

Briefing

Katie John

Case

Alaska State Legislature

House Resources Committee

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Committee Meetings:
M/W/F 1 - 3 p.m.

Members: Vice Chair John Cowdery, Representatives: Ramona Barnes,
John Harris, Carl Morgan, Jim Whitaker, John Cowdery, Reggie Joutle, and Mary Kapsner

Joint Hearing of the House and Senate Resources Committee

January 26, 2000
Senate Finance Room -- 532
2:00 PM

BRIEFING: Katie John Case

AGENDA

- I. Call to Order
- II. Roll Call
- III. Witnesses:

Joanne Grace, Assistant Attorney General, AK Dept. of Law
Kathryn Swiderski, Assistant Attorney General, AK Dept. of Law

- IV. Adjournment

Enclosures:

- 1) Memo of January 12, 2000 from Ted Popely and Ron Sommerville to Sen. Pearce and Rep. Porter, Final Judgement in *Katie John Case*.
- 2) Memorandum of January 24, 2000 from Joanne Grace to Bruce Botelho, Appeal option in *Katie John v. United States*.
- 3) Alaska's Complaint to Quiet Title in *State of Alaska v. United States of America* (Glacier Bay/Tongass).

MEMORANDUM

TO: Senator Pearce
Speaker Porter

FR: Ted Popely (JWP)
Ron Somerville

RE: Final Judgment in *Katie John* Case

DT: January 12, 2000

On January 7 of this year, U.S. District Court Judge Hoiland issued a final judgment in *Katie John et al. v. United States of America et al.* This case had been stayed until October 1, 1999, the date that federal subsistence fisheries regulations took effect.

The plaintiffs alleged that ANILCA requires the federal government to manage fisheries in navigable waters of Alaska. Both the District Court and the Ninth Circuit Court of Appeals agreed in part and the Appellate Court held that the term "public lands" includes navigable waters in which the United States has reserved water rights. Under the reserved water rights doctrine, when the United States withdraws land and reserves it for a federal purpose, it also reserves by implication water rights minimally necessary to fulfill the purposes of the reservation.

The court remanded the case to the Departments of Interior and Agriculture to identify those waters. The state's petition to the U.S. Supreme Court asking it to review the Ninth Circuit decision was denied in 1996. In January 1999, the Departments of Interior and Agriculture published final regulations to assume management of subsistence fisheries. The regulations cover subsistence activities on all waters within or adjacent to the exterior boundaries of 34 identified federal areas, including national parks, refuges, preserves, monuments, wild and scenic rivers, and national forests. They also will extend the Federal Subsistence Board's management to some federal lands selected under ANCSA or the Alaska Statehood Act until conveyed. In addition, the rules purport to confirm the Secretaries' authority to restrict or eliminate hunting, fishing and trapping on state and private lands when these activities interfere with the subsistence priority on the public lands.

Now that the final regulations are effective, Judge Holland has issued this final judgment. Procedurally, that means that the State has 60 days from January 7 to file its Notice of Appeal if it wishes to appeal to the Ninth Circuit Court of Appeals. That court would

undoubtedly issue an unfavorable ruling, which could then be appealed to the U.S. Supreme Court.

The Department of Law and the Administration may or may not choose to appeal the case. If they do not, the result for the state could be serious. Experts through several Administrations have felt that this case is positioned perfectly for a reversal by the U.S. Supreme Court. First, the decision could have impacts well beyond the State of Alaska, extending its effect on many western states with related water management issues. That prospect obviously supports the Supreme Court's desire to hear the case. Second and more importantly, Chief Justice Rehnquist and Justice Sandra Day O'Connor are renowned water law experts. It is widely believed that they would never allow the Ninth Circuit's decision to stand. It is virtually unheard of for the reserved water rights doctrine to stand for the proposition that the federal government reserved water rights so that it may extend management and control downstream from the federal reserve to affect fisheries and other activities. Rather, the reserved water rights doctrine evolved from the federal government's need to reserve its power to prevent upstream states and citizens from affecting the federal government's land downstream.

If the Administration chooses not to appeal the case, the Legislature will not have standing to continue the litigation. Private litigants affected by the decision may intervene, but the Legislature almost certainly cannot.

MEMORANDUM

State of Alaska

Department of Law

To: Bruce Botelho
Attorney General

DATE: January 25, 2000

TELEPHONE NO.: (907) 269-5100

FROM: Joanne Grace
Assistant Attorney General

SUBJECT: Appeal Option in
Katie John v. United States, A90-484-CV
(HRH)

This memorandum summarizes the history of *Katie John v. United States* and the option the state has to continue the case by appealing the recent final judgment entered in the case.

Procedural History of the Case

This case was filed by Katie John, Doris Charles, and the Mentasta Village Council in 1990. AFN later intervened. The plaintiffs alleged that the Alaska National Interest Lands Conservation Act requires the federal government to manage fisheries in navigable waters of Alaska and, accordingly, that the Federal Subsistence Board should take over management of the Copper River and authorize a subsistence fishery at Bazulnetas.

The District Court agreed and held that the term "public lands" includes navigable waters in which the United States has reserved water rights. The subsistence priority of title VIII of ANILCA and the corresponding authority of the Federal Subsistence Board to regulate fishing and hunting apply to "public lands" as that term is defined in the Act. ANILCA defines "public lands" as "lands, waters, and interests therein, title to which is in the United States." The plaintiffs argued and prevailed on their theory that a federal reserved water right is an interest in water to which the United States has title, and the existence of such a right thereby renders the waters to which it applies "public lands." Under the reserved water rights doctrine, when the United States withdraws land and reserves it for a federal purpose -- for example, a national park or wildlife refuge -- it also reserves by implication water rights necessary to fulfill the purposes of the reservation. The United States initially agreed with the state that waters subject to a reserved water

right did not constitute public lands, but it changed its position after briefing in the district court, when the federal executive administration changed.

Although resolution of this legal issue did not dispose of the case, the state considered it vital to the case's outcome. Rather than wait until the Federal Subsistence Board completed the daunting task of assuming regulatory authority for subsistence fishing over a large percentage of Alaska's rivers and lakes, the state petitioned the Ninth Circuit to review the District Court decision on this issue without a final judgment. The Ninth Circuit agreed to hear the interlocutory appeal, and affirmed the part of the District Court decision based on federal reserved water rights. The Ninth Circuit remanded the case to the federal agencies to identify the waters in Alaska where the water right exists.

The Alaska Supreme Court considered the same issue at about the same time, and came to a contrary conclusion. In *Totemoff v. Alaska*, 905 P.2d 954 (Alaska 1995), the court held that ANILCA's definition of "public lands" did not include navigable waters subject to a federal reserved water right.

Partly based on this conflict between the court of appeals and Alaska's highest court, the state petitioned the U.S. Supreme Court in 1995, asking it to review the Ninth Circuit decision. The United States opposed the petition, arguing in part that review of the issue was premature. It urged the Court to wait until the case was complete, suggesting that the issue might be resolved through the regulations that the federal agencies would prepare, or through amendment of the Alaska Constitution. It maintained that the issue would be presented in a more concrete context after final judgment in the case. The Supreme Court denied the state's petition without comment in 1996.

In January 1999, the departments of Interior and Agriculture published final regulations to assume management of subsistence fisheries. The regulations cover subsistence activities on all waters within or adjacent to the exterior boundaries of 34 identified federal areas, including national parks, refuges, preserves, monuments, wild and scenic rivers, and national forests (excluding the marine waters of the Tongass and Chugach National Forests). They also extend the Federal Subsistence Board's management to some federal lands selected under the Alaska Native Claims Settlement Act or the Alaska Statehood Act until conveyed. In addition, the rules purport to confirm the Secretaries' authority to restrict or eliminate hunting, fishing, and trapping on state and private lands when these activities interfere with the subsistence priority on the public lands. The rules became final in October 1999.

Because the regulations were final, the U.S. District Court entered judgment in the case on January 7, 2000.

State's Option to Continue the Case

The District Court's entry of a final judgment presents the state with an option to re-petition the Supreme Court in the case. Denial of certiorari at the interlocutory stage of a proceeding is without prejudice to renewal of the questions presented when certiorari is later sought from the final judgment. A prior denial in this context does not establish the law of the case or amount to *res judicata* on the points later raised. The state would have to appeal first to the Ninth Circuit, however, which would be unlikely to reconsider its earlier decision.

The state has 60 days to appeal a final order in a case in which the United States is a party. The window may be even larger in this case, as the plaintiffs have filed a motion to amend the judgment (to continue an injunction that has no effect on the state), which tolls the time for appeal until the motion is decided.

The issue on appeal would be precisely the same issue raised in the last appeal, whether Congress intended "public lands" in ANILCA to include waters in which the United States has a reserved water right.

IN THE
Supreme Court of the United States

No. —, Original

STATE OF ALASKA,

v.

Plaintiff,

UNITED STATES OF AMERICA,

Defendant.

MOTION FOR LEAVE TO FILE A COMPLAINT

Pursuant to S. Ct. Rule 17, the State of Alaska, through its Attorney General, asks leave of the Court to file a complaint against the United States to quiet title to the lands underlying marine waters in Southeast Alaska. This motion is accompanied by a complaint and supporting brief.

Respectfully submitted,

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Counsel for Plaintiff

IN THE
Supreme Court of the United States

No. —, Original

STATE OF ALASKA,

v.

Plaintiff,

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT TO QUIET TITLE

The State of Alaska, plaintiff, alleges as follows:

1. This is an action to quiet title to the tide and submerged lands in Southeast Alaska. These include the submerged lands within the Alexander Archipelago of Southeast Alaska that are enclosed behind the closing lines drawn by the United States to mark the seaward limit of inland waters at the 1903 Alaska Boundary Tribunal arbitration, together with the submerged lands extending three miles seaward from that line and from the remainder of Southeast Alaska's coast line. The lands that are the subject of this action are shown on the map at Exhibit ("Ex.") 1.*
2. This Court has jurisdiction under Article III, Section 2, Clause 2, of the United States Constitution and 28 U.S.C. § 1251(b)(2).
3. The United States consented to this action in 28 U.S.C. § 2409a(a). Alaska gave the United States written

* Exhibits referenced herein are appended to the accompanying Brief in Support of Motion for Leave to File a Complaint.

notice of its intent to file suit to quiet title to these lands on or about August 21, 1998, and March 22, 1999, as required by 28 U.S.C. § 2409a(m).

Count I: Historic Waters of the Alexander Archipelago

4. Upon admission to the Union on an equal footing with the other States, a new State succeeds to the United States' title to lands underlying navigable inland waters within its boundaries as an incident of its sovereignty.

5. Alaska was admitted to the Union "on an equal footing with the other States in all respects whatever" on January 3, 1959. Alaska Statehood Act § 1, Pub. L. No. 85-508, 48 U.S.C. note prec. § 21.

6. Under the equal footing doctrine, Alaska succeeded to the United States' title to lands underlying navigable inland waters within Alaska's boundaries as an incident of statehood.

7. From at least 1903 until 1971, the United States took the position in its international relations and in litigation with the States in this Court that the waters of the Alexander Archipelago were inland waters, including the pockets and enclaves that are more than three miles from the coast line of the mainland and any of the islands enclosed behind the closing lines drawn by the United States to mark the seaward limit of inland waters at the 1903 Alaska Boundary Tribunal arbitration (hereinafter "pockets and enclaves"). These pockets and enclaves are depicted in red on the map at Ex. 1.

8. Foreign nations acquiesced in the United States' claim that the waters of the Alexander Archipelago were inland waters, including the pockets and enclaves.

9. All of the submerged lands within these pockets and enclaves underlie navigable historic inland waters.

10. Because all of the submerged lands within the pockets and enclaves underlie navigable historic inland waters, Alaska took title to them upon its admission to the Union under the equal footing doctrine.

11. Congress both confirmed the equal footing doctrine rule of state ownership of lands underlying navigable inland waters and quitclaimed to the States the offshore submerged lands within state boundaries in the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315.

12. Congress made the Submerged Lands Act applicable to Alaska in Section 6(m) of the Alaska Statehood Act.

13. Congress defined Alaska's boundaries as coextensive with the three-mile territorial sea claimed by the United States at the time of Alaska's admission to the Union on January 3, 1959.

14. The United States claims an interest in the submerged lands within the pockets and enclaves, and also claims the submerged lands extending three miles seaward of the closing lines drawn by the United States to mark the seaward limit of inland waters at the 1903 Alaska Boundary Tribunal arbitration (hereinafter "1903 closing lines") where the submerged lands are more than three nautical miles from any point on the coast line of the mainland or any of the islands. The latter areas are depicted in dark blue on the map at Ex. 1.

15. Because the submerged lands within the pockets and enclaves and extending three miles seaward of the 1903 closing lines passed to Alaska at statehood under the equal footing doctrine and the Submerged Lands Act, the United States has no right, title, or interest in those lands.

16. On or about September 10, 1907, President Theodore Roosevelt reserved by proclamation an area of Southeast Alaska as the Tongass National Forest.

17. In 1908, President Theodore Roosevelt consolidated the Tongass National Forest with the Alexander Archipelago Forest Reserve and named the new entity Tongass National Forest.

18. On or about February 16, 1909, President Theodore Roosevelt enlarged the Tongass National Forest.

19. On or about June 10, 1925, President Calvin Coolidge again enlarged the Tongass National Forest. *See Ex. 2* (map with the 1925 enlargement and resulting outer boundaries of the Tongass National Forest).

20. Although the pockets and enclaves and the submerged lands extending three miles seaward of the 1903 closing lines are within the outer boundaries of the Tongass National Forest shown on the map at Ex. 2, the reservation of lands within these boundaries did not reserve the submerged lands therein or defeat Alaska's title to them at statehood.

21. Alaska's title is adverse to and clouded by the United States' claim of title to the lands underlying the pockets and enclaves and the waters extending three miles seaward of the 1903 closing lines where the submerged lands are more than three miles from any point on the coast line of the mainland or any of the islands.

22. Unless this Court declares and establishes Alaska's rights, Alaska will continue to be injured by the United States' claims to the lands underlying the pockets and enclaves and the waters extending three miles seaward of the 1903 closing lines where the submerged lands are more than three miles from any point on the coast line of the mainland or any of the islands.

Count II: The Tongass National Forest

23. Paragraphs 1-6, 11-13, and 16-19 are realleged and incorporated by reference.

24. Alaska took title to all lands between mean high and mean low tide and three miles seaward from the coast line inside the boundaries of the Tongass National Forest when it entered the Union on January 3, 1959. *See Ex. 2* (map showing boundaries).

25. Although the lands described in paragraph 24 are within the lines delimiting the public lands withdrawn and reserved for the Tongass National Forest, the withdrawal and reservation of lands within the boundaries did not reserve or defeat Alaska's title to those submerged lands.

26. Because Alaska took title to the lands between mean high and mean low tide and three miles seaward from the coast line inside the boundaries of the Tongass National Forest at statehood, the United States has no right, title, or interest in those lands.

27. The United States claims an interest in these lands that is disputed by Alaska and creates a cloud on Alaska's title to them.

28. The United States' claim to these lands will continue to cloud Alaska's title unless this Court declares and establishes Alaska's rights.

Count III: Glacier Bay National Monument

29. Paragraphs 1-6 and 11-13 are realleged and incorporated by reference.

30. On or about February 26, 1925, President Calvin Coolidge created Glacier Bay National Monument by issuing Proclamation 1733 under the authority of the Antiquities Act of 1906, 34 Stat. 223, 16 U.S.C. §§ 431-433.

31. The President set apart as Glacier Bay National Monument "the tract of land" lying within the boundaries described in the 1925 order. *See* Ex. 3 (1939 map depicting 1925 boundaries in purple).

32. The Antiquities Act permits the President "to declare * * * historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest * * * to be national monuments," but permits the reservation of only "the smallest area compatible with the proper care and management of the objects to be protected." 16 U.S.C. § 431.

33. The primary purpose of the 1925 creation of Glacier Bay National Monument was to preserve the land left bare by the retreat of tidewater glaciers for study of the development of flora and fauna.

34. The President did not intend to include as part of the monument the lands underlying marine waters within the boundary described in Proclamation 1733.

35. Given the purposes of the monument, the President's authority to withdraw and reserve lands under the Antiquities Act did not extend to the submerged lands within the boundaries described by the 1925 reservation order.

36. On or about April 18, 1939, President Franklin D. Roosevelt expanded the area of Glacier Bay National Monument by issuing Proclamation 2330 under the authority of the Antiquities Act.

37. The Proclamation added to Glacier Bay National Monument certain public lands, including lands simultaneously excluded from the Tongass National Forest. *See* Ex. 3 (lands transferred from the Tongass National Forest

to Glacier Bay National Monument depicted between the red and green lines).

38. The primary purposes of the 1939 expansion of Glacier Bay National Monument were to set aside a refuge for brown bears and to preserve a coastal forest.

39. The lands underlying marine waters within the 1939 boundary of the newly expanded monument were unrelated to the purposes of a bear refuge and a forest preserve and therefore exceeded "the smallest area compatible with the proper care and management of the objects to be protected." 16 U.S.C. § 431.

40. The President did not intend to include as part of the monument the lands underlying marine waters within the boundaries described in Proclamation 2330.

41. The President's authority to reserve lands under the Antiquities Act did not extend to the submerged lands within the boundaries described by the 1939 proclamation.

42. The State of Alaska took title to all the lands underlying marine waters within the boundaries of Glacier Bay National Monument at statehood, pursuant to the equal footing doctrine and the Submerged Lands Act.

43. The United States' claim of title to the lands underlying marine waters within the boundaries of Glacier Bay National Monument as they were drawn at statehood is adverse to and disputed by Alaska, and creates a cloud on Alaska's title to those lands.

44. The United States' claim of title to these lands will continue to cause injury to Alaska unless this Court declares and establishes Alaska's rights.

PRAYER FOR RELIEF

Alaska prays that the Court require the United States to answer Alaska's Complaint and that, after due proceedings, the Court enter a decree declaring the rights of Alaska as against the United States in the submerged lands within the Alexander Archipelago of Southeast Alaska that are enclosed behind the closing lines drawn by the United States to mark the seaward limit of inland waters at the 1903 Alaska Boundary Tribunal arbitration, together with the submerged lands extending three miles seaward from that line and the remainder of Southeast Alaska's coastline, and enjoining the United States, its privies, assigns, lessees, and other persons claiming under it from interfering with the rights of Alaska, as well as award Alaska any other relief the Court may deem just and appropriate.

Respectfully submitted,

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