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Environmental and Natural Resources Law Center

Alaska Native Allotments and Federal Reserved Water Rights

A White Paper of the University of Oregon School of Law
Environmental and Natural Resources Law Center
Native Environmental Sovereignty Project

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June 2019

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Cover Photo: Charley River, Alaska, National Park Service Photo by Josh Spice

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Acknowledgements

This paper would not have been possible without the support of Heather Brinton and the ENR Center's faculty and staff, and Matthew Newman, who provided the idea for this paper and helpful guidance along the way. Thank you.

About this Paper

This white paper was created through the University of Oregon Environmental and Natural Resources Law (ENR) Center's Native Environmental Sovereignty Project, an interdisciplinary research project focused on examining emerging tribal roles in co-managing lands and resources.

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About the Native Environmental Sovereignty Project

The Native Environmental Sovereignty Project is one of the seven theme-based interdisciplinary research projects administered by the University of Oregon ENR Center. The project is led by faculty leaders Mary Christina Wood and Howie Arnett. The mission of the Native Environmental Sovereignty Project is to examine emerging tribal roles in comanaging lands and resources. Important issues the Project has recent explored include evaluating the legal and policy implications for fossil fuel infrastructure developments on Pacific Northwest Tribes.

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Abstract
Land ownership in Alaska has been contested by the original Alaska Native landowners since before statehood. Much of the federal statutory framework for Alaska has sought to resolve these tensions while recognizing the fundamental importance of Native rights and traditional subsistence practices. In 1906, Congress passed the Alaska Native Allotment Act to give Alaska Natives the opportunity to protect their lands and resources from encroachment by white settlers.[1] Pursuant to this act, individual Alaska Natives could receive title to an allotment to continue traditional subsistence ways of life. These allotments were issued in restricted fee title, whereby they could not be alienated without congressional authorization. It is unknown exactly how many allotments exist in Alaska, but more than 16,000 individuals filed for allotments under the 1906 Act.[2] Alaska Native allotments are important pockets of Indian Country in Alaska. The 1971 Alaska Native Claim's Settlement Act (ANSCA) extinguished native title and aboriginal land claims.[3] In exchange for the extinguishment of existing native land claims, ANCSA provided $936 million dollars to ANCSA-created, Native-owned corporations and the ability for those corporations to receive 45.5 million acres of land in fee simple.[4] ANCSA fee lands are not considered Indian Country for jurisdictional purposes, even if ownership transfers to a federally recognized tribe.[5] However, the Supreme Court has explicitly noted that unlike ANCSA lands, allotments are Indian Country.[6] This article argues that given the essential nature and purpose of Alaska Native Allotments, upon their creation, water rights were impliedly reserved to facilitate traditional subsistence practices, including fishing. Part I examines the foundational statutes, common law doctrines, and legal precedents governing Alaska Native allotments and federal Indian reserved water rights. Then, Part II applies the principles of Indian reserved water rights to Alaska Native allotments to argue that the clear purpose behind those allotments requires sufficient reserved water to protect and maintain traditional hunting and fishing subsistence.

I. BACKGROUND

A. Alaska Native Allotments

Indigenous people's possession and occupation of the lands in what is now called Alaska was recognized long before statehood. Beginning with the 1884 Alaska Organic Act, the widespread use, occupancy, and ownership of Alaska's landscapes by Native peoples was clearly understood.[7] After an influx of non-Native settlers and growing tensions over land

[1] DAVID S. CASE and DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 113 (3rd ed. 2012).
[2] Natalie Landreth and Erin Doughtery, *The Use of the Alaska Native Claims Settlement Act to Justify Disparate Treatment of Alaska's Tribes*, 36 AM. INDIAN L. REV. 321, 345-46 (2012).
[3] *See,* John v. Baker, 982 P.2d 738 (Alaska 1999) (holding additionally that ANCSA did not extinguish tribal sovereignty).
[4] Landreth, *supra* note 2, at 345-46 (Citing Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629h) Id. §§ 2, 6, 12).
[5] Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520, 523-26 (1998).
[6] *Id.*, at 527 n.2.
[7] Act of May 17, 1884, 23 Stat. 24, 26 ("[T]he Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.").

rights, Congress passed the Alaska Native Allotment Act in 1906. In recognition of the lack of widespread reservations in Alaska and the encroachment of non-native settlers, the Alaska Native Allotment Act specifically extended the General Allotment Act (Dawes Act) principles to Alaska.[8] The Act's purpose was to protect the traditional subsistence ways of life and to "enable Alaska Natives to protect the lands which they used and occupied."[9]

Native allotments were withdrawn from the public domain and were inalienable and not subject to taxes unless Congress provided otherwise.[10] Due process concerns and the sheer number of allotment applications led to an exceedingly slow adjudication process and the legislative approval of allotment applications that "were pending before the Department of the Interior on or before December 18, 1971."[11] The Secretary was instructed to "issue trust certificates" for those allotments.[12]

To qualify for an allotment of up to 160 acres, an applicant needed to live in Alaska, be Alaska Native, be twenty-one years old or the head of a family, and meet other requirements as set forth by the Secretary of the Interior.[13] Allotments were generally chosen along rivers for access to salmon and other wildlife.

The federal government retained interest in these lands because of their restricted fee status. The Ninth Circuit has noted that "one of the government's interest in allotted lands is a property interest."[14] In a memorandum discussing the legal issues surrounding Alaska Native governance, a Department of the Interior Solicitor stated, "we wish to make clear that Alaska Native allotments, like other Indian allotments, remain under federal superintendency and subject to federal protection while in restricted status. Thus, we conclude that Congress has not divested the Federal Government of its jurisdictional authority over such lands [Alaska Native Allotments], and they are Indian Country."[15] Unlike ANCSA fee lands, allotments maintain an ongoing relationship between the allotment owner and the federal government.

B. Alaska National Interest Lands Conservation Act

The Alaska National Interest Lands Conservation Act (ANILCA) was intended to "provide sufficient protection for the national interest in the scenic, natural,

[8] Elizabeth Saagulik Hensley, *Look Back to Go Forward*, 33 ALASKA L. REV. 287, 292 (2016); *See also* Pence v. Kleppe, 529 F.2d 135, 140 (9th Cir. 1976) ("[B]ecause a number of lower courts found that Alaska Natives were not within the definition of 'Indian,' there was doubt whether the General Allotment Act did apply to them. Thus Congress moved in 1906 to eliminate this doubt by passing the Alaska Native Allotment Act.").

[9] Olympic v. United States, 615 F. Supp. 990 (D. Alaska, 1985) (citing H.R.Rep. No. 3295, 59th Cong., 1st Sess. (1906)); Pence, 529 F.2d at 141.

[10] CASE, *supra* note 1, at 113.

[11] Sec. 905(a)(1), 94 Stat. 2371, 43 U.S.C. § 1634; Alaska Native Allotment Act of 1906, ch. 2469, 34 Stat. 197 (repealed 1971).

[12] 43 U.S.C. § 1634(a)(1)(A).

[13] Act of May 17, 1906, 34 Stat. 197; Pence, 529 F.2d 135. Additional requirements were set forth and specified (among other things) that no mineral rights could pass to Alaska Native applicants, that if the allotment was in a national forest, the occupancy must predate the establishment of national forest, and that the occupancy must be at least five years.

[14] United States v. Newmont USA Ltd., 504 F.Supp.2d 1050, 1067 (E.D. Wash. 2007)(citing United States v. City of Tacoma, 332 F.3d 574, 579 (9th Cir. 2003)).

[15] Memorandum from Thomas Sansonetti, Solicitor Dept of the Interior, on Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers (M-36975) (Jan. 11, 1993), at 129.

cultural and environmental values on the public lands in Alaska" and to "provide adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people."[16] ANILCA sought a balance between state, federal, and Native interests and adopted a federalism scheme in Title VIII whereby Alaska would implement a subsistence preference on all lands, state and federal, throughout the state.[17] This preference sought to protect the rights of Native Alaskans to maintain their traditional subsistence cultures.[18] However, the final language of the statute settled on a rural subsistence preference, devoid of any mention of Alaska's first peoples cultures and traditional subsistence practices.[19] When the Alaska Supreme Court invalidated the Alaska legislature's attempts to codify this priority,[20] the federal government resumed implementation of the preference on federal "public lands." Public lands are defined as "lands, waters, and interests therein" "the title to which is in the United States."[21] This does not include state owned lands.[22]

C. Federal Reserved Water Rights

Federal reserved water rights arise when "the Federal Government withdraws its land from the public domain and reserves it for a federal purpose [. In doing so] the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."[23] Recognition of these rights first arose in Indian Country where the Federal Government reserved sufficient appurtenant water for tribal residents of the Belknap Reservation to accomplish the purpose of creating an agrarian homeland.[24] The presence of reserved water rights rests on the purpose behind the reserved land – is water necessary to accomplish that purpose, if so, water was impliedly reserved.[25]

Only appurtenant waters can be reserved, and this is increasingly understood to include both surface and groundwater.[26] Reserved water rights also include an instream flow right to adequately support reserved hunting and fishing rights.[27] As Indian law and water law

[16] 16 U.S.C. §3101(d).
[17] CASE, *supra* note 1, at 301.
[18] ANILCA defines Subsistence Uses as "the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal family consumption; and for customary trade." CASE, *supra* note 1, at 298 (citing 16 U.S.C. §3113).
[19] *Id.* at 291
[20] McDowell v. State, 785 P.2d 1 (Alaska 1989).
[21] 16 U.S.C. § 3102, Pub. L. 96-487, 94 Stat. 2371 (1980).
[22] CASE, *supra* note 1 at 300.
[23] Cappaert v. United States, 426 U.S. 128, 138 (1976).
[24] Winters v. United States, 207 U.S. 564, 576 (1908).
[25] *Id.*; Cappaert, 426 U.S. at 138.
[26] Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262, 1271-72 (9th Cir. 2017), *cert denied*, 138 S. Ct. 468 (2017) ("Apart from the requirement that the primary purpose of the reservation must intend water use, the other main limitation of the reserved rights doctrine is that the unappropriated water must be 'appurtenant' to the reservation. Appurtenance, however, simply limits the reserved right to those waters which are attached to the reservation. It does not limit the right to surface water only.")(citing Cappaert, 426 U.S. at 138).
[27] In the Matter of the Determination of the Rights to the Use of Surface Waters of the Yakima River Drainage Basin, No. 77-2-01484-5, Final Order Re: Treaty Reserved Water Rights at Usual and Accustomed Fishing Places at 3-4 (Yakima Sup. Ct.

scholar Robert Anderson notes, "None of the treaties or agreements spoke directly to water rights, but many provisions made it clear that access to and use of water was critical to the tribes"[28] and this is the foundation for federal reserved water rights.

The Supreme Court has held that the federal reserved water rights doctrine applies equally to individual Indian allotments.[29] In *Colville Confederated Tribes v. Walton*, the Supreme Court recognized a reserved water right for the purpose of maintaining a fishery in Omak Lake which replaced the Tribe's traditional Columbia River fishery.[30] There, the federal government had reserved land to serve as "homeland" and for "preservation of the tribe's access to fishing grounds."[31] These purposes required water and thus the federal government had impliedly reserved a water right sufficient to accomplish those purposes. The reserved water right attached to the individual allotment and could be transferred along with the title to a non-native owner.[32]

i. Katie John Cases

A series of cases, known as the *Katie John* cases, outlined the federal government's ability to implement a subsistence priority on public lands in Alaska.[33] These cases provided definitions for important statutory terms in ANILCA, particularly the term "public lands." Heavily litigated by both Alaska Natives and the State of Alaska, the determination of public lands under the Alaska National Interest Lands Conservation Act (ANILCA) rested upon the federal reserved rights doctrine. The question was whether reserved water rights were enough to confer a sufficient interest to the federal government so that it could lawfully implement the subsistence priority.[34] The court ultimately held that ANILCA's definition of public lands "includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine."[35]

When the federal government excluded subsistence fishing on navigable waterways from this preference, the Ninth Circuit held that "the definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine."[36] This decision required the federal agencies to identify which navigable

March 1, 1995); United States v. Adair, 723 F.2d 1394, 1415 (9th Cir. 1983), *see also* United States v. Winans, 198 U.S 371 (1905); Dep't of Ecology v. Yakima Reservation Irrigation Dist., 850 P.2d 1306, 1317 (Wash. 1993).

[28] Robert Anderson, *Indian Water Rights and the Federal Trust Responsibility,* 46 NAT. RESOURCES J. 399, 406 (206).

[29] United States v. Powers, 305 U.S. 527, 531 (1939); Colville Confederated Tribes v. Walton, 647 F.2d 42, 50 (1981).

[30] Colville Confederated Tribes, 647 F.2d at 50.

[31] *Id.*

[32] *Id.*

[33] *See* Alaska v. Babbitt, 72 F.3d 698 (1995) (Katie John I); John v. United States, 247 F.3d 1032 (2001) (en banc) (Katie John II); John v. United States, 720 F.3d 1214 (2013) (Katie John III).

[34] "Title to an interest in water almost certainly means a vested interest in the water, such as a reserved water right. But even if we were uncertain, Katie John I already decided the matter when it held that ANILCA's 'definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine. 72 F.3d at 704. That could not be so unless title to an interest in Alaska's navigable waters is in the United States. See 16 U.S.C. § 3102(1)-(3)."[34]

[35] Katie John I, 72 F.3d at 704.

[36] *Id.*, at 703-04.

waters carried a federal interest via the reserved water rights doctrine and to implement the preference on those waters.

Subsequent notice and comment regulations were adopted in 1999 clarifying the scope of the federal government's interest, and those regulations withstood challenges from all sides.[37] The Katie John plaintiffs argued that according to the federal reserved water rights doctrine, waters appurtenant to Alaska Native Allotments were public lands, and should not have been excluded from the regulations.[38] The state argued that federal reserved water rights only attach to allotments created out of existing Indian Country as a result of the General Allotment Act, and that water rights do not attach to allotments "created from the public domain"[39]

Importantly for this issue, the Ninth Circuit did not take a firm position, but deferred to the agency's decision to determine if allotments give rise to federal reserved water rights on a "case-by-case" basis.[40] The court held that "determining which waters within or appurtenant to each allotment may be necessary to fulfill the allotment's needs is a complicated and fact-intensive endeavor that is best left in the first instance to the Secretaries, not the courts."[41] But reiterated that, "our circuit is committed to the position that for the rural subsistence priority to apply to navigable waters outside federal reservations, the waters have to be 'appurtenant to' the reservations and so 'necessary to accomplish the purposes for which the land was reserved' that 'without the water the purposes of the reservation would be entirely defeated.'"[42]

ii. Sturgeon Cases

Outside of the context of Alaska Native allotments, the extent of the federal interest stemming from reserved water rights, and the definition of public lands under ANILCA, has been litigated in the *Sturgeon* cases.

The National Park Service gave John Sturgeon a citation for violating a nationwide ban on hovercraft use on waters within the Yukon-Charley National Preserve, Alaska.[43] The District Court and Ninth Circuit both applied the *Katie John* holdings and held that the National Park Service could regulate Sturgeon's actions on the Nation River because the river was a public land under ANILCA. The United States had a federal reserved water right – an interest – in the river, conferring upon it the status of a public land and the ability to regulate.[44]

However, the Supreme Court reversed and held that the statutory language in ANILCA made it clear that Alaska was to be treated differently and that public lands did not include lands or waters that the United States did not have possessory title to.[45] The court focused on the "title" language over the "interest"

[37] Katie John III, 720 F.3d at 1214.
[38] Brief of Appellant at 47, Katie John et. al. v. United States, Nos. 09-36125, 09-36122 (L), 09-36127, 2010 WL 5853696 (9th Cir. 2010).
[39] Katie John III, 720 F.3d at 1243.
[40] *Id.*, at 1243.
[41] *Id.*
[42] *Id.* at 1240 (quoting Katie John I, 72 F.3d at 703).
[43] Sturgeon v. Frost, 139 S. Ct. 1066, 1070 (2019).
[44] *Id.* (citing Katie John I, "Title to an interest in water almost certainly means a vested interest in the water, such as a reserved water right. But even if we were uncertain, Katie John I already decided the matter when it held that ANILCA's 'definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine. 72 F.3d at 704. That could not be so unless title to an interest in Alaska's navigable waters is in the United States. See 16 U.S.C. § 3102(1)-(3).").
[45] *Id.* at 1080.

language concluding that the interest must be such that it would create possessory title in the United States.[46]

Importantly, the Court distinguished the Title VIII subsistence provisions and announced that it was not overturning those portions of the *Katie John* holdings because they were not on appeal and all parties had urged that they be separated from the issues at hand.[47] The Court agreed and noted that while it was aware of previous cases that had held that a federal reserved water right would give rise to an interest sufficient for ANILCA in the subsistence context, "those provisions" were not at issue here.[48]

While the Supreme Court in *Sturgeon* explicitly preserved the Ninth Circuit's *Katie John's* holdings that the U.S. has an interest in navigable waters because of its federally reserved water rights in those waters, the Sturgeon court's logic conflicts with the foundation of the *Katie John* cases. In *Sturgeon*, the court held that the federal government's federally reserved water right in the Nation River is not sufficient for the Nation River to be a public land under ANILCA because the "interest merely enables the government to take or maintain the specific 'amount of water' – and no more – required to 'fulfill the purpose of [its land] reservation.'"[49]

After *Sturgeon*, ANILCA's subsistence preference can still be implemented on waters in which the federal government has a reserved water right. This holding underscores the need for definitive recognition of the reserved water rights attached to Alaska Native allotments so that the federal subsistence priority is implemented appropriately.

II. THE FEDRAL RESERVED WATER RIGHTS DOCTRINE PROVIDES WATER FOR ALASKA NATIVE ALLOTMENTS

A. Alaska Native allotments independently gives rise to reserved water rights

The Alaska Native Allotment Act is not ANILCA. While it has similar goals of advancing subsistence use and resources, it is not bound by the *Katie John* or *Sturgeon* holdings regarding the federal reserved water rights doctrine. Outside of the statutory ANILCA context, federal reserved water rights are applicable to land reserved by the federal government and set aside for a particular purpose. Alaska Native Allotments are such lands.

The quintessential federal reserved water right (a *Winters* right) attaches to land that has been set aside by the federal government to serve a specific purpose that necessarily requires water. In federal Indian law, asserting and protecting these rights is a cornerstone of the trust responsibility.[50]

When the federal government set aside allotments for Alaska Natives to preserve subsistence hunting and fishing traditions, appurtenant waters were necessary to fulfill that purpose. Fishing is, and has been, a cornerstone of Alaska Native cultural and traditional practice since time immemorial. It is also a practice

[46] *Id.* at 1079

[47] *Id.* at 1080 n.2. ("As noted earlier, the Ninth Circuit has held in three cases – the so-called Katie John trilogy – that the term 'public lands,' when used in ANILCA's subsistence-fishing provisions, encompasses navigable waters like the Nation River. Those provisions are not at issue in this case, and we therefore do not disturb the Ninth Circuit's holdings that the Park Service may regulate subsistence fishing on navigable waters.") (citations omitted).

[48] *Id.*

[49] Sturgeon, 139 S. Ct. at 1079 (citing Cappaert, 426 U.S. at 141).

[50] Anderson, *supra* note 28, at 429.

that requires water.[51] The appurtenancy requirement is satisfied because allotments were regularly selected along rivers, lakes, and streams. In Alaska, vast rivers and wetlands, coupled with a low population density mean that Alaska's waters are plentiful: less than one percent of the state's water resources have been appropriated.[52] Unappropriated water was available for land reservations made under the Alaska Native Allotment Act and other federal statutes.

And, as the plaintiffs in Katie John III argued, "Congress's primary purpose under the Alaska Native Allotment Act was to set aside lands in order to protect Native hunting and fishing activities. It follows inexorably that sufficient water was necessarily reserved to protect those hunting and fishing activities – activities which, absent water, would be destroyed."[53] The necessary appurtenant waters were unappropriated when Alaska Native Allotments were reserved from the public domain; accordingly, the common law doctrine of federal reserved water rights applies.

The *Winans* doctrine of federal reserved water rights may also be applicable. These federal reserved water rights specifically act to protect customary and traditional use of resources that require water, like traditional Alaska Native use of salmon and other aquatic species.[54] For example, in *Winans*, Pacific Northwest tribes use of salmon and water since time immemorial gives rise to a federal reserved water right regardless of the underlying title of the rivers themselves to protect the tribe's right to take salmon.[55] This is particularly applicable for Alaska where tribes may not always have title to their ancestral lands, but individual members of those tribes hold restricted title to lands pursuant to the Alaska Native Allotment Act. Each allotment was intended to preserve the allotee's ability to practice traditional subsistence hunting and fishing activities, this necessarily requires waters, where were impliedly reserved by the federal government at the time of the allotments issuance.

The reserved water rights doctrine is applicable to allotments.[56] And despite arguments made to the contrary in the Katie John litigation, Indian allotments are treated equally regardless of the land's status prior to the allotment.[57] The federal reserved water rights doctrine applies to Alaska Native Allotments.

[51] Robert T. Anderson, *Indigenous Rights to Water & Environmental Protection*, 53 HARV. C.R.-C.L. L. REV. 337 (2018).

[52] Alaska Department of Fish and Game, Statewide Aquatic Resources Coordination Unit, *Overview*, (April 21, 2018), http://www.adfg.alaska.gov/index.cfm?adfg=habit at oversight.isfhome; Mary Lu Harle, *Private Appropriation of Instream Flows in Alaska*, Instream Flow Protection in the Western United States: A Practical Symposium, Natural Res. Law Ctr., Univ. of Colo. Sch. Of Law, 2-3 (1988).

[53] Brief of Appellant at 47, Katie Joh et. al. v. United States, Nos. 09-36125, 09-36122 (L), 09-36127, 2010 WL 5853696 (9th Cir. 2010) at 19-20.

[54] United States v. Adair, 723 F.2d at 1411; Winans, 198 U.S. at 384; While *Winans* rights are typically grounded in treaty language, the treaty era had ended before the federal government began seeking settlements from Alaska Native peoples, the purpose of the Alaska Native Allotment act mirrors the broad mandates in treaties and executive orders that court have interpreted to reserve *Winans* water rights. It could be argued that *Winans* rights should apply to Alaska Native Allotments.

[55] Winans, 198 U.S. at 384.

[56] Colville Confederated Tribes, 647 F.2d at 50.

[57] FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 16.03[2] (2005 ed.).

B. Additionally, Alaska Native allotments give rise to reserved water rights because they are public lands under ANILCA

Under ANILCA, public lands in Alaska are those "lands, waters, and interests therein" that give rise to title in the United States. Because there are restraints on alienation, and the lands are often held in trust, the United States has retained an interest in Alaska Native Allotments. This retained interest brings the allotments under the purview of ANILCA public lands. The Ninth Circuit agreed with this analysis, but because it was reviewing an administrative law case, it deferred to agency regulations regarding how these rights should be confirmed.[58]

The recent Supreme Court decision in *Sturgeon*, which emphasized the required property element of the interest, only strengthens this argument. According to the reasoning in *Sturgeon*, federal reserved water rights are not sufficient to trigger a public lands designation because those rights are not an interest that the US can have title to.[59] In contrast, the federal government retains a property interest in Alaska Native Allotments by restricting their alienation. This is a property interest directly affecting the title of the allotments. Accordingly, these allotments, set aside by the federal government for the continuation of subsistence hunting and fishing, are public lands, with corresponding reserved water rights, under Title VIII of ANILCA.

C. The law is clear- there is no reason to adjudicate the federal reserved water rights of Alaska Native allotments on a case by case basis

The courts have explicitly held that the question of federal reserved water rights and Alaska Native Allotments should be determined on a case-by-case basis.[60] The court was upholding the agency's decision that because of the fact specific complexity of allotments the agency should look at each situation as it arose. The agency published this decision in a notice and comment regulation and was accordingly entitled to deference for this decision. However, the legal foundation under the federal reserved water rights doctrine is sufficiently sound for the courts to acknowledge a presumption for reserved water rights. Alaska Native Allotments were specifically created to preserve subsistence fishing and hunting, purposes that require water. Coupled with vast quantities of unappropriated waters in Alaska, the legal test for federally reserved rights is satisfied. If the need arises to quantify the extent of a federal reserved water right associated with a particular allotment, that will be an assessment that will require case-by-case analysis. However, it is clear that Alaska Native Allotments have federal reserved water rights attached an acknowledging this legal reality would provide more certainty and stability to all involved.

[58] Katie John III, 720 F.3d at 1243.
[59] Sturgeon, 139 S. Ct. at 1079.
[60] Katie John III, 720 F.3d at 1243.

III. COURTS SHOULD RECOGNIZE THAT FEDERAL RESERVED WATER RIGHTS ATTACH TO ALL ALASKA NATIVE ALLOTMENTS BY LAW, AND ALLOW AGENCIES TO ADJUDICATE THE QUANTITY OF EACH RIGHT ON A CASE-BY-CASE BASIS

Alaska Native Allotments were set aside by the federal government and are owned in restricted title by Alaska Natives for the purpose of facilitating Native land ownership and enabling the continuation of subsistence practices, like fishing. This purpose requires water. Accordingly, pursuant to settled Indian water law principles, reserved water rights attach to Alaska Native allotments. Alternatively, because the federal government retains an interest in the allotments, they are public lands for the purposes of ANILCA. This status also gives rise to reserved water rights, as the purpose behind ANILCA's public lands was, similarly to the Allotment Act, to preserve subsistence. The legal foundation built from prior caselaw including the *Katie John* and *Sturgeon* cases on this issue is strong. While the *Katie John* court deferred to an agency regulation to adjudicate each allotment individually, that approach is only necessary to determine the quantity of water required by the reserved right. The existence of the reserved water right is clear as a matter of law and can be established for all allotments created pursuant to the Alaska Native Allotment Act.