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## John v. United States, 720 F.3d 1214 (9th Cir. 2013)

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The court also referenced the validation process each of the Canal Authority members completed. The court held the validation process ensured all provisions in the CVP contracts were enforceable. The validated contracts, therefore, prohibited Canal Authority members from challenging the contract provisions granting the Bureau discretion to reduce allocations during times of water shortage.

Ultimately, the court affirmed the district court's grant of summary judgment because the Bureau's authority to reduce allocations during times of shortage was a valid contractual provision, and the contracts contained no provision for area of origin priority. In addition, the CWC's area of origin statutes did not require area of origin priority in the allocation of water under the CVP contracts.

*Rafael Mendez*

**John v. United States, 720 F.3d 1214 (9th Cir. 2013)** (holding (i) the 1999 Rules, promulgated by the Secretaries of the Interior and Agriculture, properly implemented *Katie John I* and the federal reserved water rights doctrine; (ii) the Secretaries properly determined Alaskan "public lands" with a priority for rural subsistence hunting and fishing under Title VIII of ANILCA included waters appurtenant to federal reservations, but (iii) excluded lands upstream and downstream of reservations; and (iv) the Federal Subsistence Board should determine federal reserved water rights for Alaska Native Settlements on a case-by-case basis).

In 1980 Congress enacted the Alaska National Interest Lands Conservation Act ("ANILCA") to conserve approximately 105 million acres of Alaskan public land. ANILCA expresses a preference for Alaskan management of its provisions, but the Secretaries of the Interior and Agriculture ("Secretaries") have the authority to implement ANILCA if Alaska fails to do so. Alaska lost certification to implement ANILCA in 1990 following *McDowell v. Alaska*. In *McDowell*, the Alaska Supreme Court found ANILCA's rural subsistence priority violated the Alaskan state constitution because the priority did not accord with Alaskan subsistence lifestyles.

When Alaska lost its certification, implementation of ANILCA fell back to the federal government. Since then, the Secretaries and the courts have further developed the meaning of "public lands." ANILCA defines "public lands" as federal lands, waters, and interests therein, except for lands conveyed or selected for conveyance to Alaska under the Alaska Statehood Act or to a Native Corporation under the Alaska Native Claims Settlement Act ("ANCSA"). Title VIII of ANILCA grants a priority to hunting and fishing for rural subsistence over hunting and fishing for other purposes on "public lands." In 1995, the United States Court of Appeals for the Ninth Circuit ("court") found in *Alaska v. Babbitt* ("*Katie John I*") that, contrary to the Secretaries' 1992 Rules, "public lands" under Title VIII included some navigable waters and that the Secretaries possessed the authority to identify those waters. In response, the Secretaries issued the 1999 Final Rules ("1999 Rules"). The 1999 Rules brought navigable waters with a federal reserved water right under the aegis of ANILCA. The 1999 Rules also identified federal land units that possessed federal reserved water rights. These 34 land units included non-

navigable waters on federal land units, navigable and non-navigable waters on the land units' exterior boundaries, and inland waters adjacent to the land units' exterior boundaries.

Katie John, as well as other individuals, tribal groups, and environmental organizations ("Katie John") and the State of Alaska ("State") brought actions against the Secretaries in the United States District Court for the District of Alaska ("district court"). Katie John argued the Secretaries too narrowly construed "public lands" in the 1999 Rules. The State, however, argued the Secretaries too broadly construed "public lands." The district court consolidated the two challenges into one lawsuit. The district court upheld the Secretaries' middle position because the Secretaries lawfully and reasonably used the rulemaking process to determine public lands where the United States had federal reserved water rights.

Katie John and the State appealed to the court. First, both Katie John and the State argued the 1999 Rules did not qualify for deference under *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.* ("*Chevron*"). The State also argued (i) the Secretaries should have used adjudication and not rulemaking to implement Katie John I; the Secretaries erred in interpreting ANILCA to include as "public lands" (ii) waterways not within federal lands, conservation system units ("CSUs"), or national forests; (iii) marine water; and (iv) water on land "selected-for-but-not-yet-conveyed" to the State or to a Native Corporation. Katie John argued ANILCA's rural subsistence priority must apply (i) to navigable waters upstream and downstream from ANILCA's CSUs, as well as (ii) to waters appurtenant to land the Alaskan Native Allotment Act of 1906 ("ANAA") earmarked for Alaskan Natives.

Before addressing either side's arguments, the court discussed two overarching doctrines involved in evaluating the 1999 Rules and the power of Alaska over its waters: the federal navigational servitude and the federal reserved water rights doctrine. The navigational servitude allows the United States to protect and facilitate interstate commerce on navigable waterways. The federal reserved water rights doctrine traditionally grants the United States the right to use the amount of water necessary for fulfilling the primary purposes of a federal reservation. In the context of Title VIII of ANILCA, however, the focus is not on the amount of water necessary for fulfilling the purpose of a reservation, but rather the location of the water sources for potential subsistence use. This novel use of the federal reserved water rights doctrine, the court warned, may prove a "poor mechanism" for identifying water locations for subsistence use.

The court's analysis began with a discussion of the State's first argument. The court determined that the Secretaries' use of notice-and-comment rulemaking rather than adjudication was appropriate and consistent with ANILCA. The Secretaries did not need to adjudicate because they were not "determining their own water rights" under the federal reserved water rights doctrine, but rather identifying geographic water locations. The court found the Secretaries properly left unanswered the purposes of the land reservation and how much water they needed. Future adjudicators, the court noted, can resolve those questions as usual.

Next, the court discussed whether *Chevron* deference applies to the Secretaries' administration of ANILCA. Under *Chevron*, the court must implement any unambiguous intent of Congress, but if the statute is silent or, like ANILCA, ambiguous, the administering agency interprets congressional intent and the courts generally defer to that interpretation. Under the Administrative Procedure Act, an agency's decision in matters such as the interpretation of congressional intent cannot be "arbitrary, capricious, [or] an abuse of discretion." The court found the Secretaries acted in accordance with the Administrative Procedure Act and that the Secretaries warranted some *Chevron* deference. However, the court refrained from granting complete deference because the court envisioned an integral role for itself in the implementation of the judicially created federal reserved water rights doctrine.

The court then addressed the State's argument that "public lands" under Title VIII of ANILCA should not include waters appurtenant to federal reservations. Appurtenant waters are waters adjacent to federal reservations that play a significant part in the hydraulic cycle of waters on the reserved land. Under the federal reserved water rights doctrine, appurtenancy pertains to the water's use, not its physical location. Citing *United States v. New Mexico* and *Cappaert v. United States*, the court noted that the United States may claim appurtenant waters when they are necessary for the reserved land's primary purposes. Therefore, the Secretaries reasonably determined that this strong federal interest allows appurtenant waters to qualify as "public lands" under ANILCA.

The court also rejected the State's argument that the Secretaries incorrectly identified certain specific lands as "public lands" under ANILCA. The State argued Sixmile Lake is not "public land" because the lake's shoreline is not on federal or public land. The court found Sixmile Lake is "public land" because, regardless of the lake's physical border in relation to the Lake Clark National Park, the United States may need to appropriate its water under the federal reserved water rights doctrine. The State also argued, using a map as evidence, that seven Juneau-area streams fell outside the boundaries of the Tongass National Forest. On the Secretaries' own map, however, the streams fell within the forest's boundaries. The court noted that neither side presented a conclusive map but found the seven Juneau-area streams were "public lands" because it was reasonable for the Secretaries to use their own map in their final decision. The State then argued that waters on inholdings—lands within a federally listed land unit conveyed to Alaska, a Native corporation, or a private individual—were not "public lands" because federal reserved water rights apply only to waters appurtenant to federal lands. The court found the Secretaries reasonably concluded that inholdings were "public lands." The court noted that the United States still retained federal water rights even after it conveys the land to a third party because the water may still be necessary to the reservations' primary purposes.

The court then addressed the State's argument that the Secretaries' headland-to-headland method does not properly exclude all tidal and marine waters from ANILCA's definition of "public lands." Under the Secretaries' method, "inland waters" include "waters located landward of the mean high tide line or the waters located upstream of the straight line drawn from head-

land to headland across the mouths of rivers or other waters as they flow into the sea." The court found the Secretaries' establishment of a boundary necessary because, under the federal reserved water rights doctrine and ANICLA, federal reserved rights do not extend to marine waters. Additionally, the court found the boundary method reasonable because it included tidally-influenced waters indivisible from waters inland of the high tide land or from waters on federal reservations.

Next, the court addressed the State's argument that ANICLA's rural subsistence priority should not apply to federal land "selected-but-not-yet-conveyed" to Alaska or a Native Corporation. Section 102 of ANILCA specifically excludes such land from its definition of "public lands," but in section 906(o)(2) "public lands" includes lands in the process of conveyance. Faced with these conflicting directives, the court decided that the definition in section 906(o)(2) superseded section 102 for reasons of practicality. The court noted the impracticality of requiring the Secretaries to apply various federal laws to the "selected-but-not-yet-conveyed" lands while excluding them only from the rural subsistence priority. Accordingly, the court found the Secretaries properly resolved the statutory conflict.

After rejecting the State's arguments, the court addressed Katie John's argument that the rural subsistence priority should include waters upstream and downstream from federal reservations. If the Secretaries did include these waters, the court noted, the priority would apply to the majority of Alaskan rivers and streams. The court flatly denied such a broad application. The court came to its conclusion after examining three areas of particular relevance. First, the court looked at the history of rural subsistence under ANILCA. The court acknowledged past Alaskan discontentment with federal regulation of Alaskan waters; indeed, one of the main reasons Alaskans pursued statehood was to regulate their own waters. ANILCA, in light of this historic federal-state tension, granted rural subsistence priority only to certain public lands subject to certain limitations. Second, the court discussed the primary purposes of ANILCA and other Alaskan federal reservations. The court noted ANILCA mostly reserved land from people rather than for people. The 1999 Rules also identified reservations whose primary purposes are not rural subsistence. Recognizing the unique nature of federal reservations in Alaska as compared to the arid Western States, the court noted that many of these reservations allow for rural subsistence use even if it is not the primary purpose. The court emphatically stated that rural subsistence use on most ANILCA reservations is "a servitude imposed as a limitation on federal control," not a specific purpose of the reservation. Third, the court discussed constraints on the federal reserved water rights doctrine. The court reaffirmed its holdings in *Katie John I* and *Katie John v. United States* ("*Katie John II*") that federal reserved water rights pertain to waters the United States intended to reserve in order to accomplish the purposes of federal land reservations. Rural subsistence use is not the primary purpose of most ANILCA reservations, but its attachment to the reservations through the federal reserved water rights doctrine suggests it involves comparable limitations. Thus, after a detailed examination, the court agreed with the Secretaries' exclusion of waters upstream and downstream from federal lands under ANILCA's definition of "public lands."

Finally, the court addressed Katie John's argument that "public lands" under ANILCA extends to waters appurtenant to land allotted by the ANAA to an Alaska Native. The 1906 ANAA and its successor, the ANCSA of 1971, granted the Secretary of the Interior the power to allot a 160-acre piece of unappropriated land to an Alaskan Native. In the 1999 Rules, the Secretaries did not list waters appurtenant to these allotments as "public lands." Instead, the Secretaries delegated to the Federal Subsistence Board ("FSB") the authority to decide this issue. The FSB decided to identify which, if any, of these waters fall within "public lands" on a "case-by-case basis." In opposition, the State argued that none of the Native allotments, which were conveyed out of the public domain, could give rise to federal reserved water rights. However, the court asserted that it did not need to decide that issue to conclude the Secretaries reasonably delegated the difficult and complex matter to the FSB.

Accordingly, the court affirmed the district court's decision that (i) the Secretaries appropriately implemented *Katie John I* and the federal reserved water rights doctrine; (ii) ANILCA's rural subsistence priority can apply to appurtenant waters; (iii) the Secretaries properly excluded certain lands, including lands upstream and downstream from federal reserved land, from the definition of "public lands;" and (iv) agencies may determine reserved water rights for Alaska Native Settlements on a "case-by-case basis."

*Emily Miller*

## UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

**Miccosukee Tribe of Indians of Fla. v. United States**, 716 F.3d 535 (11th Cir. 2013). (holding (i) the Florida Indian Land Claims Settlement Act created no obligation for the United States Army Corps of Engineers to administer its flood management system in a way that protects and does not interfere with the Miccosukee Tribe's rights of use and enjoyment for leased and reservation land, and (ii) the Miccosukee Tribe failed to adequately state due process and equal protection claims).

The Miccosukee Tribe of Indians of Florida ("Tribe") brought this appeal against the United States claiming the Army Corps of Engineers' ("Corps") management of the Central and South Florida Project ("C&SF Project") caused extreme flooding of tribal lands in violation of its rights under the Constitution and the Florida Indian Land Claims Settlement Act ("FILCSA").

Several pieces of legislation influenced the actions and outcome of the case. Congress passed the Swamp and Overflowed Lands Act of 1850 in order to bring development to the Everglades of Florida. The Overflowed Lands Act allowed the establishment of a system of canals, levees, locks, and dams to encourage a large migration of individuals and to bring development to the South Florida area. However, the system Florida established proved inadequate to protect against future disaster. Congress then passed the Flood Control Act of 1948, which created the C&SF Project and enlisted the Corps to work in conjunction with state and local agencies to better implement the project. Though considered a state project, the Corps maintained operational