

SUBSISTENCE & *STURGEON*: FEDERAL ENFORCEMENT ON ALASKA'S RIVERS

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ABSTRACT

*In March 2019, the United States Supreme Court decided *Sturgeon v. Frost*, unanimously holding navigable waters within Alaska's national parks are exempt from the Park Service's normal regulatory authority. The result of the Court's holding has stifled federal law enforcement in Alaska. An overly cautious interpretation of *Sturgeon* could jeopardize federal enforcement in its entirety on the thousands of miles of navigable rivers in Alaska. However, considered in the broader context of the history of Alaskan subsistence rights and corresponding jurisprudence, there is ample legal footing in the *Sturgeon* opinion to provide federal law enforcement personnel with authority to enforce subsistence fishing regulations, as opposed to the navigation-based hovercraft regulation at issue in *Sturgeon*. Should a future challenge arise, the Supreme Court would likely uphold the Department of Interior's authority to enforce federal subsistence fishing regulations on navigable waterways in Alaska.*

I. INTRODUCTION

In *Sturgeon v. Frost*, the United States Supreme Court unanimously held that section 103(c) of the Alaska National Interest Lands Conservation Act (ANILCA)¹ forbids the National Park Service from enforcing the Service's hovercraft rule on navigable waterways in Alaska's national parks.² The Court's decision can be summarized in a simple syllogism. The National Park Service's hovercraft rule applies only to public lands. The navigable waterways in Alaska's federal lands—also known in Alaska as conservation system units (CSUs)—are not public

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1. Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§ 3101–3233 (2018).

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

lands. Thus, the hovercraft rule does not apply to these waterways. How the Court reaches this conclusion, unsurprisingly, is more complex, reflecting the tension between Alaskan and federal control and ultimately highlighting why “Alaska is often the exception, not the rule.”³

Passed in 1980, ANILCA divided land in Alaska between the state and federal governments by formally preserving 104 million acres of federal land in Alaska and incorporating them into the Park Service as new and existing CSUs.⁴ Critical to the *Sturgeon* decision, these CSUs “follow[ed] topographic or natural features, rather than enclos[ing] only federal owned lands.”⁵ This meant more than 18 million acres of so-called “inholdings” — *i.e.*, State, Native, and private land — “wound up inside” Alaska’s CSUs.⁶ ANILCA also notably furthered the interests of Alaska Natives, a key party to the negotiation, by explicitly providing for subsistence rights.⁷ This provision also effectuated the Alaska Native Claims Settlement Act,⁸ which had been passed nine years earlier to resolve aboriginal land claims.⁹

The central issue in *Sturgeon* hinged on interpreting ANILCA section 103(c), which according to the Court, “expressly exempts all those non-public lands (the inholdings) from certain regulations.”¹⁰ Because the title to the land beneath navigable waterways belongs to the State of Alaska, the Court held that “Alaska, not the United States, has title” and corresponding enforcement authority.¹¹ The Court did not find any exception that would permit enforcement of the Park Service’s hovercraft rule, and therefore the statutory language of 103(c) exempting non-public

3. *Id.* at 1080 (internal quotation omitted).

4. *Id.* at 1075 (describing the history, purpose, and meaning of ANILCA); *see also* ANILCA § 3101 (describing the Act’s overarching purpose).

5. *Sturgeon*, 139 S. Ct. at 1075–76 (internal quotations omitted).

6. *Id.* (internal quotations omitted).

7. ANILCA § 3101(c) (“It is further the intent and purpose of this Act . . . to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.”).

8. Pub. L. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601–1629 (2018)).

9. 43 U.S.C. § 1601(a) (“[T]here is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims. . . .”); *see generally* Gavin Kentch, *A Corporate Culture? The Environmental Justice Challenges of the Alaska Native Claims Settlement Act*, 81 Miss. L.J. 813, 816–17 (2012) (discussing how the Alaska Native Claims Settlement Act “resolved aboriginal land claims by conveying to Native groups fee simple title to roughly forty-four million acres” of the state’s 365 million acres “so that oil development could go forward”).

10. *Sturgeon*, 139 S. Ct. at 1077.

11. *Id.* at 1078; *see also* *United States v. Alaska*, 521 U.S. 1, 5 (1997) (“Ownership of submerged lands—which carries with it the power to control navigation, fishing, and other public uses of water—is an essential attribute of sovereignty.”).

lands was conclusive: Jim Sturgeon could “rev up his hovercraft in search of moose.”¹²

In a significant footnote, however, the Court referenced a series of Ninth Circuit decisions known collectively as the *Katie John* trilogy,¹³ and explicitly held that *Sturgeon* does “not disturb the Ninth Circuit’s [*Katie John* decisions] holdings that the Park Service may regulate subsistence fishing on navigable waters.”¹⁴ Justice Sotomayor’s concurrence (joined only by Justice Ginsburg) also noted additional ways in which the majority’s holding is actually much narrower in application. She pointed out key exceptions where federal enforcement is still likely allowed, such as on navigable waters “adjunct to [the Park Service’s] authority over the parks themselves,”¹⁵ as well as on Alaska’s 26 Wild and Scenic Rivers given “Congress’ highly specific definition” of them, which “overrides” section 103(c).¹⁶

Because of the *Katie John* footnote and Justice Sotomayor’s concurrence, *Sturgeon* has caused tangible enforcement difficulties in Alaska: the extent of the Department of Interior’s (DOI) jurisdiction on Alaska’s navigable waterways is unclear.¹⁷ While the prohibition on hovercrafts is clearly proscribed . . . , the level of applicable generality is in question. One such issue of application that is of major concern to Alaskans is subsistence rights. Whereas hovercraft use is anomalous, approximately 95 percent of rural Alaska households use fish for subsistence purposes.¹⁸ Moreover, the questionable enforcement authority pertains to a vast amount of land. The DOI alone manages 220 million acres of Alaska—more than 60 percent of the state.¹⁹ For context,

12. *Sturgeon*, 139 S. Ct. at 1073.

13. *Alaska v. Babbitt (Katie John I)*, 72 F.3d 698 (9th Cir. 1995), *cert. denied*, 517 U.S. 1187 (1996); *John v. United States (Katie John II)*, 247 F.3d 1032 (9th Cir. 2001) (en banc); *John v. United States (Katie John III)*, 720 F.3d 1214 (9th Cir. 2013), *cert. denied*, 572 U.S. 1042 (2014). For historical background on *Katie John*, an Ahtna Athabaskan Indian, and her role in the litigation, see Native American Rights Fund, *Katie John – Her Life and Legacy*, NARF.ORG, <https://www.narf.org/cases/katie-john-v-norton/> (last visited Nov. 25, 2019).

14. *Sturgeon*, 139 S. Ct. at 1080 n.2.

15. *Id.* at 1091 (Sotomayor, J. concurring).

16. *Id.* at 1093 (Sotomayor, J. concurring).

17. Though *Sturgeon* only discusses the Park Service, the federal lands implicated are also managed by additional arms of the Department of the Interior, such as Bureau of Land Management and Fish and Wildlife.

18. ALASKA DEP’T OF FISH & GAME, ALASKA’S SUBSISTENCE FISHERIES DATABASE (2011), <https://seagrant.uaf.edu/events/2011/wakefield-people/presentations/lemons-alaska-subsistence-fisheries-database.pdf>.

19. As of 2015, federal possession of Alaska under the Department of Interior breaks down as follows: Bureau of Land Management, 74.7 million acres; Wildlife Refuges, 69.4 million acres; National Parks, 53.8 million acres; National Forest, 21.9 million acres. An additional 2.2 million acres is managed by the Department

that is roughly the size of Texas and Oklahoma combined.²⁰ Given the importance of subsistence rights to rural Alaskans and the enormous scale of land subject to federal regulation, proper preservation of subsistence rights is paramount.

The question, then, is whether there is still legal authority to continue enforcing *any* federal regulations on Alaska's navigable waterways, and if so, what is the scope of that enforcement authority? The answer is yes, federal agents still have a key role to play in enforcement on these rivers, particularly in the area of subsistence fishing rights. Moreover, enforcement authority is still on firm legal footing after *Sturgeon*.

II. ENFORCEMENT: NAVIGATION VS. SUBSISTENCE

Rivers in Alaska are unlike those in the rest of the Lower Forty-Eight. Both their navigation- and subsistence-based utility distinguish them. As the Court aptly noted, "rivers function as the roads of Alaska, to an extent unknown anywhere else in the country."²¹ This remote accessibility is due to the fact that "[o]ver three-quarters of Alaska's 300 communities and roughly twenty percent of its 735,000 residents live in regions unconnected to the road system."²² Consequently, rivers are essential for travel.

The other critical facet of Alaska rivers' uniqueness is their use for subsistence fishing. ANILCA protects the "[s]ubsistence way of life for rural residents,"²³ where subsistence uses are defined as "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."²⁴ In rural Alaska, there is often no alternative to

of Defense. CHUCK BURNHAM, ALASKA LEGISLATIVE RESEARCH SERVS., FEDERAL LANDS IN ALASKA AND LAND TRANSFERS UNDER THE STATEHOOD ACT (2015), http://www.akleg.gov/basis/get_documents.asp?session=29&docid=2870. For context of federal ownership in other states and a map of federal ownership in Alaska, see CAROL H. VINCENT ET AL., CONGRESSIONAL RESEARCH SERV., FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 4-6, 15 (2017).

20. Texas is 168,217,600 acres, and Oklahoma is 44,087,680 acres. Vincent et al., *supra* note 19, at 8.

21. *Sturgeon*, 139 S. Ct. at 1087; see also Brief for National Parks Conservation Association et al. as Amici Curiae Supporting Respondents at 20, *Sturgeon*, 139 S. Ct. 1066 (No. 17-949) [hereinafter Brief for National Parks Conservation Association et al.] ("In many parks in Alaska, the navigable rivers form the major transportation corridors, akin to roads in the parks in the contiguous United States. For example, the Yukon River in the Preserve is how the majority of visitors travel through the Preserve.").

22. Brief for the State of Alaska as Amicus Curiae Supporting Petitioner at 11, *Sturgeon*, 139 S. Ct. 1066 (No. 17-949) [hereinafter Brief for Alaska].

23. ANILCA, 16 U.S.C. § 3101(c) (2018).

24. *Id.* § 3113.

the food supply that subsistence rights provide.²⁵ And to underscore the significance of these rights, Congress prioritized subsistence uses of wildlife over other consumptive uses in ANILCA.²⁶ Accordingly, a major reason “to give the State and Natives assurance that their [lands] wouldn’t be treated just like federally owned property” was the complexity of carefully negotiated subsistence rights.²⁷

The Court held in *Sturgeon* that federal enforcement of a hovercraft rule on navigable waterways running through federal land is contrary to the statutory language of ANILCA. However, when considered through the framework of Alaska rivers’ uniqueness—navigation versus subsistence—it becomes clear that the Court only intended to limit federal enforcement with regard to *regulating navigation*, such as a hovercraft prohibition. A clear distinction can be drawn as to subsistence rights for the following reasons: 1) the careful negotiation of subsistence rights by Alaska Natives in ANILCA Title VIII means federal reserved water rights are part of “public lands” for subsistence, but not navigation regulation; 2) a “tragedy of the commons” is only inherent to subsistence rights; and 3) the high water mark line is only administrable as a meaningful enforcement distinction for navigation regulation.

A. Reserved Water Rights & Title VIII

Returning to the introductory syllogism, the lack of enforcement authority hinges on navigable waters not being public lands. Reserved water rights, however, transform such waterways into public lands for the purposes of subsistence rights. Understanding how reserved water rights could constitute public lands for subsistence but not navigation regulation requires returning to *Katie John I.*

25. *Id.* § 3111(2); see also E. Barrett Ristroph, *Alaska Tribes’ Melting Subsistence Rights*, 1 ARIZ. J. ENVTL. L. & POL’Y 47, 63–64 (2010) (discussing the ways in which climate change contributes to food scarcity for Alaska Natives and the impact on subsistence); Sophie Thériault et al., *The Legal Protection of Subsistence: A Prerequisite of Food Security for the Inuit of Alaska*, 22 ALASKA L. REV. 35, 55–58 (2005) (demonstrating that subsistence foods are a “precondition for Inuit food security”).

26. ANILCA § 3114 (“[T]he taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes.”). Congress also declared as much in ANILCA’s statement of policy. *Id.* § 3112(2).

27. *Sturgeon*, 139 S. Ct. at 1076 (internal quotations omitted). For further history on the development of the rural priority in ANILCA, see Miranda Strong, *Alaska National Interest Lands Conservation Act Compliance & Nonsubsistence Areas: How Can Alaska Thaw Out Rural & Alaska Native Subsistence Rights?*, 30 ALASKA L. REV. 71, 73–77 (2013). For further discussion of federal statutory obligations Alaska Natives have negotiated, see Ristroph, *supra* note 25, at 67–75.

Faced with the issue of whether navigable waters are subject to ANILCA's subsistence priority, the Ninth Circuit rejected the district court's expansive definition,²⁸ instead limiting the subsistence priority to "navigable waters in which the United States has reserved water rights."²⁹ The Ninth Circuit recognized that in reserving large parcels of Alaska land through "a myriad of statutes," the United States had "implicitly reserved appurtenant waters, including appurtenant navigable waters, to the extent needed to accomplish the purposes of the reservations" – in this case effectuating the subsistence priority.³⁰ Consequently, the court "impose[d] an extraordinary administrative burden on federal agencies" to identify the waters in which there was a reserved water right.³¹

The DOI subsequently amended its ANILCA subsistence regulations to conform to *Katie John I*, such that the subsistence management program applied to activities "occurring on inland navigable waters in which the United States has a reserved water right."³² The DOI also enumerated specific federal land units in which reserved water rights exist.³³ Moreover, this justification for the identification of subsistence rights still has support from the Ninth Circuit. In its 2013 decision in *Katie John III*, the Ninth Circuit upheld the federal government's inclusion of waters in which DOI had identified reserved water rights in the definition of public lands for the purposes of subsistence.³⁴

The Court in *Sturgeon* contrasted this approach to reserved water

28. The district court held that the subsistence priority applied to all navigable waters because the federal government's navigational servitude defines the scope of public lands, all navigable waters are subject to the servitude, and thus all navigable waters qualify as public lands. The Ninth Circuit rejected this construction as overly broad because a navigational servitude is not a property interest to which the United States can hold title. *Katie John I*, 72 F.3d 698, 702–03 (9th Cir. 1995).

29. *Id.* at 700.

30. *Id.* at 703. The court further delineated the statutes at issue, writing "[t]hese statutes include, but are not limited to, acts reserving land for national parks, forests and wildlife preserves, the Statehood Act, the Alaska Native Claims Settlement Act and ANILCA itself." *Id.* at 703 n.10.

31. *Id.* at 704.

32. 64 Fed. Reg. 1276, 1276 (Jan. 8, 1999) (codified at 50 C.F.R. Pt. 100).

33. 50 C.F.R. § 100.3(c) (2019) (listing 30 areas of federal land, notably including the Yukon-Charley Rivers National Preserve at issue in *Sturgeon*).

34. *Katie John III*, 720 F.3d 1214, 1233 (9th Cir. 2013) ("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.'").

rights. In *Sturgeon*, the Supreme Court ruled that navigable waters in Alaska CSUs do not qualify as “public lands” for the purposes of the hovercraft ban because the United States’ water rights are “usufructuary,” not ownership rights, and do not vest title in the affected waters in the government.³⁵ In dicta, the Court reasoned that even if the government has an interest in navigable waters by virtue of the reserved water rights doctrine, that interest would only authorize regulation to restrict depletion or diversion of the water, not regulations that do not relate to safeguarding the water, such as restrictions on hovercraft use.³⁶

Nonetheless, the reserved water rights argument—which the Court dismissed in *Sturgeon* as a basis for federal authority to enforce the Park Service’s navigation-based hovercraft rule—will likely prevail with regard to the issue of federal regulation of subsistence fishing rights. Indeed, the Court strongly implied as much in its decision.

The reserved water rights argument in the context of subsistence rights—as first laid out in *Katie John I* and further developed in *Katie John III*—is meaningfully different than the potential application of reserved water rights to non-subsistence uses. Recall that ANILCA was a compromise not only between the state of Alaska and the federal government, but also Alaska Natives.³⁷ Title VIII of ANILCA accordingly protected Alaska Natives’ subsistence rights (and expanded those rights to include similarly-situated, non-Native rural Alaskans) because “no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses.”³⁸ Given this explicit provision within Title VIII of ANILCA, although federal reserved water rights clearly are no longer part of the definition of “public land” as relevant for navigation regulation post *Sturgeon*, the federal reserved water rights uniquely qualify as public land for the purposes of Title VIII as relevant for subsistence rights.³⁹

This point was implicitly accepted in *Sturgeon* when the Court concluded its discussion of the reserved water rights argument with the

35. *Sturgeon v. Frost*, 139 S. Ct. 1066, 1079 (2019).

36. *Id.*

37. See *supra* notes 6–9 and accompanying text; see also Ristroph, *supra* note 25, at 67–69 (discussing how statutory protections of Alaska Natives’ subsistence rights differ from treaties with Native Americans in the Lower Forty-Eight).

38. ANILCA, 16 U.S.C. § 3111(2) (2018). Colloquially, subsistence rights are still often referred to as Title VIII, as laid out in the original public law. See Pub. L. 96-487, 94 Stat. 2371 (1980).

39. Congress further effectuated this understanding that subsistence rights were pursuant to reserved water rights. See Brief for Alaska Native Subsistence Users as Amici Curiae Supporting Respondent at 19–21, *Sturgeon*, 139 S. Ct. 1066 (No. 17-949) [hereinafter Brief for Alaska Native Subsistence Users].

Katie John carve out.⁴⁰ Numerous parties' briefs—even those that generally argued against federal oversight—also endorsed this argument.⁴¹ The state of Alaska wrote in its amicus brief supporting the petitioner, “This case presents a salient example of a circumstance where a complex statute’s use of a term in different contexts is properly interpreted differently.”⁴² Accordingly, the state urged the Court not to disturb *Katie John* because subsistence is “the lifeblood of cultural, spiritual, economic, and physical well-being” for Alaska Natives, and therefore the *Katie John* decisions “effectuate[d] Congress’ intent” to “protect the important values embodied by subsistence.”⁴³

Perhaps most demonstrative is that at least some Alaska Natives—a critical party to the negotiation of ANILCA—believe subsistence rights have a unique meaning within the context of Title VIII as opposed to the rest of the statute.⁴⁴ This position is most clearly laid out in the amicus brief of Ahtna, Inc., an Alaska Native Regional Corporation representing approximately 2,000 Ahtna Athabascan native people.⁴⁵ In their brief, filed in support of neither party, the Ahtna corporation described how Alaska Natives have been “forced to litigate frequently to protect their customary and traditional way of life,” often because of ANILCA’s complexity.⁴⁶ Accordingly, although the statute’s use of the term “public lands” is, at best, muddled, there is “no debate that federal management

40. See *Sturgeon*, 139 S. Ct. at 1080 n.2.

41. See, e.g., Brief for the Petitioner at 34 n.4, *Sturgeon*, 139 S. Ct. 1066 (No. 17-949) (“Title VIII supports an array of subsistence management regulations that are beyond the scope of Mr. Sturgeon’s challenge. The focus of Mr. Sturgeon’s challenge is instead the Ninth Circuit’s decision to expand the reasoning of the *Katie John* cases beyond subsistence and, in so doing, grant NPS plenary control over State waterways.”); Brief for Alaska, *supra* note 22, at 29–35 (“Nor should the *Katie John* and *Sturgeon* decisions be tied together as the Ninth Circuit has done. Title VIII stands apart from the rest of ANILCA with its own findings, its own statement of policy, and—unlike any other part of the legislation—specific invocations of congressional authority under the Commerce Clause, the Property Clause, and Congress’s ‘constitutional authority over Native affairs.’” (citations omitted)). But see Brief for Alaska Native Subsistence Users, *supra* note 39, at 22–23 (“There is no separate definition of ‘public lands’ for purposes of Title VIII of ANILCA governing subsistence uses.”).

42. Brief for Alaska, *supra* note 22, at 34.

43. *Id.* at 31–33.

44. Though there were other Alaska Native amici who did not support the dual meaning of public lands within the context of subsistence, it is critical to note their argument was made in support of *respondents*, not *petitioners*. In other words, it was framed under the umbrella that “*amici* support all efforts to recognize and preserve the *Katie John* decisions.” Brief for Alaska Native Subsistence Users, *supra* note 39, at 23.

45. Brief for Ahtna, Inc. as Amicus Curiae Supporting Neither Party at 1, *Sturgeon*, 139 S. Ct. 1066 (No. 17-949) [hereinafter Brief for Ahtna].

46. *Id.* at 28–29 (“As evidenced by the extensive litigation ANILCA has spawned, the balance Congress struck in ANILCA is difficult to manage.”).

authority over navigable waters must extend as far as necessary to effectuate the subsistence preference in Title VIII."⁴⁷

The Ahtna corporation argued in its brief that Title VIII—and its reliance on federal reserved water rights to protect subsistence rights as decided in *Katie John I*—stands on its own compared to the rest of the statute. Most significantly, the Ahtna corporation argued that Title VIII relies on a unique definition of the term “public lands” compared to the rest of the statute. Though typical statutory interpretation dictates the same term takes on a singular meaning within a statute, in the case of ANILCA, multiple definitions of the term “public lands” is plausible. “ANILCA ‘is far from a chef d’oeuvre of legislative draftsmanship’” meaning that “no court should presume that ‘identical words used in different parts of the same statute are intended to have the same meaning.’”⁴⁸ It is therefore within reason that federal reserved water rights are part of public lands for the purposes of subsistence, but not navigation regulation. Furthermore, Title VIII can be construed uniquely because within ANILCA, Congress singularly invoked its Commerce Clause authority in the context of Title VIII, not anywhere else.⁴⁹

As an integral party to ANILCA, Alaska Natives’ understanding of—and reliance on—subsistence rights should be given special attention. Reserved water rights have no bearing on the construction of “public lands” as relevant for navigation regulation, such as the hovercraft ban. But in the context of Title VIII, reserved water rights can justify the protection of subsistence rights as laid out in the *Katie John* trilogy.

B. Tragedy of the Commons

Natural resource protection is vital to Alaska.⁵⁰ Consequently, a key tension in Alaska is short- versus long-term resource management.⁵¹ The

47. *Id.* at 30.

48. *Id.* at 32 (citing *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 319–20 (2014)).

49. See ANILCA, 16 U.S.C. § 3111(4) (2018); see also Brief for the Petitioner, *supra* note 41, at 70 (“In ANILCA, Congress invoked its Commerce Clause power only for purposes of authorizing subsistence regulation. . . . Congress did not, however, invoke the Commerce Clause to justify any of the other provisions of ANILCA.”).

50. For example, the value of Alaska salmon alone was \$595.6 million in 2018. CAROLE TRIEM, ALASKA DEPARTMENT OF COMMERCE, ALASKA ECONOMIC UPDATE 12 (2018), <https://www.commerce.alaska.gov/web/Portals/6/pub/2018Q4AlaskaEconomicUpdate.pdf?ver=2019-03-15-110020-270>.

51. This tension between short- and long-term resource management is pervasive in Alaska. Consider, for example, the current political debate over the state’s annual permanent fund dividend (PFD). See Richard Feloni, *Alaska’s*

federal government has an obligation to ensure that the subsistence rights, as negotiated in ANILCA, remain in perpetuity.⁵² A tragedy of the commons is not just a hypothetical; part of the reason why Alaska wanted statehood in the first place was overfishing.⁵³ Relatedly, climate change – the paradigmatic tragedy of the commons example has already manifested itself in Alaska, threatening the long-term viability of subsistence.⁵⁴ Navigable waters in CSUs, which rural communities disproportionately rely on, are prone to the distinct *and real* possibility of overfishing or permanent contamination.⁵⁵ Subsistence regulation accordingly protects against this danger.

In contrast, navigation regulations do not address the same tragedy of the commons type of concerns. Too many hovercrafts – or as is more plausibly the case, too many boats – navigating one of these rivers does

Republican Governor Wants to Give Every Resident More Than \$4,000 for the Next 3 Years, but Not Everyone Is Happy, BUSINESS INSIDER (Feb. 20, 2019), <https://www.businessinsider.com/alaska-permanent-fund-dividend-political-debate-2019-2>, (“Polling has shown that the majority of Alaskans have long favored the fund, but Permanent Fund Defenders founder Juanita Cassellius said that as the political debates over the fund and the dividend increase in intensity, the fund needs protection.”); *see also* Lori Townsend, *The PFD Debate*, ALASKA PUBLIC MEDIA (June 28, 2019), <https://www.alaskapublic.org/2019/06/28/the-pfd-debate>, (interviewing two Alaska state senators to discuss the long-term future of the PFD).

52. ANILCA § 3112(2) (declaring “nonwasteful subsistence uses of fish and wildlife . . . shall be the priority consumptive uses of all such resources . . . to assure the continued viability of a fish or wildlife population or the continuation of subsistence uses”).

53. *See Katie John III*, 720 F.3d 1214, 1235 (9th Cir. 2013) (“Among the major reasons why Alaskans sought statehood was that federal regulation of territorial waters allowed non-Alaskan commercial firms to take salmon in ‘fish traps,’ which starved local Alaskans of the catch and threatened the salmon runs. . . . Between 1936 and 1959, when federal management of Alaska’s salmon finally ended, production had fallen from 8.5 million cases annually to 1.8 million cases.”).

54. *See Ristroph*, *supra* note 25, at 52–61 (outlining the numerous ways in which climate change has already negatively impacted Alaska and the corresponding threats to subsistence, particularly for Alaska Natives on the North Slope); E. Barrett Ristroph, *Still Melting: How Climate Change and Subsistence Laws Constrain Alaska Native Village Adaptation*, 30 COLO. NAT. RESOURCES ENERGY & ENVTL. L. REV. 245, 264–66 (2019) (“Nearly half of [Alaskan Native Village] participants spoke about threats to subsistence that they had to deal with in addition to climate change.”).

55. One of the most prominent examples in Alaska history being the Exxon Valdez oil spill. *See* JAMES A. FALL, ALASKA DEP’T OF FISH & GAME DIVISION OF SUBSISTENCE, *SUBSISTENCE AFTER THE SPILL: USES OF FISH AND WILDLIFE IN ALASKA NATIVE VILLAGES AND THE EXXON VALDEZ OIL SPILL* 23–24 (Feb. 1991) (“The dominant oil spill-related reason for lower harvests was fear that subsistence foods had been contaminated by the oil. . . . In addition, reports of dead wildlife and other signs warning of danger led many people to doubt that their traditional harvest areas were safe to use and traditional foods were safe to eat.”).

not prompt the same necessity to conserve resources long term. Furthermore, from a pragmatic standpoint, given the small size of Alaska's population relative to its geographic footprint, the likelihood of just a single person potentially disturbing a river such that it is no longer suitable for subsistence fishing is far greater than any likelihood of overuse via navigation.⁵⁶

One counterargument is that Alaska state authorities, rather than federal agents, could seemingly just as effectively ensure the protection of these subsistence rights. If resource conservation is the primary motivating concern, leave it to state enforcement. To that point, the Court specifically noted that the federal government may "enter into 'cooperative agreements' with the State (which holds the rivers' submerged lands) to preserve the rivers themselves."⁵⁷

The issue with this counterargument is that Alaska constitutionally cannot live up to ANILCA's statutory duty. Recall, ANILCA subsistence rights specifically enumerate protections for *rural residents*.⁵⁸ ANILCA even has language deferring to the state for enforcement of those protections, and originally, the state did in fact handle such enforcement.⁵⁹ In 1989, however, the Alaska Supreme Court concluded in *McDowell v. State* that the rural subsistence priority conflicted with the Alaska State Constitution's provisions pertaining to equal common use of fish and game.⁶⁰ Oversight of subsistence hunting and fishing rights on federal lands accordingly reverted to the federal government, thereby effectuating "Congress's discrete intent that there be an enforceable subsistence priority" in some form.⁶¹

Today, the federal government could enter into cooperative

56. Unsurprisingly, Alaska has the smallest population per square mile of any state in the country: only 1.2 people per square mile. In comparison, Wyoming, the 49th smallest state, has 5.8 people per square mile. U.S. CENSUS BUREAU, 2010 CENSUS: POPULATION DENSITY DATA (2018), <https://www.census.gov/data/tables/2010/dec/density-data-text.html>.

57. *Sturgeon v. Frost*, 139 S. Ct. 1066, 1086 (2019).

58. ANILCA, 16 U.S.C. § 3101(c) (2018); see also Strong, *supra* note 27, at 75-77 (overviewing the origin of the rural priority).

59. See *Katie John III*, 720 F.3d 1214, 1219 (9th Cir. 2013) ("ANILCA states that the Secretaries should not take action to implement Title VIII if Alaska 'enacts and implements laws of general applicability which are consistent with' ANILCA's rural subsistence priority requirements. In other words, ANILCA expresses a preference for state management of the rural subsistence priority. . . .") (citing 16 U.S.C. § 3115(d)); see also Strong, *supra* note 27, at 78-83 (detailing the history of the state's failure to maintain the rural priority).

60. *McDowell v. State*, 785 P.2d 1, 9 (Alaska 1989) ("We hold only that the residency criterion used in the 1986 act which conclusively excludes all urban residents from subsistence hunting and fishing regardless of their individual characteristics is unconstitutional.").

61. Brief for Alaska, *supra* note 22, at 31.

agreements with the state to take over enforcement of regulations such as the hovercraft rule, per the Court's recommendation. The state, however, could not enforce rural subsistence rights as protected and prioritized by ANILCA through a cooperative agreement because of the state constitutional bar—unless Alaska amends its state constitution or Congress amends ANILCA, both of which having been recommended by the judiciary.⁶² Thus, until such amendment occurs, federal enforcement of subsistence rights is the *only* means available to protect subsistence rights and ensure no tragedy of the commons materializes.

C. High Water Mark

In pointing out ways to still protect rivers, the Court noted “[t]he Park Service may at a minimum regulate the public lands flanking rivers.”⁶³ Such regulation is based on a “high water mark” rule, which, as applied to the enforcement of navigation regulations, presents a workable bright line for federal agents and officers because the division between navigation on land versus water is clear.⁶⁴ There is no concern about the actual location of the mean high water mark when dealing with navigation-based activity. Any boat on a river—or in the case of *Sturgeon*, a hovercraft on the river—is unquestionably operating below that high water mark since the activity necessarily occurs above water. On the other hand, that same boundary as applied to the enforcement of subsistence fishing regulations becomes indeterminate and unworkable.

For example, if a subsistence fisher is standing above the high water mark, but her lure is in the water, is federal enforcement authority based on the spot where the fisher is standing or the location of the lure? Alternatively, in a similar manner to Justice Sotomayor's hypothetical, if a fisher tosses toxic waste from the riverbank into the river itself, does the

62. See, e.g., *Sturgeon*, 139 S. Ct. at 1094 (Sotomayor, J. concurring) (“Congress can and should clarify the broad scope of the Service's authority over Alaska's navigable waters.”); *Katie John I*, 72 F.3d 698, 704 (9th Cir. 1995) (“The issue raised by the parties cries out for a legislative, not a judicial, solution. If the Alaska Legislature were to amend the state constitution or otherwise comply with ANILCA's rural subsistence priority, the state could resume management of subsistence uses on public lands including navigable waters. . . . If Congress were to amend ANILCA, it could clarify both the definition of public lands and its intent. Only legislative action by Alaska or Congress will truly resolve the problem.”).

63. *Sturgeon*, 139 S. Ct. at 1086.

64. The Park Service's regulations are applicable to “navigable waters and areas within their ordinary reach (up to the mean high water line in places subject to the ebb and flow of the tide and up to the ordinary high water mark in other places).” 36 C.F.R. § 1.2(a)(3) (2019).

federal agent lose enforcement authority?⁶⁵ Or what if the potential violator has one foot above the high water mark and the other foot below? Even if clear answers could be fashioned to these hypotheticals, another problem arises from the difficulty in discerning where exactly along the riverbank the mean high water mark lies.⁶⁶ Add in the hostility of many Alaskans to even the faintest notion of federal oversight, and the boundary becomes increasingly unworkable in the context of actual enforcement.⁶⁷

These questions are not just theoretical. They undoubtedly impact decisions made by federal enforcement in the field. Take the following situation that could very well be encountered on a river like the one at issue in *Sturgeon*: an agent comes across an angry Alaska fisherman who wants to blow fish out of the water with dynamite, and the fisherman is standing a foot above the mean high water mark. Assuming the agent even knows where the high water mark is, can she stop the fisherman?⁶⁸ Moreover, the ambiguity in discerning the precise location of the mean high water mark is not only problematic for federal agents, but also for the subsistence fishers who are looking to comply with the law.

When viewed through the lens of a rule as opposed to a standard, using the high water mark as a meaningful dividing line is only an

65. See *Sturgeon*, 139 S. Ct. at 1090 (Sotomayor, J. concurring) (“[R]eading ANILCA § 103(c) to bar any Park Service regulation of navigable waters would permit [citizens] to evade those rules entirely if she were to wade into the river or paddle along the bank in a canoe.”); see also Brief for National Parks Conservation Association et al., *supra* note 21, at 21 (“The Park Service may be unable . . . to prevent the dumping of trash or fuel into the waterway, or to enforce subsistence hunting and fishing regulations when violations occur on the water.”).

66. Even experienced federal agents can have trouble discerning the high water mark. See Frank E. Maloney, *The Ordinary High Water Mark: Attempts at Settling an Unsettled Boundary Line*, 13 LAND & WATER L. REV. 465, 466 (1978) (“Ironically, the determination of the [ordinary high water line] is as confused as it is important.”).

67. For an example of such hostility, consider the locally well-known case of Jim Wilde. Federal agents attempted to perform a safety inspection on Wilde’s boat and he resisted, forcing the rangers to pull out a shotgun to convince Wilde to head to the riverbank where he “began walking toward the Rangers with clenched fists, yelling profanities.” *United States v. Wilde*, 4:10-CR-21 RRB, 2013 WL 6237704, at *1–2 (D. Alaska Dec. 3, 2013), *aff’d*, 585 Fed. Appx. 336 (9th Cir. 2014) (unpublished).

68. See *Sturgeon*, 139 S. Ct. at 1090–91 (Sotomayor, J. concurring) (“Imagine if all Service regulations could apply in Alaska’s parklands only up to the banks of navigable rivers, and the Service lacked any authority whatsoever over the rivers themselves. If Jane Smith were to stand on the public bank of the Nation River, bag of trash in hand, Service rules could prohibit her from discarding the trash on the riverbank. . . . But reading ANILCA § 103(c) to bar any Park Service regulation of navigable waters would permit Jane to evade those rules entirely if she were to wade into the river or paddle along the bank in a canoe.”) (internal citations omitted).

administrable rule in the context of navigational regulation.⁶⁹ Conversely, such a rule fails in the context of subsistence rights. The Court's reliance on this boundary between the riverbank and river is further evidence of why the Court explicitly carved out subsistence fishing rights from its holding: the decision implicitly recognizes that navigation enforcement based on the high water mark is substantively different from subsistence enforcement.

III. CONCLUSION

Even though there is a theoretical distinction between navigation and subsistence regulation enforcement, tough cases will still arise. Consider *United States v. Wilde*, a quintessentially Alaska case which turned on the question of whether the National Park Service has "jurisdiction on the Yukon River to stop vessels in order to conduct safety inspections."⁷⁰ Framed in the paradigm of navigation versus subsistence use, in which category does a safety inspection qualify? Though the answer is not necessarily clear, such difficult questions should be ones of application between discrete categories, not questions of whether enforcement is an issue as a first principle.

Ultimately, when viewed within the framework of navigation versus subsistence rights, the Court's opinion in *Sturgeon* clearly lays out a path for still enforcing subsistence regulations. The Court's decision to carve out the *Katie John* trilogy was purposeful, and the Secretary of the Interior has strong legal grounds to ensure the federal government will continue to protect subsistence rights.

69. See generally Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985) (discussing the theoretical arguments underpinning the "stereotyped, almost caricatured, forms of arguments" related to rules versus standards).

70. *Wilde*, 2013 WL 6237704 at *2.