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Press Release: Court issues decision on Subsistence

Re: *State v. Norton*, 3:05-cv-00006-HRH consolidated with
Katie John v. United States of America, 3:05-cv-00158-HRH

On July 3, 2013, a panel of the Ninth Circuit Court of Appeals affirmed the district court's decisions upholding the 1999 Final Rules promulgated by the Secretary of the Interior and the Secretary of Agriculture to implement part of the Alaska National Interest Lands Conservation Act concerning subsistence fishing and hunting rights.

As threshold issues, the panel held that the Secretaries appropriately used notice-and-comment rulemaking, rather than adjudication, to identify whose waters are "public lands" for the purpose of determining the scope of the Act's rural subsistence policy; and that in construing the term "public lands," the Secretaries were entitled to "some deference." The panel concluded that, in the 1999 Rules, the Secretaries applied Katie John I and the federal reserved water rights doctrine in a principled manner. The panel held that it was reasonable for the Secretaries to decide that: the "public lands" subject to the Act's rural subsistence priority included the waters within and adjacent to federal reservations; and reserved water rights for Alaska Native Settlement allotments were best determined on a case-by-case basis.

Background

In 2005, the State of Alaska filed a lawsuit in the U.S. District Court for the District of Columbia challenging a federal agency final rule implementing the mandate in a prior Alaska Native subsistence case which established that the United States must protect subsistence uses of fisheries in navigable waters where the United States possesses a reserved water right. See, *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995) ("Katie John I"). The State challenged the Federal agencies' implementation of the mandate by arguing that the reserved waters doctrine requires a quantification of waters necessary to fulfill specific purposes. Katie John moved for limited intervention for purposes of filing a motion to dismiss for failure to join an indispensable party. The United States also sought transfer of the case to the U.S. District Court for the District of Alaska and transfer was granted. The case was then consolidated with *John v. Norton* (below). The issues in the two cases were bifurcated for briefing with the State's claims addressed first. In 2007 the court upheld the agency's rule making process identifying navigable waters in Alaska that fall within federal jurisdiction for purposes of federal subsistence priority.

To counter the State's challenge, Katie John, Tanana, Charles Erhart and the Alaska Inter-Tribal Council filed a lawsuit in the U.S. District Court for the District of Alaska to challenge the Federal Agencies' final rule as being too restrictive in its scope. Katie John alleged that the

Federal agencies should have included Alaska Native allotments as public lands and that the federal government's interest in water extends upstream and downstream from Conservation Units established under the Alaska National Interest Lands Conservation Act. The State of Alaska intervened and challenged the regulations as illegally extending federal jurisdiction to state waters. In 2009 the Court upheld the agencies' final rule as reasonable. While rejecting Katie John's claim that the agency had a duty to identify all of its federally-reserved water rights in upstream and downstream waters, the court stated that the agency could do so at some future time if necessary to fulfill the purposes of the reserve. The case was appealed to the U.S. Court of Appeals for the Ninth Circuit where oral argument was held on July 25, 2011. One of the panelists, Judge Betty Fletcher, passed away in August 2012, and her docket was assigned to Judge Canby.

Ninth Circuit Decision

As to the State's specific challenges the Court determined:

- a) Adjacent waters: The State argued that the rules should not apply to waters that are adjacent to the boundaries of federal conservations system units. These boundary streams include long river segments, such as the portions of the Copper River technically outside the Park and Preserve boundaries. The court agreed with AFN the United States and Katie John that such waters were subject to the reserved rights doctrine and thus subject to the subsistence priority.
- b) Sixmile Lake: This lake is adjacent to the Lake Clark National Park and Preserve. The State argued that because the Lake's shoreline is non-federal, non-public land owned primarily by the Native Village Corporation for Nondalton, the lake could not be considered as adjacent to the Park. The court deferred to the federal determination that the boundary of the Park was adjacent to the shore of Sixmile Lake and thus the lake is covered by the subsistence priority.
- c) Seven Juneau-area streams: The State argued that these streams near Juneau were either outside of the Tongass National Forest, or were surrounded by private and state inholdings and thus could not be considered as subject to federal reserved water rights. The court concluded the U.S properly considered the rivers to be within the Tongass. The court also agreed with the U.S., AFN and Katie John that as a general matter the waters within the Tongass, but surrounded by private lands, should be considered public and lands subject to federal reserved water rights.
- d) Water flowing through inholdings: The court rejected the State's general arguments that waters that ran between State and private inholdings within conservation system units could not be subject to federal reserved water rights. The court also agreed with the U.S., AFN and Katie John that waters within federal conservation system units surrounded by private lands should be considered public lands subject to federal reserved water rights.
- e) Coastal waters and the "headland-to headland method": The State argued that the federal government's subsistence rules unlawfully included waters at the mouths of rivers. A prime example was the Yukon Delta National Wildlife Refuge where the river meets the sea. The

federal government determined the outer boundary of the river to determine federal reserved rights by drawing a boundary across the water from the outer bank of the Refuge land across to an opposite point on the other bank where the river meets the water. The court agreed that this was a reasonable way to determine where the federal subsistence priority applies and rejected the State's arguments.

f) Upstream and downstream waters: Katie John argued that because some adjacent waters were included, the federal priority should also apply to waters farther upstream and downstream of the various Conservation System Units. The court agreed that this was a reasonable way to apply the reserved water rights doctrine, but that it was up to the federal agencies to make that determination in the first instance. Importantly, the court recognized that the expansion advanced by Katie John might be appropriate in a particular situation.

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

Summary

The decision is an important affirmation of the fishing priority in those federal waters identified by the agency rule-making.

The State will have the option of seeking rehearing in front of the 9th circuit, or asking the Supreme Court to review the decision.

Any questions can be directed to attorney Heather Kendall-Miller at (907) 276-0680.