the original 1995 decision, it seemed the public lands status of the federal reserved waters identified in the 1999 Rule was secure. However, none of those cases considered an obscure savings clause added at the last minute to the “Maps”

144. *Id.* at 1245.

145. Judge Holland wrote:

Footnote 15 in *Amoco* is a clear signal that the term “title” in Section 102 can refer to something less than technical fee title. This result was suggested, indeed we think required, because Section 102(1) of ANILCA expressly defines “lands” as including “interests” in both “lands” and “waters”. Footnote 9 of *Boone*, and the cases cited therein, reinforce the proposition that the United States may be considered to own an “interest” in property by virtue of the navigational servitude. The court concludes that, for purposes of Title VIII of ANILCA, the United States holds title to an interest in the navigable waters of Alaska.

John v. United States, 1994 WL 487830 at *17 (D. Alaska Mar. 30, 1994), *rev'd*, Alaska v. Babbitt (*Katie John I*), 72 F.3d 698 (9th Cir. 1995).

section of ANILCA.¹⁴⁶ That section protects the “inholdings” within the exterior boundaries of the CSUs created or added by ANILCA from being treated as “public land.” The so-called inholdings consist primarily of submerged lands that passed to the State of Alaska under the equal footing doctrine, along with Alaska Native Corporation lands selected pursuant to ANCSA.¹⁴⁷ The text plainly protects the actual land received by the state and Native corporations. The text does not address the status of the water column itself. Instead of focusing on the purpose of the provision, i.e., to protect the land transferred from federal to state or private ownership, the Court in *Sturgeon II* focused solely on whether navigable waters were “public lands” for purposes of National Park Service (NPS) regulation of non-subsistence activity on that water.

A. *Enter the Moose Hunter—On a Hovercraft.*

Section 103(c), no longer obscure, was front and center in the litigation over hovercraft use by a moose hunter within the Yukon-Charley Rivers National Preserve.¹⁴⁸ A hovercraft is “an amphibious vehicle capable of gliding over land and water.”¹⁴⁹ In *Sturgeon I*, the Court considered the NPS’s

146. 16 U.S.C. § 3103(c) (2018) (“Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.”). This provision was at the center of both *Sturgeon I* and *Sturgeon II*. *Sturgeon v. Frost (Sturgeon II)*, 139 S. Ct. 1066 (2019); *Sturgeon v. Frost (Sturgeon I)*, 136 S. Ct. 1061 (2016). District Judge Holland heard the *Sturgeon* case and described this provision as “[s]omewhat buried in the “maps” section of ANILCA . . .” *Sturgeon v. Masica*, 2013 WL 5888230, at *3 (D. Alaska Oct. 30, 2013). The Supreme Court plainly did not agree with that characterization.

147. State submerged lands under navigable waters passed to the State of Alaska under the equal footing doctrine unless explicitly reserved by the United States prior to statehood. *Alaska v. United States*, 545 U.S. 75, 78–79 (2005). In addition, many of the Alaska Native Corporation lands selected pursuant to ANCSA, *ARNOLD*, *supra* note 29, at 157, are now within CSUs, because the CSUs were often drawn based on watershed boundaries rather than gerrymandered to cover only federal lands. *Sturgeon II*, 139 S. Ct. at 1075–76 (2019). Other inholdings consist of Alaska Native allotments, and other private lands located within the exterior boundaries of the CSUs.

148. *Sturgeon I*, 136 S. Ct. at 1064.

149. *Id.* Hovercraft are not devices used by the average sportsman. One manufacturer’s website lists a base model at \$24,900.00 and is billed as “Ready to Fly.” RENEGADE HOVERCRAFT, <http://www.renegadehovercraft.com/renegade-turnkey-b.html> [https://perma.cc/UQR4-FA3H]

nationwide ban on hovercraft use within Parks and Preserves.¹⁵⁰ John Sturgeon was issued a citation for using his hovercraft on the Nation River in the Yukon-Charley Rivers National Preserve and sued the Park Service, arguing that the regulation was prohibited by ANILCA, § 103(c).¹⁵¹ The court of appeals ruled that general, or national, federal regulations apply to inholdings in Alaska CSUs regardless of their “public lands” status.¹⁵² Thus, under the appellate court’s reasoning, both State submerged lands and Alaska Native Corporation lands were subject to all general NPS regulations. The court reasoned that only Alaska-specific regulations were prohibited by § 103(c). The Ninth Circuit’s reasoning was not seriously defended in the Supreme Court by the United States—and was flatly rejected by the Supreme Court.¹⁵³ Instead, the United States argued that the river itself, i.e., the water column, was not an inholding protected by § 103(c) or that it was “public land” subject to NPS authority due to the *Katie John* trilogy.¹⁵⁴ As to the *Katie John*-based arguments, i.e., that the Nation River is “public land,” Chief Justice Roberts wrote for unanimous court “we do not decide whether the Nation River qualifies as ‘public land’ for purposes of ANILCA We find that in this case those issues should be addressed by the lower courts in the first instance.”¹⁵⁵ On remand, the Ninth Circuit upheld NPS jurisdiction based

(last visited Sept. 16, 2019). A base model with all options costs \$32,000. RENEGADE HOVERCRAFT, <http://www.renegadehovercraft.com/renegade-turnkey-iq.html> [https://perma.cc/DVT5-7RVP] (last visited Sept. 16, 2019). Unlike aluminum boats which can be used for transportation, fishing, and multiple passenger use, the basic hovercraft is a transportation-only vehicle.

150. *Sturgeon I*, 136 S. Ct. at 1064.

151. *Id.* The Yukon-Charley Rivers National Preserve was established by Congress 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” 16 U.S.C. § 410hh(10) (2018) (emphasis added).

152. *Sturgeon v. Masica*, 768 F.3d 1066, 1076–77 (9th Cir. 2014), *rev’d sub nom. Sturgeon I*, 136 S. Ct. 1061.

153. *See Sturgeon I*, 136 S. Ct. at 1069–70 (“The Ninth Circuit, for its part, adopted a reading of Section 103(c) different from the primary argument advanced by the Park Service in this Court.”).

154. Brief for the Respondents at 25–29, *Sturgeon v. Frost (Sturgeon I)*, 136 S. Ct. 1061 (2016) (No. 17-949), 2018 WL 4381223, at *25–29.

155. *Sturgeon I*, 136 S. Ct. at 1072. As noted earlier, Chief Justice Roberts did not participate in *Katie John III* at the cert. petition stage, presumably due to his prior representation of the State of Alaska in *Katie John II*. *See John v. United States (Katie John III)*, 720 F.3d 1214 (9th Cir. 2013). Whether that prior representation should have precluded participation in the *Sturgeon* litigation is an unreviewable determination by the Chief Justice. *See Christopher Riffle, Ducking Recusal: Justice Scalia’s Refusal To Recuse Himself from Cheney v. United States District Court for the District of Columbia*, 541 U.S. 913 (2004), and *the Need for a Unique Recusal Standard for Supreme Court Justices*, 84 NEB. L. REV. 650, 657 (2005).

on the Katie John trilogy, thus setting the stage for another round of Supreme Court review.¹⁵⁶

The case squarely presented the federal reserved water rights theory of the “public lands” definition.¹⁵⁷ Paraphrasing the three part definition, the Court stated that “‘Public lands’ are . . . most but not quite all lands (and again, waters and interests) that the Federal Government owns.”¹⁵⁸ Because the Park Service was attempting to regulate hovercraft use on a navigable river in a CSU, the key question was whether the river (water column) falls within the “public lands” definition. The Court agreed (or at least assumed) that the federal government owned reserved water rights in the Nation River, but then focused on the issue of whether the government could hold “title” to the usufructuary rights (as it characterized a reserved right) within the meaning of ANILCA.¹⁵⁹ Focusing on the nature of a reserved water right, the Court concluded that reserved water rights are not the type of interest to which “title” may be held, rather, it said, the term “title” applies more generally fee or leasehold type interests in property.¹⁶⁰ The United States’ interest in a reserved water right would only be in the nature of protecting that right as necessary to fulfill the purpose of the Yukon-Charley Rivers National Preserve.¹⁶¹ In concluding that the United States does not hold “title” to federal reserved waters, the Court ignored its decision in *Amoco Production Co. v. Village of Gambell* in which the Court indicated that the term “title” may have a more broad meaning within the context of ANILCA.¹⁶² Even so, the Court went on to say that even if the government had title to the reserved

156. *Sturgeon v. Frost*, 872 F.3d 927, 936 (9th Cir. 2017).

157. *Sturgeon v. Frost (Sturgeon II)*, 139 S. Ct. 1066, 1076–77 (2019).

158. *Id.* at 1077.

159. *Sturgeon II*, 139 S. Ct. at 1079. In general, federal reserved water rights are implied rights created “[w]hen the Federal Government withdraws its land from the public land from the public domain and reserves it for a federal purpose[.]” *Id.* at 1078 (citing *Cappaert v. United States*, 426 U.S. 128, 138 (1976)). Such rights may also be created without a land withdrawal when the United States exercises its Commerce Clause power. OFFICE OF LEGAL COUNSEL, U.S. DEP’T OF JUSTICE, FEDERAL “NON-RESERVED” WATER RIGHTS, 6 Op. O.L.C. 328, 363 (1982). The opinion “still expresses executive branch policy.” John D. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the-Century Evaluation*, 4 U. DENV. WATER L. REV. 271, 288 (2001).

160. *Sturgeon II*, 139 S. Ct. at 1079.

161. *Id.*

162. 480 U.S. 531, 548 n.15 (1987) (“The United States may not hold ‘title’ to the submerged lands of the OCS, but we hesitate to conclude that the United States does not have ‘title’ to any ‘interests therein.’ Certainly, it is not clear that Congress intended to exclude the OCS by defining public lands as ‘lands, waters, and interests therein’ ‘the title to which is in the United States.’”). In the initial *Katie John* public lands decision, District Judge Holland took this language to mean that the term meant more than simply technical fee title. *John v. United States*, Nos. A90-0484-CV (HRH), A92-0264-CV (HRH), 1994 WL 487830, at *17 (D. Alaska Mar. 30, 1994), *overruled by Katie John I*, 72 F.3d 698, 700 (9th Cir. 1995).

right, it did not have title to the river itself and thus could not regulate the hovercraft use.¹⁶³ Thus, the “public lands” theory from the *Katie John* trilogy could not justify NPS jurisdiction to regulate hovercraft use.

B. The Continued Vitality of the Katie John Trilogy and Federal Authority To Apply Title VIII to Federal Reserved Waters.

Despite rejecting the “public lands” rationale for NPS authority, the Court dropped a footnote critical to the *Katie John* litigants and all rural subsistence users in Alaska:

As noted earlier, the Ninth Circuit has held in three cases—the so-called *Katie John* trilogy—that the term “public lands,” when used in ANILCA’s subsistence-fishing provisions, encompasses navigable waters like the Nation River. [citations omitted] Those provisions are not at issue in this case, and we therefore do not disturb the Ninth Circuit’s holdings that the Park Service may regulate subsistence fishing on navigable waters. See generally Brief for State of Alaska as *Amicus Curiae* 29–35 (arguing that this case does not implicate those decisions); Brief for Ahtna, Inc., as *Amicus Curiae* 30–36 (same).¹⁶⁴

Because the Supreme Court left in place the federal government’s authority to enforce the subsistence priority, the *Katie John* decisions constitute binding precedent as to the duty and power to continue to enforce Title VIII on federal reserved waters. It is axiomatic that federal agencies must follow their own rules, and the 1999 rule remains in effect.¹⁶⁵ Legislative rules are binding on the agency that promulgated the rule.¹⁶⁶ In this case, the agency

163. *Sturgeon II*, 139 S. Ct. at 1080. The Court ignored the argument that section 103(c) was intended to protect inholdings, and that navigable waters cannot be said to be “inholdings” in the same sense as submerged lands owned by the state or fee simple lands owned by Alaska Native Corporations. Rather, because the submerged lands under navigable waters were not public land, the river itself was not part of the CSU.

164. *Id.* at 1080 n.2.

165. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954) (noting that an agency must follow its own rules as long as they remain operative); *see also* *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (“Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.”); CHARLES H. KOCH, JR. & RICHARD MURPHY, *ADMINISTRATIVE LAW AND PRACTICE* § 4:22 (3d ed. 2019) (“One of the most firmly established principles in administrative law is that an agency must obey its own rules. An agency’s failure to follow its own rules may be fatal to the agency’s action.”).

166. KRISTEN E. HICKMAN & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 4.3.2 (6th ed. 2019) (citing *United States v. Nixon*, 418 U.S. 683 (1974)).

likely does not even have authority to change the reserved waters aspect of the rule, because it was done in response to the Ninth Circuit's mandates in the Katie John trilogy.

Although there is no way of knowing the Court's views of the merits of the argument that the "public lands" definition may have a different meaning in the context of Title VIII, a quick review of the two briefs citing by the Court indicates that "public lands" plausibly has a different meaning when applied in the context of Title VIII of ANILCA. The State of Alaska made the following points in its brief:

- "Nor should the *Katie John* and *Sturgeon* decisions be tied together as the Ninth Circuit has done. *Title VIII stands apart from the rest of ANILCA with its own findings*, 16 U.S.C. § 3111, its own statement of policy, 16 U.S.C. § 3112, and—unlike any other part of the legislation—specific invocations of congressional authority under the Commerce Clause, the Property Clause, and Congress's 'constitutional authority over Native affairs.' 16 U.S.C. § 3111(4)."¹⁶⁷
- "Congress mandated the subsistence priority to protect the important values embodied by subsistence, 16 U.S.C. § 3111, and in the nearly twenty years since the federal government assumed management of subsistence activities on federal lands in Alaska, rural Alaskans have depended on this subsistence priority to effectuate those values and preserve their way of life."¹⁶⁸
- "Subsistence activities under ANILCA are also crucial to Alaskans living in remote, undeveloped settings where residents rely on customary and traditional harvest of wild and natural foods because access to packaged and other processed and non-local foodstuffs may not be available at a reasonable price—or any price."¹⁶⁹
- "This case presents a salient example of a circumstance where a complex statute's use of a term in different contexts is properly interpreted differently. . . . [a]nd Title VIII explicitly contemplates federal regulation if necessary to ensure that rural Alaska residents

167. Brief of Amicus Curiae State of Alaska in Support of Petitioner at 30, *Sturgeon II*, 139 S. Ct. 1066 (2019) (No. 17-949), 2018 WL 4063284, at *30 (emphasis added).

168. *Id.* at 31–32.

169. *Id.* at 32.

can engage in traditional and customary subsistence fishing activities. 16 U.S.C. § 3115(d).¹⁷⁰

In similar fashion, Ahtna Incorporated, an ANCSA Corporation which owns land within CSUs, filed an amicus brief in support of neither party and argued that the Court should acknowledge that “the extent of federal authority under Title VIII is separate and distinct from . . . the rest of ANILCA[.]”¹⁷¹

- “After *Katie John*, the subsistence wars largely subsided. A fragile equilibrium was finally established among the United States, the State of Alaska, and Alaska Natives regarding the scope of Title VIII’s subsistence priority.”¹⁷²
- “Given Congress’s clear desire to protect subsistence rights and the obvious reality that the protection would be substantially diminished if federal land managers did not have the authority to enforce the subsistence priority in navigable waters, it is reasonable to interpret federal authority to achieve that end, as the Ninth Circuit did in the *Katie John* decisions.”¹⁷³

The Ahtna and State of Alaska briefs offer persuasive reasons supporting the continued vitality of the *Katie John* trilogy, and the Supreme Court apparently took notice. The 1999 rule remains in place and the agencies must follow it unless and until otherwise ordered by a court or replaced through notice and comment rulemaking.¹⁷⁴

Another powerful reason why Title VIII’s subsistence priority continues to apply to the federal reserved waters identified in the rule is that Congress expressly approved the rules in a series of moratoria that were allowed to lapse.¹⁷⁵ The history of the rule’s enactment shows an extraordinary amount

170. *Id.* at 34. The Court reiterated this principle in a case decided shortly after *Sturgeon v. Frost*: indeed, it is often true that when Congress uses a word to mean one thing in one part of the statute, it will mean the same thing elsewhere in the statute. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U. S. 71, 86, (2006). This principle, however, “readily yields to context,” especially when a statutory term is used throughout a statute and takes on “distinct characters” in distinct statutory provisions. *See Utility Air Regulatory Group v. EPA*, 573 U. S. 302, 320, (2014) (internal quotation marks omitted). *Return Mail, Inc. v. United States Postal Serv.*, 139 S. Ct. 1853, 1863 (2019); *see also Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 548 n.15 (“We also reject the assertion that the phrase ‘public lands,’ in and of itself, has a precise meaning, without reference to a definitional section or its context in a statute.”).

171. Brief of Amicus Curiae Ahtna Inc. in Support of Neither Party at 4, *Sturgeon II*, 139 S. Ct. 1066 (2019) (No. 17-949), 2018 WL 3952032.

172. *Id.* at 26.

173. *Id.* at 35–36.

174. *See supra* text accompanying notes 170–173.

175. *See supra* note 138. The United States Solicitor General also took this position in the Supreme Court. Brief of Respondent United States, *Sturgeon v. Frost*, 2018 WL 4381223, 38 (Sept. 11, 2018) (“Congress ultimately ratified [the] regulations.”). The Supreme Court did not address this argument, but it provides a basis for continued enforcement of the 1999 Rule.

of involvement by Congress—so much that this is the archetype of congressional ratification. Once *Katie John I* was decided, the Secretary of the Interior promulgated permanent regulations explaining that the United States held reserved water rights in the navigable waters within Alaska CSUs, and therefore that these waters constitute “public lands” under ANILCA.¹⁷⁶ Congressional interaction with the administrative agencies was immediate and extensive. Congress first delayed the implementation of the regulations in 1996 to give the State an opportunity to amend its laws to allow a subsistence-use priority on public lands and thereby eliminate the need for federal regulations.¹⁷⁷ This was widely reported in the Alaska press with U.S. Senator Ted Stevens repeatedly urging the state to amend its constitution to allow a rural preference, and finally warning the state that it should do so or the federal fisheries takeover would occur.¹⁷⁸ In addition, Congress appropriated \$11 million to implement the federal fisheries management takeover.¹⁷⁹

Each of these appropriations acts explicitly referenced the regulatory definition of “public lands” and withheld their inclusion of federal reserved waters, until the 1999 act, which set the conditions the State was to meet or else federal jurisdiction would extend to federal reserve waters.¹⁸⁰ This chronology shows Congress’s close attention to the proposed regulations, and

176. Subsistence Management Regulations for Public Lands in Alaska, 64 Fed. Reg. 1276, 1279 (Jan. 8, 1999); *see also* Subsistence Management Regulations for Public Lands in Alaska, 62 Fed. Reg. 66,216, 66,217-18 (proposed Dec. 17, 1997) (to be codified at 50 C.F.R. pt. 100).

177. Omnibus Consolidated and Rescissions Appropriations Act of 1996, Pub. L. No. 104-134, § 336, 110 Stat. 1321 (1996); *see* David Whitney, *Stevens Pushes Subsistence Moratorium Natives*, ANCHORAGE DAILY NEWS, Mar. 7, 1996, at B1; *see also* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 317, 110 Stat. 3009 (1996); Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, § 316(a), 111 Stat. 1543 (1997).

178. Don Hunter, *Babbitt Says Feds Won’t Move in To Stay*, ANCHORAGE DAILY NEWS, Oct. 23, 1997, at A1; Robert Kowalski, *Stevens’ Final Warning—Put Subsistence Amendment*, ANCHORAGE DAILY NEWS, Feb. 20, 1998, at A1; Robert Kowalski, *The Hunt Continues for Subsistence Law*, ANCHORAGE DAILY NEWS, May 30, 1998, at A1 (“Stevens, who is chairman of the U.S. Senate’s powerful Appropriations Committee, helped broker a deal last year in which Congress agreed to postpone that [subsistence fisheries] takeover date one year, to this Dec. 1.”).

179. *See* Hunter, *supra* note 179; David Whitney, *\$1 Million for Takeover—Subsistence Switch Nears*, ANCHORAGE DAILY NEWS, June 2, 1999, at A1 (“The Federal government moved a step closer Tuesday to stripping state government of the power to regulate subsistence hunting and fishing across much of the state. Interior Secretary Bruce Babbitt released \$1 million to help agencies gear up to take over management of subsistence activities on millions of acres of federal land, now scheduled for Oct. 1.”).

180. *See* Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999 (1999 Appropriations Act), Pub. L. No. 105-277, §§ 101(e), 339(a)(1), 339(b)(2), 112 Stat. 2861, 2681-96 (repealing prior restriction on effective date of regulation); Alaska National Interest Lands Conservation, 16 U.S.C. § 3102 (2018).

by actually setting their effective date creates a powerful argument that it Congress effectively ratified the Secretaries' interpretation of "public lands" for Title VIII of ANILCA.¹⁸¹ Indeed where, as here, Congress acts by "positive legislation" to adopt an existing agency position the "administrative construction" is "virtually conclusive."¹⁸² The detailed nature of the moratoria over the course of several congressional sessions makes it plain that the "public lands" definition developed in response to the *Katie John* trilogy was approved by Congress. Moreover, because the *Katie John II* was an en banc decision, it is binding on all courts in the Ninth Circuit unless reversed by the Supreme Court or an en banc panel consisting of the entire active court.¹⁸³ The Supreme Court's explicit directive that the *Katie John* trilogy survives and that the federal agencies may implement their "public land" definition as applied to Title VIII, indicates approval of the rule in that limited context.

V. CONCLUSION

In general, the subsistence priority for rural residents has not provided adequate protections for Native hunting and fishing rights.¹⁸⁴ There is widespread dissatisfaction among the Alaska Native community with the limited nature of the federal subsistence program. In a number of congressional oversight hearings, Alaska Native tribes and organizations have expressed their frustration with the way the federal subsistence priority has been implemented. At the United States Senate Energy and Natural Resources Committee Hearing "[t]o examine wildlife management authority within the State of Alaska under [ANILCA] and [ANCSA]," Alaska Native leader Rosita Worl described the current situation: "Forty-two years after

181. See, e.g., *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) (congressional awareness of interpretation of statute is evidence of ratification of interpretation); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) ("Where an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.") (citations and quotation marks omitted); see also *Bob Jones Univ. v. United States*, 461 U.S. 574, 600–01 (1983) (Given the multiple enactments on the subject, "it is hardly conceivable that Congress . . . was not abundantly aware of what was going on.").

182. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986).

183. U.S. Ct. of App. 9th Cir. Rule 35-3, 28 U.S.C.A., CTA9 Rule 35-3 (West 2012) ("In appropriate cases, the Court may order a rehearing by the full court following a hearing or rehearing en banc.").

184. State efforts to limit application of the subsistence priority resulted in a wide array of federal court litigation under Title VIII, with subsistence users generally prevailing. The cases are collected in Anderson, *supra* note 13, at 215 n.182; see also *HANDBOOK OF FEDERAL INDIAN LAW*, *supra* note 18, § 4.07[3][c][ii][C], at 348–52 (footnotes omitted).

ANCSA passed, and thirty-three years after ANILCA passed, neither the Department of the Interior nor the State of Alaska has lived up to Congress's expectation that Alaska Native subsistence needs would be protected."¹⁸⁵

As the United States interprets the "public lands" definition of ANILCA, about sixty percent of the water and land in the state is under federal jurisdiction for purposes of Title VIII.¹⁸⁶ That means that of the 365 million acres in Alaska, roughly 104 million acres owned by the state and another forty-four million acres owned by Alaska Native Corporations (ANCs) and tribes, are not considered "public lands" under federal law. Footnote 2 of *Sturgeon II* preserves federal jurisdiction over subsistence fishing under the 1999 rule, but Congress could step in to expand federal subsistence fisheries jurisdiction, or rework entirely the federal protections for the aboriginal hunting, fishing, and gathering rights extinguished by ANCSA.¹⁸⁷ The cooperative federalism regime envisioned by the State, Congress, and the Native community has clearly failed. Prospects for progressive and creative congressional action seem unlikely in the current political climate, but the one certainty is that the Alaska Native community will never surrender in the battle to restore and protect their aboriginal rights to hunt, fish, and gather wild renewable resources.

185. *Alaska Wildlife Management: Hearing Before the S. Comm. on Energy and Nat. Res.*, 113th Cong. 50 (2013) (statement of Dr. Rosita Worl, Subsistence Comm. Chair, Alaska Federation of Natives).

186. See ALASKA DEP'T OF NAT. RES., FACT SHEET: LAND OWNERSHIP IN ALASKA (2000), http://dnr.alaska.gov/mlw/factsht/land_fs/land_own.pdf [<https://perma.cc/75NK-TP3N>].

187. 139 S. Ct. 1066, 1080 n.2 (2019). Some possible approaches are outlined in my earlier article. See Anderson, *supra* note 13, at 218–19.