

3-1-2001

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Recommended Citation

Ryan T. Peel, *Katie John v. United States: Balancing Alaskan State Sovereignty With a Native Grandmother's Right to Fish*, 15 BYU J. Pub. L. 263 (2013).

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Katie John v. United States: Balancing Alaskan State Sovereignty With a Native Grandmother's Right to Fish^{*,1}

I. INTRODUCTION

"First Come, Last Served."²

"It's depressing that . . . [Alaska Governor Tony Knowles] fights respected Native elder Katie John in federal court over the few fish ANILCA guarantees her to sustain her family."³

"As Alaska's governor, I believe it is my clear responsibility, even in the face of a difficult political battle, to vigorously defend this important aspect of state sovereignty."⁴

The above are merely a small sampling of arguments in the heated debate currently occurring in Alaska over Governor Tony Knowles's recent decision to appeal the Ninth Circuit Court of Appeals case *Katie John v. United States*⁵ to the Ninth Circuit en banc. The case concerns the creation of a priority for subsistence fishing rights for rural residents and whether the federal or state government should manage the fisheries. The Ninth Circuit was asked to determine what the definition of "public lands" means in the Alaska National Interest Lands Conservation Act (ANILCA).⁶ The court determined that "public lands" in ANILCA included navigable waterways in and adjacent to federal lands in which the

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1. See *Katie John v. United States*, 72 F.3d 698 (9th Cir. 1995). It is important to note that the actual title of the case is "State of Alaska v. Babbitt". As will be explained later, Katie John was a plaintiff in a similar case against the United States; the two cases were consolidated. Since most Alaskans know this infamous case as "Katie John v. United States", this note will refer to the case as such.

2. Liz Ruskin, *Rural Cause, City Streets; Downtown March Carries the Banner for Subsistence*, ANCHORAGE DAILY NEWS, May 4, 2000, at A1. The quote is from a protestor's sign.

3. Eric Johnson, *Letters from the People*, ANCHORAGE DAILY NEWS, Aug. 30, 2000, at B8.

4. Tony Knowles, *Katie Johns Appeal is About State Sovereignty*, ANCHORAGE DAILY NEWS, Mar. 3, 2000, at B12. Governor Knowles wrote an "Op-Ed" piece explaining his recent actions.

5. *Katie John v. United States*, 72 F.3d 698 (9th Cir. 1995), *cert. dismissed*, 516 U.S. 1036 (1996), and *cert. denied*, 517 U.S. 1187 (1996) [hereinafter *Katie John III*].

6. *Id.* The text of ANILCA is codified at 16 U.S.C. §§ 3101-3233 (1994).

federal government has a reserved water right.⁷ As a result, the court found that the federal government must intercede on behalf of the rural residents to protect their right to priority subsistence fishing.⁸ As such, on October 1, 1999, the federal government took control of subsistence fishing on federal lands in Alaska.⁹

On January 27, 2000, Governor Knowles decided to appeal the five-year old decision, citing not the desire to destroy subsistence priority, but to curtail the "unprecedented expansion of federal control over navigable waters that has not been applied in other states, and one that could be extended beyond subsistence issues in the future."¹⁰ The Ninth Circuit, on July 14, 2000, agreed to hear the case en banc;¹¹ oral arguments were held on December 20, 2000.

This note will present a detailed historical and political background explaining the atmosphere in which *Katie John III* was decided, including an explanation of subsistence hunting and fishing and its impact on the political conflict between the state and the federal government. It will also describe the attempts by Congress to protect the subsistence resources in Alaska, as well as the Alaskan Legislature's attempts to implement the federal requirements and the Alaskan Supreme Court's decisions that undermined congressional intentions. This note will recite the facts, procedural history, and arguments of the parties involved, and then explain the reasoning of the decision of the Ninth Circuit. An equitable solution will then be proposed—one that will balance congressional interests in protecting rural priority subsistence rights, while maintaining Alaskan state sovereignty by allowing the state to manage the fisheries.

II. BACKGROUND

In order to truly understand the situation in *Katie John III*, one needs to have a basic understanding of Alaskan geography, history, and prevailing opinions, as well as an awareness of subsistence fishing and its importance to the rural residents of Alaska. Furthermore, one also requires an explanation of Congress's attempts to give subsistence fishing priority and Alaska's attempts to manage its own waterways; only then can an in-depth understanding of *Katie John III* begin.

7. See *Katie John III*, 72 F.3d at 700.

8. See *id.*

9. See Don Hunter et. al., *Feds Take Fisheries Control*, ANCHORAGE DAILY NEWS, Oct. 2, 1999, at A1.

10. Don Hunter, *Subsistence Ruling Appealed*, ANCHORAGE DAILY NEWS, Jan. 27, 2000, at B1. It is interesting to note that Gale Norton, before her appointment as Secretary of Interior, was hired by the state legislature to help overturn *Katie John III*. Liz Ruskin et. al., *Interior Nominee Familiar With Alaska Issues*, ANCHORAGE DAILY NEWS, Dec. 30, 2000, at A1.

11. *Katie John v. United States*, 216 F.3d 885 (9th Cir. 2000).

A. Understanding the Alaskan Situation

The United States bought Alaska from Russia in 1867 and by means of the purchase increased in size by 20 percent and added nearly 34,000 miles of tidal coastland to the country.¹² Ever since that time, the federal government has had an active presence in the state, from governing through military commanders of the War Department to adding nearly \$2,000,000,000 to the local economy since territorial days.¹³ The economy of the state is dependent upon both the federal government as well as the state's natural resources. The top six industries in the state comprise nearly ninety-seven percent of the state's economy, and are either natural resources or directly related to natural resources: oil, timber, agriculture, mining, fishing, and tourism.¹⁴ The oil industry alone "accounts for ninety percent of Alaska's total revenues," with the state producing nearly twenty-five percent of all the oil produced in the United States.¹⁵ However, because this note is concerned with subsistence fishing, it is important to understand that Alaska is the single largest producer of wild salmon in the entire world, harvesting almost 6,000,000,000 pounds of seafood each year.¹⁶ With such a large portion of the economy dependent upon the natural resources of the state, it is understandable why Alaskans are in a constant struggle with the federal government over control of these natural resources—the state is fighting for its economic life.

B. Understanding the Subsistence Right

Scholars have written "[i]n Alaska, the word 'subsistence' means much more than living at a minimum economic level."¹⁷ Unfortunately, most of Alaska's natives are doing just that.¹⁸

12. 29 NEW ENCYCLOPEDIA BRITANNICA 431 (15th ed. 1998).

13. This is largely due to the amount of bases and other military installations constructed during World War II and the Cold War, but also includes many infrastructure improvements, including the Alaskan Pipeline.

14. Alaska Division of Community and Economic Development (Dec. 1, 2000) (visited Feb. 15, 2001) <<http://www.dced.state.ak.us>>.

15. Karen Bridges, Note, *Uncooperative Federalism: The Struggle Over Subsistence and Sovereignty in Alaska Continues*, 19 PUB. LAND & RESOURCES L. REV. 131, 131 n.3 (1998). Because of the state's oil wealth, nearly eighty-five percent of the state's budget is supplied by oil revenues. Alaska Division of Community and Economic Development (Dec. 1, 2000) (visited Feb. 15, 2001) <<http://www.dced.state.ak.us>>.

16. Alaska Division of Community and Economic Development (Dec. 1, 2000) (visited Feb. 15, 2001) <<http://www.dced.state.ak.us>>.

17. Joan M. Nockels, Note, *Katie John v. United States: Redefining Federal Public Lands in Alaska*, 26 ENVTL. L. 693, 698 (1996).

18. See Bridges, *supra* note 15.

Nearly half of the state's residents live in and around Anchorage, with a population density of almost one square mile per person.¹⁹ Most of the residents living in the vast expanse of the state "still must hunt and fish for at least some of their food, as many have done for centuries."²⁰ Subsistence is defined as living off what the land produces, but not being limited by the amount or by the seasons.²¹ In many of the native rural villages of Alaska, subsistence hunting and fishing has been a way of life for centuries and is viewed as a communal activity—often involving religious rituals.²² It is an integral part of the life of native Alaskans, who feel they have a right to subsistence hunting and fishing and are willing to fight for that right in court. This explains the determination of Katie John and others like her who have pushed the cause for over 15 years.

C. Congressional Actions

The federal government and Congress have recognized the importance of protecting the rights of native Alaskans to subsistence hunting and fishing. Beginning with the Alaska Statehood Act of 1958 and continuing up to 1980, Congress has attempted to protect the native subsistence rights by not only recognizing aboriginal fishing rights, but also giving them priority.²³

When Alaska became a state on January 3, 1959, the state received from the federal government the opportunity to choose approximately 102.5 million acres of "vacant, unappropriated and unreserved" land out of all the public land. Alaska also received control over fish and game regulation on the land it chose.²⁴ In return for the grant, the state of Alaska relinquished claims to any land or property of native Alaskans or "any land or property that is held in trust by the United States."²⁵ Under construction of the statute, "property rights" were interpreted as including fishing rights.²⁶ With that disclaimer written into the Alaska Statehood Act, Congress allowed the native Alaskans to retain their fishing rights, thereby protecting them from state claims.

19. As a comparison, New York City has .003 square miles per person. *Alaska Division of Community and Economic Development* (Dec. 1, 2000) (visited Feb. 15, 2001) <<http://www.dced.state.ak.us>>.

20. Bridges, *supra* note 15.

21. See Nockels, *supra* note 17, at 698.

22. See Mary Kancewick & Eric Smith, *Subsistence In Alaska: Towards a Native Priority*, 59 U. MO. KAN. CITY L. REV. 645, 649 (1991).

23. See Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958); ANILCA, 16 U.S.C. §§ 1301-3233 (1994).

24. Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339.

25. *Id.*

26. See Kancewick & Smith, *supra* note 22, at 654.

However, once Alaska began to select their 102.5 million acres, problems arose over whether land which was used by natives to hunt and fish was actually "vacant, unappropriated and unreserved". Fearing the state encroached upon their secured rights to hunt and fish, many native Alaskans began filing lawsuits against the state.²⁷ In 1966, this confusion prompted then Secretary of the Interior Stewart Udall to temporarily halt all sales of gas and oil leases until the claims of the native Alaskans could be determined.²⁸ Two years later, the future of Alaska changed with the discovery of oil at Prudhoe Bay, which "fueled the . . . desire to settle Native land claims."²⁹ Congress, recognizing this desire for settlement, passed the Alaska Native Claims Settlement Act (ANSCA).³⁰

ANSCA did many things: gave the native Alaskans a \$962 million settlement;³¹ divided the native Alaskans into twelve geographic regions and villages and established corporations for each region;³² and withdrew approximately forty-four million acres of federal land, with the native Alaskans choosing the lands.³³ However, under ANSCA, the native Alaskans relinquished title and rights to hunting and fishing—the very rights that were guaranteed under the Alaska Statehood Act.³⁴ While destroying the right to subsistence hunting and fishing, Congress was confident that native Alaskans would still be protected, expecting both the Secretary of the Interior and the State of Alaska to take any action necessary to protect the subsistence needs.³⁵ Congress may have had honorable intentions when it removed the rights under ANSCA, but it soon "became increasingly obvious that 'neither the state nor the secretary were likely to protect subsistence in the manner Congress had contemplated.'"³⁶ Congress realized that in actuality it had afforded little, if any,

27. Bridges, *supra* note 15, at 141 (citing DAVID S. CASE, ALASKA NATIVES AND AMERICAN LAWS 64 (1984)).

28. *See id.*

29. *Id.* Alaska wanted public lands over which to construct the Alaska Pipeline to the newly discovered oil fields.

30. 43 U.S.C. §§ 1601-1629 (1994). ANSCA stated that Congress found "there [was] an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska" 43 U.S.C. § 1601(a) (1994).

31. 43 U.S.C. § 1605 (1994).

32. 43 U.S.C. § 1606, 1607 (1994).

33. 43 U.S.C. § 1610 (1994).

34. "All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished." 43 U.S.C. § 1603(b) (1994).

35. *See* H.R. Rep. No. 92-523 (1971), *reprinted in* 1971 U.S.C.C.A.N. 2192.

36. Bridges, *supra* note 15, at 142 (quoting DAVID S. CASE, ALASKA NATIVES AND AMERICAN LAWS 295 (1984)).

protection to the subsistence rights of the native Alaskans; something else had to be done.³⁷

Congress recognized its mistake with ANSCA, and in 1980, passed the Alaska National Interests Lands Conservation Act (ANILCA).³⁸ One of Congress's expressed purposes in enacting ANILCA was "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so."³⁹ Under the act, Congress established a subsistence priority right on all renewable resources on federal public lands in Alaska.⁴⁰ This priority was made available to all rural residents, both native and non-native, "who depend on subsistence resources when it becomes necessary to restrict takings on public lands to assure 'the continued viability of a fish or wildlife population or the continuation of subsistence uses of such population.'"⁴¹ Under ANILCA, the Secretary of the Interior was to establish regulations pertaining to the newly protected rural subsistence priority right, unless the state of Alaska modified its existing laws to conform to the newly recognized right.⁴² If the state chose to adopt ANILCA's priority right, the new state laws would have to be reviewed by the federal administrative agencies, and even by the federal court system if aggrieved petitioners exhausted administrative remedies.⁴³ If the state of Alaska wanted to continue to manage the subsistence hunting and fishing on federal public land, they simply had no other choice but to conform to ANILCA's requirements.

D. Alaskan Modifications of Congressional Actions

With the adoption of ANILCA, the state of Alaska realized it had to play by the rules of the federal government if it wanted to retain control of fish and wildlife management. In fact, Alaska "was so anxious to maintain its role as the sole regulator of fish and game in the state that it had enacted a subsistence law of its own two years before Congress finished the business of fine-tuning . . . ANILCA."⁴⁴ The regulations that

37. "Congress finds. . . in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act [ANSCA] and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents." 16 U.S.C. § 3111(4) (1994) (citations omitted).

38. 16 U.S.C. §§ 3101-3233 (1994).

39. 16 U.S.C. § 3101(c) (1994).

40. See 16 U.S.C. § 3114 (1994).

41. Bridges, *supra* note 15, at 144 (quoting 16 U.S.C. § 3112(2) (1994)).

42. See 16 U.S.C. § 3115(d) (1994).

43. See 16 U.S.C. § 3117 (1994).

44. Katie John v. United States, 1994 WL 487830, at *3 (D. Alaska, Mar. 30, 1994) [hereinafter *Katie John II*].

were enacted by the state recognized the right to subsistence uses, which were defined as "'customary and traditional' uses of wild, renewable resources for direct personal or family consumption."⁴⁵ After ANILCA, the Alaska Board of Fish and Game adopted regulations under which rural residents would be given a priority for subsistence hunting and fishing.⁴⁶ Because of the new regulations, Secretary of the Interior James Watt certified state compliance with ANILCA on May 14, 1982, and the state was allowed to continue to manage fish and wildlife.⁴⁷

Three years later, the Alaska Supreme Court began to rework the ANILCA-forced statutes. In 1985, the Alaska Supreme Court in *Madison v. Alaska Dept. of Fish & Game* held that the subsistence regulations adopted by the Alaska Board of Fish and Game, because of the preference given to rural residents, were inconsistent with the state laws passed in 1978 and therefore invalid.⁴⁸ According to Assistant Secretary of the Interior William Horn, the *Madison* decision now took the state of Alaska out of compliance with ANILCA, and the Department of the Interior threatened to remove its certification of ANILCA compliance if the state legislature did not act to bring the state back into compliance.⁴⁹ Acting on that warning, the Alaska Legislature, in 1986, changed the laws with the sole motivation of compliance with ANILCA.⁵⁰ The state was then able to remain in compliance with ANILCA and retain control over the fish and wildlife.

Three years later, however, the Alaska Supreme Court put ANILCA compliance again in jeopardy with its decision in *McDowell v. Alaska*.⁵¹ The Alaska Supreme Court held that the 1986 subsistence statute violated sections 3, 15, and 17 of article VIII of the Alaska Constitution (Article VIII prohibits exclusive or special exceptions in fishing and wildlife).⁵² Therefore, any subsistence preference or priority as required by ANILCA would be held unconstitutional in Alaska. The *McDowell* court recognized that the only way Alaska could retain management of hunting and fishing was to amend the state constitution or have Congress change the ANILCA requirements.⁵³ Unfortunately, neither option occurred before the Ninth Circuit decided *Katie John III*.

45. Bridges, *supra* note 15, at 146 (quoting ALASKA STAT. § 16.05.940(23) (Michie 1978)).

46. *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 314 (9th Cir. 1988).

47. *Bobby v. Alaska*, 718 F. Supp. 764, 813 (D. Alaska 1989).

48. *Madison v. Alaska Dept. of Fish & Game*, 696 P.2d 168 (Alaska 1985).

49. *Bobby*, 718 F. Supp. at 813.

50. 1986 Alaska Sess. Laws 56.

51. 785 P.2d 1 (Alaska 1989).

52. *See id.* Article VIII, section 3 is the Common Use Clause, section 15 is the No Exclusive Right of Fishery Clause, and section 17 is the Uniform Application Clause. *Id.*

53. *See Katie John III*, 72 F.3d at 701.

III. FACTS

The *Katie John* cases did not have such a complicated beginning, but once the Ninth Circuit granted the en banc rehearing on July 14, 2000, it was the culmination of a long, complicated journey that included suits by various individuals in both federal and state court.

The origins of the *Katie John* cases began with an eighty-five year old Athabascan grandmother named Katie John, who lives in the village of Mentasta, Alaska.⁵⁴ Along with another Athabascan elder, Doris Charles, and the Village Council of Mentasta, Katie John sought permission to continue subsistence fishing.⁵⁵ The parties claimed that their ancestors had done such "since time immemorial."⁵⁶ The group sought permission for subsistence fishing at a fish camp located at the confluence of the Copper River and Tanada Creek, which is situated within the boundaries of the Wrangell-St. Elias National Park.⁵⁷ Historically, this fish camp was the location of an Athabascan village named Batzulnetas.⁵⁸ Batzulnetas was abandoned in the 1940's, although a subsistence fishery continued there for many years.⁵⁹ Finally, in 1964, fishing at Batzulnetas was essentially closed when the Alaska Board of Fish and Game disallowed the use of nets and fishwheels for subsistence fishing.⁶⁰ Twenty years later, when Katie John, Doris Charles, and the Village Council of Mentasta applied to the Alaska State Board of Fisheries for permission to reopen Batzulnetas for subsistence fishing, the board denied the request.⁶¹

One year later, in 1985, Katie John and the others filed a lawsuit against the state of Alaska in federal court under section 807(a) of ANILCA.⁶² She claimed that permitting commercial salmon fishing at

54. See David Hulen, *She Recalls the Past, Fights For the Future: Katie John's Lawsuits Against the State and Federal Governments Have Become Landmarks in the Battles Over Native Sovereignty and Subsistence Rights*, ANCHORAGE DAILY NEWS, Sept. 25, 1994, at A1.

55. See *Katie John III*, 72 F.3d at 699-700.

56. *Id.* at 700.

57. *Katie John II*, 1994 WL 487830, at *10. To understand the importance of the location of the fish camp, the district court explained:

Tanada Creek is a part of the Copper River system. Approximately 120 known sockeye and other salmon stocks ascend the Copper River system every year. The fish stocks mix with one another, and at a given time some twenty or more stocks may be migrating up the river. The Copper River sockeye stocks are harvested commercially near the mouth of the Copper River.

Id. The Copper River empties into the Prince William Sound, located southeast of Anchorage.

58. See *id.*

59. See *id.*

60. See *id.*

61. See *id.*

62. Section 807(a) allowed for aggrieved parties, after exhausting appropriate state and federal administrative remedies, to "file a civil action in the United States District Court for the District

the mouth of the Copper River while at the same time restricting subsistence fishing at Batzulnetas violated the priority requirement of section 804 of ANILCA.⁶³ The actual filing of *Katie John I* instigated negotiations between the parties, resulting in a tentative agreement limiting the amount of subsistence fishing at Batzulnetas; however, the suit continued.⁶⁴ In 1988, the Alaska Board of Fisheries formally adopted the agreement, allowing a limited amount of subsistence fishing at Batzulnetas and memorializing the agreement in an official regulation.⁶⁵ A year later, the plaintiffs in *Katie John I* again pressed the case, requesting the district court to grant a preliminary injunction against the new regulations. The district court granted the preliminary injunction in June 1989.⁶⁶ The injunction granted full-time subsistence fishing at Batzulnetas under one of two alternative conditions: fishing would only be allowed from June 1 through September 1 or a limit of 1,000 sockeye per year would be imposed.⁶⁷ Once the actual case was heard by the district court, the court ruled that the 1988 regulations of the Alaska Board of Fisheries were invalid under ANILCA. The court also ordered the board to create regulations that would allow for a priority subsistence fishing right at Batzulnetas.⁶⁸ However, before Alaska could change the regulations, the Alaska Supreme Court decided *McDowell*. Thus, control was lost over subsistence fishing on federal public lands, including the Wrangell-St. Elias National Park, which includes Batzulnetas.⁶⁹

Since Alaska could no longer manage the wildlife because of non-compliance with ANILCA, the Federal Subsistence Board stepped in and passed temporary regulations mandating priority subsistence fishing on all public lands in Alaska.⁷⁰ However, the temporary regulations that were adopted "were essentially the same as the state regulations that [the district court] declared invalid in *Katie John I*."⁷¹

Again faced with apparently invalid regulations on priority subsistence fishing, *Katie John* and others submitted petitions to the Federal

of Alaska to require such actions to be taken as are necessary to provide for the priority." 16 U.S.C. § 3117(a) (1994).

63. See *Katie John v. State of Alaska*, No. A85-698 CV (D. Alaska 1989) [hereinafter *Katie John I*]. Section 804 stated: "Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for non-wasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes." 16 U.S.C. § 3114 (1994).

64. See *Katie John II*, 1994 WL 487830, at *10.

65. *Id.* The new regulation was codified as ALASKA ADMIN. CODE tit. 5, § 01.647(i) (1988).

66. Order, June 6, 1989 (No. A85-0698-CV).

67. *Katie John II*, 1994 WL 487830, at *10.

68. *Id.*

69. See *supra* note 51.

70. *Katie John II*, 1994 WL 487830, at *10.

71. *Id.*

Subsistence Board, arguing reconsideration of the temporary regulations.⁷² In a surprising decision, the Federal Subsistence Board found that Batzulnetas and other fisheries were not under the management of the federal government, and therefore, returned control to the state of Alaska.⁷³ This decision was based on the location of the fishing camp and the recent opinion of the Secretary of the Interior, which adopted a narrow definition of public lands, stating, "navigable waters generally are not included within the definition of public lands."⁷⁴ Because Batzulnetas is near both Tanada Creek and Copper River, both of which are navigable, the fishery at Batzulnetas was determined not to be public lands and therefore not subject to the subsistence priority of ANILCA.⁷⁵

Believing that Batzulnetas was subject to the priority subsistence right under ANILCA, Katie John and others filed a complaint against the United States and the Secretary of the Interior under section 807(a) of ANILCA.⁷⁶ Unhappy with the situation as well, the state of Alaska also sued the federal government, believing that the federal government did not have the authority to regulate in this area at all.⁷⁷ Many other parties, also unhappy with the situation, began to sue the federal government under the same issues raised by Katie John and the state of Alaska.⁷⁸ The district court then ordered that all similar citizen cases be consolidated and jointly managed with the state's case.⁷⁹

The district court, during consultation with counsel from the various jointly managed cases, decided to "address the fundamental issue of whether navigable waters are public lands before resolving other issues" and the various parties presented arguments on only that issue.⁸⁰ Katie John argued that because of the federal navigational servitude, virtually all navigable waters are determined to be public lands.⁸¹ Alaska argued that navigable waters are not public lands; the federal government agreed with that argument prior to oral argument.⁸² Once before the district

72. *See id.* at *11.

73. *See id.*

74. *Katie John III*, 72 F.3d at 701 (quoting 55 Fed. Reg. 27, 114 (1990)).

75. *Katie John II*, 1994 WL 487830, at *11.

76. *Id.* *See supra* note 62.

77. *See Katie John III*, 72 F.3d at 701.

78. *See id.* The other cases were: *Kluti Kaah Native Village of Copper Ctr. v. Alaska*, No. A90-0004-CV; *Fish & Game Fund v. Alaska Bd. of Fisheries*, No. A92-0443-CV; *Peratrovich v. United States*, No. A92-0734-CV; *Native Village of Stevens v. McVee*, No. A92-0567-CV; and *Native Village of Quinhagak v. United States*, No. A93-0023-CV. *Id.* at n.4.

79. *See id.* at 701. This explains why Katie John, although the first to file suit, was not the primarily named plaintiff.

80. *Id.*

81. *See id.*

82. *See id.*

court, the federal government changed its argument. Using the federal reserved water rights doctrine, the government argued that public lands include “those navigable waters in which the federal government has an interest under [the reserved water rights doctrine].”⁸³ The United States District Court for the District of Alaska, in dismissing the federal government’s motions,⁸⁴ agreed with Katie John and concluded that for the purpose of ANILCA, public lands include all navigable waters encompassed by the federal navigational servitude.⁸⁵ Both Alaska and the federal government appealed to the Ninth Circuit Court of Appeals.⁸⁶

IV. REASONING

On December 19, 1995, the Ninth Circuit Court of Appeals decided *Katie John III*, which reversed the district court, and held that the “subsistence priority applies to navigable waters in which the United States has reserved water rights.”⁸⁷ In doing so, the court rejected both the arguments that public lands include all navigable waters subject to the federal navigational servitude and that public lands exclude all navigable waters.⁸⁸

The court’s analysis first began with concisely stating the issue on appeal: “the sole issue remaining on appeal concerns the meaning of the definition of public lands in § 102 of ANILCA.”⁸⁹ The court recited the main facts of the case, noting the complexity; it then briefly summarized the arguments of each party to the case.⁹⁰

Since the court was looking to a federal agency’s decision,⁹¹ the court recognized that the first step in reviewing an agency’s decision is to ask two questions under the *Chevron* analysis.⁹² The first question is “whether Congress ‘has directly spoken to the precise question at issue,’

83. *Id.*

84. The two motions before the court were a Motion to Dismiss the Complaint for Failure to State a Claim Upon Which Relief Can be Granted (FED. R. CIV. P. 12(b)(6)), and a Motion for Summary Judgment (FED. R. CIV. P. 56). *Katie John II*, 1994 WL 487830, at *18.

85. *See Katie John III*, 72 F.3d at 701.

86. *See id.*

87. *Id.* at 700.

88. *Id.* at 704.

89. *Id.* at 700.

90. *See id.* at 701. The court likened the arguments to a spectrum where on one end, the state of Alaska argued that ANILCA excludes all navigable waters, and on the other, Katie John argued that all navigable waterways are public lands. The court also noted that the federal government stood on middle ground, claiming that public lands include certain navigable waterways, but only those defined by the reserved water rights doctrine. *Id.* at 702.

91. This refers to the Federal Subsistence Board’s decision that Batzulnetas was not public lands, and therefore was not subject to the subsistence priority of ANILCA.

92. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984).

either in the statute itself or in the legislative history.”⁹³ The second question is “if Congress has not directly spoken to the precise question, [the court] consider[s] ‘whether the agency’s answer is based on a permissible construction of the statute.’”⁹⁴ The court answered the first question by determining that the language in ANILCA, as well as the legislative history “indicate[s] clearly that Congress spoke to the precise question of whether *some* navigable waters may be public lands.”⁹⁵ The court reasoned that subsistence fishing is included in the subsistence uses of ANILCA,⁹⁶ and since subsistence fishing has taken place in navigable waters in the past, Congress must have intended that public lands include some navigable waters.⁹⁷ However, the question presents itself: which navigable waters are public lands? The court found no language or legislative history to guide its decision, and so using the second prong of the *Chevron* analysis, the court had to determine if the federal government’s arguments that public lands include some navigable waters under the reserved water rights doctrine is based on a permissible construction of the statute.⁹⁸

The court then examined the three different arguments advanced by the parties: the navigational servitude, the Commerce Clause, and the reserved water rights doctrine. First, the court discussed the navigational servitude and its application in the current action. The navigational servitude, as the court described it, is an interest the federal government has in navigable waterways which is derived from the Commerce Clause.⁹⁹ However, the court noted that it had already discussed this in a previous case.¹⁰⁰ In *City of Angoon v. Hodel*, the court found that it “ha[d] held that the navigational servitude is not public land within the meaning of ANILCA.”¹⁰¹

The court then looked to the Commerce Clause of the Constitution.¹⁰² The court noted that although Congress used the Commerce Clause to protect subsistence uses of the public lands,¹⁰³ there is nothing

93. *Katie John III*, 72 F.3d at 701 (quoting *Railway Labor Executives’ Ass’n v. ICC*, 784 F.2d 959, 963 (9th Cir. 1986) (quoting *Chevron*, 467 U.S. at 842)).

94. *Katie John III*, 72 F.3d at 701 (quoting *Chevron*, 467 U.S. at 843).

95. *Katie John III*, 72 F.3d at 702.

96. 16 U.S.C. § 3113 (1994).

97. See *Katie John III*, 72 F.3d at 702. It is important to note that the court limited the federal government’s ability to “usurp state power over navigable waters elsewhere.” *Id.* at n.9. The court noted that this only applies to Alaska in so much as it is interpreting a statute already in place. *Id.*

98. See *id.* at 702.

99. See *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

100. *City of Angoon v. Hodel*, 803 F.2d 1016 (9th Cir. 1986).

101. *Katie John III*, 72 F.3d at 702 (quoting *City of Angoon*, 803 F.2d at 1027).

102. U.S. CONST. art. I, § 8, cl. 3.

103. 16 U.S.C. § 3111(4) (1994).

in the language of ANILCA to indicate that Congress wanted to use that power to regulate navigable waterways.¹⁰⁴ The court did note one reference in the legislative history, but dismissed it as “deserv[ing] little weight.”¹⁰⁵ Since there was no adequate evidence, the court rejected the argument that “Congress expressed its intent to exercise its Commerce Clause powers to regulate subsistence fishing in all Alaskan navigable waters.”¹⁰⁶

Finally, the court looked to the reserved rights doctrine. The reserved rights doctrine is asserted when the federal government removes lands from the public domain and “reserves them for a federal purpose, the United States implicitly reserves appurtenant waters then unappropriated to the extent needed to accomplish the purpose of the reservation. . . . [but is limited] to ‘only that amount . . . necessary to fulfill the purpose of the reservation.’”¹⁰⁷ In order to determine if the doctrine applies, the court looked to the intent of the federal government in making the initial reservation and at whether “without the water the purposes of the reservation would be entirely defeated.”¹⁰⁸ The federal government had reserved large amounts of land for specific purposes, and “[i]n doing so, it ha[d] also implicitly reserved appurtenant waters, including appurtenant navigable waters, to the extent needed to accomplish the purposes of the reservations.”¹⁰⁹ Thus, the court held the definition of public lands in ANILCA includes the navigable waterways that the federal government has an interest in as a result of the reserved water rights doctrine.

It is important to note a dissent to the majority opinion. The dissent pointed out that on the surface, this may be a simple case, but it is, “unfortunately, an incredibly complex issue whose resolution will impact all the navigable waters in Alaska.”¹¹⁰ The dissent’s recognition of potential impact in this decision led her to argue that because of the importance of the issue and the uncertainty in the record, the decision should be made by Congress.¹¹¹

The majority was somewhat reluctant in deciding the issue—or at least aware of the problems this decision causes. In its closing para-

104. See *Katie John III*, 72 F.3d at 703.

105. *Id.* The one reference is a statement made by Congressman Morris Udall that public lands in ANILCA includes navigable waters in Alaska. 126 CONG. REC. 29260 (1980). However, the court notes that this statement was made after the Senate had passed ANILCA and after the House had debated it. *Katie John III*, 72 F.3d at 703.

106. *Id.*

107. *Id.* (quoting *Cappaert v. United States*, 426 U.S. 128, 141 (1976)).

108. *Katie John III*, 72 F.2d at 703 (citing *United States v. New Mexico*, 438 U.S. 696, 700 (1978)).

109. *Id.*

110. *Id.* at 704 (Hall, J., dissenting) (footnote omitted).

111. See *id.* at 705-706 (Hall, J., dissenting).

graphs, the majority opinion lamented the "extraordinary administrative burden" it was now placing on federal agencies. The court also regretted as well the "complicated regulatory scheme" of both federal and state management, not to mention the expectant hope of cooperation between the federal agencies and the state.¹¹² Finally, in the last paragraph of the opinion, the majority declares that this issue "cries out for a legislative, not a judicial, solution."¹¹³ The court illustrates two ways in which a legislative solution could be reached: an amendment to the Alaska State Constitution that would allow compliance with ANILCA, or congressional modification of ANILCA that would allow for a clear definition of public lands.¹¹⁴ The majority closes its opinion by stating that "[o]nly legislative action by either Alaska or Congress will truly resolve the problem."¹¹⁵

V. ANALYSIS

The en banc rehearing of *Katie John III* will allow the Ninth Circuit the opportunity to create an equitable solution to the issue of fish and wildlife management in Alaska. That solution should be to stay any decision it reaches, instead deferring to action by either Congress or the Alaskan Legislature.

Both the Ninth Circuit and the Alaska Supreme Court recognized this remedy. In *Katie John III*, the majority closed its opinion by informing all parties involved that while the court had resolved the issue, the better remedy would be for a legislative solution.¹¹⁶ The dissent also echoed this, as is apparent from the fact that most of its opinion consists of an explanation that the judiciary is not "empowered to resolve the issue without direction from Congress."¹¹⁷ The Alaska Supreme Court, in holding that the preference of subsistence rights violated the state constitution, stayed its decision to actually allow the legislature to propose an amendment.¹¹⁸ Clearly, a legislative solution to the problem should be reached; that solution can either come from Congress or the Alaska Legislature.

Congress can rectify the problem by further explaining the intent of ANILCA and defining what "public lands" are under the act. Alaskan Senator Frank Murkowski introduced a bill in the 104th Congress that

112. *Id.* at 704.

113. *Id.*

114. *See id.*

115. *Id.*

116. *See id.*

117. *Id.* (Hall, J., dissenting).

118. *See id.* at 701. Clearly, the legislature failed to act.

would have appointed a Special Master who would have mediated a resolution between the federal and state government.¹¹⁹ Senator Murkowski must have known that Congress would not act to further define ANILCA nor attempt to mediate a settlement. Realizing that the only other option would be an amendment to the Alaska Constitution, Senator Murkowski introduced a bill in the 106th Congress that would have provided “for the earliest opportunity for the state to regain management” of fish and wildlife once Alaska amended its constitution.¹²⁰ The actions of Senator Murkowski not only illustrates Congress’s unwillingness to enter into the debate and provide a solution, but also demonstrates the expectation that Alaska should amend its constitution.

Not willing to amend the state constitution and realizing Congress would not act to resolve the situation, the Alaska Legislative Council and some Alaska legislators filed suit against the federal government attempting to block federal implementation of the priority subsistence right under ANILCA.¹²¹ The district court, after a brief recitation of the facts, noted the plaintiff’s motivation in bringing this action was “an apparent attempt to avoid the . . . choice between amending Alaska’s Constitution to permit implementation of the subsistence priority and suffering federal government implementation.”¹²² The Court of Appeals for the D.C. Circuit found, in affirming the decision of the district court, that the plaintiffs did not even have the requisite standing to sue, thus closing the door on any potential judicial solution.¹²³ With Congress unwilling to act and the federal courts not wanting to provide a solution, there existed only one more solution: amend the state constitution. The choice the Alaska Legislative Council and the legislators had hoped to avoid was now before them—if Alaska would manage fish and wildlife in the future, the state had to amend its constitution.

The Alaska Supreme Court stayed its decision in *McDowell* with the expectation that the state legislature would act. Twelve years later, Alaska is finally in a position to amend the state constitution to allow a

119. Alaska Subsistence Hunting & Fishing Act, S. 2172, 104th Cong. (1996). The bill was read twice and then referred to the Committee on Energy and Natural Resources, where it “died.” U.S. Congress on the Internet (visited Feb. 15, 2001) <<http://thomas.loc.gov>>.

120. S. 1826, 106th Cong. (1999). Unfortunately, the bill also “died” in the Committee on Energy and Natural Resources. U.S. Congress on the Internet (visited Feb. 15, 2001) <<http://thomas.loc.gov>>.

121. See *Alaska Legislative Council v. Babbitt*, 15 F. Supp. 2d 19 (D.D.C. 1998), *aff’d*, *Alaska Legislative Council v. Babbitt*, 181 F.3d 1333 (D.C. Cir. 1999). The Alaska Legislative Council is a permanent interim committee and agency of the legislature. ALASKA STAT. § 24.20.010 (Michie 2000).

122. *Alaska Legislative Council*, 15 F. Supp. 2d at 22.

123. See *Alaska Legislative Council*, 181 F.3d at 1333.

priority subsistence right.¹²⁴ In the past two years, there has been a growing majority of Alaskans that favor an amendment to the state constitution allowing the priority subsistence right.¹²⁵ Governor Tony Knowles, in 1999, called for a special legislative session to specifically address the issue; the governor hoped to head off the federal takeover.¹²⁶ The Alaska House of Representatives passed the proposed amendment, which would have given a priority to rural subsistence hunters and fishermen, but the Senate rejected the amendment by two votes.¹²⁷ At that point, Governor Knowles was willing to wait until after the 2000 elections to reintroduce the proposed amendment.

Now, after the elections, the possibility of the passage of the proposed amendment seems even more likely. In the recent elections, the state legislature has made a shift to the moderate side of the political spectrum, and that shift, some argue, "could make a difference when . . . the long-debated constitutional amendment" comes up again for consideration.¹²⁸ That opportunity arose almost immediately with the new legislature—on the first day of the new legislative session, House Joint Resolution No. 4 was introduced.¹²⁹ The resolution is a proposed amendment to the Alaska Constitution that would recognize a priority for subsistence users in any replenishable natural resource.¹³⁰ With the ideological shift of the legislature, the proposed amendment could finally be approved by the legislature and be voted on by the Alaskan people. If such a circumstance happens, the amendment would most surely pass, given the past overwhelming support of the majority of Alaskans.

124. It is important to note that the state has been in this position before. Beginning in 1993, and continuing to the present day, there have been twenty attempts to bring the constitutional amendment to the people for ratification (House Joint Resolution 23 in the 18th Legislature; House Joint Resolution 14 and Senate Joint Resolution 2 in the 19th Legislature; House Joint Resolution 3, 10, 46, 101, 102, 201, Senate Joint Resolution 2, 6, 31, 101, and 201 in the 20th Legislature; House Joint Resolution 4, 201, 202, and Senate Joint Resolution 36 and 201 in the 21st Legislature; and House Joint Resolution 4 in the 22nd Legislature). Alaska Legislature Online (Jan. 25, 2001) (visited Feb. 15, 2001) <<http://www.legis.state.ak.us>>.

125. A Dittman Research Corp. poll conducted June 7-11, 1999 found that 72% of Alaskans support a constitutional amendment giving a rural priority to subsistence rights, while only 24% would not support the amendment. Governor Tony Knowles on the Web (Jan. 25, 2001) (visited Feb. 15, 2001) <http://www.gov.state.ak.us/subsistence_amendment/>.

126. See Tony Knowles, *Katie John Appeal is About State Sovereignty*; *Compass*, ANCHORAGE DAILY NEWS, Mar. 3, 2000, at 12B.

127. See *id.* This amendment is found at H.R.J. Res. 202, 21st Leg., 1st Spec. Sess. (Alaska 1999).

128. Martha Bellisle, *New Lawmakers Could Reshape Juneau Agenda*, ANCHORAGE DAILY NEWS, Nov. 9, 2000, at 1B.

129. Alaska Legislature Online (Jan. 25, 2001) (visited Feb. 15, 2001) <<http://www.legis.state.ak.us>>.

130. *Id.* The resolution was read and then referred to the appropriate committees.

However, the state legislature might not receive such an opportunity to amend the state constitution if the Ninth Circuit decides the issue before the legislature can act. The Ninth Circuit, if it chooses to heed the advice of both the Alaska Supreme Court as well as the recommendations of Judge Wright and Judge Hall,¹³¹ brethren of their own circuit, should stay whatever decision the court renders until the legislature acts. After all, the issue raised cries out for a legislative and not a judicial solution.

VI. CONCLUSION

In December, 2000, the Ninth Circuit Court of Appeals heard en banc an appeal from *Katie John III*. The *Katie John III* court found that a preferential subsistence right, as guaranteed by ANILCA, applied to all navigable waters in which the United States has an interest under the reserved water rights doctrine. The decision meant that management of subsistence hunting and fishing would now be the responsibility of the federal government because the state was out of compliance with ANILCA—a significant problem for Alaska because it is extremely protective of its natural resources and wants management of those resources left solely to the state. As discussed, the court recognized a potential solution: action by the Alaska state legislature. The state legislature merely needs to amend the state constitution to allow a priority in subsistence rights. Some commentators have argued that it “may [be] a very long wait before . . . any resolution of this complex issue” occurs from legislative action.¹³² However, with the current trends in Alaska state politics and a recognition that the majority of Alaskans support a constitutional amendment, that very long wait may have finally come to an end.

The Ninth Circuit should allow the state to amend its constitution and stay any decision it reaches until the new, moderate state legislature has an opportunity to amend the state constitution. Once it does, Alaska will be able to once again be the sole manager of the fish and wildlife in the state. Under such circumstances, *Katie John* will have a constitutionally protected right to subsistence fishing and the state of Alaska, again in compliance with ANILCA, will regain its state sovereignty in fish and wildlife management.

Ryan T. Peel

131. Judge Eugene A. Wright wrote the majority opinion in *Katie John III*, while Judge Cynthia Holcomb Hall wrote the dissent.

132. Bridges, *supra* note 15, at 158.