Hearing Before the
United States Senate Energy and Natural Resources Committee

To Examine Wildlife Management Authority within the State of Alaska Under the Alaska National Interest Lands Act and the Alaska Native Claims Settlement Act

Testimony of Professor Robert T. Anderson

September 19, 2013

Good afternoon, my name is Robert Anderson and I am a Professor of Law at the University of Washington School of Law, Director of its Native American Law Center. I also have a long-term appointment as the Oneida Indian Nation Visiting Professor of Law at Harvard Law School. I have worked on Alaska Native hunting and fishing issues since 1984 when I was one of two attorneys who opened the Anchorage office of the Native American Rights Fund. I spent six years in the Clinton Administration working on many Native rights issues, among other matters. I have been a law professor for the past thirteen years. I am a co-author and member of the Board of Editors of COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Lexis/Nexis 2005 and 2012 Editions). I am also a co-author of a casebook used in many law schools, Anderson, Berger, Frickey & Krakoff, AMERICAN INDIAN LAW (2008 & 2010 Editions). My CV is attached to this testimony.

My testimony addresses the history of federal law regarding hunting, fishing and gathering rights in Alaska, the subsistence management regime under Title VIII of ANILCA, and the power of Congress to adopt a Native tribal preference for access to fish and game. For the reasons explained below, I believe a Native tribal preference would easily withstand any federal constitutional challenge.

I. Legal History of Native Hunting and Fishing Rights in Alaska

Since Alaska was purchased by the United States in 1867, the hunting and fishing rights of Alaska Natives have been affirmatively recognized and protected in various forms by Congress, the Executive Branch, and the federal courts. *See generally* D. CASE & D. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 270-290 (3rd Ed. 2012). The leading scholarly treatise on Native American law and contains the following summary of the legal treatment of Alaska Native rights to fish and game.

> From the time of Alaska's purchase in 1867 until the present day, all branches of the federal government have protected to some degree the fish and wildlife uses of Alaska natives through exemptions from conservation laws, land reservations, and

withdrawals.[1189] In its first action to protect wildlife resources in the new territory from over-exploitation, Congress restricted the taking of fur seals, but exempted native hunting for food, clothing, and boat-manufacture.[1190] Alaska's first game law[1191] restricted the taking of game animals, but exempted hunting for food or clothing by "native Indians or Eskimos or by miners, explorers, or travelers on a journey when in need of food." The 1916 Migratory Bird Convention with Great Britain exempted natives from the closed seasons for certain species.[1192] The 1925 Act creating the Alaska Game Commission authorized "any Indian or Eskimo, prospector, or traveler to take animals and birds during the closed seasons when he is in absolute need of food and other food is not available,"[1193]

The 1925 Act also imposed a one-year territorial residency requirement,[1194] amended in 1938 to authorize a three-year requirement, for trapping licenses whenever "the economic welfare and interests of native Indians or Eskimos, or the fur resources of Alaska, are threatened by the influx of trappers from without the Territory."[1195] The Reindeer Industry Act of 1937[1196] was intended to provide for native subsistence needs and establish a native monopoly over the reindeer industry.[1197]

As to fisheries, the 1924 White Act exempted from methods and closed-season restrictions "the taking of fish for local food requirements or for use as dog food."[1198] The

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[1189] Before Alaska's purchase, Native subsistence rights were protected by the "laws of an antecedent government [Russia]." United States v. Berrigan, 2 Alaska 442, 446 (D. Alaska 1905); *see also* Russian Administration of Alaska and the Status of the Alaska Natives, S. Doc. No. 81–152 at 45, 50–51 (1950) (reprinting Second (1821) & Third (1844) Charters of the Russian American Company). *See generally*, David S. Case, *Subsistence and Self-Determination: Can Alaska Natives Have a More "Effective Voice"?* 60 U. Colo. L. Rev. 1009 (1989).

[1190] Act of July 1, 1870, 16 Stat. 180.

[1191] Act of June 7, 1902, 32 Stat. 327, *amended*, Act of May 11, 1908, 35 Stat. 102.

[1192] Migratory Bird Convention, U.S.-Gr. Brit., 39 Stat. 1702, 1703, T.S. No. 628. Migratory Bird Treaties with Canada and Mexico were amended by protocols in 1997, which exempt the taking of migratory birds and their eggs by Alaska natives. Treaty Doc. No. 104-28 and Treaty Doc. No. 105–26. 143 Cong. Rec. S11,167 (Oct. 23, 1997).

[1193] Alaska Game Commission Act, 43 Stat. 739, 744 (1925), *amended by* Act of Oct. 10, 1940, 54 Stat. 1103, [1104] *and* Act of July 1, 1943, 57 Stat. 301, 306.

[1194] Alaska Game Commission Act, 43 Stat. 739, 740.

[1195] Act of June 25, 1938, § 2, 52 Stat. 1169, 1170. The foregoing territorial statutes were omitted from the United States Code on Alaska's admission as a state. 48 U.S.C. §§ 192–211 (note).

[1196] 25 U.S.C. § 500 et seq.

[1197] *See* Gigi Berardi, *Natural Resource Policy, Unforgiving Geographies, and Persistent Poverty in Alaska Native Villages*, 38 Nat. Resources J. 85, 98–99 (1998); *cf.* Williams v. Babbitt, 115 F.3d 657 (9th Cir. 1997) (interpreting statute narrowly to permit non-native ownership of imported reindeer).

[1198] Act of June 6, 1924, §§ 4, 5, 43 Stat. 464, 466 (codified in part as amended at 48

> 1934 amending act[1199] further excepted the "Karluk, Ugashik, Yukon, and Kuskokwim Rivers" from the restrictions on devices such as fish fences, traps, and fish-wheels, as well as other methods-and-means restrictions. The amendment stated that the exception for the Kuskokwim and Yukon Rivers, "shall be solely for the purpose of enabling native Indians and bona fide permanent white inhabitants along the said rivers" to take king salmon "for commercial purposes and for export," but "no person shall be deemed to be a bona fide permanent inhabitant of the said rivers who has not resided thereon, or within fifty miles thereof for a period of over one year."[1200] In 1943, the Secretary established the Karluk Indian reservation on Kodiak Island, designating adjacent tidelands and coastal waters under the Indian Reorganization Act's authority to reserve "public lands which are actually occupied by Indians or Eskimos" in Alaska.[1201] The Supreme Court rejected a challenge to the Secretary's inclusion of navigable waters in the reservation, noting that for natives "the adjacent fisheries are as important, perhaps more important than the forests, the furbearing animals or the minerals."[1202]

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.07[3](c)(i) (Lexis/Nexis 2012) (footnotes as in original text).

This summary of congressional actions demonstrates consistent early recognition by the United States of Alaska Native rights and the importance of access to fish and wildlife resources.

II. The Aboriginal Rights Question

Native aboriginal rights, which include the right to hunt, fish and gather natural resources, are recognized as belonging to all indigenous Indian tribes, including Alaska Native tribes. *See*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 10-22, 326-329 (Lexis/Nexis 2012); D. CASE & D. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 62, 79-80 (3rd Ed. 2012). These legal principles are premised on international law recognizing indigenous rights to use and occupy their traditional territories, but subject to negotiations with the colonizing nations. No modern land title is secure unless it can be demonstrated that Native aboriginal title to that area was somehow extinguished, or accommodated by treaty, agreement, or statute. Most of those treaties, agreements and statutes reserved rights to the affected tribe to a land base, as well as hunting, fishing and gathering rights both on and sometime off of the reserved lands.

For Alaska, application of these legal principles began with the Treaty of Cession in 1867, 15 Stat. 539, by which the United States acquired Russia's rights to Alaska. The Treaty provided that federal law pertaining to Indian tribes in the United States would likewise apply to Alaska

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U.S.C. §§ 232–234).

[1199] Act of Apr. 16, 1934, §§ 3, 4, 48 Stat. 594, 595.

[1200] Act of Apr. 16, 1934, § 3, 48 Stat. 594, 595.

[1201] Act of May 1, 1936, § 2,49 Stat. 1250 (extending portions of the IRA to Alaska).

[1202] Hynes v. Grimes Packing Co., 337 U.S. 86, 114 (1949). The Court held, however, that the White Act could not serve as the basis for regulations prohibiting non-Indian fishing within the reservation.

Natives. This naturally included the law governing Native aboriginal rights. The Secretary of the Interior and his Solicitor addressed the question of aboriginal hunting and fishing rights in Alaska in a 1942 decision. The question presented was "Whether Indians of Alaska have any fishing rights which are violated by control of particular trap sites by non-Indians under departmental regulations. . ." Secretary Harold Ickes concurred in the Solicitor's "opinion that this question must be answered in the affirmative." He reasoned as follows.

> Although the Natives of Alaska did not enter into formal treaties with the United States, such treaties are not essential to the maintenance of rights based upon aboriginal occupancy. As the Supreme Court said in *United States* v. *Winans*, 198 U.S. 371 (1905), "the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." (at p. 381.) Thus, unless the rights which Natives enjoyed from time immemorial in waters and submerged lands of Alaska have been modified under Russian or American sovereignty, it must be held that the aboriginal rights of the Indians continue in effect.

Aboriginal Fishing Rights in Alaska, 57 Interior Dec. 461, 462-63, 1942 WL 4531 (1942).

> Finally, it must be noted that the allowance of non-Indian fishing in areas subject to Indian possessory rights is a continuing wrong, rather than a wrong which, once committed, creates supervening and inalienable rights in third parties. It is well settled that by allowing and licensing the use of particular areas for fish traps the Federal Government does not recognize any permanent or proprietary interest therein. Thus while preexisting Indian proprietary interests have been violated they have not thereby been permanently extinguished. The Indian who has been forbidden from fishing in his back yard has not thereby lost his aboriginal title thereto.
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> 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.

Id. at 476.

The 1958 Statehood Act further acknowledged the existence of Native rights. It provided that "all right and title … to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts … or is held by the United States in trust for said Natives … shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe." Pub. L. No. 85-508, § 4, 72 Stat. 339 (1958). Corresponding language appears in the Alaska Constitution. Alaska Const., art. XII, § 12; *see Organized Village of Kake v. Egan*, 369 U.S. 60, 65–67 (1962) (Statehood Act preserved status quo respecting Native aboriginal title).

Section 6(b) of the Statehood Act, however, granted the State of Alaska the right to select 102.5 million acres for its own use from "vacant, unappropriated, and unreserved" public lands. As the new State began to select lands, Native tribes protested to the Secretary of the Interior, and on

January 12, 1969, Secretary Stewart Udall imposed a freeze on further patenting or approval of applications for public lands in Alaska pending the settlement of Native claims. Pub. Land Order No. 4582, 34 Fed. Reg. 1025 (1969); *see Alaska v. Udall*, 420 F.2d 938 (9th Cir. 1969). 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. *See* Mary Clay Berry, THE ALASKA PIPELINE: THE POLITICS OF OIL AND NATIVE LAND CLAIMS 123, 163–214 (Ind. U. Press 1975). 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 Pipeline, to transport the oil. *See* R. Arnold, ALASKA NATIVE LAND CLAIMS 137–147 (2d ed. Cambridge Univ. Press 1978); *Native Village of Allakaket v. Hickel*, No. 706-70 (D. D.C. April 6, 1970) (enjoining construction of trans-Alaska pipeline over Native-claimed lands).

Finally, in 1971, Congress confronted the issues it had postponed for a century and enacted the Alaska Native Claims Settlement Act ("ANCSA"). Section 4(b) explicitly extinguished hunting and fishing rights based on aboriginal title: "All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy… including any aboriginal hunting and fishing rights that may exist, are hereby extinguished." 43 U.S.C. § 1603(b). The ANCSA Conference Report, however, expressly provided that the Secretary of the Interior (presumably by virtue of his on-going trust obligations) could "exercise his existing withdrawal authority" to "protect Native subsistence needs and requirements," from "nonresidents when subsistence resources for [the public lands] are in short supply or otherwise threatened." H. Conf. Rep. No. 92-746, 92d Cong., 1st Sess. 37 (1971), *reprinted in* 1971 U.S. Code Cong & Ad. News 2247, 2250. "The Conference Committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives." *Id*.

ANCSA's extinguishment clause as it relates to fish and wildlife is arguably inconsistent with current international law, which the United States supports. The *United Nations Declaration on the Rights of Indigenous Peoples*, includes the following:

> *Article 20*
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> 1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
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> 2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

See, Announcement of U.S. Statement of Support for the United Nations Declaration on the Rights of Indigenous Peoples (Dec. 16, 2010).
http://www.state.gov/s/tribalconsultation/declaration/

III. Post-ANCSA Treatment of Hunting and Fishing Rights Often Included Native Preferences

After ANCSA, Congress and the executive branch continued to afford federal protection to specific subsistence rights, largely through exemptions from federal laws, or international treaties governing migratory birds or marine mammals. The Marine Mammal Protection Act of 1972 (MMPA) 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," if the taking is for "subsistence purposes" or for "creating and selling" handicrafts and clothing. 16 U.S.C. § 1371(b); *see Beck v. U.S. Dep't of Commerce*, 982 F.2d 1332 (9th Cir. 1992) (interpreting Native handicrafts exception favorably to Alaska Natives); *United States v. Clark*, 912 F.2d 1087 (9th Cir. 1990); *People of Togiak v. United States*, 470 F. Supp. 423 (D.D.C. 1979). *See generally* Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361 *et seq*. Congress thus preempted state authority over marine mammal hunting throughout Alaska's territorial sea and coastal inland waters. *Cf. Alaska v. Arnariak*, 941 P.2d 154 (Alaska 1997) (narrowly construing the Marine Mammal Protection Act's preemptive scope to allow state prohibition of firearms to take marine mammals on state wildlife refuge). Under a 1981 amendment to the MMPA, the Secretary of the Interior was prohibited from transferring marine mammal management authority to Alaska unless the State adopted a subsistence priority law. 16 U.S.C. § 1379(f); *see also* 50 C.F.R. § 18.23 (2013) (implementing regulations). The MMPA was amended in 1996 to provide for comanagement with Alaska Natives. *See* 16 U.S.C. § 1388. The Alaska Eskimo Whaling Commission annually obtains subsistence bowhead whaling quotas pursuant to the International Whaling Convention. *See* David A. Case & David A. Voluck, Alaska Natives & American Laws 276–78 (3d ed. 2012). Polar bear management agreements and treaties also contain special provisions dealing with Native harvest. 16 U.S.C. § 1423c,. *See* Agreement on the Conservation and Management of the Alaska-Chutkotka Polar Bear Population, U.S.-Russ. Fed. (Oct. 16, 2000). *See also* 50 CFR § 300.65 ("A person is eligible to harvest subsistence halibut if he or she is a member of an Alaska Native tribe with customary and traditional uses of halibut listed in the following table."); http://alaskafisheries.noaa.gov/ram/subsistence/halibut.htm

In 1973, the Trans-Alaska Oil Pipeline Act imposed strict liability for any harm to the subsistence resources of Natives or others, 43 U.S.C. § 1653(a)(1), and the Endangered Species Act (ESA) presumptively exempted subsistence uses by Natives and "any non-Native permanent resident of an Alaskan Native village" from its coverage. 16 U.S.C. § 1539(e)(1); the Secretaries of the Interior and Commerce issued an order requiring early and substantial consultation between federal agencies implementing the ESA and affected Alaska Native tribes. Secretarial Order No. 3225 (Jan. 19, 2001).

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." 16 U.S.C. § 712(1). Finally, executive land withdrawals in the decade following passage of ANCSA contained expansive subsistence-protection mandates: 14 of the 17 national monument proclamations signed by President Carter on December 1, 1978, noted the presence of "the unique subsistence culture" and directed the Secretary to protect it. 43 Fed. Reg. 57,019 (Dec. 5,

1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 9589–9628; *see* 43 Fed. Reg. 60,252–60,258 (Dec. 26, 1978) (interim implementing subsistence regulations, providing for "subsistence fishing" in "monument area waters"). These efforts to protect Native subsistence access to marine mammals, migratory birds and halibut in offshore waters were beneficial, but too limited in scope. Fish and game, which are critical for Native subsistence uses, were not generally protected and the need for congressional action was apparent.

By the late 1970's, it was obvious that in order for the federal government to be faithful to its policy of dealing honorably with Alaska's indigenous peoples, Congress would have to devise a new means of protecting Native customary and traditional hunting, fishing and gathering in Alaska. Resurrecting language earlier deleted from drafts of the Claims Settlement Act, Alaska Natives returned to Congress asking that explicit comprehensive protections for Native customary and traditional hunting and fishing be included in the Alaska National Interest Lands Conservation Act (ANILCA). The original Committee drafts of Title VIII of ANILCA proposed a Native-only subsistence preference on all federal public lands in Alaska and allowed the State to manage the priority on those lands if it passed a law of general applicability that provided the same preference on state lands. Before the bill was passed, Congress recast the priority as one for "rural" residents in order to appease the State of Alaska, which argued that a Native priority would violate the State's Constitution. The State's argument was incorrect as a matter of law, for states may implement federal laws regarding Native American tribes if authorized to do so. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (rejecting Washington's argument that it could not implement federally protected Indian treaty rights).

IV. Current State of Affairs under Title VIII of ANILCA

The State came into compliance with Title VIII of ANILCA in 1981 and thus obtained authority to manage subsistence uses on federal public lands in Alaska. Even then, however, the State program did not provide a meaningful priority for subsistence uses by rural residents. The Alaska Board of Game applied sport regulations to moose and caribou hunting in the Lime Village area and Federal District Judge Holland declared that the state rules were invalid because they did not adequately accommodate customary and traditional subsistence use patterns. *Bobby v. Alaska*, 718 F. Supp. 764 (D. Alaska 1989). The situation with fisheries management was even worse. Under state management many traditional upriver subsistence fisheries had been shut down shortly after Statehood in favor of downriver commercial fisheries highlighting the need for comprehensive legislation to protect subsistence uses of fish and game. These upriver closures were the genesis for the *Katie John* litigation, which was commenced in 1985 after the Alaska Board of Fisheries refused the request from Katie John and Doris Charles that the fishery at the site of Batzulnetas be opened. In 1987 the fishery was opened as a result of the litigation, and Judge Holland ordered the State to promulgate regulations that complied with Title VIII's rural priority. *Katie John, et al. v. Alaska*, No. A85-698 Civil, Order on Cross Motions for Summary Judgment (D. Alaska Jan. 19, 1990) (striking down state regulations that restricted subsistence fishing at an historic Native fish camp). *See, United States v. Alexander*, 938 F.2d 942 (9th Cir. 1991) (setting aside a federal Lacey Act prosecution on the ground that state law prohibiting cash sales from being considered subsistence uses was in conflict with ANILCA's

protection of customary trade as a subsistence use); *Kwethluk IRA Council v. Alaska*, 740 F. Supp. 765 (D. Alaska 1990) **(**striking down state regulations governing subsistence hunting of caribou in western Alaska as inconsistent with the customary and traditional harvest patterns of Yupik Natives).

In 1989 the State Supreme Court set aside the State's ability to provide a rural subsistence preference when it declared that the rural priority violated the Alaska Constitution. Consequently, the State lost regulatory authority over subsistence uses on federal lands pursuant to federal regulations adopted in 1992. Because the federal government refused to assert jurisdiction over most navigable waters, Katie John and others filed a successful lawsuit to obtain federal management over many navigable waters in the state. That decision was handed down in 1995, and federal agencies were charged with developing rules to implement the court decision.

Governor Knowles made several attempts to convince the state legislature to place a rural preference constitutional amendment on the ballot, but was unsuccessful. Senator Stevens secured a series of appropriations riders that held proposed final federal rules in abeyance to secure time for the state legislature to act, but no action was taken. *See* Pub.L. 105-277, Div. A, § 101(e) [Title III, § 339], 112 Stat. 2681 (1998); and Historical Note, 16 U.S.C.A. § 3102.

Federal regulations to implement the *Katie John* court decision thus became final in 1999, and all was relatively quiet until the State brought a new lawsuit in 2005 challenging the new rules on several grounds. Since then, much time and expense has been spent in litigation by both the United States and the Native community in defending the federal priority from attack by the State of Alaska. These attacks focus on the scope and mechanics of the federal management regime on federal public lands. The *Katie John* case is now in its third generation of litigation. In the latest decision, the Ninth Circuit Court of Appeals rejected the State's challenge to the federal subsistence rules promulgated to implement that court's 1995 and 2001 decisions. *Katie John v. Alaska*, 720 F.3d 1214 (9th Cir. 2013) (*Katie John* III). Set out at the end of this document is a summary of the decision. The State has until early October to ask the United States Supreme Court to review the case.

Secretary of the Interior Ken Salazar initiated a review of the federal subsistence program in 2009, and AFN urged that the Administration recommend congressional action toward a Native priority, or "Native plus" priority for subsistence uses. Instead, the Administration made a few changes in Board structure, which are best characterized as window dressing.

As of now the federal-state subsistence divide is as follows.

1. The federal priority (Title VIII) applies on all federally-owned uplands. It also applies to all non-navigable waters within such federally-owned lands.

2. The federal priority also applies to navigable waters that are located above submerged lands that were retained by the United States at Statehood in 1959 (most submerged lands passed automatically to the State of Alaska at the moment of statehood).

3. The federal priority also applies to navigable waters that are covered by the federal reserved rights doctrine. This includes all waters within and adjacent to federal conservation system units, such as National Forests, Parks, Preserves, Monuments, Recreation Areas, and so on. Litigation continues over whether the federal government has included too few, or too many waters within its interpretation of the federal reserved rights doctrine. That litigation, *Katie John v. United States*, 720 F.3d 1214 (9th Cir. 2013), was decided in July and the court rejected all of the State's challenges to the federal rules governing the scope of the subsistence priority. Any appeals to the U.S. Supreme Court must be taken by early October.

4. All other non-federal lands (including Alaska Native corporation lands and tribally-owned lands) are subject only to the state's subsistence law.

5. The State's own subsistence program, on the other hand, has lost meaningful protection for subsistence by rural Alaska Natives. *See Alaska v. Kluti Kaah*, 831 P.2d 1270 (Alaska 1992) (upholding state "subsistence season" of seven days duration in order to accommodate the requirement that all Alaskans were eligible to hunt moose in the road-accessible Unite 13 management area); *State v. Morry*, 836 P.2d 358 (Alaska 1992) (state not mandated to take into consideration traditional and customary methods of subsistence takings in their formulation of subsistence regulations). Aside from the fact that the state "priority" is available to all Alaskans, state regulatory boards have exercised their authority to declare large areas as "non-subsistence use areas" to preclude application of even the state's watered-down subsistence preference. Most of the areas around Anchorage (including the Kenai Peninsula and Mat-Su Valley), Fairbanks, and Juneau have been designated non-subsistence areas by the Joint Boards of Fisheries and Game. In addition, areas around Ketchikan and Valdez have been designated as non-subsistence areas. The State would have considerable work to do in order to come back into compliance with Title VIII.

V. Constitutionality of Native Preference Laws

A tribal preference for Alaska Native hunting, fishing and gathering rights would be consistent with a long line of Supreme Court cases upholding federal legislation providing separate treatment for indigenous tribes and their members in the United States. The Supreme Court summarized the law in this area:

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.
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> "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, *Worcester v. Georgia*, 31 U.S. 515, 6 Pet. 515, 557, 8 L.Ed. 483 (1832); they are 'a separate people' possessing 'the power of regulating their internal and social relations . . ..' " *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975).

> Legislation with respect to these "unique aggregations" has repeatedly been sustained by this Court against claims of unlawful racial discrimination. In upholding a limited employment preference for Indians in the Bureau of Indian Affairs, we said in *Morton v. Mancari,* 417 U.S. 535, 552, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974):
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> "Literally every piece of legislation dealing with Indian tribes and reservations . . . single(s) out for special treatment a constituency of tribal Indians living on or near reservations. If these laws . . . were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased . . .."
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> In light of that result, the Court unanimously concluded in *Mancari:*
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> "The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities . . .." *Id.*, at 554, 94 S.Ct., at 2484.

U. S. v. Antelope, 430 U.S. 641, 645 (1977).

These rules were applied to reject Washington State's attack on the treaty fishing rights of Indian tribes in off-reservation areas. The Supreme Court stated that it "has repeatedly held that the peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government's 'unique obligation toward the Indians.'" *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673, (1979). In a recent case challenging Congress's power to restore tribal criminal jurisdiction, the Supreme Court noted that it has traditionally identified the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, and the Treaty Clause, Art. II, § 2, cl. 2, as sources of federal power and that "at least during the first century of America's national existence ... Indian affairs were more an aspect of military and foreign policy than a subject of domestic or municipal law." *United States v. Lara*, 541 U.S. 193, 200-202 (2004). Those sources of power are also sufficient to restore or reform the federal regime governing Alaska Native hunting, fishing and gathering rights.

VI. Conclusion

Until ANCSA passed in 1971, Native aboriginal rights were protected under federal law. In addition, many statutes, treaties and executive actions provided protections for Native hunting and fishing rights. The Congress that passed ANCSA intended that subsistence uses be protected, and when that aim was not fulfilled Title VIII of ANILCA was passed. Title VIII was intended to protect those rights through a "rural" preference that would be fulfilled with the State of Alaska's cooperation. The State has refused to cooperate and the intended federal subsistence protections have not been fulfilled. ANCSA's corporate scheme was experimental and Congress has revisited it with substantial amendments on many occasions. Now is the time for Congress to act to fulfill the promise that Native subsistence rights be protected.

The undeniable federal power in this area, coupled with the federal action since acquisition of Alaska to the present time, demonstrates that the proposed Native preference is consistent with

federal law. The question here is whether Congress has the authority, consistent with equal protection values embodied in the Due Process clause of the 5th Amendment, to establish a Native priority for access to fish, game and other natural resources. The answer, based on over two hundred years of congressional, judicial and executive branch precedent, is yes.

Addendum -- The *Katie John III* Decision

Katie John v. United States, 720 F.3d 1214 (9th Cir. 2013).

Senior Judge William C. Canby, Jr. and Judge Consuelo Callahan joined Senior Judge Kleinfeld's opinion. Senior Judge Betty Fletcher was on the panel when the case was argued in Anchorage in July of 2011, but passed away in 2012 and was replaced by Judge Canby.

The lengthy opinion begins with a discussion of the history of the State's unsuccessful efforts to obtain management over federal public lands under Title VIII of ANILCA, and the current litigation over the geographic scope of federal management authority. The opinion then recounts the basic parameters of the federal reserved water rights doctrine, which is the primary issue in the litigation. Judge Kleinfeld correctly notes that the reserved rights doctrine has previously been applied to protect or quantify actual federal or Indian water use. Here, instead, it is being utilized to determine the geographic boundaries of federal public lands. Judge Kleinfeld observed that:

> "We, and perhaps the Secretaries, failed to recognize the difficulties in applying the federal reserved water rights doctrine in this novel way, and in retrospect the doctrine may provide a particularly poor mechanism for identifying the geographic scope of ANILCA's rural subsistence priority management when it comes to water. *** Of course, we had the opportunity to revisit *Katie John I* in *Katie John II*, and while a majority of the en banc court agreed for diverging reasons that *Katie John I* was incorrectly decided, we could not come to a controlling agreement about why that was true. We accordingly concluded that the decision 'should not be disturbed or altered.' *Katie John I* therefore remains controlling law, and we must attempt to apply it in this case."

[*Katie John I* was decided by a three-judge panel of the Ninth Circuit in 1995 and determined that the federal reserved rights doctrine should be utilized to delineate federal jurisdiction over navigable waters under ANILCA].

Despite the difficulties in applying the federal reserved rights doctrine, the court moved on to the merits of the challenges to the 1999 federal subsistence rule. Set out below are short descriptions of the issues and language from the court's opinion resolving each matter presented in the case.

1. **What Process**: The State argued that the federal determination of waters subject to the federal reserved rights doctrine should have been decided in a judicial proceeding instead of through an administrative rule-making. Judge Kleinfeld rejected the State's argument.

> We hold that the Secretaries appropriately used notice-and-comment rulemaking, rather than adjudication, to identify those waters that are "public lands" for the purpose of determining the scope of ANILCA's rural subsistence priority. The use of rule making is consistent with ANILCA, which requires the federal government to "prescribe such regulations as are necessary," and with our decision in Katie John I, where we expressed our "hope that the federal agencies will determine promptly which navigable waters are public lands subject to federal subsistence management. * * * Logically, we intended the agencies to act through rulemaking, where doing so was feasible.

2. **Which waters**: Federal District Court Judge H. Russel Holland presided over the lower court proceedings and directed the parties to frame any challenges to the federal rules through particular test cases when appropriate. Judge Holland and the court of appeals addressed the following issues.

a) **Adjacent waters**: The State argued that the rules should not apply to waters that are adjacent to the boundaries of federal CSUs. These boundary streams include long river segments, such as the portions of the Copper River technically outside the Park and Preserve boundaries. The court agreed with AFN, the United States and Katie John that such waters were subject to the reserved rights doctrine and thus subject to the subsistence priority. The court stated:

> Accordingly, the Secretaries reasonably concluded that the United States has an "interest" in these adjacent waters by virtue of the federal reserved water rights doctrine sufficient to qualify as "public lands" for purposes of Title VIII.

b) **Sixmile Lake**: This lake is adjacent to the Lake Clark National Park and Preserve. The State argued that because the Lake's shoreline is non-federal, non-public land owned by the Native Village Corporation for Nondalton, the lake could not be considered as adjacent to the Park. The court deferred to the federal determination that the boundary of the Park was adjacent to the shore of Sixmile Lake and thus the lake is covered by the subsistence priority.

> [T]he agency map of the Lake Clark National Park and Preserve places the Park's boundary at the shoreline of Sixmile Lake. ANILCA provides that, "[i]n the event of discrepancies between the acreages specified in this Act and those depicted on such maps, the maps shall be controlling." The Secretaries therefore properly concluded that Sixmile Lake was in fact adjacent to the Lake Clark National Park and Preserve. Moreover, under the federal reserved water rights doctrine, the Secretaries must show only that the waters are positioned such that the United States may need to exercise its rights upon them. For that reason, the formal ownership of the land immediately along the shoreline of Sixmile Lake is not dispositive, so long as the lake contains water that is or might be necessary to fulfill the primary purposes of the Lake Clark National Park and Preserve.

c) **Seven Juneau-area streams**: The State argued that several streams near Juneau were either outside of the Tongass National Forest, or were surrounded by private and state inholdings and thus could not be considered subject to federal reserved water rights. The court concluded the U.S properly considered the rivers to be within the Tongass.

d) **Water flowing through inholdings**: The court rejected the State's general arguments that waters that ran between State and private inholdings within the 34 CSUs could not be subject to federal reserved water rights.

> [W]ater rights that the United States impliedly acquires are not forfeited or conveyed to third parties when the government conveys to another party land within a federal reservation. Furthermore, federal reserved water rights can reach waters that lie on inholdings as long as those waters, based on their location and proximity to federal lands, are or may become necessary for the primary purposes of the federally reserved land. Because these water bodies are actually situated within the boundaries of federal reservations, it is reasonable to conclude that the United States has an interest in such waters for the primary purposes of the reservations. We therefore uphold the Secretaries' inclusion of these waters within "public lands."

e) **Coastal waters and the "headland-to headland method"**: The State argued that the federal government's subsistence rules unlawfully included marine waters at the mouths of rivers. A prime example was the Yukon Delta National Wildlife Refuge where the river meets the sea. The federal government determined the outer limit of public lands by drawing a boundary across the water from the bank of one side of the river to the opposite bank where the river meets the sea. The court agreed that this was a reasonable way to determine where the federal subsistence priority applies and rejected the State's arguments.

> As discussed above, a federal interest by virtue of the federal reserved water rights doctrine may exist in waters adjacent to, but outside the boundary of, a federal reservation, as long as these waters are appurtenant to the reservation. Because the headland-to-headland method includes tidally influenced waters that are physically connected to, and indeed practically inseparable from, waters inland of the high tide line (or waters on the federal reservations themselves), drawing of the boundary line in this manner is consistent with the federal reserved water rights doctrine. Finally, as the Secretaries explain in the 2005 amendments, "the regulations use the methodology found in the Convention on the Territorial Sea and Contiguous Zone from the United Nations Law of the Sea for closing the mouths of rivers." For these reasons, using the headland-to-headland approach for purposes of determining the boundaries of rural subsistence priority management is a reasonable way to administer ANILCA.

f) **Upstream and downstream waters**: Katie John argued that because some adjacent waters were included, the federal priority should also apply to waters farther upstream and downstream of the various conservation system units. The court agreed that this was a reasonable way to apply the reserved water rights doctrine, but that it was up to the federal agencies to make that determination in the first instance. Importantly, the court recognized that the expansion advanced by Katie John might be appropriate in a particular situation. However, because the argument was made in general terms, the courts deferred to the federal agency decision. The court stated:

> In short, we agree with the district court that the Secretaries reasonably determined that,

> as a general matter, federally reserved water rights may be enforced to implement ANILCA's rural subsistence priority as to waters within and "immediately adjacent to" federal reservations, but not as to waters upstream and downstream from those reservations. We also agree with the district court that the federal reserved water rights doctrine might apply upstream and downstream from reservations in some circumstances, were there a particularized enforcement action for that quantity of water needed to preserve subsistence use in a given reservation, where such use is a primary purpose for which the reservation was established. But the abstract claim that all upstream and downstream waters are necessary for all the federal reservations in the 1999 Rules cannot withstand ANILCA's text or history, the joint decision of the two cabinet secretaries to whom administration of the complex statute has been delegated, our decisions in Katie John I and Katie John II, or the facts established in this litigation.

g) **Allotments**: In the lower 48, allotments are generally recognized as including reserved water rights to allow full use of the land. In Alaska there is a strong argument that Native allotments include reserved waters to allow for full use of the allotment. The United States agrees, but has deferred determination of which waters are reserved to a case-by-case process. The court agreed with the federal position.

> Determining which waters within or appurtenant to each allotment may be necessary to fulfill the allotment's needs is a complicated and fact-intensive endeavor that is best left in the first instance to the Secretaries, not the courts. We are mindful that *Katie John I* expresses the hope that the federal agencies will "determine promptly which navigable waters are public lands subject to federal subsistence management," and that the parties to this litigation have an interest in a final determination of how the Secretaries will manage ANILCA's rural subsistence priority. Accordingly, while we defer to the Secretaries' determination in the 1999 Rules regarding how best to identify federal reserved water rights for Alaska Native settlement allotments, we encourage them to undertake that process in a reasonably efficient manner.

3. **Selected-but-not-yet-conveyed lands**: The court rejected the State's argument that land selected by the state or a Native Corporation, but not yet conveyed from the United States, was not federal land for purposes of the subsistence priority.

> [B]ecause the title to the selected-but-not-yet-conveyed land remains with the United States, there is no practical reason to exclude these lands from federal rural subsistence priority management before they are formally conveyed to the State or a Native corporation.

END