

THE IMPACT OF *STURGEON II* ON ALASKA SUBSISTENCE MANAGEMENT: A CHANCE FOR PEACE IN THE JURISDICTION WARS

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ABSTRACT

In Sturgeon v. Frost, the Supreme Court addressed the status of navigable waters in Alaska's conservation system units. In holding that these waters are not "public lands" for the purposes of ANILCA, the Court limited the ability of the federal government to regulate them. In a footnote, Sturgeon preserved the longstanding Katie John trilogy of Ninth Circuit precedent regarding subsistence rights. This new jurisdictional framework has the potential to cause problems for subsistence management in Alaska. This Note addresses these potential consequences and proposes possible steps to create a more harmonized subsistence management system through greater cooperation between the federal government, the State, and subsistence users.

I. INTRODUCTION

On March 26, 2019, the Supreme Court issued its unanimous opinion in *Sturgeon v. Frost (Sturgeon II)*.¹ The Court held that the National Parks Service (NPS) did not have the authority to regulate navigable waters in Alaska's conservation system units (CSUs).² This decision concludes the latest battle in a decades long jurisdictional turf war over who controls Alaska CSUs, the State of Alaska or the federal government. The front line of this war has traditionally been the management of Alaskan natural resources for subsistence harvest. Caught in the crossfire are Alaska Natives, many of whom depend on subsistence lifestyles.³

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1. 139 S. Ct. 1066 (2019).

2. *Id.* at 1085.

3. Miranda Strong, *Alaska National Interest Lands Conservation Act Compliance & Nonsubsistence Areas: How Can Alaska Thaw out Rural & Alaska Native Subsistence*

While the Court attempted to dodge the subsistence issue in *Sturgeon II*, its decision magnifies the battle lines. The question of Alaskan subsistence management remains open, and the next moves by each party will be critical. The first part of this Note situates *Sturgeon II* in the statutory and judicial history of subsistence in Alaska. The following discussion introduces the *Sturgeon* decisions and considers the possible impact of *Sturgeon II* on subsistence management. The final part proposes a truce in the subsistence jurisdiction wars, suggesting that *Sturgeon II* might present new avenues for federal-state cooperation and the further recognition of Alaska Native interests. This discussion includes two proposals for policy change in response to the Court's decision: 1) increased cooperation through cooperative management plans, the Alaska Land Use Council, and memoranda of understanding, and 2) a state constitutional amendment recognizing rural subsistence rights.

II. BACKGROUND

A. Factual Background

In 2007, John Sturgeon was navigating the Nation River on his hovercraft,⁴ traveling to his preferred moose hunting grounds.⁵ National Parks Service (NPS) agents arrived and informed him that NPS regulations prohibited the operation of hovercrafts in the Yukon-Charley Rivers National Preserve.⁶ Sturgeon returned home empty-handed but did not resign himself to the NPS regulations. Instead, he launched litigation that spanned more than a decade and resulted in two trips to the highest court in the land.

B. Statutory Background

1. ANILCA § 103(c)

Sturgeon's desire to operate his hovercraft in the Yukon-Charley preserve implicated a fundamental question about who has the authority to regulate the navigable waters located in Alaska's CSUs. The answer to this question lies within the law that created Alaska's CSUs, the Alaska National Interest Lands Conservation Act (ANILCA).⁷ However, ANILCA is far from a model of clarity on this point. Section 103(c) states:

Rights?, 30 ALASKA L. REV. 71, 73 (2013).

4. *Sturgeon v. Frost*, 136 S. Ct. 1061, 1062 (2016).

5. *Id.* at 1064.

6. *Id.* at 1062.

7. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified at 16 U.S.C. § 3101-3233. (2018)) [hereinafter ANILCA].

Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after [the date of ANILCA's enactment], are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.⁸

The Act defines "land" as "lands, waters, or interests therein."⁹ "Public lands" are defined as "land situated in Alaska which, [after the date of ANILCA's enactment] are Federal lands . . ."¹⁰ Finally, "Federal land[s]" under ANILCA are "lands the title to which is in the United States after [the date of ANILCA's enactment]."¹¹

To summarize, public lands for the purposes of ANILCA are lands to which the United States had title on December 2, 1980, when ANILCA was enacted, as well as lands within CSUs acquired by the federal government after that date. Only these "public lands" are "subject to the regulations applicable solely to public lands within such units."¹² As a practical matter, this section refers to NPS regulations. Other federal regulations, for instance those issued by the EPA, are of general applicability to both public and private lands, removing them from 103(c)'s purview. At first blush, this provision may seem trivial, but its importance is highlighted by the presence of vast "inholdings"¹³ within Alaska CSUs. Much of the land that falls within the boundaries of the CSUs in Alaska is owned privately or by Alaskan Native corporations. These inholdings are more prevalent in Alaska than elsewhere because in ANILCA Congress chose to follow topographic or natural features rather than property lines.¹⁴ Without section 103(c), these inholdings would be

8. *Id.* § 103(c), 94 Stat. 2371, 2377.

9. *Id.* § 102(1), 94 Stat. at 2375.

10. *Id.* § 102(3). This section contains an exception for federal lands that had been selected by Native Alaskan corporations but had not yet been transferred. This exception is not material in Sturgeon's case.

11. *Id.* § 102(2).

12. *Id.* § 103(c).

13. Inholdings are pockets of privately owned land within the boundaries of a federally designated national park, monument, or wilderness. Randy Tanner, *Inholdings within Wilderness: Legal Foundations, Problems, and Solutions*, 8 INT'L J. WILDERNESS 9, 9 (2002).

14. See ANILCA § 103(b) ("Whenever possible boundaries shall follow

subject to NPS regulations along with all of the federally owned land in the CSU.

2. *The History of ANILCA*

ANILCA resulted from years of legislative wrangling over the fate of Alaska's undeveloped land. The battle that led to ANILCA began with the passage of the Alaska Native Claims Settlement Act (ANSCA).¹⁵ Section 17(d)(2) of ANSCA resulted from an amendment proposed by Nevada Senator Alan Bible with the support of conservationists.¹⁶ Section 17(d)(2) authorized the Secretary of the Interior to reserve up to eighty million acres of land in Alaska for inclusion in the national park, forest, wildlife refuge, and wild and scenic rivers systems.¹⁷ However, Congress had the final authority to approve the withdrawals authorized by § 17(d)(2).¹⁸ Congress was required to act in response to the Secretary's proposed withdrawals before December 28, 1978.¹⁹ As the deadline approached, Congress had not acted on the Secretary's recommendations.²⁰ Further, the State of Alaska had selected nine to eleven million acres located in the proposed section 17(d)(2) areas under their Alaska Statehood Act²¹ entitlement.²² In response, President Carter exercised his authority under the Antiquities Act of 1906²³ to create seventeen new national monuments totaling fifty-six million acres located in the section 17(d)(2) recommended areas.²⁴ Carter also used his Federal Land Policy and Management Act²⁵ authority to reserve more land in Alaska.²⁶ In total, the President's reservations exceeded 100 million

hydrographic divides or embrace other topographic or natural features.").

15. Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601-1629 (2018)).

16. G. FRANK WILLISS, "DO THINGS RIGHT THE FIRST TIME": ADMINISTRATIVE HISTORY THE NATIONAL PARKS SERVICE AND THE ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT OF 1980 Chapter 2 Section C (1985) (ebook).

17. CLAUS-M NASKE & HERMAN E. SLOTNICK, ALASKA, A HISTORY OF THE 49TH STATE 225 (1987).

18. *Id.*

19. David Aaron Funk, The Alaska National Interest Lands Conservation Act and the National Parks Service: A Primer on Access 2 (June 1990) (unpublished Master's thesis, University of Oregon) <http://www.npshistory.com/publications/anilca-nps-primer.pdf>.

20. WALTER R. BORNEMAN, ALASKA SAGA: OF A BOLD LAND 504 (2003).

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

22. DANIEL NELSON, NORTHERN LANDSCAPES: THE STRUGGLE FOR WILDERNESS ALASKA 220 (2004).

23. Antiquities Act of 1906, Pub. L. No. 59-209, 34 Stat. 225 (codified at 54 U.S.C. § 3203 *et seq.*).

24. BORNEMAN, *supra* note 20, at 504.

25. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified at 43 U.S.C. § 1701 *et seq.*).

26. Funk, *supra* note 19, at Chapter 4 Section E.

acres.²⁷

The Carter land reservations sparked political controversy in Alaska and set the stage for ANILCA's passage.²⁸ Like the debates over ANSCA, the legislative process leading to ANILCA pitted conservationists and pro-development forces against each other.²⁹ Alaska Native interests were also determined to ensure that their rights were protected.³⁰ Ultimately, ANILCA is a compromise statute, balancing conservation, development, and subsistence use of Alaska's lands.³¹

III. *KATIE JOHN* AND SUBSISTENCE MANAGEMENT IN ALASKA

The *Sturgeon* cases unfolded against the backdrop of Alaska's complex subsistence management history. In fact, the *Sturgeon* question was not new. The Ninth Circuit had addressed the § 103(c) question several times in a series of cases collectively known as the *Katie John* trilogy. These decisions set the parameters of a patchwork state-federal subsistence management system that took center stage in the *Sturgeon* controversy. At a fundamental level, the *Katie John* decisions called upon courts to consider some finer points of federal water law and their bearing on the word "title" in ANILCA.

A. Federal Water Law

Understanding the holdings in *Katie John* and *Sturgeon* requires some grasp of federal water law. In particular, the Equal Footing Doctrine, the reserved water doctrine, and the navigational servitude loom large in the section 103(c) controversy.

1. *Equal Footing Doctrine*

The Equal Footing Doctrine states that when a new state enters the union it has the same rights and powers as the existing states.³² The exact phrase "equal footing" has appeared in every act admitting a new state since the addition of Tennessee in 1796.³³ However, this language does

27. BORNEMAN, *supra* note 20.

28. *Id.* at 505.

29. *Id.*; see also NELSON, *supra* note 22, at 247-48.

30. James D. Linxwiler & Joseph J. Perkins, *A Primer on Alaska Lands*, 61 ROCKY MTN. MIN. L. INST. 7-37 (2015).

31. See NASKE & SLOTNICK, *supra* note 17, at 234-37 (documenting the interests driving the passage of ANILCA and continuing controversies); see also Linxwiler & Joseph, *supra* note 30 at 7-33-7-34.

32. See *Coyle v. Smith*, 221 U.S. 559, 573 (1911) ("[W]hen a new State is admitted to the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states . . .").

33. John Hanna, *Equal Footing in the Admission of States*, 3 BAYLOR L. REV. 519,

not do much work on its own; the heart of the doctrine comes from Article IV Section 3 of the Constitution, which says “[n]ew states may be admitted by the Congress into this union.”³⁴ From there, the Constitution defines how these new states will relate to each other and the federal government.³⁵

The Equal Footing Doctrine is important in the context of water rights primarily because of the Submerged Lands Act,³⁶ which gives states title to the land below navigable waters within their borders.³⁷ When Alaska became a state, it gained title to its submerged lands, except those specifically reserved by the federal government.³⁸

2. Federal Reserved Water Rights

The federal reserved water rights doctrine found its first expression in *Winters v. United States*.³⁹ *Winters* involved the water rights of the Fort Belknap Indian Reservation, located on the Milk River in Montana.⁴⁰ Conflict arose because diversions upriver from the reservation threatened to deprive it of water.⁴¹ The Court protected the reservation’s water rights from these intrusions; it held that when the United States created the reservation and set it aside to be habitable and arable, it reserved the water necessary to accomplish that purpose.⁴² In other words, the right to water was “intrinsic to the purpose of the reservation in general.”⁴³ Importantly, the *Winters* court rejected Montana’s Equal Footing Doctrine argument that the state gained control over the waters when it entered the union.⁴⁴ Therefore, the states’ jurisdiction over submerged lands has

523 (1951).

34. U.S. CONST. art. IV, § 3.

35. Hanna, *supra* note 33, at 522.

36. Submerged Lands Act, Pub. L. No. 83-31, 67 Stat. 29 (1953) (codified at 43 U.S.C. § 1301 *et seq.*).

37. *Id.*

38. *United States v. Alaska*, 521 U.S. 1, 32-33 (1997).

39. 207 U.S. 564 (1907).

40. Barbara Cosens, *The Legacy of Winters v. United States and the Winters Doctrine, One Hundred Years Later* 6-7, in *THE FUTURE OF INDIAN AND FEDERAL RESERVED WATER RIGHTS: THE WINTERS CENTENNIAL* (Barbara Cosens & Judith V. Royster eds. 2012).

41. *Id.* at 7.

42. *Winters*, 207 U.S. at 576-77.

43. Richard Monette, *One Hundred Years After Winters: The Immovable Object of Tribes’ Reserved Water Rights Meets the Irresistible Force of States’ Reserved Rights Under the Equal Footing Doctrine* 114, in *THE FUTURE OF INDIAN AND RESERVED WATER RIGHTS: THE WINTERS CENTENNIAL* (Barbara Cosens & Judith V. Royster eds. 2012).

44. *Winters*, 207 U.S. at 577 (“The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied . . .”).

no bearing on the federal government's ability to reserve water rights.⁴⁵

The Court has refined the reserved water rights doctrine over the years, but its basic structure remains the same. For instance, in *Cappaert v. United States*,⁴⁶ the court applied the doctrine to preserve Devil's Hole, a subterranean pool in the Death Valley National Monument.⁴⁷ The Court said that "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."⁴⁸

3. Navigational Servitude

The navigational servitude allows the government to use navigable waters for purposes related to navigation and commerce and preserve navigable waters for those purposes.⁴⁹ The navigational servitude derives from the Commerce power⁵⁰ and has roots in English common law.⁵¹ The servitude represents a public right of use.⁵² As such, the navigational servitude does not convey ownership of any land or waters.⁵³

B. The *Katie John* Decisions

1. Katie John I

When Sturgeon's challenge to the NPS hovercraft ban reached the Ninth Circuit, the panel heard the case against the backdrop of similar cases that applied ANILCA § 103(c) in the context of subsistence management. Each of these cases involved the same plaintiff, Katie John, a respected Athabascan elder and advocate for subsistence rights.⁵⁴

*Alaska v. Babbitt*⁵⁵ (*Katie John I*) involved the rights of Ahtna Athabascan Alaska Natives to continue subsistence fishing at the Batzulnetas fishery near the confluence of Tanada Creek and the Copper

45. *Id.*; for a more complete discussion of the relationship between reserved water rights and the Equal Footing Doctrine, see Monette, *supra* note 43.

46. 426 U.S. 128 (1976).

47. *Id.* at 138.

48. *Id.*

49. Genevieve Pisarski, *Testing the Limits of the Federal Navigational Servitude*, 2 OCEAN & COASTAL L.J. 313, 313 (1997).

50. U.S. CONST. art. I, § 8, cl. 3.

51. RALPH J. GILLIS, NAVIGATIONAL SERVITUDES: SOURCES, APPLICATIONS, PARADIGMS 3 (2007).

52. *Id.* at 2.

53. *City of Angoon v. Hodel*, 803 F.2d 1016, 1027 n.6 (9th Cir. 1986).

54. Julie Stricker, *Athabascan elder Katie John receives honorary doctorate*, FAIRBANKS DAILY NEWS-MINER (May 14, 2011), http://www.newsminer.com/news/local_news/athabascan-elder-katie-john-receives-honorary-doctorate/article_df8d9ec6-383c-59e7-9bd6-592ce5d8357c.html.

55. 72 F.3d 698 (9th Cir. 1995).

River in Wrangell-St. Elias National Park.⁵⁶ With the passage of ANSCA, Congress extinguished aboriginal fishing rights.⁵⁷ However, ANILCA gave priority to rural residents to engage in subsistence uses such as hunting and fishing on “public lands.”⁵⁸ In administering this part of ANILCA, the Secretary of the Interior adopted a regulatory definition of public lands that excluded navigable waters.⁵⁹ Katie John challenged this definition because it limited the ability of Mentasa village residents to use the Batzulnetas fishery.⁶⁰

The question at the heart of *Katie John I* is the same as the fundamental question presented in the *Sturgeon II* case: what is the meaning of “public lands” under ANILCA and are navigable waters included in that definition? In *Katie John I* the district court agreed with the plaintiffs in holding that the navigational servitude brought navigable waters within the scope of “public lands.”⁶¹ This holding was based on the premise that the navigable servitude amounts to ownership of an interest in navigable waters.⁶² The district court was also concerned with the policy consequences of interpreting “public lands” narrowly, excluding navigable waters that offer some of the best opportunities for subsistence fishing.⁶³

On appeal, the Ninth Circuit upheld the district court’s ruling in favor of Katie John but disagreed with the district court’s reasoning.⁶⁴ The circuit court rejected the idea that the navigational servitude gave the United States “title” to an “interest” in navigable waters.⁶⁵ The court found this interpretation to contradict an earlier ANILCA case, *City of Angoon v. Hodel*,⁶⁶ which held that the navigational servitude does not

56. *Id.* at 699–700.

57. 43 U.S.C. § 1603(b) (2012).

58. ANILCA § 804, 94 Stat. at 2423 (“Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes.”).

59. *Babbitt*, 72 F.3d at 701.

60. *Id.*

61. *John v. United States*, No. A90-0484-CV (HRH), 1994 WL 487830, at *18 (D. Alaska Mar. 30, 1994).

62. *See id.* at *17 (“[T]he United States may be considered to own an ‘interest’ in property by virtue of the navigational servitude. The court concludes that, for purposes of Title VIII of ANILCA, the United States holds title to an interest in the navigable waters of Alaska.”). [R4.1]

63. *See id.* at *18 (“By limiting the scope of Title VIII to non-navigable waterways, the Secretary has, to a large degree, thwarted Congress’ intent to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.”).

64. *Babbitt*, 72 F.3d at 704.

65. *Id.* at 703.

66. 803 F.2d 1016 (9th Cir. 1986).

give the United States title to navigable waters.⁶⁷ Instead, the court found that the federal reserved water rights doctrine was a more appropriate avenue saying, “By virtue of its reserved water rights, the United States has interests in some navigable waters. Consequently, public lands subject to subsistence management under ANILCA include certain navigable waters.”⁶⁸

The court employed two disparate approaches to judicial interpretation in coming to its conclusion in *Katie John I*. First, the court rejected the district court’s navigational servitude approach on textualist grounds, giving weight to the fact that the United States does not hold “title” to that interest.⁶⁹ However, the court did not seem concerned with the question of whether the United States holds title to its interest derived from the federal reserved waters doctrine.⁷⁰ Here, the court recognizes its more functionalist approach: “If we were to adopt the state’s position, that public lands exclude navigable waters, we would give meaning to the term ‘title’ in the definition of the phrase ‘public lands.’ But we would undermine congressional intent to protect and provide the opportunity for subsistence fishing.”⁷¹ The court gives meaning to the word title in one part of the opinion while minimizing its importance in another. To their credit, the court faced an exceptionally difficult task and “recognize[d] that [its] holding may be inherently unsatisfactory.”⁷²

2. *Katie John II*

Katie John I did not settle the issue. After the district court issued a ruling on remand consistent with *Katie John I*, the Ninth Circuit took the unusual step of voting to hear the case en banc before a three-judge panel had an opportunity to review it.⁷³ In *John v. United States (Katie John II)*,⁷⁴ the en banc court affirmed the district court’s decision with a one-paragraph opinion.⁷⁵ This result effectively endorsed the holding in *Katie John I*.

While the court adopted the *Katie John I* position, a concurring opinion by Judge Tallman laid out an alternative vision of how ANILCA

67. See *id.* at 1027 n.6 (“Since the United States does not hold title to the navigational servitude, the servitude is not ‘public land’ within the meaning of ANILCA.”).

68. *Babbitt*, 72 F.3d at 703–04.

69. *Id.* at 702–03.

70. *Id.* at 703–04.

71. *Id.* at 704.

72. *Id.*

73. *John v. United States*, 216 F.3d 885, 886 (9th Cir. 2000) (granting en banc review).

74. 247 F.3d 1032 (9th Cir. 2001) (per curiam).

75. *Id.* at 1033.

applies to navigable waters. Judge Tallman “[did] not believe Congress intended the reserved water rights doctrine to limit the scope of ANILCA’s subsistence priority.”⁷⁶ Instead, he reasoned that Congress invoked its Commerce Clause power to protect subsistence fishing in Alaska.⁷⁷ This interpretation relies in part on ANILCA’s declaration of findings.⁷⁸ If Congress intended federal authority in ANILCA CSUs to be coextensive with the commerce power, the importance of the “title” analysis would be greatly reduced. Like the district court in *Katie John I*, Judge Tallman was concerned with the policy implications of removing navigable waters from the subsistence priority.⁷⁹ His Commerce Clause approach represents a broad interpretation of the federal government’s authority to regulate under ANILCA.

Representing the opposite end of the spectrum with respect to federal authority, Judge Kozinski authored a dissenting opinion. He started from the principle that “Alaska exercises sovereignty over the beds of its navigable waters . . . its power to control navigation, fishing and other public uses of the water above the beds is an incident of this sovereignty.”⁸⁰ Judge Kozinski was unwilling to find that Congress intended to preempt that sovereignty without a “super-strong clear statement.”⁸¹ In his estimation, ANILCA did not offer a clear statement that the federal government intended to enter an area of traditional state sovereignty.⁸²

Judge Kozinski also used a textualist approach to arrive at what he thought to be the most tenable interpretation of ANILCA. He reasoned that since the federal reserved water doctrine does not grant “title” in the conventional sense, “the . . . reserved water right is simply not sufficient

76. *Id.* at 1034 (Tallman, J., concurring).

77. *Id.* at 1035 (Tallman, J., concurring) (citing 16 U.S.C. § 3111(4) (2012)).

78. *See* ANILCA § 801(4), 94 Stat. at 2422 (“[I]n order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act 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 . . .”).

79. *See John*, 247 F.3d at 1036 (Tallman, J., concurring) (“Given the crucial role that navigable waters play in traditional subsistence fishing, it defies common sense to conclude that, when Congress indicated an intent to protect traditional subsistence fishing, it meant only the limited subsistence fishing that occurs in non-navigable waters.”).

80. *Id.* at 1044 (Kozinski, J., dissenting) (citing *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987)).

81. *Id.*

82. *See id.* at 1050 (Kozinski, J., dissenting) (“[I]t is far from clear that Congress intended to take away the state’s traditional authority to control fishing in half of the state’s navigable waters, as the majority implicitly holds, or in all of the state’s navigable waters, as the concurrence would have it.”).

to turn waters subject to that right into public lands.”⁸³

While *Katie John II* affirmed the holding in *Katie John I*, it also highlighted the lack of unanimity behind that position amongst the en banc court.

3. Katie John III

The final chapter in the Katie John saga, *John v. United States*⁸⁴ (*Katie John III*), involved a challenge to the 1999 rules promulgated by the Secretaries of Agriculture and the Interior implementing the ruling in *Katie John I*.⁸⁵ Specifically, Katie John and others asserted that the rules defined “public lands” too narrowly by not including navigable waters upstream and downstream of ANILCA CSUs.⁸⁶ The court reaffirmed its reliance on the federal reserved water rights doctrine, upholding *Katie John I* and finding that the 1999 rules were consistent with its holding.⁸⁷

C. Subsistence Management after *Katie John*

The *Katie John* trilogy was a battle over the subsistence resource management regime in Alaska. However, *Katie John* was just one chapter in the history of subsistence in the state. Prior to European arrival in 1741, Alaska’s entire population was made up of indigenous people living a subsistence lifestyle.⁸⁸ The survival of this lifestyle was at stake when ANCSA extinguished aboriginal title along with traditional hunting and fishing rights in Alaska in exchange for land and monetary compensation.⁸⁹ ANILCA sought to preserve subsistence rights by codifying a subsistence priority for rural Alaskans in Title VIII.⁹⁰ Congress placed primary responsibility for implementing this priority in the state, with a federal right to step in if the state did not comply with the law within a year.⁹¹ In anticipation of ANILCA, Alaska passed a subsistence

83. *Id.* at 1047.

84. 720 F.3d 1214 (9th Cir. 2013).

85. *Id.* at 1218.

86. *Id.* at 1223.

87. *Id.* at 1245.

88. Jack B. McGee, *Subsistence Hunting and Fishing in Alaska: Does ANILCA’s Rural Subsistence Priority Really Conflict with the Alaska Constitution?* 27 ALASKA L. REV. 221, 223 (2010).

89. Robert T. Anderson, *Sovereignty and Subsistence: Native Self-Government and Rights to Hunt, Fish, and Gather after ANCSA*, 33 ALASKA L. REV. 187, 204 (2016).

90. ANILCA § 804, 94 Stat. at 2423.

91. *See id.* § 805(d), 94 Stat. at 2425 (“The Secretary shall not implement subsections (a), (b), and (c) of this section if within one year . . . the State enacts and implements laws of general applicability which are consistent with . . . sections 803, 804, and 805, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility pursuant to this title for the taking of fish and wildlife on the public lands for subsistence uses.”).

priority law in 1978, and regulations promulgated under that law brought Alaska into compliance with ANILCA.⁹²

However, Alaska's compliance did not last. In 1989, the Alaska Supreme Court ruled in *McDowell v. State* that the state's ANILCA-compliant rural subsistence priority violated Article VIII, Section 3 of the Alaska Constitution.⁹³ This provision guarantees that, "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."⁹⁴ The court's main complaint was with the "crude" nature of the urban-rural dichotomy as a criterion for establishing subsistence use.⁹⁵ The court suggested "[a] classification scheme employing individual characteristics would be less invasive of the article VIII open access values and much more apt to accomplish the purpose of the statute"⁹⁶ However, Alaska did not act to replace the unconstitutional rural priority with an alternative system.⁹⁷ The federal government stepped in to administer the subsistence priority on ANILCA-defined public lands.⁹⁸

This system persists because Alaska has never come back into compliance with ANILCA. On public lands (including navigable waters after *Katie John*), the federal government administers the rural subsistence priority.⁹⁹ The Federal Subsistence Management Board (FSMB) defines who is eligible for the rural subsistence priority and creates regulations regarding subsistence harvest.¹⁰⁰ On non-public lands, the State of Alaska administers its own subsistence management program.¹⁰¹ The rural subsistence priority only applies on federally regulated waters. This means that subsistence users must carefully consider whose jurisdiction they are hunting and fishing under, imposing the costs of research and possible mistakes on those users.

It is helpful to situate these subsistence programs in property law concepts of commons management. Both the state and federal systems

92. Anderson, *supra* note 89, at 214.

93. *McDowell v. State*, 785 P.2d 1, 9 (Alaska 1989).

94. ALASKA CONST. art. VIII, § 3.

95. *McDowell*, 785 P.2d at 10–11.

96. *Id.* at 11.

97. McGee, *supra* note 88, at 236.

98. *Id.*

99. U.S. FISH & WILDLIFE SERV., OFFICE OF SUBSISTENCE MGMT., 2017/2019 FEDERAL SUBSISTENCE FISHERIES REGULATIONS 3 (effective Apr. 1, 2017–Mar. 31, 2019), https://www.fws.gov/uploadedFiles/Region_7/NWRS/Zone_1/Tetlin/PDF/2017-2019_fisheries_regulations-web_reduced.pdf.

100. 50 C.F.R § 100.10(a), (d) (2019); LISA MAAS, U.S. FISH & WILDLIFE SERV., FEDERAL SUBSISTENCE MANAGEMENT PROGRAM 1, https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd541305.pdf (last visited Oct. 4, 2019).

101. MAAS, *supra* note 100, at 1.

regulate the gear and methods that can be used for subsistence fishing.¹⁰² These are “rightway” regulations that use technology restrictions to place a functional limit on the amount that can be harvested.¹⁰³ By adding the rural subsistence priority, the federal system incorporates a “keep-out” regulation that restricts the number of people who can access the resource.¹⁰⁴

IV. THE *STURGEON* DECISIONS

On his quest to use his hovercraft in the Yukon-Charley preserve, John Sturgeon went to the Supreme Court twice. Grappling with many of the same issues as the Ninth Circuit in the *Katie John* trilogy, the Court arrived at a final answer regarding the proper statutory interpretation of section 103(c). However, the Court’s solution does not resolve underlying tensions regarding subsistence management in Alaska. The perpetual push and pull between the state and the federal government will continue, but the *Sturgeon II* decision may present an opportunity for increased cooperation and compromise.

A. *Sturgeon I*

In 2013, the district court ruled against Sturgeon, holding that since none of the regulations Sturgeon challenged applied “solely” to public lands within ANILCA CSUs, they were not precluded by section 103(c).¹⁰⁵ The Court found it dispositive that the regulations applied to NPS units nationwide, not just in Alaska.¹⁰⁶ This narrow interpretation left NPS free to regulate inholdings in ANILCA parks as long as their regulations applied generally to NPS property in all fifty states. The court did not reach the question of whether the Nation River and other navigable waters within CSUs were “public lands.”¹⁰⁷ On appeal, the Ninth Circuit

102. See ALASKA ADMIN. CODE tit. 5 § 39.105 (2019) (documenting the gear allowed by state law); see also U.S. FISH & WILDLIFE SERV., OFFICE OF SUBSISTENCE MGMT., *supra* note 99, at 83 (listing the allowable gear for subsistence fishing).

103. Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1, 9 (1991).

104. See *id.* (defining available methods of managing common resources).

105. *Sturgeon v. Masica*, No. 3:11-cv-0183-HRH, 2013 WL 5888230, at *8 (D. Alaska Oct. 30, 2013) (“None of those regulations was adopted ‘solely’ to address entry upon or use of various equipment on public lands within ANILCA-created conservation units such as Yukon-Charley and Katmai.”).

106. *Id.* at *9 (“[The regulations banning hovercrafts and helicopters] are regulations of general applicability across the entirety of the NPS.”).

107. *Id.* at *7 (“[W]e need not decide here which if any of the correlative rights with respect to the navigable waters (as distinguished from submerged lands) of the Nation and Alagnak Rivers are owned by the State or the United States, or

affirmed the district court's ruling and its interpretation of ANILCA section 103(c).¹⁰⁸ Like the district court, the circuit court did not reach the question of whether navigable waters within CSUs were "public lands" for the purposes of ANILCA.¹⁰⁹ Finally, the Supreme Court reversed the Ninth Circuit's decision. Chief Justice Roberts wrote for the Court, rejecting the lower courts' construction of the statute and remanding the case for consideration of the broader "public lands" issue.¹¹⁰

B. The Ninth Circuit's Ruling

On remand, the Ninth Circuit finally reached the central issue of whether navigable waters are included in "public lands" under ANILCA.¹¹¹ By the time the court decided this iteration of the section 103(c) issue, the competing interests and interpretations had been thoroughly hashed out in the *Katie John* decisions. Nonetheless, the court performed its own analysis of the role section 103(c) plays in the ANILCA system, finding that ANILCA contemplates at least some NPS interest in non-public lands.¹¹² Judge Nguyen concluded that the *Katie John* cases were binding and decided the issue based on the federal government's interest in the federal reserved waters doctrine.¹¹³

While the Ninth Circuit's holding was relatively straightforward, there are two additional aspects of the opinion that are worth highlighting. First, the court recognized the importance of having a consistent definition of "public lands" throughout ANILCA.¹¹⁴ Second, Judge Nguyen took the unusual step of authoring an opinion concurring with her own majority opinion, characterizing the result as "unfortunate."¹¹⁵ The concurring opinion echoes the critiques of *Katie John*

whether such interests are or are not public land.").

108. *Sturgeon v. Masica*, 768 F.3d 1066, 1077 (9th Cir. 2014) ("In short, then, the hovercraft ban is not one that 'appli[es] solely to public lands within [CSUs]' in Alaska.").

109. *Id.* at 1077-78 ("[E]ven assuming (without deciding) that the waters of and lands beneath the Nation River have been 'conveyed to the State' for purposes of § 103(c), that subsection does not preclude the application and enforcement of the NPS regulation at issue.").

110. *Sturgeon v. Frost*, 136 S. Ct. 1061, 1072 (2016).

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

112. *See id.* at 932 ("ANILCA recognizes that the federal government retains an interest in at least some otherwise non-public lands.").

113. *Id.* at 934 ("We are bound under our *Katie John* precedent to reach a similar conclusion here.").

114. *Id.* ("It would be anomalous if we treated the regulation at issue in *Katie John III* regarding the geographic scope of regulations implementing Title VIII as employing a different construction of 'public lands' than applicable elsewhere in ANILCA.") (internal citations omitted).

115. *Id.* at 937 (Nguyen, J., concurring).

that were present throughout the original litigation. According to Judge Nguyen:

A reserved water right is the right to a sufficient *volume* of water for use in an appropriate federal purpose. This case has nothing to do with that. Rather, it is about the right to regulate navigation on navigable waters within an Alaska national preserve. That is a Commerce Clause interest and should be analyzed as such.¹¹⁶

As this critique suggests, the Ninth Circuit's decision in *Sturgeon II* represented a microcosm of the *Katie John* saga. At least for Judge Nguyen, the *Katie John* precedent remained an "inherently unsatisfactory" resolution to a complex problem.¹¹⁷

C. The Supreme Court Weighs in Again

*Sturgeon II*¹¹⁸ finally gave the Supreme Court the opportunity to decide whether navigable waters in Alaska's CSUs are "public lands" under ANILCA. The Court took the opportunity to overturn the Ninth Circuit's holding and to reject its approach to the problem. Writing for the Court, Justice Kagan began from the premise that federal reserved water rights are usufructuary and do not confer title in the traditional sense.¹¹⁹ The Court found this fact decisive with regard to the "public lands" question. Reflecting on the *Katie John* decisions, this approach brings to mind Judge Kozinski's textualist dissent in *Katie John II*.¹²⁰ The Court's conclusion bars enforcement of NPS regulations in Alaska CSUs' navigable waters. Justice Kagan points out that the Court's holding is consistent with ANILCA's "grand bargain" because it "provide[s] an 'assurance' that [inholding owners] would not be subject to all the regulatory constraints placed on neighboring federal properties."¹²¹ This conclusion also offers a reading of ANILCA that is consistent with traditional conceptions of federal water law.¹²² On its surface, the Court's resolution of *Sturgeon II* is a cut and dried construction of ANILCA, but two additional factors complicate the matter.

First, Justice Sotomayor filed a concurring opinion joined by Justice

116. *Id.* (Nguyen, J., concurring) (internal citations omitted).

117. *See Alaska v. Babbitt*, 72 F.3d 698, 704 (9th Cir. 1995) (recognizing that the holding in *Katie John I* is frustrating because of the administrative burden and potential confusion it creates).

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

119. *Id.* at 1079.

120. *John v. United States*, 247 F.3d 1032, 1047 (9th Cir. 2001) (per curiam) (Kozinski, J., concurring).

121. *Sturgeon*, 139 S. Ct. at 1084.

122. *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.10 (1954).

Ginsburg that takes issue with the presumed implications of the majority's holding. On narrow statutory construction grounds, Justice Sotomayor agrees that navigable waters are not public lands under ANILCA.¹²³ However, Justice Sotomayor dove headlong into two sources of NPS authority the majority did not discuss. The most significant of these is the authority to regulate out-of-park areas when it is necessary and proper to protect in-park areas.¹²⁴ Here, this authority would allow NPS to regulate on navigable waters where it is necessary and proper to uphold the purposes of a CSU.

Justice Sotomayor is confident that this power exists and can be exercised in Alaska because "Congress must have intended for the Park Service to have at least some authority over navigable waters within Alaska's parks."¹²⁵ She calls upon several examples of ANILCA's focus on "rivers and river systems."¹²⁶ This argument is compelling because it seems unlikely that Congress would call upon NPS to, for instance, "maintain the environmental integrity of the Charley River basin, including streams, lakes and other natural features"¹²⁷ if the NPS has no authority to regulate navigable waters in CSUs.¹²⁸ This argument leaves open the possibility that NPS could reassert regulations like the hovercraft ban by citing its out-of-park authority.

Second, the Court in *Sturgeon II* avoids fully addressing the *Katie John* trilogy. In a footnote, citing to the briefs of the State of Alaska and the Ahtna Native Alaskan corporation, the Court says that ANILCA's subsistence fishing provisions are "not at issue in this case."¹²⁹ As such, the Court "do[es] not disturb the Ninth Circuit's holdings that the Park Service may regulate subsistence fishing on navigable waters."¹³⁰ Though the Court does not belabor this point, its holding means that "public lands" has different meanings in different parts of ANILCA.¹³¹ As addressed below, this inconsistency poses challenges for regulatory consistency.

123. *Sturgeon*, 139 S. Ct. at 1088 (Sotomayor, J., concurring).

124. *Id.*

125. *Id.* at 1089.

126. *Id.*

127. 16 U.S.C. § 410hh(10) (2018).

128. *Sturgeon*, 139 S. Ct. 1066, 1089 (2019) (Sotomayor, J., concurring).

129. *Id.* at 1080 n.2.

130. *Id.*

131. *See id.* at 1079–80, 1082 (defining "public lands" to mean lands where the federal government holds title to a reserve water right and to mean any federally owned land).

V. RESPONSES TO STURGEON

A. Alaska's Response to Increased Sovereignty

The State of Alaska's reaction to *Sturgeon II* was overwhelmingly positive. The state has long viewed the turf war over navigable waters in CSUs as an issue of sovereignty.¹³² Governor Dunleavy released an effusive statement praising the ruling and saying, "Today's ruling represents an important moment for Alaska's sovereignty and the rule of law."¹³³ Department of Fish and Game Commissioner Doug Vincent-Lang was equally pleased because "[Alaska's] waterways are our lifeblood. Management authority impacts fishing, hunting, transportation and economic development—all the things Alaskans hold dear. With this decision the state can continue to do what it does best: manage Alaska's resources for the benefit of all Alaskans."¹³⁴ Clearly, the state views the decision as a win and is happy to take on more influence over CSUs. Alaska's federal lawmakers also supported the decision and congratulated Sturgeon on his victory.¹³⁵ Senator Lisa Murkowski was careful to specify that she appreciated the Court's refusal to overturn the *Katie John* decisions.¹³⁶ The state was not specific about the implications of the decisions in the near term, but it seems that the provisions of the Alaska Administrative Code will replace NPS regulations as the governing law on the navigable waters in CSUs.¹³⁷

B. Alaska Native Responses

Before the Supreme Court, the Native American Rights Fund (NARF) joined an amicus brief that advocated for the *Katie John* approach to be extended in *Sturgeon II*.¹³⁸ This position was likely motivated by the

132. See Press Release, Alaska Dep't of Law, U.S. Supreme Court Agrees to Hear Sturgeon Case on Alaska Water Rights (June 18, 2018) ("The State will continue to defend our sovereign rights and the best interests of Alaskans."), <http://www.law.alaska.gov/press/releases/2018/061818-Sturgeon.html>.

133. Press Release, Governor Michael J. Dunleavy, Supreme Court Rules 9-0 in Favor of John Sturgeon and Alaska's Rights (Mar. 26, 2019), <https://gov.alaska.gov/newsroom/2019/03/26/supreme-court-rules-9-0-in-favor-of-john-sturgeon-and-alaskas-rights/>.

134. *Id.*

135. Press Release, Senator Lisa Murkowski, Alaska Congressional Delegation Welcomes Supreme Court's Unanimous Decision on Sturgeon Case (Mar. 26, 2019), <https://www.murkowski.senate.gov/press/release/alaska-congressional-delegation-welcomes-supreme-courts-unanimous-decision-on-sturgeon-case->.

136. *Id.*

137. See Governor Michael J. Dunleavy, *supra* note 133.

138. Brief for Alaska Native Subsistence Users as Amici Curiae Supporting

desire to maintain the hard-won victories of Alaska Natives and subsistence users through the *Katie John* litigation. Though the Supreme Court rejected the arguments advanced by NARF, the Alaska Native responses to the Supreme Court's ruling in *Sturgeon II* have been widely positive.¹³⁹

The Alaska Federation of Natives (AFN) released a statement praising the *Sturgeon* decision, saying the organization viewed the ruling "favorably."¹⁴⁰ The Court's decision to leave the *Katie John* decisions undisturbed was especially important to AFN.¹⁴¹ Ahtna, a Native Alaskan corporation, also approved of the decision despite filing an amicus brief that did not reflect the Court's ultimate conclusion.¹⁴²

While Alaska Native reactions to *Katie John* precedent's survival were positive, they recognized that challenges remain. AFN said, "The real problem of dual federal-state management of Alaska's fish and game resources remains unsolved."¹⁴³

C. Parks Service

The NPS response to the *Sturgeon II* ruling has been muted thus far. Immediately following the ruling, the NPS said it was "determin[ing] what changes will be necessary to bring existing policy in line with today's ruling."¹⁴⁴ The National Parks Conservation Association, a nonprofit group focused on preserving national parks, voiced more disappointment.¹⁴⁵ Though NPS has not said as much, the *Sturgeon* decision does leave the federal government in something of a conundrum. As Justice Sotomayor pointed out in concurrence, ANILCA

Respondents, *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019) (No. 17-949).

139. *AFN Responds to Supreme Court's Decision on Sturgeon Case*, THE DELTA DISCOVERY, Apr. 3, 2019, <https://deltadiscovery.com/afn-responds-to-supreme-courts-decision-on-sturgeon-case/>.

140. *Id.*

141. *Id.*

142. Press Release, Ahtna, Inc., Ahtna Issues Statement in Response to U.S. Supreme Court *Sturgeon* Decision (Mar. 26, 2019), https://www.ahtna-inc.com/wp-content/uploads/2019/03/2019-AHTNA-MEDIA-RELEASE_Sturgeon-Decision_FINAL.pdf.

143. *AFN Responds to Supreme Court's Decision on Sturgeon Case*, *supra* note 139.

144. Zaz Hollander, *Supreme Court Backs Alaska Moose Hunter Over Park Service but Steers Clear of Katie John*, ANCHORAGE DAILY NEWS, Mar. 26, 2019, <https://www.adn.com/outdoors-adventure/2019/03/26/supreme-court-backs-alaska-moose-hunter-over-park-service-in-broad-ruling-on-jurisdiction/>.

145. Press Release, Nat'l Parks Conservation Ass'n, Supreme Court Ruling Green-Lights Hovercraft Use in Alaska National Park (Mar. 26, 2019), <https://www.npca.org/articles/2135-supreme-court-ruling-green-lights-hovercraft-use-in-alaska-national-park>.

calls on NPS to preserve many of the rivers in CSUs.¹⁴⁶ This task will be difficult if not impossible with only the authority to control the lands surrounding those waters. The approach NPS takes to solving this puzzle will have important implications for the future of Alaska resource management.

Jim Adams, the regional director of the NPS in Alaska, seemed willing to pursue the alternative regulatory routes offered in the Sotomayor concurrence.¹⁴⁷ He commented that opinion “makes it clear that the park service still has the authority to protect park lands from resource damage.”¹⁴⁸ At the same time, he recognized the *Sturgeon II* decision as an opportunity for collaboration, saying “[the ruling] give[s] the Park Service a voice in management of the river and it gives the state a voice in management of the river [a]nd the challenge and the opportunity the agencies have now moving forward is to work together.”¹⁴⁹

This spirit of cooperation is key if the issues left open following the *Sturgeon II* opinion are to be resolved. The NPS could attempt to reinstate all or most of their existing regulations under the authorities suggested in the Sotomayor opinion. However, this recalcitrant approach would almost certainly lead to more litigation, prolonging a courtroom battle that has lasted almost a decade already. As AFN Subsistence Committee Chairman Tom Tilden noted, “Litigation is no place to solve our resource management problems.”¹⁵⁰

VI. LIFE AFTER *STURGEON II*

A. Vulnerability of *Katie John* Precedent

While the Supreme Court “d[id] not disturb”¹⁵¹ the *Katie John* trilogy in its *Sturgeon II* opinion, it is not entirely clear where the *Katie John* cases stand in a post-*Sturgeon* world. On one hand, it seems that the Court adopted the State of Alaska’s assertion that “public lands” should mean something different in subsistence and non-subsistence contexts.¹⁵² On the other hand, the Supreme Court adopted an unambiguous definition

146. *Sturgeon v. Frost*, 139 S. Ct. 1066, 1089 (2019) (Sotomayor, J., concurring).

147. Nat’l Parks Conservation Ass’n, *supra* note 145.

148. *Id.*

149. Lauren Maxwell, ‘Our Parks are Different.’ *Sturgeon* Hails Supreme Court Ruling, KTVA, Mar. 26, 2019, <https://www.ktva.com/story/40200421/our-parks-are-different-sturgeon-hails-supreme-court-ruling>.

150. AFN Responds to Supreme Court’s Decision on *Sturgeon Case*, *supra* note 139.

151. *Sturgeon*, 139 S. Ct. at 1080 n.2 (2019).

152. *See id.*

of “public lands” that repudiates the *Katie John* Courts’ approach.¹⁵³ At the very least, the *Sturgeon* and *Katie John* cases coexist uneasily. Their apparent conflict adds another layer of complication to the regulation of navigable waters in CSUs. The federal government lacks the power to impose NPS regulations on those waters under the *Sturgeon II* decision but is required to regulate subsistence and uphold the rural subsistence priority under *Katie John* and Title VIII of ANILCA.¹⁵⁴ This situation further blurs the line between federal and state authority. Any judicial solution to this problem will be fraught with thorny issues.

B. Potential Judicial Solutions

1. *The End of Katie John*

One route for the courts would be to do away with the *Katie John* doctrine. This approach would be consistent with the *Sturgeon* majority’s implication that the federal reserved waters doctrine does not customarily confer “title.”¹⁵⁵ ANILCA initially assigned primary responsibility for subsistence management to the states, so state management would also be consonant with the statute.¹⁵⁶ However, state management would run squarely into the state constitutional law issues that led to federal management in the first place.¹⁵⁷ Without a state constitutional amendment or reinterpretation of *McDowell*, a state-run subsistence management system would remain noncompliant with ANILCA.¹⁵⁸

2. *The Imperfect Status Quo*

Another path would be to continue defining “public lands” differently with regard to subsistence use and non-subsistence management. This appears to be the state of affairs after *Sturgeon II*.¹⁵⁹ The legal viability of this interpretation relies on the ability to interpret a statutorily defined term differently in separate contexts within the same statutory scheme. The leading cases establishing this principle, cited by the State of Alaska in *Sturgeon*, concern the use of broad terms (i.e. “air pollutant”).¹⁶⁰ These kinds of terms lend themselves to flexible

153. *Id.* at 1076–77.

154. *Id.* at 1084–85.

155. *See id.* at 1079 (“[T]he more common understanding . . . is that ‘reserved water rights are not the type of property interests to which title can be held’ . . .”) (quoting *Totemoff v. State*, 905 P.2d 954, 965 (Alaska 1995)).

156. ANILCA § 805(d), 94 Stat. at 2424.

157. *McDowell v. State*, 785 P.2d 1, 9 (Alaska 1989).

158. *See id.*

159. *See generally Sturgeon*, 139 S. Ct. 1066 (2019).

160. *See Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (“A given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies. The point

interpretation. In addition, the structure of a comprehensive statute largely implemented by one agency provides a hospitable environment for some internal inconsistency. When the Environmental Protection Agency defines the term “air pollutant” to include greenhouse gases in one Clean Air Act context, but excludes them in another, the agency can work internally to ensure this difference does not create confusion.

The navigable waters in ANILCA CSUs present different considerations. The costs to administrability will likely be higher where the statutory term in question (i.e. “public lands”) is decisive as to whether the state or federal government has jurisdiction. Defining “public lands” differently within ANILCA subjects the same navigable waters to two regulatory authorities. The deciding factor would be subsistence management, federally regulated under the *Katie John* definition, and non-subsistence management, regulated by the State under the *Sturgeon II* definition.¹⁶¹

While these two regimes might not directly contradict each other, their separate goals could lead to conflict. The federal subsistence management program strives to preserve resources for subsistence use by rural Alaskans.¹⁶² The State of Alaska administers its programs to promote open access.¹⁶³ These goals seem primed to lead to continued federal-state tension. Further, NPS regulations will no longer apply on the CSU navigable waters that the federal government will still manage for subsistence.¹⁶⁴ To the extent that NPS regulations implicitly supported subsistence use, perhaps by prohibiting access by means such as

is the same even when the terms share a common statutory definition, if it is general enough . . .”).

161. See *John v. United States*, 720 F.3d 1214, 1241 (9th Cir. 2013) (“[F]ederally reserved water rights may be enforced to implement ANILCA’s rural subsistence priority as to waters within and ‘immediately adjacent to’ federal reservations, but not as to waters upstream and downstream from those reservations. . . . [T]he federal reserved water rights doctrine might apply upstream and downstream from reservations in some circumstances, were there a particularized enforcement action for that quantity of water needed to preserve subsistence use in a given reservation, where such use is a primary purpose for which the reservation was established.”); *Sturgeon v. Frost*, 139 S. Ct. 1066, 1080 n.2 (2019) (holding that navigable waters within ANILCA CSUs are non-public lands subject to local control, but leaving the federal subsistence management regime intact).

162. See ANILCA §§ 801-16, 94 Stat. at 2422-2430 (1980) (establishing the subsistence priority).]

163. See ALASKA CONST. art. VIII, §§ 1, 3 (providing for open access to Alaska’s land and waters).

164. See *Sturgeon*, 139 S. Ct. at 1087 (2019) (“But [non-public lands] did not become subject to new regulation by the happenstance of ending up within a national park. In those areas, Section 103(c) makes clear, Park Service administration does not replace local control.”); see also 36 C.F.R. §§ 2.1-2.62 (regulating activities in National Parks).

hovercrafts, that synergy will no longer exist.¹⁶⁵

Each of these judicial solutions, including the status quo, leaves serious questions unanswered. None of them is ideal. In the short term, both the state and NPS have the opportunity push their positions aggressively in the courts. The State could attack the *Katie John* decisions, using *Sturgeon II* as ammunition. Likewise, NPS could seize on the Sotomayor concurrence to assert out-of-park authority and reinstate regulations on CSU navigable waters that the State would surely challenge. Either of these approaches would likely entail protracted litigation. This battle would be unlikely to result in the best solution for either party. It is time for a truce in the ANILCA jurisdiction wars.

VII. COOPERATIVE MANAGEMENT AS A POLICY SOLUTION

If the courts are not the place to find a solution for ANILCA's jurisdictional problems, the state and federal governments, along with Alaska Native stakeholders, will have to work together to solve their problems. The most promising avenue to reach a satisfactory outcome for all parties, allowing for subsistence use, conservation, and state sovereignty, is cooperative management. The State has called for greater cooperation with the federal government across a range of resource management issues.¹⁶⁶ The Department of the Interior has also expressed a desire to be a better "neighbor" to the states by engaging in collaborative management.¹⁶⁷ ANILCA provides several opportunities for this kind of cooperation, including conservation and management plans,¹⁶⁸ the Alaska Land Use Council (ALUC),¹⁶⁹ and approval of memoranda of understanding.¹⁷⁰ Cooperative efforts between the federal and state governments could lead to further synchronization of subsistence management. Ultimately, these efforts could prompt substantive changes in state law that would allow for the ANILCA compliant state subsistence management the law's framers envisioned.

165. See 36 C.F.R. § 3.8(a)(1) (prohibiting the use of airboats).

166. Letter from Doug Vincent-Lang, Acting Comm'r, Alaska Dep't of Fish & Game, to David Bernhardt, Deputy Comm'r, Dep't of the Interior (Jan. 2, 2019), https://www.peer.org/assets/docs/ak/1_8_19_Transmittal_ltr.pdf (transmittal letter); see also Attachment to Letter from Doug Vincent-Lang, (Jan. 2, 2019), https://www.peer.org/assets/docs/ak/1_8_19_Full_list_demands.pdf (attachments).

167. JASON HAYES, MACKINACK CTR. FOR PUB. POLICY, CONFLICT TO COOPERATION: COLLABORATIVE MANAGEMENT OF FEDERAL LANDS IN MICHIGAN 11-12 (2018), <https://www.mackinac.org/archives/2018/s2018-07.pdf>.

168. ANILCA § 1301, 94 Stat. at 2472-73 (1980).

169. *Id.* § 1201.

170. *Id.* § 809.

A. Conservation and Management Plans

Section 1301 of ANILCA requires the preparation of conservation and management plans for each ANILCA National Park and preserve within five years.¹⁷¹ Section 304(g)(1) requires a comprehensive conservation plan for each national refuge.¹⁷² These requirements prompted a deluge of planning after the Act's passage that limited the capacity for meaningful participation by sheer scale.¹⁷³ While NPS has updated some of these plans,¹⁷⁴ others, including the conservation and management plan for the Yukon-Charley Rivers National Preserve, have not been updated since their publication in the 1980s.¹⁷⁵ More than thirty years later, the time is ripe to revisit these plans. *Sturgeon II* gives the state expanded sovereignty over rivers that the federal government is required to conserve under ANILCA.¹⁷⁶ This expanded sovereignty calls for increased coordination with the federal government. Reopening the management plan process for updates offers a perfect opportunity for state, federal, and Alaska Native stakeholders to be heard through the notice and comment process.

Rather than enacting regulations directly, the federal government can seek to reach their goals through state policy. For instance, the State has the capacity to enact common sense regulations on the kinds of vessels can be used on CSU rivers.¹⁷⁷ If the State implements such policies, both the conservation and state sovereignty aspects of ANILCA can be fully realized. These kinds of compromises have the potential to grow from the management plan process. The NPS should adopt a policy of systematically reviewing and reopening the management plans for the CSUs in Alaska over the next ten years, beginning with those that have not been revisited since their publication.

171. *Id.* § 1301.

172. *Id.* § 304(g)(1).

173. Thomas J. Gallagher, *Native Participation in Land Management Planning in Alaska*, 41 *ARCTIC* 91, 94 (1989).

174. *See, e.g.*, NAT'L PARK SERV., CONSOLIDATED MANAGEMENT PLAN FOR DENALI NATIONAL PARK (last updated 2006), <https://www.nps.gov/dena/learn/management/upload/GMP-Consolidated-Final.pdf>.

175. *See, e.g.*, NAT'L PARK SERV., YUKON-CHARLEY RIVERS NATIONAL PRESERVE GENERAL MANAGEMENT PLAN (1985), <https://parkplanning.nps.gov/document.cfm?parkID=22&projectID=34502&documentID=3808>.

176. *See e.g.*, ANILCA § 202(2) ("The monument addition and preserve shall be managed . . . to maintain unimpaired the water habitat for significant salmon populations . . .").

177. *See* ALASKA ADMIN. CODE tit. 11, § 20.860(b) (2019) (limiting the power of motors allowed in the Kenai River Special Management Area to 50 horsepower).

B. Reviving ALUC

ANILCA established ALUC to provide a forum for federal agencies, state government, and Alaska Native interests to collaborate and voice their opinions on issues regarding land management in Alaska.¹⁷⁸ ALUC was comprised of a presidential appointee, the Governor of Alaska, the Alaska office heads of several federal agencies including NPS and FWS, and two representatives selected by Alaska Native corporations.¹⁷⁹ The Council did not have much in the way of regulatory authority; its main function was to make recommendations to the state and federal governments.¹⁸⁰ However, ALUC did convene a representative body that included many of the major parties concerned with Alaska land management.¹⁸¹ The Council also recommended cooperative planning zones where “the management of lands or resources by one member materially affects the management of lands or resources by another”¹⁸² This kind of body could work to facilitate collaboration that would alleviate some of the remaining federal-state tensions in the wake of *Sturgeon II*.

Unfortunately, ANILCA included a sunset provision that disbanded ALUC after ten years absent congressional action.¹⁸³ Reconstituting ALUC would be timely, because a state body that performed a similar function, the Citizens Advisory Council on Federal Areas, recently lost state funding.¹⁸⁴ In 2016, Alaska Senator Lisa Murkowski introduced a bill that would reinvigorate ALUC.¹⁸⁵ State leaders like Senator John Coghill have also called for a ALUC’s revival.¹⁸⁶ Bringing back the Council would not be a panacea. Its predecessor was plagued by the state-federal competition that pervades Alaska land management.¹⁸⁷ However, ALUC at least creates a forum where collaboration can happen and compromises must be made. Perhaps *Sturgeon II* could present an opportunity for a new ALUC to designate cooperative management areas around navigable

178. ANILCA § 1201.

179. *Id.*

180. *Id.*

181. *See id.* § 1201(c) (specifying membership of ALUC to include representatives from federal and state organizations, and Alaska Native corporations).

182. *Id.* § 1201(j)(1).

183. *Id.* § 1210(l).

184. Sam Friedman, *Gov. Walker’s Budget Veto Closes State Federal Overreach Panel*, FAIRBANKS DAILY NEWS-MINER, July 2, 2016, http://www.newsminer.com/news/local_news/gov-walker-s-budget-veto-closes-state-federal-overreach-panel/article_fb6cb850-40f2-11e6-9cc7-a36712131ef4.html.

185. Alaska Land Use Planning Act, S. 3005, 114th Cong. (2016).

186. Friedman, *supra* note 184.

187. Gallagher, *supra* note 173, at 93.

waters. This could help both parties meet their goals. While it would require an act of Congress, reinstating ALUC would be a step in the right direction for cooperative management in Alaska CSUs.

C. Memoranda of Understanding

Section 809 of ANILCA authorizes cooperative subsistence management plans by saying, “The Secretary may enter into cooperative agreements or otherwise cooperate with other Federal agencies, the State, Native Corporations, other appropriate persons and organizations . . . to effectuate the purposes and policies of this [title].”¹⁸⁸ These agreements take the form of memoranda of understanding (MOUs) between the federal government and other interested parties.¹⁸⁹ In the past, the Federal Subsistence Management Board operated under an MOU with the State of Alaska that provided an outline of federal-state relations in subsistence management.¹⁹⁰ However, this MOU expired.¹⁹¹ Efforts to revive the MOU commenced in 2016, but they do not seem to have resulted in a final agreement.¹⁹² A new MOU would normalize federal-state relations and make coordinating with other parties easier.¹⁹³

Beyond federal-state relations, MOUs for subsistence co-management between the federal government and Alaska Native groups has seen some success. A Memorandum of Agreement between the Department of Interior and the Ahtna Native Corporation allows for greater Alaska Native input regarding moose and caribou hunting and

188. ANILCA § 809.

189. See, e.g., Memorandum of Agreement Between United States Department of the Interior and Ahtna Inter-Tribal Resource Commission for a Demonstration Project for Cooperative Management of Customary and Traditional Subsistence Uses in the Ahtna Region (2016), https://www.doi.gov/sites/doi.gov/files/uploads/ahtna_doi_moa_with_signature_pages_final.pdf. (citing ANILCA as supporting authority for a wildlife management partnership between the United States Department of the Interior and the Ahtna Inter-Tribal Resource Commission).

190. FED. SUBSISTENCE MGMT. BD., PUB. MEETING MATERIALS JANUARY 10-12, 2017 at 130, https://www.doi.gov/sites/doi.gov/files/uploads/jan_2017_fsb_meeting_book_smallest.pdf.

191. Joaquin Estus, *Federal Subsistence Board Votes to Mend Alaska Relations*, ALASKA PUBLIC MEDIA, Jan. 19, 2016, <https://www.alaskapublic.org/2016/01/19/federal-subsistence-board-to-see-agreement-with-state/>.

192. Letter from Tim Towarak, Chair, Fed Subsistence Mgmt.t Bd., to Ted Spraker and Tom Kluberton, Chairmen, Alaska Dep’t of Fish and Game Bds. Support Section (Mar. 1, 2016), http://www.adfg.alaska.gov/static/regulations/regprocess/gameboard/pdfs/2015-2016/work_session/fsb.pdf.

193. See Estus, *supra* note 191 (“[W]e’re not going to do much better to bring in a third party when the first two parties aren’t necessarily in alignment or agreement . . .”) (quoting Daniel Sharp, Subsistence Coordinator, Alaska Office, BLM).

began the process of allowing the Ahtna Commission to administer hunts for tribal members under the Federal Subsistence Management Program.¹⁹⁴ In the fisheries context, FWS has entered an MOU with the Kuskokwim River Inter-Tribal Fish Commission.¹⁹⁵ The MOU provides for consultation with the Commission before FWS makes decisions about the Kuskokwim salmon fishery.¹⁹⁶ These MOUs have promise as tools for increased cooperation and show a willingness on the federal government's part to work with stakeholders.¹⁹⁷ However, these MOUs do not include the State of Alaska, largely because the State cannot allocate resources to one subgroup of Alaskans.¹⁹⁸

The Federal Subsistence Board and the State could leverage the section 809 MOU process in two ways to alleviate the tensions between federal and state subsistence management systems. First, while the rural subsistence priority remains an intractable problem between the state and federal government, a new MOU could synchronize the "rightway" regulations in the federal and state systems. For instance, it makes little sense to have differing regulations of fishing gear in the federal and state systems.¹⁹⁹ This level of coordination would reduce the level of inconsistency between the two regulatory regimes. Second, the federal

194. See Memorandum of Agreement Between United States Department of the Interior and Ahtna Inter-Tribal Resource Commission for a Demonstration Project for Cooperative Management of Customary and Traditional Subsistence Uses in the Ahtna Region (2016), https://www.doi.gov/sites/doi.gov/files/uploads/ahtna_doi_moa_with_signature_pages_final.pdf ("This MOA formalizes an agreement for the purpose of establishing a process and structure as a demonstration project within the Federal Subsistence Management Program that provides the AITRC with authority to cooperatively manage, within parameters established by the Board, certain aspects of subsistence hunting on Federal public lands by rural residents who are members of the eight federally recognized tribes in the Ahtna region."); see also Press Release, U.S. Dep't of the Interior, Interior and Ahtna Intertribal Resource Commission Agree to Cooperative Wildlife Demonstration Project (Nov. 29, 2016), <https://www.doi.gov/pressreleases/interior-and-ahtna-intertribal-resource-commission-agree-cooperative-wildlife> (announcing "a cooperative wildlife management demonstration project on federal and Ahtna Corporation lands").

195. Memorandum of Understanding Between the United States Department of the Interior U.S. Fish and Wildlife Service Alaska Region and Kuskokwim River Inter-Tribal Fish Commission (2016), https://www.doi.gov/sites/doi.gov/files/uploads/kuskokwim_mou_final.pdf.

196. Charles Enoch, *KRITFC Signs an MOU With USFWS*, KYUK, (May 24, 2016), <http://www.kyuk.org/post/kritfc-signs-mou-usfws>.

197. Chris McDevitt, *Equitable Co-Management on the Kuskokwim River 94* (Aug. 2018) (unpublished Master's thesis, University of Alaska-Fairbanks), <https://scholarworks.alaska.edu/handle/11122/9676>.

198. *Id.* at 90.

199. Compare 50 C.F.R. § 100.27 (2019) (detailing federal gear requirements for subsistence fishing), with 5 ALASKA ADMIN. CODE tit. 5, § 39.105 (2019) (detailing state gear requirements for subsistence fishing).

government should continue to use the MOU process to offer a new avenue for Alaska Native participation in policymaking. Though these MOUs only affect federal subsistence management, they produce models that could improve both federal and state policy in the future, especially if state subsistence law undergoes changes.

D. Potential State Level Changes

The State of Alaska could take on the entirety of the subsistence management program if it became compliant with the ANILCA Title VIII subsistence priority. Compliance would end the awkward situation of dual jurisdiction over navigable waters that seems to be the most likely outcome of the *Sturgeon II* decision. There are three options open for coming into compliance: 1) the Alaska Supreme Court overturns *McDowell* and the State implements a rural priority, 2) the Alaska Legislature passes a law that effectuates the rural priority without relying on the distinction struck down in *McDowell*, or 3) Alaska passes a state constitutional amendment making the rural subsistence priority a constitutional right, or at least permissible.

The judicial route is unlikely. The equal access provisions of the Alaska Constitution are clear.²⁰⁰ And in recent cases, the Alaska Supreme Court has maintained its rigid interpretation of those clauses even as it rules in favor of some community hunting and fishing rights. In *Alaska Fish & Wildlife Fund v. State*,²⁰¹ the court upheld a program that allowed “community harvest permits” for “groups following a hunting pattern similar to the one traditionally practiced by members of the Ahtna Tene Nene’ community”²⁰² However, in the same decision, the court affirmed that “[the equal access provisions] ‘share at least one meaning: exclusive or special privileges to take fish and wildlife are prohibited.’”²⁰³ The court has also allowed for the designation of fisheries as “subsistence” fisheries where nonsubsistence use can be curtailed in times of scarcity.²⁰⁴ However, this designation does not limit the fisheries’

200. See ALASKA CONST. art. VIII, § 3 (“Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.”); see also *id.* § 15 (“No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. . . .”); see also *id.* § 17 (“Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.”).

201. *Alaska Fish & Wildlife Conservation Fund v. State*, 347 P.3d 97 (Alaska 2015).

202. *Id.* at 100.

203. *Id.* at 102 (quoting *McDowell v. State*, 785 P.2d 1, 6 (Alaska 1989)).

204. *Alaska Fish & Wildlife Conservation Fund v. State Dep’t of Fish and Game*, 289 P.3d 903, 910 (Alaska 2012).

use to rural residents, but rather to use by any Alaskan who is fishing for subsistence.²⁰⁵ These cases demonstrate that while there is some flexibility in how subsistence is regulated at the state level, the Alaska Supreme Court has shown no inclination to revisit the urban-rural distinction struck down in *McDowell*.

As the law stands now, the State likely cannot recognize the ANILCA rural subsistence priority because of the *McDowell* precedent.²⁰⁶ However, even in *McDowell*, the court recognized that another criterion might be specific enough to allow for an ANILCA compliant system that passed state constitutional muster.²⁰⁷ Several efforts to do so arose in the aftermath of the decision.²⁰⁸ At least one scholar has suggested that ANILCA's subsistence priority does not in fact restrict subsistence use to only rural residents; thus, the State of Alaska could thread the needle to create a complex tiered system of priority that satisfies ANILCA and the equal access provisions.²⁰⁹ This kind of system is theoretically possible, but its implementation would likely be difficult as a practical matter. In addition, it would be difficult to determine *ex ante* whether the Alaska Supreme Court would in fact uphold a new subsistence priority system. A negative result in court would send the whole process back to square one.

The most plausible and elegant state policy solution to bring the state into ANILCA compliance would be a state constitutional amendment guaranteeing rural Alaskan subsistence rights. Such an amendment would be a simple "revisory" change, meaning it could be enacted through a two-thirds vote of the legislature and approval by a majority of voters.²¹⁰ More serious changes, called revisions, require a constitutional convention.²¹¹ This rural priority amendment would eliminate *McDowell*

205. *Id.* at 910 (Alaska 2012).

206. See *McDowell*, 785 P.2d at 9 ("[T]he requirement contained in the 1986 subsistence statute, that one must reside in a rural area in order to participate in subsistence hunting and fishing, violates sections 3, 15, and 17 of article VIII of the Alaska Constitution.").. [10.9(a)]

207. See *id.* ("We are not called upon in this case to rule on what selection criteria might be constitutional. It seems appropriate, however, to note that any system which closes participation to some, but not all, applicants will necessarily create tension with article VIII.")

208. See FRANK NORRIS, ALASKA SUBSISTENCE: A NATIONAL PARK SERVICE MANAGEMENT HISTORY 163 (2002), https://www.nps.gov/subjects/alaskasubsistence/upload/Norris_For_Web.pdf (describing legislative attempts to overcome the *McDowell* precedent).

209. McGee, *supra* note 88, at 254.

210. Letter from Bruce M. Botleho, Attorney Gen., State of Alaska and Joanne Grace, Assistant Attorney Gen., to Frank Rue, Alaska Dep't of Fish & Game (Dec. 14, 2001), http://www.law.state.ak.us/pdf/opinions/opinions_2001/01-022_2001op1.pdf.

211. Bess v. Ulmer, 985 P.2d 979, 981 (Alaska 1999).

as an obstacle to ANILCA compliance. This amendment would also serve the interest of state sovereignty. After *Sturgeon II*, assuming that NPS does not pursue aggressive out-of-park regulations, subsistence management will be the last area where the state does not control navigable waters in ANILCA CSUs. If the state became ANILCA compliant, it could take over this responsibility and be the sole government in control of those waters. This arrangement is actually the design that ANILCA set as the default, before *McDowell* forced the federal government to step in.²¹² The State of Alaska should pursue a rural subsistence priority amendment, ending the confusing status quo for subsistence users and solidifying state authority in CSU navigable waters.

VIII. CONCLUSION

The war over jurisdiction in Alaska's CSUs has produced more confusion than clarity. *Sturgeon II* has the potential to be yet another battle in that long conflict or a turning point that leads to peace. If it is to be the latter, the State of Alaska and the federal government must use *Sturgeon II* to spark a more productive era of cooperation. ANILCA provides several means of fostering cooperative management if the parties are willing to use them. In addition, the state could take a major step forward by finding a way, likely through a constitutional amendment, to become compliant with Title VIII of ANILCA. This compliance would not be easy to achieve, but it would remove one of the major underlying issues that has made subsistence management in Alaska such an intractable problem.

212. ANILCA § 805(d), 94 Stat. at 2425 (2018).