# Living with Wildlife: Regulating Subsistence Hunting and Fishing in Alaska

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In Alaska, diverse and abundant wildlife species inhabit the state's varied landscapes. The waters teem with fish, including salmon, Pacific Halibut, Pacific herring, and whitefish, as well as marine mammals such as seals, sea lions, and walruses. Deer, bears, Dall sheep, mountain goats, and beavers populate the terrain. In this "last frontier," subsistence is a way of life; all of these species are commonly harvested for food. An estimated 36.2 million pounds of wild food is taken annually by rural subsistence users. Alaska Department of Fish and Game, *Subsistence in Alaska: A Year 2012 Update* (2014). To some residents, however, the word "subsistence" means much more than meeting the basic needs for survival.

For Alaska Natives, "subsistence" has come to describe the traditional economy, culture, and way of life. For example, moosehead soup, salmon, caribou, and food from other wild animals are vital to the Native Alaskan Athabascan culture and mark traditional events surrounding birth, death, and honor during ceremonial dinners and potlatches. H. Rep. Committee on Natural Resources, Subcommittee on Indian and Alaska Native Affairs, Hearing on Discussion Draft Bill, "The Alaska Native Subsistence Co-Management Demonstration Act of 2014" (Mar. 14, 2014), Statement of Michelle Anderson (herein *Michelle Anderson Statement*), *available at* http://docs.house.gov/meetings/II/II24/20140314/101879/HHRG-113-II24-Wstate-AndersonM-20140314-U1.pdf.

Subsistence for these Alaskans involves "a complex understanding of the local environment that enables the people to live directly from the land. It also involves cultural values and attitudes: mutual respect, sharing, resourcefulness, and an understanding that is both conscious and mystical of the intricate interrelationships that link humans, animals, and the environment." Thomas R. Berger, Village Journey: The Report of the Alaska Native Review Commission 51 (1985). Despite the importance of fish and wildlife for Alaska Native peoples, in the Alaska Native Claims Settlement Act (ANCSA) of 1971, Congress did not preserve aboriginal hunting and fishing rights. 43 U.S.C. § 1603(b); *see generally* Felix Cohen's Handbook of Federal Indian Law § 4.07[3][c] (2012 ed.). After the discovery of large quantities of oil on Alaska's North Slope, pressure mounted to settle the Native land claims in order to facilitate the extraction of oil and the construction of a trans-Alaska pipeline. The eventual settlement was enacted as ANCSA. Subsistence had been one of the elements that the land claim settlement was intended to include, but the law instead extinguished any prior existing aboriginal hunting and fishing rights, although the Conference Committee Report accompanying ANSCA indicated that the law was not intended to eliminate subsistence interests and called on both the Secretary of Interior and the state to "take any action necessary to protect the subsistence needs of the Natives." H. R. Rep. No. 92-746, at 4 (1971) (Conf. Rep.) *reprinted in* 1971 U.S.C.C.A.N. 2247, 2250. After less than a decade, it had become apparent that neither the Secretary of Interior nor the state was meeting the expectations of Congress regarding Native subsistence users: no lands were withdrawn for subsistence use; no hunting and fishing preferences limiting nonresident access were created; and urban and sporting interests continued to dominate the state's management of fish and wildlife resources. David S. Case and David L. Voluck, Alaska Natives and American Laws 283–86 (2d ed. 2002).

In 1980, Congress provided for some statutory protection for Alaska Native subsistence traditions through the enactment of the Alaska National Interest Lands Conservation Act (ANILCA). 16 U.S.C. § 3101 *et seq.* While protection of subsistence is included in the expressed purpose of ANILCA, it is only part of the purpose. More broadly, Congress sought "to preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values." 16 U.S.C. § 3101. The law withdrew and reclassified more than 100 million acres of federal lands within the state for federal management and protection. The intent of Congress was "to provide for the maintenance of sound populations of, and habitat for, wildlife species of inestimable value to the citizens of Alaska and the Nation, including those species dependent on vast relatively undeveloped areas" and "to protect the resources related to subsistence needs." *Id.*

The statutory protection for Alaska Native subsistence traditions is set out in Title VIII of ANILCA. 16 U.S.C. §§ 3111–3126. The protection of subsistence in ANILCA is for "rural Alaska residents," rather than specifically for Alaska Natives or members of Alaska Native tribes, although the congressional intent was, in large part, to protect traditional Alaska Native ways of life. 16 U.S.C. § 3113; see Cohen's Handbook § 4.07[3][c][ii][A]. Alaska Natives comprise about 55 percent of the rural population of Alaska. Alaska Department of Fish and Game, *Subsistence in Alaska: A Year 2012 Update* (2014). The subsistence harvest of fish and game accounts for about 1.1 percent of the total annual harvest of such resources in Alaska and is mostly comprised of fish (salmon 32 percent, other fish 21 percent), land mammals (23 percent, including moose, caribou, deer, bears, Dall sheep,

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mountain goats, and beavers), and marine mammals (14 percent, including seals, sea lions, walruses, and whales). *Id.* at 2.

In Title VIII of ANILCA, Congress recognized "the opportunity for subsistence uses . . . is essential to Native physical, economic, traditional, and cultural existence"; that "in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents"; that there are pressures on subsistence resources from increasing population and increased accessibility of remote areas; that it was necessary for Congress to invoke its constitutional power over Native affairs, as well as its power under the property clause and commerce clause, to fulfill the policies of ANCSA; and that continuation of the opportunity for a subsistence way of life is in the national interest. U.S.C. § 3111. As defined in ANILCA, the term "subsistence use" means:

> the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of non-edible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal family consumption; and for customary trade.

16 U.S.C. § 3113.
The policy of support for non-wasteful subsistence uses is framed as a priority over the taking of fish and wildlife for other purposes. 16 U.S.C. § 3114.

For much of the three-and-a-half decades since the enactment of ANILCA, how subsistence hunting and fishing are regulated has been the subject of litigation. The controversy arises out of the conflict between federal law, which gives a subsistence hunting and fishing priority to rural Alaska residents, and the state constitution, which allows equal access to fish and game to all residents. This drawn-out period of litigation now seems to have come to an end as, in March 2014, the U.S. Supreme Court declined to review the decision of the Ninth Circuit in *John v. United States*, 720 F.3d 1214 (9th Cir. 2013) (*Katie John III*), *cert. denied sub nom Alaska v. Jewell*, 134 S. Ct. 1759 (Mar. 31, 2014), which ensures that the federal government will retain management of subsistence fishing and hunting on about 60 percent of inland waters. To summarize the Ninth Circuit's decision will require some background.

ANCSA had revoked all but one of the previously-established Indian reservations in Alaska, and it had not provided for tribal governments to regulate hunting and fishing by tribal members. Rather, unlike the legal framework in the lower forty-eight states, ANILCA provided for subsistence hunting and fishing by Alaska Natives to be regulated by the state, except that, if the state failed to enact and implement a regulatory regime providing a rural priority for all lands subject to its jurisdiction, the federal government was empowered to manage subsistence uses on federal public lands. 16 U.S.C. § 3115(d). In 1978, in anticipation of ANILCA becoming law the state had enacted a statute; the state Joint Boards of Fish and Game then issued regulations; and, in 1982, the Secretary of the Interior certified Alaska to manage subsistence hunting and fishing on public lands. *Katie John III*, 720 F.3d at 1219.

In 1985, however, the Alaska Supreme Court held that the rural preference in the regulations was inconsistent with the statute, which provided a preference for subsistence users regardless of whether they were rural. *Madison v. Alaska Dep't of Fish & Game*, 696 P.2d 168 (Alaska 1985). The state legislature then amended the statute to limit subsistence to persons domiciled in rural areas, but the Ninth Circuit rejected the statutory definition of "rural." *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 316-318 (9th Cir. 1988) (describing the state's geographic reach to be "a creative redefinition of the word rural, a redefinition whose transparent purpose is to protect commercial and sporting interests"), *cert. denied*, 491 U.S. 905 (1989). Then the Alaska Supreme Court held that the rural preference in the state statute violated the Alaska Constitution. *McDowell v. State*, 785 P.2d 1, 9 (Alaska 1989). After the decision in McDowell, the federal government declined to re-certify Alaska to regulate subsistence hunting and fishing on public lands, and, in 1992, the Secretary of the Interior and Secretary of Agriculture (collectively the Secretaries) promulgated regulations. *Katie John III*, 720 F.3d at 1221. One outcome of the issuance of federal regulations is a dual management system in Alaska, with the federal government managing subsistence hunting and fishing on public lands and the state managing such activities elsewhere.

## Katie John I

In the 1992 rules, the secretaries had taken the position that public lands under Title VIII of ANILCA (i.e., the lands that are subject to the federal subsistence priority) did not include any navigable waters. *Id.*, *citing* 57 Fed. Reg. 22,940, 22,942 (May 29, 1992). Several lawsuits were filed, which were consolidated into a single action, captioned *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995), *cert. denied*, 517 U.S. 1187 (1996), but commonly referred to as *Katie John I*.

Katie John, who died in 2013 at the age of 97, was an Ahtna Athabascan elder who challenged the Secretaries' position that navigable waters within the state of Alaska were not public lands and therefore not subject to a subsistence fishing priority. That position would have excluded many of the waters where traditional subsistence fishing occurs from federal control, including the Copper River where John's people have traditionally fished. Prior to the issuance of the federal regulations, Katie John and another elder, Doris Charles, had attempted to persuade the Alaska Board of Fisheries and Game to authorize subsistence fishing at Batzulnetas on the Copper River, the site of a seasonal Ahtna village over hundreds of years until the middle of the twentieth century, a site which is now within Wrangell-St. Elias National Park. *See* www.nps.gov/history/history/online_books/norris1/chap9a.htm. The Board rejected their proposal, the Katie John plaintiffs sued them in federal court and prevailed, but before their proposal could take effect, the *McDowell* court struck down the rural preference, which had the effect of rendering the Batzulnetas subsistence fishery open to all Alaskans, rural and urban. *Id.*

During the course of *Katie John I* (i.e., the litigation against the federal government), the Secretaries changed their position regarding navigable waters, reasoning that at least some navigable waters are public lands by virtue of the federal reserved water rights doctrine. Katie John I, 72 F.3d at 701. That doctrine provides that, when the federal government creates federal reservations, it "also implicitly reserve[s]


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appurtenant waters, including appurtenant navigable waters, to the extent needed to accomplish the purposes of the reservations." *Id.* at 703. In ANILCA, the term "land" is defined as "lands, waters, and interests therein." 16 U.S.C. § 3102(1). The position taken by the secretaries was a novel application of the federal reserved water rights doctrine—relying on the doctrine to establish interests in navigable waters rather than to establish a consumptive right to a certain amount of water. The Ninth Circuit agreed with this reasoning, saying that, "[b]y virtue of its reserved water rights, the United States has interests in some navigable waters. Consequently, public lands subject to subsistence management under ANILCA include certain navigable waters." 72 F.3d at 703.

Accordingly, the Ninth Circuit ruled that the Secretaries' position on this point was a "permissible construction of the statute" and that the federal agencies were responsible for "identifying those waters." *Id.* at 703–704. The Katie John plaintiffs had argued that *all* navigable waters are public lands for purposes of Title VIII of ANILCA, but the Ninth Circuit rejected this argument. *Id.* at 702–703.

## Katie John II *and* III

Following *Katie John I*, the secretaries issued revised rules in 1999, amending the "scope and applicability of the Federal Subsistence Management Program to include those subsistence activities on inland navigable waters where the United States has a reserved water right and identifying specific Federal land units where reserved water rights exist." Subsistence Management Regulations for Public Lands in Alaska, 64 Fed. Reg. 1,276 (Jan. 8, 1999) (codified at 36 C.F.R. pt. 242 and 50 C.F.R. pt. 100), *quoted in Katie John III*, 720 F.3d at 1222. The state of Alaska sued, and the district court, which had retained jurisdiction over the 1992 challenges, ruled that the case involving the 1992 rules should not serve as the action for a challenge to the 1999 rules. *Id.* The district court then issued an order that readopted all of its rulings, deemed those rulings final as to all the parties for all purposes, and dismissed the case. *Id.* at 1223.

The Ninth Circuit granted initial en banc rehearing and issued a per curiam opinion leaving its holdings in Katie John I as controlling law. *John v. United States*, 247 F.3d 1032 (9th Cir. 2001) (en banc) (*Katie John II*). In *Katie John II*, three of the judges wrote an opinion concurring in the judgment, saying that they would have ruled that the ANILCA subsistence priority applies to all navigable waters in Alaska, while three other judges filed a dissenting opinion saying that they would have held that no navigable waters in Alaska are "public lands" for purposes of ANILCA, in part because the United States does not hold title to Alaskan waters or the lands underlying them. 720 F.3d. at 1223. In the absence of a majority opinion, the holdings in *Katie John I* were left as controlling.

*Katie John III* involved two consolidated challenges to the 1999 rules. The Katie John plaintiffs argued that the rules should have included navigable waters upstream and downstream from conservation system units created under ANILCA, while the state argued that the Secretaries had gone too far by, among other points, treating as public lands water bodies outside the boundaries of federal lands, conservation system units, or national forests. 720 F.3d. at 1223. As noted earlier, the Ninth Circuit rejected both lines of attack on the 1999 rules. The Supreme Court's denial of certiorari in *Katie John III* means that subsistence priorities have been upheld for the approximately 60 percent of the inland waters controlled by the federal government. This effectively ends the state's challenge to federal management of subsistence on public lands and ensures that Alaska will continue to have dual management of hunting and fishing, with the state managing areas on applicable state lands and the federal government managing it on federal lands—at least for now.

## *Proposed Reform for the Dual-Management System*

Although the decision in *Katie John III* represents a major win for Alaska Natives in the battle for subsistence rights, the struggle to maintain rights to this traditional practice and to sustained physical and cultural survival persists. Those interested in protecting subsistence have since promised to "recommit to double [their] efforts to protect [their] peoples' rights." *See* Alex DeMarban, *Three Decades of Katie John Litigation Ends with Supreme Court Declining to Review Key Case*, Alaska Dispatch, March 31, 2014. Julie Kitka, President of the Alaska Federation of Natives (AFN), said "We are hopeful that this opens a new and better chapter in our relationship with the state of Alaska. The people of Alaska overwhelmingly support subsistence and we are hopeful that we can all move forward . . . We still struggle under a highly complex federal-state dual management system, which needs reform." *Id.* In the midst of the conflict between state and federal management it is the wildlife, and therefore those who depend on it for subsistence and cultural purposes, that are disadvantaged. As aptly noted by the President of Ahtna, Inc., "wildlife populations know nothing of lines on maps or what agency is in charge, but they do suffer the consequences of uncoordinated and often conflicting management plans and policies." *Michelle Anderson Statement*, *supra*.

For Alaska Natives, management of natural resources must recognize the role of wildlife in management rather than simply focusing on managing the conduct of people. An example of a traditional practice grounded in this cultural value was eloquently described nearly thirty years ago by Judge Berger:

> Subsistence activities link the Native peoples with the animals and the land on which they all depend. Many Alaska Natives believe that spiritual ties bind their own success in hunting to the welfare of the animals on which they depend. The Koyukon Athabascans of interior Alaska extend their policy of reciprocity beyond their own kin to the wolves, by leaving a portion of their harvest for the wolves. This is done because the Koyukon believe that the wolves kill animals and leave them for the Koyukon.

Thomas R. Berger, Village Journey: The Report of the Alaska Native Review Commission 53 (1985).

With a vested interest in managing subsistence resources, not only because of a dependence on fish and game for food, but also for the preservation of varied cultures and traditions, Alaska Natives are fighting for a system in which they play a greater role.


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One step toward this goal is evident in a proposed wildlife management bill that would amend Title VIII of ANILCA by adding a provision for the comanagement of wildlife in traditional Alaska Native hunting territories by tribes, the state of Alaska, and the Department of the Interior. Alaska Native Subsistence Co-Management Demonstration Act of 2014, Discussion Draft, *available at* http://naturalresources.house.gov/uploadedfiles/hr____-_an_subsistence_comanagement_demonstration_act_discussion_draft.pdf. Representatives of the Ahtna Athabascan tribe and of the AFN testified before the House Subcommittee on Indian and Alaska Native Affairs, indicating that the proposed strategy would create a wildlife management structure that incorporates both science and traditional knowledge, provides for subsistence use as well as other customary and traditional uses of wildlife, and coordinates wildlife management practices between governments rather than focusing on the jurisdictional boundaries, which fish and other wildlife species do not observe, anyway. H. Rep. Committee on Natural Resources, Subcommittee on Indian and Alaska Native Affairs, Hearing on Discussion Draft Bill, "The Alaska Native Subsistence Co-Management Demonstration Act of 2014" (Mar. 14, 2014), Statement of Tara Sweeny, co-chair of the Alaska Federation of Natives, *available at* http://docs.house.gov/meetings/II/II24/20140314/101879/HHRG-113-II24-Wstate-SweeneyT-20140314.pdf. Although the bill would only provide for a pilot project in a small area of the state, the Ahtna region, its proponents see it as a necessary next step in resolving the deficiencies of the current system, a step toward meeting the promises made over forty years ago to protect traditional hunting and fishing practices necessary for cultural survival.


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