

# SOVEREIGNTY AND SUBSISTENCE: NATIVE SELF-GOVERNMENT AND RIGHTS TO HUNT, FISH, AND GATHER AFTER ANCSA

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## ABSTRACT

*The Alaska Native Claims Settlement Act (ANCSA) was passed in 1971 to extinguish aboriginal rights of Alaska Natives and provide compensation for those rights extinguished. Instead of vesting assets (land and money) in tribal governments, Congress required the formation of Alaska Native corporations to receive and hold these assets. A major flaw in the settlement was the failure to provide statutory protections for the aboriginal hunting, fishing, and gathering rights extinguished by ANCSA. Moreover, while ANCSA did not directly address Alaska Native tribal status or jurisdiction, the Supreme Court interpreted the Act to terminate the Indian country status of ANCSA land. Subsequently, Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) was adopted in 1980 to provide a subsistence priority for rural Alaska residents, but the approach contemplated in Title VIII failed due to the State of Alaska's unwillingness to participate. On the self-government front, state and federal courts have joined the federal Executive Branch and Congress in recognizing that Alaska Native tribes have the same legal status as other federally recognized tribes in the lower forty-eight states. The Obama Administration recently changed its regulations to allow land to be taken in trust for Alaska Native tribes, and thus be considered Indian country subject to tribal jurisdiction, and generally precluding most state authority. This article explains these developments and offers suggestions for a legal and policy path forward.*

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## INTRODUCTION

Indigenous occupancy of what is now Alaska began over 11,000 years ago, and Russian exploration of coastal areas began in the mid-eighteenth century. Russia claimed ownership of Alaska by virtue of “discovery” and passed the rights it claimed to the United States by treaty in 1867. Piecemeal encroachment on tribal territories by the government increased over time, as Alaska’s non-Native population expanded. Alaska Natives, like all other indigenous populations within what became the United States, possessed property rights in the form of aboriginal title, which is based on principles of international law adopted as federal common law.<sup>1</sup> Part I of this Article outlines the history of Alaska Native aboriginal rights prior to passage of the Alaska Native Claims Settlement Act (ANCSA). Part II reviews the history of ANCSA, its structure, and its effect on tribal sovereignty and hunting and fishing rights. Part III examines the post-ANCSA judicial and congressional treatment of Alaska Native sovereignty and subsistence uses, and offers suggestions for improvements.

The view that Alaska Natives possessed property rights and rights to self-government under federal law became the accepted view of the national government, but there was little pressure to deal with Alaska Native land claims until the 1950s when statehood became a reality. Although statehood itself did not affect aboriginal title, it was the first in a series of events that led Congress to pass ANCSA in 1971.<sup>2</sup> ANCSA extinguished aboriginal title, but left unresolved important questions regarding tribal sovereignty and Native hunting and fishing rights. The sovereign status of Alaska Native villages has been confirmed, though their territorial sovereignty was severely limited by the Supreme Court’s interpretation of ANCSA in *Alaska v. Native Village of Venetie Tribal Government*.<sup>3</sup>

However, tribal sovereignty decisions from federal and state courts, along with recent Obama Administration action permitting land to be taken in trust for Alaska Native tribes, point toward an expansion of Native self-governance. The main vehicle for protecting tribal access to fish and game in all lands in Alaska, Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA),<sup>4</sup> relied on a cooperative

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1. See generally *Johnson v. M’Intosh*, 21 U.S. 543 (1823) (adopting the international principle that a discovering government claims exclusive title to land it discovers subject to the right of occupancy of indigenous peoples).

2. Pub. L. No. 92-203, 85 Stat. 688 (1971) (current version at 43 U.S.C. §§ 1601-1629h (2012)).

3. 522 U.S. 520 (1998).

4. 16 U.S.C. §§ 3111-3126 (1980).

federalism model that has failed due to the State of Alaska's unwillingness to participate in a regime it initially supported. Forty-five years after ANCSA's passage, it is evident that congressional and federal administrative action is needed to remedy these flaws in the Settlement Act.

## I. ABORIGINAL TITLE IN ALASKA<sup>5</sup>

When the United States acquired Alaska from Russia in 1867 pursuant to the Treaty of Cession,<sup>6</sup> what is now the State of Alaska was essentially unknown and unexplored by non-Native<sup>7</sup> people. Article III of the Treaty provided that "[t]he uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country."<sup>8</sup> In essence, the United States stepped into Russia's shoes with respect to its relationship with the people who inhabited Alaska and occupied the land and waters.<sup>9</sup> The

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5. Section I and parts of Section II originally appeared in a 2007 article written by Professor Anderson and published in the *Tulsa Law Review*. Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished Business*, 43 *Tulsa L. Rev.* 17 (2007). We have included these updated sections here with the express permission of the *Tulsa Law Review*. These earlier sections have been included as a way to provide context for the latter, updated portions of the article. Those wishing to read the original 2007 article may do so here: <http://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=2599&context=tlr>.

6. Treaty Concerning the Cession of Russian Possessions in North America, Russ.-U.S., Mar. 30, 1867, 15 Stat. 539 [hereinafter Treaty of Cession]. For a history of the Russian exploration and assertion of control over parts of Alaska, see CHIEF OF THE FOREIGN LAW SECTION LAW LIBRARY, LIBRARY OF CONGRESS, RUSSIAN ADMINISTRATION OF ALASKA AND THE STATUS OF THE ALASKA NATIVES, S. DOC. NO. 81-152 at 45, 50-51 (1950). See also HUBERT HOWE BANCROFT, *HISTORY OF ALASKA 1730-1885* (1886); Richard H. Bloedel, *The Alaska Statehood Movement 1-5* (Mar. 9, 1974) (unpublished Ph.D. dissertation, University of Washington) (on file with the Suzzallo and Allen Libraries, University of Washington).

7. The term "Alaska Native" is generally used as a collective reference to Alaska's various indigenous groups.

8. Treaty of Cession, *supra* note 6. The population was roughly 27,000 Natives, 1,400 Creoles, 480 Russians and Siberians, 200 non-Russian foreigners, and 150 American civilians. Bloedel, *supra* note 6, at 1.

9. See, e.g., *Alaska v. United States*, 422 U.S. 184, 192 n.13 (1975) ("By the Treaty of Cession in 1867 Russia ceded to the United States 'all the territory and dominion now possessed (by Russia) on the continent of America and in the adjacent islands.' 15 Stat. 539. The cession was effectively a quitclaim. It is undisputed that the United States thereby acquired whatever dominion Russia had possessed immediately prior to cession."); see also DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS 24-26* (3d ed. 2012) (discussing the relationship between the United States and Alaska Natives after the transition from Russian to United States sovereignty).

plain import of the provision in the treaty was that general federal law governing Native rights was applicable.

Congress did nothing to suggest otherwise in subsequent actions. In 1868, Congress designated Alaska as a “customs collection district” and extended United States laws relating to customs, commerce, and navigation over the “mainland, islands, and waters of the territory” of Alaska.<sup>10</sup> Under federal law, this designation had no legal or practical effect on Alaska Natives, and simply began a congressional practice of legislating for Alaska on a piecemeal basis with no consideration of Alaska Native rights.<sup>11</sup> The United States was essentially a colonizing nation asserting rights without much regard to the indigenous population.

What was the law regarding the indigenous inhabitants in areas that came to be claimed by the United States? Under general principles of international law, discovering nations acquired the exclusive right to deal with indigenous peoples with respect to matters of land ownership and intergovernmental relations.<sup>12</sup> In *Johnson v. M'Intosh*,<sup>13</sup> Chief Justice Marshall explained that under this so-called Doctrine of Discovery, indigenous tribes have a “legal as well as just claim to retain possession of [the lands]” they historically occupied.<sup>14</sup>

Following *M'Intosh*, the rights of the discovering nation, Russia and then the United States, would similarly consist of a technical legal title plus the “right of preemption” – the right to acquire the full beneficial title to land used and occupied by the indigenous occupants.<sup>15</sup> The right of Alaska Natives to use and occupy their lands (i.e., their rights as property owners) would be labeled by federal law to be aboriginal title, or original Indian title. Of course, the Alaska Natives had no such understanding, much less agreement, with the proposition that Russia, the United States, or any other country could divest the Native peoples of their rights to soil

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10. Act of July 27, 1868, ch. 273, 15 Stat. 240.

11. See CASE & VOLUCK, *supra* note 9 at 24–25.

12. See generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.02[1]–[2], at 9–18 (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK] (explaining the origins and development of this policy). For a comprehensive history of the discovery doctrine, see ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT (1990).

13. 21 U.S. 543 (1823).

14. *Id.* at 574. See also *Cherokee Nation v. Georgia*, 30 U.S. 1, 2 (1831) (“The Indians are acknowledged to have an unquestionable, and heretofore unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government.”).

15. For an illuminating analysis of *Johnson v. M'Intosh* and its progeny, see LINDSAY G. ROBERTSON, CONQUEST BY LAW (2005). See generally COHEN'S HANDBOOK, *supra* note 12, § 15.04[1]–[2], at 999–1004 (explaining forms of tribal property).

and their way of life without their voluntary consent. Chief Justice Marshall was aware of the arrogance of the legal proposition introduced in *M'Intosh*:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.<sup>16</sup>

Thus, the United States' legal claim to title was rooted in Supreme Court precedent, and the framework for eventual extinguishment of Alaska Native aboriginal title was in place.<sup>17</sup>

It is now generally accepted that prior to adoption of ANCSA,<sup>18</sup> Alaska Natives possessed unextinguished aboriginal title, which included hunting, fishing and gathering rights.<sup>19</sup> There were indigenous people and societies on the ground in Alaska, and they had their own systems of governance and land use rights.<sup>20</sup> In retrospect, it seems ludicrous to think that the notion of indigenous land rights was even a matter of debate. As one Native leader described the concept of land "ownership," it is plain that the Native system recognized its own form of property rights:

The notion of private ownership was alien to most of our people. We had lived throughout the length and breadth of Alaska, using the land as our forefathers had, becoming intimate with its ways as it nurtured, however grudgingly at times, our

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16. *Johnson*, 21 U.S. at 591.

17. See STUART BANNER, *HOW THE INDIANS LOST THEIR LAND* (2005) (surveying federal-Indian land transactions and underlying policies).

18. Pub. L. No. 92-203, 85 Stat. 688 (1971) (current version at 43 U.S.C. §§ 1601-1629h (2012)).

19. See *Tlingit and Haida Indians v. United States*, 177 F. Supp. 452, 461-63 (Ct. Cl. 1959) (rejecting the United States' argument that Alaska Natives could not have possessed aboriginal title due to their mode of socio-political organization); see also *Status of Alaskan Natives*, 53 Interior Dec. 593, 595 (1932) ("[T]hese [Alaska] natives are now unquestionably considered and treated as being under the guardianship and protection of the Federal Government, at least to such an extent as to bring them within the spirit, if not within the exact letter, of the laws relative to American Indians . . ."); cf. *Native Vill. of Eyak v. Blank*, 688 F.3d 619 (9th Cir. 2012) (assuming existence of aboriginal title in Outer Continental Shelf of Alaska but rejecting claim based on lack of exclusive use).

20. WILLIAM L. IGGIAGRUK HENSLEY, *FIFTY MILES FROM TOMORROW: A MEMOIR OF ALASKA AND THE REAL PEOPLE* 108 (2009).

existence . . . . A house built by the leader of a family would “belong” to him and his relatives in a loose sense[.]<sup>21</sup>

The author further explained that the advent of reorganized tribal governance under the Indian Reorganization Act “didn’t change very much the ways we had shared the land for generations.”<sup>22</sup>

Native tribes establish their aboriginal title in United States courts by demonstrating actual use and/or occupation of an area on a continuous basis, except for periods of involuntary dispossession, and this property right is not “based upon a treaty, statute, or other formal government action.”<sup>23</sup> In *Tlingit and Haida Indians v. United States*,<sup>24</sup> the court of claims affirmed the existence of aboriginal title among the Tlingit and Haida Indians of Alaska, stating that “land and water owned and claimed by each local clan division in a village was usually well-defined as to area and use,” with tracts “parceled out or assigned to the individual house groups for use and exploitation,” and “[c]ertain designated offshore fishing and sea mammal hunting areas in larger bodies of water” available for common use by various clans’ members residing within “a particular geographical area, but” not to those Indians living outside that geographical area.<sup>25</sup> The court’s ruling was consistent with an earlier opinion from the Department of the Interior (DOI) recognizing aboriginal fishing rights of Alaska Natives.<sup>26</sup>

Typically, the United States acquired tribal lands pursuant to treaty,<sup>27</sup> as negotiated by the Executive Branch and approved by the Senate. But while that had been the pattern since the formation of the United States, by the 1860s the House of Representatives became increasingly resentful of the fact that it was being called upon repeatedly to appropriate funds for treaty obligations it had not participated in approving. To resolve a budget stalemate over the Interior Appropriations Bill, the Senate agreed to a statute that ended treaty-

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21. *Id.*

22. *Id.*

23. *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 347 (1941). This “right of occupancy is considered as sacred [to Native people] as the fee simple of the whites.” *Id.* at 345 (quoting *Mitchel v. United States*, 34 U.S. 711, 746 (1835)).

24. 177 F. Supp. at 456.

25. *Id.*

26. *Aboriginal Fishing Rights in Alaska*, 57 Interior Dec. 461, 474, 476 (1942) (“The Indian who has been forbidden [through government callousness or indifference] from fishing in his back yard has not thereby lost his aboriginal title thereto. I conclude that aboriginal occupancy establishes possessory rights in Alaskan waters and submerged lands, and that such rights have not been extinguished by any treaty, statute, or administrative action.”).

27. BANNER, *supra* note 17, at 252. See also Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 34-35 (1947).

making with tribes.<sup>28</sup> Since Alaska's acquisition by the United States in 1867 predated the formal termination of treaty-making with Indian tribes by only four years, there was little time within which treaties might have been negotiated and ratified.<sup>29</sup> Thus, agreements after 1871 were negotiated with tribes by executive branch representatives and then presented to both houses of Congress for ratification by statute, or statutes taking tribal land for compensation were adopted, but conditioned on subsequent tribal consent.<sup>30</sup> The geographic isolation of Alaska and its sparse non-Native population meant there was no need for an expeditious elimination of Alaska Native aboriginal rights.<sup>31</sup> Early federal legislation simply maintained the status quo or completely ignored the issue.

### A. Early Federal Governance in Alaska

In 1884, Congress took its first major step toward governance of Alaska when it passed an Organic Act,<sup>32</sup> establishing a civil government for the district of Alaska with the laws of Oregon made applicable.<sup>33</sup> With respect to Alaska Natives, Congress provided that "the 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."<sup>34</sup> A historian writing in 1886 stated that "it is probable that the natives would be only too glad to be left alone as severely in the future as they had been in the past."<sup>35</sup>

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28. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified as amended at 25 U.S.C. § 71 (2012)).

29. *Antoine v. Washington*, 420 U.S. 194, 203 (1975) (citations omitted) ("[The end of treaty-making] meant no more, however, than that after 1871 relations with Indians would be governed by Acts of Congress and not by treaty. The change in no way affected Congress' plenary powers to legislate on problems of Indians, including legislating the ratification of contracts of the Executive Branch with Indian tribes to which affected States were not parties.").

30. BANNER, *supra* note 17, at 252.

31. In 1880 and 1890 the non-Native population was 430 and 6,698, respectively. ROBERT D. ARNOLD, *ALASKA NATIVE LAND CLAIMS* 71 (1976).

32. Act of May 17, 1884, ch. 53, 23 Stat. 24. Section 2 of the Organic Act provided for an appointed Governor, while remaining provisions of the Act called for the appointment of judges and commissioners. *Id.*

33. *Id.* § 7, at 25-26.

34. *Id.* § 8, at 26. In *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), the Supreme Court held that the Organic Act did not recognize or confirm Native ownership for Fifth Amendment Takings Clause purposes, but merely preserved aboriginal title for later disposition. *Id.* at 278.

35. BANCROFT, *supra* note 6, at 640.

Congress provided a criminal code for Alaska in 1899,<sup>36</sup> and a year later extended mining laws to Alaska, while withholding application of general public land laws.<sup>37</sup> Like the Organic Act of 1884, later statutes provided that Alaska Natives were not to be disturbed in their use and occupancy of land.<sup>38</sup> Territorial courts, as well as the Solicitor of the DOI, treated this Act as confirming that Alaska Natives held unextinguished aboriginal rights to land and to hunt and fish.<sup>39</sup> For the most part, Alaska Natives maintained their ways of life and continued to occupy their territories largely without outside interference.<sup>40</sup> Alaska officially became a “United States Territory” with a legislative body in 1912,<sup>41</sup> and the first statehood bill was introduced in Congress in 1916.<sup>42</sup> But for the most part, consideration of Native rights would be left to federal officials.

Like the treatment of Alaska Native rights to property, Native rights to hunt, fish, and gather were also provided special protection in some cases through exemptions from general government regulations.<sup>43</sup> Alaska Natives were thus exempted from the ambit of several wildlife

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36. Act of Mar. 3, 1899, ch. 429, 30 Stat. 1253.

37. Act of June 6, 1900, ch. 786, § 26, 31 Stat. 321.

38. *Id.* § 27, at 330; *United States v. Atl. Richfield Co.*, 435 F. Supp. 1009, 1014–15 (D. Alaska 1977) (citations omitted) (“The second Organic Act, for example, provided that Natives ‘shall not be disturbed in the possession of any lands now actually in their use and occupancy . . . .’”).

39. *United States v. Cadzow*, 5 Alaska 125, 132 (D. Alaska 1914); *United States v. Berrigan*, 2 Alaska 442, 449–50 (D. Alaska 1905) (explaining that the Organic Act of 1900 rendered “void all attempts to dispossess [Natives] of their land by deed or contract.”); *Aboriginal Fishing Rights in Alaska*, 57 Interior Dec. 461, 474 (1942). *See also* CASE & VOLUCK, *supra* note 9, at 66 (“If one reads article III of the 1867 treaty and all of the cases together, the most satisfactory legal conclusion is that prior to ANCSA the Alaska Natives held their lands in Alaska by right of aboriginal possession.”). *But see* *Worthen Lumber Mills v. Alaska Juneau Gold Mining Co.*, 229 F. 966 (9th Cir. 1916); *Sutter v. Heckman*, 1 Alaska 188 (D. Alaska 1901), *aff’d on other grounds*, *Heckman v. Sutter*, 119 F. 83 (9th Cir. 1902) (involving disputes between non-Natives over possession of land purportedly conveyed by individual Indians). In *Miller v. United States*, 159 F.2d 997 (9th Cir. 1947), the court concluded that the Treaty of Cession in 1867 extinguished aboriginal title, but that the disclaimer in the 1884 Organic Act preserved individual rights of occupancy. *Id.* at 1001–02, 1003–04. *Miller’s* holding as to extinguishment was implicitly repudiated in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279–82 (1955). The idea that the Treaty of Cession eliminated Native aboriginal title runs afoul of the rule that federal acts extinguishing tribal property rights must clearly express such an intent. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2032 (2014).

40. *See supra* notes 38–39.

41. Act of August 24, 1912, ch. 387, 37 Stat. 512. *See* Bloedel, *supra* note 6, at 20–23 (explaining the structure of Alaska’s territorial legislature as defined by the Act of August 24, 1912).

42. H.R. 13978, 64th Cong. (1916). The events leading up to introduction of the statehood bill are recounted in Bloedel, *supra* note 6, at 35–47.

43. The obvious difference is the lack of treaty-based rights due to the end of treaty-making in 1871. *See supra* notes 28–29 and accompanying text.

conservation measures adopted by Congress prior to statehood. For example, Congress limited the taking of fur seals, but exempted Native hunting for food, clothing, and boat-manufacture.<sup>44</sup> Congress's first hunting regulations prohibited the destruction or taking of game animals and birds, and set seasons and bag limits for hunting, but exempted hunting for food or clothing by "native Indians or Eskimos or by miners, explorers, or travelers on a journey when in need of food."<sup>45</sup> The 1916 Migratory Bird Convention with Great Britain exempted Natives from the closed seasons for certain species.<sup>46</sup> In 1925, Congress established an Alaska Game Commission which authorized "any Indian or Eskimo, prospector, or traveler to take animals or birds during the close season when he is in absolute need of food and other food is not available . . ."<sup>47</sup> The Reindeer Industry Act of 1937<sup>48</sup> was intended to provide for Native subsistence needs and establish a Native monopoly over the reindeer industry.<sup>49</sup>

## B. Efforts to Westernize Alaska Native Aboriginal Title

While Alaska Natives had claims to aboriginal title, and were obviously present on the landscape, it was not clear whether Alaska Natives could obtain fee title to individual parcels of land under applicable federal law.<sup>50</sup> Because tribal claims to aboriginal title had not

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44. Act of July 1, 1870, ch. 189, 16 Stat. 180, 180.

45. Act of June 7, 1902, ch. 1037, 32 Stat. 327, 327 (amended 1908).

46. Convention for the Protection of Migratory Birds, Gr. Brit.-U.S., Aug. 16, 1916, 39 Stat. 1702. This pattern continued with respect to birds in the 1990s when migratory bird treaties with Canada and Mexico were amended by protocols, which exempt the taking of migratory birds and their eggs by Alaska Natives. Protocol Amending Convention for Protection of Migratory Birds and Game Mammals, Mex.-U.S., May 5, 1997, Treaty Doc. 105-26; Protocol Amending the 1916 Convention for the Protection of Migratory Birds, Can.-U.S., Aug. 14, 1995, Treaty Doc. 104-28.

47. Alaska Game Law, ch. 75, 43 Stat. 739, 739, 744 (1925) (amended 1938, 1940, 1943). The 1925 statute also imposed a one-year territorial residency requirement, *id.* at 740, which was amended to authorize a three-year residency requirement for trapping licenses whenever "the economic welfare and interests of native Indians or Eskimos" were threatened by non-Native trapping. Act of June 25, 1938, ch. 686, 52 Stat. 1169, 1170. These protective statutes were removed from the U.S. Code upon statehood. *See* 48 U.S.C. §§ 192-211 (2012).

48. Reindeer Industry Act of 1937, ch. 897, 50 Stat. 900.

49. *See id.*; Gigi Berardi, *Natural Resource Policy, Unforgiving Geographies, and Persistent Poverty in Alaska Native Villages*, 38 NAT. RES. J. 85, 98-99 (1998) (emphasizing subsistence as a way of life for Alaska Natives). *But see* Williams v. Babbitt, 115 F.3d 657, 659-60 (9th Cir. 1997) (interpreting statute to not provide Natives a monopoly over the reindeer industry, but rather to permit non-Native ownership of imported reindeer).

50. *See* Miller v. United States, 159 F.2d 997 (9th Cir. 1947) (evidencing confusion about whether Alaska Natives could obtain fee title under federal law).

been extinguished, the grant of a parcel of land to anyone – Native or non-Native – would presumably transfer only a legal interest subject to the Native right of use and occupancy.<sup>51</sup> This right of occupancy was a protectable interest, but Congress nevertheless took two actions to provide Alaska Natives with the opportunity to obtain title to land under some form of federal supervision. First, individual Alaska Natives could acquire title to land from the United States pursuant to the Alaska Allotment Act of 1906.<sup>52</sup> The Allotment Act was not part of a move to break up reservations as in the lower forty-eight states,<sup>53</sup> but rather was intended to provide a way for individual Alaska Natives to acquire title to individual parcels of land important for traditional use and occupancy.<sup>54</sup> Title to up to 160 acres of land would be granted if individual applicants could demonstrate continuous use and occupancy for five years.<sup>55</sup> The other means provided for individual Native land ownership was supplied by the Alaska Native Townsite Act of 1926,<sup>56</sup> which permitted Native occupants of populated areas to obtain restricted fee lots in areas surveyed by a federal “townsite trustee.”<sup>57</sup>

Congress and the Executive Branch also established reservations in a fashion similar to that followed in the rest of the United States after 1871. In *Alaska Pacific Fisheries v. United States*,<sup>58</sup> the Supreme Court upheld regulations banning encroachment by non-Native fishermen in waters

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51. See *id.* at 1003–06 (indicating that aboriginal title had been extinguished in the 1867 Treaty of Cession, but that the 1884 Organic Act recognized some form of individual Native title). The case has been repudiated by the Supreme Court and the Solicitor of the DOI and cannot be reconciled with general federal Indian law principles. See *supra* note 39.

52. Act of May 17, 1906, ch. 2469, 34 Stat. 197, *repealed by* Alaska Native Claims and Settlement Act, 85 Stat. 688 (1971) (codified at 43 U.S.C. § 1617 (2012)).

53. See COHEN’S HANDBOOK, *supra* note 12, § 16.03[2], at 1072–75 (explaining allotment policy generally as implemented in the lower forty-eight). As a consequence of the allotment process in the lower forty-eight states, tribal and individual Indian land holdings were reduced from roughly 150 million acres in 1887 to fifty million acres in 1934. *Id.* Of the thirty-six million acres allotted to individuals by 1920, twenty-seven million acres had passed out of Indian hands by 1934. *Id.* at 1074.

54. See *generally* Allotment of Land to Alaska Natives, 71 Interior Dec. 340 (1964) (canvassing prior administrative interpretations of the Act); CASE & VOLUCK, *supra* note 9, at 117–19; COHEN’S HANDBOOK, *supra* note 12, § 4.07[3][b][iv], at 338–40.

55. Allotment of Land to Alaska Natives, 71 Interior Dec. at 354–55, 357. See *Akootchook v. United States*, 271 F.3d 1160, 1161 (9th Cir. 2001).

56. Act of May 25, 1926, ch. 379, 44 Stat. 629 (*repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 702, 90 Stat. 2743 (codified in 43 U.S.C. §§ 1701–1722 (2012))).

57. For a description of the program see *Aleknagik Natives v. United States*, 635 F. Supp. 1477, 1479–80 (D. Alaska 1985). For a comprehensive review of the Native town site and allotment programs, see CASE & VOLUCK, *supra* note 9, at 113–52.

58. 248 U.S. 78 (1918).

adjacent to the Annette Islands.<sup>59</sup> The statute creating the reservation did not mention the waters explicitly when it created the Annette Island Indian reservation.<sup>60</sup> In interpreting the statute, the Court applied the basic Indian law jurisprudence as in the contiguous states. The Court accordingly ruled that the reservation of the islands included the surrounding waters because they were necessary to fulfill the purpose of establishing the reservation, which was to provide a homeland with a fishing economy.<sup>61</sup> In reaching its conclusion, the Court followed the liberal canons of interpretation generally applicable in Indian law.<sup>62</sup>

The Indian Reorganization Act of 1934 (IRA),<sup>63</sup> was made applicable to Alaska in 1936,<sup>64</sup> and a number of Alaska Native tribes reorganized their governments under the IRA.<sup>65</sup> Much controversy ensued in the 1940s and continued into the 1950s after the Secretary of the Interior used his authority under the IRA to establish six reservations, with the largest being the Venetie Indian Reservation consisting of approximately 1.4 million acres.<sup>66</sup> Eleven reservations had been created by Executive Order,<sup>67</sup> and several others, including all of St. Lawrence Island, were set aside as Reindeer Reserves prior to enactment of the IRA.<sup>68</sup> As discussed below, the anxiety that many non-Native Alaskans felt regarding

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59. *Id.* at 88–90.

60. *Id.* at 86–87. *See* *Winters v. United States*, 207 U.S. 564 (1908) (Indian reservation included implied reservation of water to fulfill agricultural purpose of reservation).

61. *Alaska Pac. Fisheries*, 248 U.S. at 89.

62. *Id.*

63. Act of June 18, 1934, ch. 576, 48 Stat. 987 (1934) (current version at 25 U.S.C. §§ 5101–5119 (2012)).

64. Act of May 1, 1936, ch. 254, 49 Stat. 1250 (codified at 25 U.S.C. § 5119 (2012)).

65. By 1947 the United States Indian Service documented that over fifty tribes in Alaska had organized under the IRA. T. HAAS, U.S. INDIAN SERV., DEP'T. OF INTERIOR, TEN YEARS OF TRIBAL GOVERNMENT UNDER THE IRA 29–30 (1947). The Solicitor of the DOI put the number at sixty-nine in 1993. DEP'T OF INTERIOR, OFFICE OF THE SOLICITOR, M-36975, GOVERNMENTAL JURISDICTION OF ALASKA NATIVE VILLAGES OVER LAND AND PEOPLE 33 (Jan. 11, 1993).

66. *See* CASE & VOLUCK, *supra* note 9, at 444 (Table V-3). This report was developed in response to a request from United States Senator Henry M. Jackson, Chairman of the Committee on Interior and Insular Affairs, “for a compilation of background data and interpretive materials relevant to a fair and intelligent resolution of the *Alaska Native problem*.” *Id.* (emphasis added). Contrary to some popular assertions, there was apparently considerable interest by Alaska Natives in the establishment of reservations for their benefit. Eleven other reservations were sought under the IRA and another ninety were also requested by 1950, although no action was taken by the Bureau of Indian Affairs. *Id.* at 443.

67. CASE & VOLUCK, *supra* note 9, at 87 n.31.

68. *Id.* at 87–89.

establishment of reservations led to a number of efforts to foreclose the legal authority to create them.<sup>69</sup>

In 1943, the Secretary established the Karluk Indian reservation on Kodiak Island,<sup>70</sup> designating adjacent tidelands and coastal waters under the IRA's authority to reserve "public lands which are actually occupied by Indians or Eskimos" in Alaska.<sup>71</sup> The Supreme Court rejected a challenge to the Secretary's inclusion of navigable waters in the reservation, noting that for Natives "the adjacent fisheries are as important, perhaps more important than the forests, the furbearing animals or the minerals."<sup>72</sup> The reservation was established for the very purpose of buffering the Natives from the non-Native commercial fishing competition.<sup>73</sup> The case was simply another product of the increase in Alaska's non-Native population and continued encroachment on areas important for aboriginal uses. It also coincided with the inexorable movement towards statehood.

### C. Statehood and Aboriginal Rights

The question of extinguishing Alaska Native aboriginal claims picked up steam following World War II, after which Alaska's population increased dramatically.<sup>74</sup> At times, confusing court decisions made it appear that there might not be much substance to the Native claims.<sup>75</sup> By 1943, though, the establishment of reservations for Alaska Natives by the Roosevelt Administration prompted Anthony Dimond, Alaska's delegate to Congress, to propose massive transfers of federal land to the Territory

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69. Bloedel, *supra* note 6, at 267-68 (discussing proposals to revoke the Secretary of the Interior's authority to create Indian reservations and replace it with authority "to issue patents to 'Native tribes, and villages or individuals for the lands actually possessed, used or occupied for town sites, villages, smokehouses, gardens, burial grounds, or missionary stations.'"). A look back reveals that no reservations were in fact created after 1946. CASE & VOLUCK, *supra* note 9, at 101, 105-106.

70. Exec. Order No. 128, 8 Fed. Reg. 8557 (May 22, 1943).

71. *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 100 (1949).

72. *Id.* at 114.

73. *See id.* at 116.

74. Bloedel, *supra* note 6, at 88. The non-Native population grew from 29,295 in 1929 to 94,780 in 1950 and then to 183,086 by 1960. ARNOLD, *supra* note 31, at 71.

75. *Miller v. United States* included dictum that Native aboriginal title had been extinguished in 1867. *See* CASE & VOLUCK, *supra* note 9, at 71-72 (discussing alternative interpretations of the *Miller* dictum); MARY CLAY BERRY, THE ALASKA PIPELINE: THE POLITICS OF OIL AND NATIVE LAND CLAIMS 31 (1975) (noting that in 1954, "many Senators did not think the [land] claims were valid.") *See also* note 38, *supra*.

of Alaska so as to preclude the establishment of new Indian reservations under the IRA.<sup>76</sup>

Hearings on statehood took place at several locations around Alaska in 1945. Secretary of the Interior Harold Ickes spoke in favor of it, discussing that “the ancestral claims of the Native population should be affirmed, delineated, or extinguished with compensation.”<sup>77</sup> The first bill introduced in the post-war period provided for statehood, but did not include any reference to Native aboriginal rights, causing the DOI, led by Secretary Julius Krug, to propose amendments requiring the State and its people to disclaim any interest in land owned or held by any Native.<sup>78</sup> The situation became more complicated as a provision precluding the establishment of any reservations in Alaska was linked to the statehood bill.<sup>79</sup> The upshot was that statehood bills failed in the 80th and 81st Congresses.

For the most part, however, non-Native Alaskans were not prepared or willing to deal with Native claims to aboriginal title during the post-war economic expansion.<sup>80</sup> One historian described the situation thus:

During this period of economic growth, the Natives were growing increasingly aware of their rights and asked repeatedly for the protections of reservations. Their petitions were ignored. . . . No one wanted to talk about the claims. This issue was a highly emotional Pandora’s box: to open it would let out bigotry and greed and fears that were inappropriate in a group of people petitioning for admission to the democratic United States of America.<sup>81</sup>

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76. Bloedel, *supra* note 6, at 95.

77. *Id.* at 124.

78. *Id.* at 192–94 (describing the disclaimer as “copied from Arizona, New Mexico and other recent states”).

79. *See id.* at 267–68 (noting the uproar against statehood when news broke regarding the reservations restrictions).

80. *See id.* at 220–21.

81. MARY CLAY BERRY, *THE ALASKA PIPELINE: THE POLITICS OF OIL AND NATIVE LAND CLAIMS* 25 (1975). Anti-Native sentiment was rampant among non-Natives in Alaska:

In 1944, Juneau was a Jim Crow town where the windows of many bars and restaurants warned “No Dogs or Indians Allowed.” Windows in Anchorage and Fairbanks had similar signs. In Nome, seating in the local movie theater was segregated. And after touring the territory the previous winter, a Bureau of Indian Affairs social worker described Alaska to Commissioner of Indian Affairs John Collier as a “territory where race prejudice is more shocking than in the South.”

DONALD C. MITCHELL, *SOLD AMERICAN: THE STORY OF ALASKA NATIVES AND THEIR LAND, 1867–1959*, at 332–33 (1997) (footnote omitted). In fact, the territorial legislature rejected an effort to outlaw discrimination. *Id.* at 333.

It was in this context that Congress considered a number of approaches to the extinguishment of Alaska Native land claims.<sup>82</sup> Some of these would have provided Alaska Natives with the right to sue the United States over compensation for the loss of aboriginal lands,<sup>83</sup> while others provided for the confirmation of title to relatively small amounts of land in and around the Native villages.<sup>84</sup> The effort to extinguish Alaska Native claims to aboriginal title subsided to some degree when the Supreme Court decided *Tee-Hit-Ton Indians v. United States*,<sup>85</sup> which was incorrectly interpreted by some as clearing the way for non-Native development and presumably, acquisition of Native lands.<sup>86</sup> In fact, the Court simply held that aboriginal title, unrecognized by Congress, was not subject to the just compensation clause of the Fifth Amendment.<sup>87</sup> The Court did not hold that aboriginal title did not exist and appeared to assume just the opposite.

While some members of Congress continued to believe the settlement of Native aboriginal claims should take place prior to Alaskan statehood,<sup>88</sup> that view did not prevail. The approach chosen by Congress in the Statehood Act set up an inevitable conflict between aboriginal property rights and State land selections under another section of the Statehood Act. Article 4 of the Statehood Act<sup>89</sup> provided that the State must disclaim any right to the property of Alaska Natives (including

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82. MITCHELL, *supra* note 81, at 332–37. It was also during this period that Congress evidenced its hostility toward ongoing government-to-government relationships with Indian tribes when it adopted a resolution calling for the termination of the federal-tribal relationship with certain Indian tribes. H.R. Con. Res. 108, 83d Cong. 1st Sess., 67 Stat. B132 (1953). This termination policy was intended to eventually do away completely with recognition of Indian tribes as sovereign entities under federal law. See COHEN'S HANDBOOK, *supra* note 12, § 1.06, at 84–93 (explaining termination policy generally).

83. MITCHELL, *supra* note 81, at 333.

84. *Id.* at 334.

85. 348 U.S. 272 (1955).

86. MITCHELL, *supra* note 81, at 358.

87. *Tee-Hit-Ton Indians*, 348 U.S. 272 at 278–79 (“There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation.”). The Court concluded that there was no such congressional recognition, but implicit in its ruling was the acknowledgement that Alaska Natives did have aboriginal title claims. *Id.* at 275 (“The Court of Claims . . . held that petitioner was an identifiable group of American Indians residing in Alaska; that its interest in the lands prior to purchase of Alaska by the United States in 1867 was ‘original Indian title’ or ‘Indian right of occupancy.’”).

88. This is not to imply that the efforts had no connection. Extinguishment of Native land claims was viewed by some as a prerequisite to statehood. See MITCHELL, *supra* note 81, at 367 (quoting Senator Hugh Butler to the effect that it was “futile” to discuss Alaska Statehood without dealing first with Native claims).

89. Statehood Act, Pub. L. No. 85-508, § 4, 72 Stat. 339, 339 (1958).

fishing rights) and that such property remained under the “absolute jurisdiction and control of the United States . . . .”<sup>90</sup> Corresponding language appears in the Alaska Constitution as required by the Statehood Act.<sup>91</sup> At the same time, however, Section 6(b) of the Statehood Act granted the State of Alaska the right to select “within twenty-five years after the admission of Alaska into the Union, not to exceed one hundred and two million five hundred and fifty thousand acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection[.]”<sup>92</sup> The State’s efforts to implement the latter section were doomed until Native aboriginal claims were settled.

Pressure to settle Native land claims gradually increased after statehood as the new State asserted its entitlement to land grants under the Statehood Act. Protests by Alaska Natives prompted the federal government to suspend transfer of public lands to Alaska. At the convention creating the Alaska Federation of Natives, Native leader Willie Hensley explained that he wrote the position paper “arguing that there was not ‘public land’ in Alaska. It was Native land unless there had been a previous taking by the federal government for federals. And if there had, then we [Natives] were owed compensation.”<sup>93</sup>

As the State of Alaska began to select lands, Native villages protested to the Secretary of the Interior that the lands chosen were not vacant and unoccupied, but were used and occupied for aboriginal purposes.<sup>94</sup> The first protests occurred in 1961 when Alaska proposed establishing a recreations area on land near the Alaska Native Village of Minto—land that was important for Native hunting and fishing activities. Minto leaders filed a protest over the selection with the DOI, which effectively precluded transfers of land to the State.<sup>95</sup> Secretary of the Interior Stewart Udall informally suspended the issuance of patents and tentative

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90. *Id.*

91. ALASKA CONST., art. XII, § 12 (“The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission. The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States. They further agree that no taxes will be imposed upon any such property, until otherwise provided by the Congress. This tax exemption shall not apply to property held by individuals in fee without restrictions on alienation.”).

92. Statehood Act § 6(b). Other subsections of § 6 provided for roughly another million acres in state selections or grants. See BERRY, *supra* note 81, at 31-33.

93. HENSLEY, *supra* note 21, at 157.

94. ARNOLD, *supra* note 31, at 100-03.

95. *Id.* See also MITCHELL, *supra* note 81, at 379-80.

approvals of state selections in 1966,<sup>96</sup> and on January 12, 1969, Secretary Udall imposed a formal freeze on further patenting or approval of applications for public lands in Alaska pending the settlement of Native claims.<sup>97</sup> An effort by the State to set aside the land freeze was rejected by the Ninth Circuit in *Alaska v. Udall*.<sup>98</sup>

In 1966, state officials complained that as a result of the protests, the state had received only three million acres of its land grant.<sup>99</sup> This was a serious problem for the new State of Alaska, because “[a]t the time, the infant state was an economic basket case, running a deficit government with little revenue . . . just about 226,000 people, and very little private land to tax.”<sup>100</sup> “Pressure to resolve Native claims in Alaska also came from the state and from oil companies wishing to exploit the state’s newly discovered petroleum resources.”<sup>101</sup> “Oil development could not progress so long as Native claims clouded state authority to lease lands or transfer rights to the companies, [and hindered] federal capacity to authorize construction of the Trans-Alaska Pipeline[, necessary] to transport the oil.”<sup>102</sup> Willie Hensley, who was serving in the State Legislature, as well as part of the Native land claims leadership effort, explained that “Alaska’s government and everyone else who had a stake in the new state’s success were doing everything in their power to get us [Natives] out of the way.”<sup>103</sup> Hensley believed “that if the oil companies had not been able to find, pump, transport, and sell the oil under Prudhoe Bay, Alaska might have had to rescind statehood.”<sup>104</sup>

Another pressing question was whether the State would have authority to regulate Native aboriginal hunting and fishing rights. The new state flexed its regulatory muscles in a case involving the use of fish traps by two Native villages pursuant to federal permits. In March 1959, the Secretary of the Interior issued regulations under authority of the White Act,<sup>105</sup> permitting Angoon to operate three fish traps during the 1959 season and Kake to operate four traps.<sup>106</sup> The following year, the

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96. CASE & VOLUCK, *supra* note 9, at 57.

97. See Public Land Order 4582, 34 Fed. Reg. 1025 (1969).

98. 420 F.2d 938 (9th Cir. 1969).

99. ARNOLD, *supra* note 31, at 112.

100. HENSLEY, *supra* note 21, at 136.

101. COHEN’S HANDBOOK, *supra* note 12, § 4.07[3][b][i], at 329. See HENSLEY, *supra* note 21, at 151; BERRY, *supra* note 81, at 123, 163–214.

102. COHEN’S HANDBOOK, *supra* note 12, § 4.07[3][b][i], at 329. See ARNOLD, *supra* note 31, at 137–47; Native Vill. of Allakaket v. Hickel, No. 706-70 (D.D.C. Apr. 1, 1970) (enjoining the issuance of permits for the construction of trans-Alaska pipeline over Native-claimed lands). See also BERRY, *supra* note 81, at 123.

103. HENSLEY, *supra* note 21, at 137.

104. *Id.* at 152.

105. White Act, 43 Stat. 464 (codified as amended at 48 U.S.C. §§ 221–228).

106. 24 Fed. Reg. 2053, 2069 (Mar. 19, 1959).

Secretary authorized permanent operation of these trap sites and specified one additional site for Angoon and five more for Kake for possible future authorization.<sup>107</sup>

State officials denied that the federal government had authority to exempt the Native fishers from state regulations, and arrested Native fishermen for violating Alaska's anti-fish trap law. In the course of upholding state authority over off-reservation fishing,<sup>108</sup> the United States Supreme Court said that the aboriginal rights disclaimer<sup>109</sup> "was intended to preserve unimpaired the right of any Indian claimant to assert his claim, whether based on federal law, aboriginal right, or simply occupancy, against the Government. Appellants' claims are 'property including fishing rights' within § 4."<sup>110</sup>

The Court nevertheless held that the State possessed regulatory authority over the exercise of aboriginal fishing rights—at least for conservation purposes. "This Court has never held that States lack power to regulate the exercise of aboriginal Indian rights, such as claimed here, or of those based on occupancy."<sup>111</sup> The disclaimer was said to relate only to interference with aboriginal property rights. The exercise of state regulatory jurisdiction over aboriginal fishing rights—at least with respect to the fish trap prohibition—was said to be consistent with aboriginal title.<sup>112</sup>

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107. *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 62 (1962), citing 25 C.F.R. (1961 Supp.) pt. 88.

108. *Id.* at 61–62.

109. Statehood Act, Pub. L. No. 85-508, § 4, 72 Stat. 339, 339 (1958).

110. *Organized Vill. of Kake*, 369 U.S. at 67.

111. *Id.* at 76. The Court's reasoning was based in part on a now discredited case, *Ward v. Race Horse*, 163 U.S. 504 (1889), which held that Montana's entry into the Union defeated certain tribal treaty rights. *Id.* at 504. In 1999, the Supreme Court stated, "[b]ut *Race Horse* rested on a false premise. As this Court's subsequent cases have made clear, an Indian tribe's rights to hunt, fish, and gather on state lands are not irreconcilable with a State's sovereignty over the natural resources in the State." *Minnesota v. Mille Lacs Band of Chippewa*, 526 U.S. 172, 204 (1999).

112. The Court ignored the fact that aboriginal property rights include the usufructuary right to hunt, fish, and gather. As the Court stated in *Mitchel v. United States*, 34 U.S. 711, 746 (1834):

Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals.

A rationale more consonant with the Court's jurisprudence would have been to recognize that states have power to regulate only for conservation-based purposes, and that like Indian treaty rights, the State would first need to eliminate non-Native consumptive uses. *Cf. Wash. Game Dep't v. Puyallup Tribe*, 414 U.S.

The State's inability to receive title to land under the Statehood Act, the injunction against permits and construction related to a trans-Alaska oil pipeline, and increasing disputes over fish and game resources, all set the table for movement on the settlement of Native land claims. Of these factors, however, it was the thirst for Alaska's North Slope oil that served as the impetus for settlement of the land claims by Congress.

## II. THE ALASKA NATIVE CLAIMS SETTLEMENT ACT

Passage of the Alaska Native Claims Settlement Act (ANCSA) in 1971 was undoubtedly the most important event in the history of Alaska Native people since 1867. If one views it from the perspective of the state and oil industry eager to develop oil and gas at Prudhoe Bay, ANCSA was a resounding success. It unequivocally extinguished all claims to aboriginal title in Alaska and also all claims for past damages based on trespass to Native aboriginal title. It also provided substantial compensation for Alaska Natives, at least if one accepts the proposition from the *Tee-Hit-Ton* case that whatever property interests Natives held under aboriginal title, they were not entitled to *any* compensation under the Fifth Amendment's just compensation clause. Rather, compensation for extinguishment was something done out of a sense of fairness and justice, and was not based on recognition of legal title to the property that would be taken.<sup>113</sup>

ANCSA was silent on the status of Native powers of self-government, though the Supreme Court would later interpret the silence as fatal to the treatment of Native corporation lands as Indian country. ANCSA's affirmative elimination of aboriginal hunting and fishing rights has had devastating effects on Native subsistence uses, and has made it extremely difficult for Native tribes to have a role in co-management by virtue of their reserved tribal rights.<sup>114</sup> The issues of sovereignty and hunting and fishing rights are explored more fully in Part III of this article.

The situation faced by Alaska Natives with respect to their aboriginal claims in the 1960s differed little from that faced by Indian tribes which entered into "agreements" with the United States in the late

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44, 49 (1973); COHEN'S HANDBOOK, *supra* note 12, § 18.04[3], at 1177-84 (describing application of state authority to Native rights pursuant to conservation necessity principles).

113. For a historical critique of *Tee-Hit-Ton*, see Joseph William Singer, *Erasing Indian Country: The Story of Tee Hit Ton Indians v. United States*, in INDIAN LAW STORIES 229 (Goldberg et al. eds., 2011).

114. In contrast, the Indian tribes of western Washington by virtue of their treaty, had the right to harvest up to one-half of the available harvest free of state jurisdiction. See COHEN'S HANDBOOK, *supra* note 12, §§ 18.03-18.04 (discussing regulatory jurisdiction over on- and off-reservation fishing and hunting rights).

nineteenth and early twentieth centuries.<sup>115</sup> Alaska Natives had some say in the terms of the settlement of their land claims, and proved adept at using the system to maximize their economic share of the pie as their claims were settled.<sup>116</sup> They did not, however, have a veto and could not postpone the inevitable for too long. The non-Natives, the oil companies and the State of Alaska were not going to go away, and the Native community fought for the best bargain it could get. Aboriginal claims would be settled, State land selections would proceed, and the trans-Alaska pipeline would be authorized and built.<sup>117</sup>

The question of how much land and money would be provided in compensation for the extinguishment would be decided by Congress after some consultation with Alaska Natives. In the end, the settlement has been praised by many in terms of the amounts of land and money awarded,<sup>118</sup> but others have decried the failings with respect to tribal sovereignty and protection of hunting, fishing, and gathering rights.<sup>119</sup> Preparations for the settlement began in earnest in the mid-1960s, and a comparison of the opening proposal with the final outcome reveals some of the strengths and weaknesses of the settlement.

Alaska Native villages and regional organizations mobilized to halt the transfer of land to the State of Alaska under the Statehood Act before 1966, and in that year came together to form the Alaska Federation of Natives (AFN).<sup>120</sup> At the initial AFN convention, 250 representatives met and appointed a land claims committee to deal with the increasing pressure toward settlement. It was at the second meeting of the AFN in 1967 that representatives of the Governor of Alaska appeared and proposed that the Native community and State work together.<sup>121</sup> An

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115. See, e.g., *Hagen v. Utah*, 510 U.S. 399 (1994) (considering the effect of a federal statute that unilaterally removed land from the Uintah Indian reservation).

116. See HENSLEY, *supra* note 21, at 134–45 (describing Native organization and mobilization in Washington, D.C. and Alaska to assert land claims).

117. See BERRY, *supra* note 81, at 123.

118. CHARLES F. WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* 235–36 (1st ed. 2005). See DONALD C. MITCHELL, *TAKE MY LAND TAKE MY LIFE* 10 (2001) (characterizing the settlement as “the most generous and innovative land claim settlement in U.S. history”). It is hard to agree that the Settlement was so great in every way. The loss of aboriginal hunting and fishing rights with no replacement, and the loss of tribal sovereignty over Indian country per the *Venetic* ruling have long-term value that is impossible to calculate. See *infra* Part III.

119. See WILKINSON, *supra* note 118, at 239 (asserting that ANCSA was “termination in disguise”). See generally THOMAS R. BERGER, *VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION* (1st ed. 1985) (sharply criticizing the Settlement and suggesting alternatives based on extensive field research and interviews with Alaska Native people and others with expertise).

120. ARNOLD, *supra* note 31, at 108–15.

121. *Id.* at 119.

Alaska Native Claims Task Force, chaired by State Representative Willie Hensley, and composed of Native leaders, state government leaders, and representatives of the DOI, was formed at the meeting. In 1968, the Task Force recommended a three-pronged settlement that included forty million acres of land, money and continued use of traditional lands for hunting, fishing and gathering activities. Task Force Chairman Willie Hensley presented the Task Force's findings to Congress in 1968 and explained the unique and yet diverse nature of Alaska's Indigenous peoples and their claims, but noted that "we all basically agree on the major objectives in the land settlement."<sup>122</sup>

The Report that Chairman Hensley submitted reflected an approach different in many ways from the traditional reservation model used in the contiguous forty-eight states, but provided the same basic elements—land, monetary compensation, and protection for traditional activities. Chairman Hensley's testimony also carried a message of self-determination in that it called for Native management of lands reserved in Native ownership, and for any federal role to be informed by Native representation.<sup>123</sup>

A REPORT OF THE GOVERNOR'S TASK FORCE ON NATIVE LAND  
CLAIMS

JUNEAU, JANUARY 10-16, 1968

HON. WALTER J. HICKEL,

*Governor of Alaska:*

Your Task Force proposes a four-part settlement of the Native land claim question, consisting of-

(a) A grant of 40 million acres of land in fee, or in trust, to village groups (compared to the 102.5 million acres given the state of Alaska under the Statehood Act, or the much larger area encompassed in the Native claims) allocated among the villages in proportion to the number of persons on their rolls.

(b) A grant of 10% royalty interest in outer continental shelf revenues, along the lines proposed by Secretary Udall, in lieu of

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122. *Alaska Native Land Claims: Hearing on H.R. 11213, H.R. 15049 and H.R. 17129 Before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs, 90th Cong. 117 (1968)* [hereinafter *Alaska Native Land Claims Hearing*] (statement of Hon. Willie Hensley, Representative in the Alaska Legislature from the 17th District, Kotzebue, Alaska).

123. *Id.* at 118 ("The task force desires a simplification of the administrative process. The powers of the Secretary of the Interior should be limited and controls over land, if necessary, be located in Alaska with native representation.").

the right to compensation for lands reserved or disposed of to third parties, with an immediate advance payment of \$20,000,000 by the Federal Government.

(c) A grant by the State of 5% royalty interest in state selected lands, tidelands, and submerged lands, but excluding current revenue sources from the state lands (in order to avoid direct impact on the general fund) and commencing only upon lifting the land freeze and resumption of state selection.

(d) A terminable license to use the surface of lands under occupancy and used by Natives.<sup>124</sup>

These general recommendations were followed by draft implementing language that detailed the way in which the corporation lands would be allocated. For example, the township grant section (a) anticipated the population formula adopted in ANCSA, but whereas ANCSA provided only surface rights to the village, the proposal provided for surface and subsurface rights.<sup>125</sup> In addition, village land grants could be held as “village-as-incorporated-tribal group[s].”<sup>126</sup> Further, the village would have the option of whether to receive the grant in fee or in trust.<sup>127</sup> If in trust, the village could choose the Secretary of the Interior as trustee, or subject to his concurrence, could “appoint any other person, including a regional or statewide Native corporation as trustee.”<sup>128</sup> The revenue sharing sections (b) & (c) would have been implemented through federal contributions of at least \$65,000,000 over twenty-five years, while the state royalty would have been perpetual.<sup>129</sup> The terminable license provision (d) would have allowed for continued, but permissive, permissive use of federal lands for up to 100 years for hunting fishing and gathering by Alaska Natives.<sup>130</sup>

The combined references to fee or trust lands for incorporated “tribal groups” could have led to an option under ANCSA that would have

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124. *Id.* at 119.

125. *Id.* at 120.

126. *Id.* These incorporated tribal groups would have been limited to Alaska Natives who would become corporate shareholders with stock ownership limited to the original holder, and for 100 years to the descendants of original stock recipients.

127. *Id.*

128. *Id.*

129. *Id.* at 120-121.

130. *Id.* at 121. H.R. 11213, § 401 which had been transmitted and introduced at the request of the Secretary of the Interior in 1967, contained the use and occupancy provision. See Letter from Secretary of the Interior Stewart Udall to Hon. Wayne N. Aspinall (April 30, 1968), reprinted in *Alaska Native Land Claims Hearing*, *supra* note 122 at 72-74.

allowed villages to maintain land that would be considered “Indian country” under federal law.<sup>131</sup> Other statements in the record at this point, however, demonstrated a clear tilt toward some form of corporation system, motivated most clearly by animosity toward the Bureau of Indian Affairs (BIA).<sup>132</sup> At the time, the BIA was known for its paternalism, which many tribes and individual tribal citizens found offensive and counterproductive to improving their economic and social status.<sup>133</sup> In any event, the die was cast, and the “administrative mechanism” for the settlement would be corporations of some sort.<sup>134</sup> At the same time, there was no discussion of the role of Native tribes as governments in the villages.

ANCSA completely accomplished the objectives of the State of Alaska and the oil companies in the first operative section of the Act. It extinguished aboriginal title and any claims based on aboriginal title and also expressly extinguished “any aboriginal hunting and fishing rights that may exist.”<sup>135</sup> In exchange, Alaska Natives born by December 18, 1971, were to become stockholders in one of thirteen regional corporations and in one of more than 200 village corporations, according to their place of residence or origin.<sup>136</sup> The monetary settlement was perceived as large: nearly a billion dollars to the corporations to be shared pursuant to a complicated formula.<sup>137</sup>

The corporations as a group were entitled to receive approximately forty million acres of land.<sup>138</sup> The quantity of land achieved thus matched the amount suggested in the 1968 Task Force Report, but there was no option related to holding the land in some form of a federal trust as

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131. 18 U.S.C. § 1151 (2012) (defining reservations as “Indian country” and trust lands held by the Secretary of the Interior as treated as the legal equivalent). See *United States v. John*, 437 U.S. 634 (1978) (holding that treatment of land as Indian country is necessary for a tribe occupying the land to take advantage of general federal Indian law principles that permit exercise of jurisdiction over non-tribe members and most immunities from state law).

132. *Alaska Native Land Claims Hearing*, *supra* note 122, at 134 (statement of Barry W. Jackson, Alaska Federation of Natives) (“Now, we are trying to get away from the BIA, frankly, and from the Secretary of the Interior and accomplish a transition into American society.”). *But see supra* notes 57–66 and accompanying text.

133. See generally Kevin Gover, *An Indian Trust for the Twenty-first Century*, 46 NAT. RESOURCES J. 317 (2006).

134. *Alaska Native Land Claims Hearing*, *supra* note 122, at 133 (statement of Barry W. Jackson, Federation of Alaska Natives) (describing effort to develop “a proposal that perhaps all could accept, that all could live with”).

135. 43 U.S.C. § 1603(b) (2012). See *Inupiat Comm. of the Arctic Slope v. United States*, 680 F.2d 122, 129 (1982) (right to sue for trespass damages extinguished).

136. 43 U.S.C. §§ 1606–1607.

137. 43 U.S.C. § 1605(a).

138. COHEN’S HANDBOOK, *supra* note 12, § 4.07[3][b][ii][B], at 332–33.

suggested in the Report delivered to Congress, and the Supreme Court made it clear that the omission (coupled with the express revocation of all reservations, save Metlakatla) extinguished the “Indian country” status of land conveyed pursuant to ANCSA.<sup>139</sup> The inherent powers of self-governance over members and territory had been acknowledged in a number of ways,<sup>140</sup> and there is no evidence that Congress intended to extinguish them.

Why was ANCSA silent on such a critical matter? The remote locations of Native villages and the relative lack of non-Native encroachment best explains the lack of concern for expressly securing rights of self-government. As explained by the chairman of the 1968 Governor’s Task Force Report, Willie Hensley:

Our focus was on land. Land was our future, our survival. In my region all we wanted was to get control of our space so we could live on it and hunt and fish on it and make our own way into the twentieth century at our own pace. Our focus was on land not structure. The vehicle for administering the land was not our focus. We weren’t lawyers. We were battling the state tooth and tong. We were always afraid the President might create a pipeline corridor. We were afraid of failure, or not getting a settlement and not protecting the land for our future generations. As a minority group we knew we could only press the country so far. But none of us ever envisioned a loss of tribal structure. We never thought the tribal control would not continue.<sup>141</sup>

In addition, federal policy had not yet moved completely out of the termination era that took hold in the 1950s. Senator Henry Jackson, a key player in ANCSA’s development, had an “antipathy toward Indian reservations in general and Alaska reservations in particular.”<sup>142</sup> Thus,

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139. *Alaska v. Native Vill. Of Venetie Tribal Gov’t*, 522 U.S. 520 (1998). *But see* Andy Harrington, *Whatever Happened to the Seveloff Fix*, 32 ALASKA L. REV. 32 (2015) (arguing that “Indian country” federal law regarding liquor extends to the Alaska Native Villages).

140. *See* Aboriginal Fishing Rights in Alaska, 57 Interior Dec. 461, 474 (1942); Validity of Marriage by Custom Among the Natives or Indians of Alaska, 54 Interior Dec. 39 (1932); 25 U.S.C. § 5119 (2012) (application of the IRA to Alaska); *In re McCord*, 151 F. Supp. 132 (D. Alaska 1957); 18 U.S.C. § 1162 (application of Public Law 280 authorizing state jurisdiction over offenses committed in “Indian country” in Alaska).

141. WILKINSON, *supra* note 118, at 238–39 (quoting Willie Hensley). *See also* HENSLEY, *supra* note 21, chs. 16–17 (describing land claims negotiation process from a first-hand perspective).

142. WILKINSON, *supra* note 118, at 238. *See generally* MARK N. TRAHANT, *THE LAST GREAT BATTLE OF THE INDIAN WARS* (2010) (describing Senator Jackson’s role in the termination policy era).

instead of providing a local option of receiving settlement lands in either trust or fee lands as set out in the 1968 Task Force Report,<sup>143</sup> ANCSA revoked all existing reservations (save Metlakatla).<sup>144</sup> The latter action can be viewed as consistent with the theme of distancing the Secretary of the Interior from a paternalistic supervisory position with respect to land, but is not necessarily inconsistent with fee simple ownership of land and continued existence of substantial aspects of tribal sovereignty.<sup>145</sup> The perceived problem with reservations is that once land is held in trust (or reservation status), the federal restriction on alienation protects the land from not only involuntary loss, but also from most leasing or other short term transfers without federal approval.<sup>146</sup> Until recently, most tribes could only lease their land with the approval of the Secretary of the Interior, and even then only for a twenty-five year term.<sup>147</sup> The paternalism inherent in a regime where the BIA acts as trustee was abhorrent to many Alaska Natives.<sup>148</sup> The trust status frees the land from state and local taxation, and most other state or local regulation such as zoning.<sup>149</sup> Trust status is also essential for the exercise of tribal territorial jurisdiction over non-members of the tribe.<sup>150</sup>

It is understandable that Native leadership at the time would not have seriously considered that settlement of land claims necessarily diminished the authority of Native tribal governments. There were over seventy villages organized under the IRA at the time, and most others operated under some form of traditional council governance.<sup>151</sup> ANCSA did not speak at all to their continued existence and federal law made it quite clear that tribal powers of self-governance survive until expressly

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143. See *supra* notes 122–128 and accompanying text. Trust lands are generally viewed as being the equivalent of Indian reservations, as both are treated as “Indian country” where federal and tribal law are generally applicable, and state law often does not apply. See *Okla. Tax Comm’n v. Sac & Fox Nation*, 508 U.S. 114, 125 (1993).

144. 43 U.S.C. § 1618 (2012).

145. For example, historic Pueblo Indian lands are held in fee simple, but have been treated as Indian country subject to tribal jurisdiction. See COHEN’S HANDBOOK, *supra* note 12, § 4.07[3][b][ii][C], at 334–35. The lands of the New York tribes are not held in trust, but as restricted fee lands. *The New York Indians*, 72 U.S. 761 (1867). In both of these instances, it must be conceded that Congress had included the land at issue within the terms of the Indian country statute (as in the case of the Pueblos), or promised by treaty that land would not be taxable. See *id.*; COHEN’S HANDBOOK, *supra* note 12, § 4.07[3][b][ii][C], at 334–35.

146. 25 U.S.C. § 177 (2012).

147. *Id.* at § 415(a).

148. See *supra* notes 131–133 and accompanying text.

149. See COHEN’S HANDBOOK, *supra* note 12, § 6.04[3][b] (discussing the limits of state civil regulation provided under Public Law 280).

150. *Id.* at 184–185, 211–212.

151. CASE & VOLUCK, *supra* note 9, at 329–30.

extinguished by Congress.<sup>152</sup> As discussed below, the Supreme Court flipped that presumption in the *Venetie* litigation and severely undermined tribal territorial jurisdiction.<sup>153</sup>

### III. ANCSA'S CHANGING STRUCTURE: SOVEREIGNTY AND SUBSISTENCE

The forty-five years since ANCSA have seen a major restructuring of the Act through amendments adopted by nearly every Congress for the following thirty-five years.<sup>154</sup> The major change came when the Native community persuaded Congress in 1988 to indefinitely extend the federal restrictions on the sale of corporate stock, which were set to expire in 1991.<sup>155</sup> Congress explained in its findings that "Natives have differing opinions as to whether the Native Corporation, as originally structured by the Alaska Native Claims Settlement Act, is well adapted to the reality of life in Native villages and to the continuation of traditional Native cultural values . . ." <sup>156</sup> At that point, the notion that the federal government would somehow terminate its involvement with the Native corporations died. Other amendments to ANCSA provided for protection from state and local taxation, and certain forms of involuntary loss.<sup>157</sup>

Congress had not spoken at all directly to the status of Alaska Native tribes with the notable exception of confirming their status as federal

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152. See *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2032 (2014) ("[C]ourts will not lightly assume that Congress in fact intends to undermine Indian self-government . . ."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) (refusing to imply limitations to tribal sovereignty in the absence of clear expressions of Congressional intent).

153. See *infra* Part III.B. (discussing Alaska Supreme Court cases recognizing tribal jurisdiction over non-members).

154. CASE & VOLUCK, *supra* note 9, at 165.

155. Act of Feb. 3, 1988, Pub. L. No. 100-241, 101 Stat. 1788; 43 U.S.C. §§ 1606(h), 1607(c) (2012). The federal securities law exemptions were similarly continued. 43 U.S.C. § 1625; see *Jimerson v. Tetlin Native Corp.*, 144 P.3d 470, 474 (Alaska 2006) (holding that "no exception applies for transfer of ANCSA stock back to a Native corporation in exchange for stock in a newly created corporation").

156. Act of Feb. 3, 1988, Pub. L. No. 100-241, § 2(4), 101 Stat. 1788. The Senate Report elaborated on dissatisfaction with parts of ANCSA:

In addition to the problems already discussed, a number of Native witnesses who appeared before the Committee testified that they and many other Alaska Natives, particularly those who live in isolated rural villages who participate in the subsistence hunting, fishing and gathering economy, feel that the social and human values embodied in the corporate form of organization frequently conflict with traditional Native values and Alaska's traditional Native cultures.

S. REP. NO. 100-201, at 21 (1987), as reprinted in 1987 U.S.C.C.A.N. 3269, 3272.

157. See, e.g., 16 U.S.C. § 1636(d) (automatic land bank protections for unleased and undeveloped corporation land).

recognized tribes in 1993.<sup>158</sup> Since then, a string of court decisions, administrative actions, and congressional acts have confirmed of the status of Alaska Native tribes and their governmental powers. Congress addressed subsistence uses in a number of statutes, but the primary vehicle for protecting subsistence uses, Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA), has failed. This section examines the developments in these two areas after ANCSA's extinguishment of aboriginal rights.

### A. Hunting, Fishing and Gathering Rights After ANCSA

ANCSA did not provide any statutory protection for Native hunting, fishing and gathering rights on lands important for subsistence purposes, though prior versions of proposed legislation provided some protection on public and Native lands.<sup>159</sup> When the Senate and the House could not agree on the terms, all protections were dropped and the conference report simply expressed the conviction that "Native peoples' interest in and use of subsistence resources" could be safeguarded by the Secretary of the Interior's "exercise of his existing withdrawal authority" to "protect Native subsistence needs and requirements . . . . The Conference Committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives."<sup>160</sup>

Soon after ANCSA, Congress and the Executive Branch continued to afford federal protection to subsistence rights in a few areas, largely through exemptions from federal laws, or international treaties governing migratory birds or marine mammals. The Marine Mammal Protection Act of 1972 (MMPA),<sup>161</sup> exempted from the moratorium on taking marine mammals any Alaska Native "who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean," if the taking is for "subsistence purposes" or for "creating and selling" handicrafts and clothing.<sup>162</sup> The MMPA was amended in 1996 to provide for co-

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158. Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791; *McCrary v. Ivanof Bay Vill.*, 265 P.3d 337, 341 (Alaska 2011) (describing federal recognition and Congress's actions respecting Alaska tribes).

159. *See* H. Conf. Rep. No. 92-746, at 37 (1971), *as reprinted in* 1971 U.S.C.C.A.N., 2247, 2250.

160. *Id.* The President had the authority under the Pickett Act to withdraw lands for public purposes, which presumably could have included a withdrawal for subsistence purposes. Pickett Act, ch. 421, Pub. L. No. 61-303, 36 Stat. 847 (1910) (repealed 1976).

161. 16 U.S.C. § 1371 (2012).

162. *Id.* § 1371(b). *See Beck v. U.S. Dep't of Commerce*, 982 F.2d 1332, 1342 (9th Cir. 1992) (interpreting Native handicrafts exception favorably to Alaska Natives); *United States v. Clark*, 912 F.2d 1087 (9th Cir. 1990) (rejecting handicraft exception where a "substantial portion" of the animal was wasted); *People of Togiak v.*

management with Alaska Natives.<sup>163</sup> The Alaska Eskimo Whaling Commission annually obtains subsistence bowhead whaling quotas pursuant to the International Whaling Convention.<sup>164</sup> Polar bear management agreements and treaties also contain special provisions dealing with Native harvest,<sup>165</sup> and regulations implementing the Pacific Halibut Convention provide for Native subsistence uses of halibut.<sup>166</sup>

In 1973, the Trans-Alaska Oil Pipeline Act imposed strict liability for any harm to the subsistence resources of Natives or others,<sup>167</sup> and the Endangered Species Act (ESA) presumptively exempted subsistence uses by Natives and “any non-[N]ative permanent resident of an Alaskan native village” from its coverage.<sup>168</sup> The Secretaries of the Interior and Commerce issued an order requiring early and substantial consultation between federal agencies implementing the ESA and affected Alaska Native tribes.<sup>169</sup>

The 1978 Fish and Wildlife Improvement Act authorized the Secretary “to assure that the taking of migratory birds and the collection of their eggs, by the indigenous inhabitants of the State of Alaska, shall be permitted for their own nutritional and other essential needs.”<sup>170</sup> These efforts to protect Native subsistence access to marine mammals, migratory birds, and halibut in offshore waters were beneficial, but too limited in scope. Fish and game, which are critical for Native subsistence uses, were not generally protected and the need for congressional action was apparent. Dissatisfaction with the lack of protection for subsistence uses by Alaska Natives led Congress to legislate a subsistence preference for all rural residents of Alaska in 1980 via ANILCA,<sup>171</sup> after it became clear that the state and federal governments were doing little to provide for Native hunting and fishing rights.

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United States, 470 F. Supp. 423 (D.D.C. 1979) (federal exception to MMPA preempts state regulation of walrus hunting).

163. See 16 U.S.C. § 1388.

164. See CASE & VOLUCK, *supra* note 9, at 276–78.

165. 16 U.S.C. § 1423c.

166. 50 C.F.R. § 300.65(g)(2) (2016) (“A person is eligible to harvest subsistence halibut if he or she is a member of an Alaska Native tribe . . . with customary and traditional uses of halibut.”).

167. 43 U.S.C. § 1653(a)(1) (2012).

168. 16 U.S.C. § 1539(e)(1) (2012).

169. DEP’T. OF THE INTERIOR, ORDER No. 3225, Endangered Species Act and Subsistence Uses in Alaska (Supplement to Secretarial Order 3206), signed Jan. 19, 2001.

170. 16 U.S.C. § 712(1) (2012).

171. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified at 16 U.S.C. §§ 3111–3126). See generally COHEN’S HANDBOOK, *supra* note 12, § 4.07[3][c][ii], at 345–52.

ANILCA served as a partial substitute for the rights extinguished in ANCSA, providing a priority for subsistence uses on the “public lands”<sup>172</sup> by rural residents of Alaska.<sup>173</sup> Although the rural priority applied only to public lands, Title VIII provided that the State could obtain management authority over subsistence on federal public lands, “if the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in [ANILCA].”<sup>174</sup> Anticipating the enactment of ANILCA, Alaska adopted a subsistence priority statute in 1978.<sup>175</sup> Although the preference was not initially restricted to rural Alaskans, regulations adopted in 1982 brought state law into compliance with ANILCA’s rural priority.<sup>176</sup> In 1982, the Secretary of the Interior certified the state government to regulate ANILCA rights.<sup>177</sup> As a result, “Alaska’s 1978 subsistence priority statute became operative as to all state lands and to virtually all federally owned lands in Alaska.”<sup>178</sup>

In a great surprise to all parties involved in the ANILCA process, the State of Alaska became legally unable to manage the subsistence priority for rural residents. The Alaska Supreme Court ruled that the State was disabled from implementing a “rural” subsistence priority by the equal access provisions of the Alaska Constitution.<sup>179</sup> The federal government was accordingly forced to administer the subsistence priority on federal public lands—a job that it assumed reluctantly and only after protracted litigation. Federal regulations implementing the Katie John ruling on federal waters were adopted in 1999,<sup>180</sup> and were challenged by the State

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172. 16 U.S.C. § 3012(1)–(3) (2012) (“The term ‘land’ means lands, waters, and interests therein. The term ‘Federal land’ means lands the title to which is in the United States after December 2, 1980. The term ‘public lands’ means land situated in Alaska which, after December 2, 1980 are federal lands”).

173. See 16 U.S.C. § 3114 (“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.”). See also 16 U.S.C. § 3111(1) (subsistence uses “essential to Native physical, economic, traditional, and cultural existence”).

174. 16 U.S.C. § 3115(d). Any laws regulating subsistence uses must be formulated with the advice and participation of regional councils and local advisory committees, which have the authority to evaluate and make recommendations on laws regulating such uses. *Id.* § 3115(a), (d). If the state chooses not to participate, the management obligations default to the federal government. *Id.* § 3115(d).

175. Bobby v. Alaska, 718 F. Supp. 764, 767 (D. Alaska 1989).

176. *Id.*

177. *Id.*

178. *Id.*

179. McDowell v. State, 785 P.2d 1 (Alaska 1989) (holding the rural priority for subsistence fishing and hunting unconstitutional under sections 3, 5, and 17 of article VIII of the Alaska Constitution).

180. Subsistence Management Regulations for Public Lands in Alaska, 64 Fed.

of Alaska on a number of grounds in litigation commenced in 2005, concluding in 2014 when the United States Supreme Court denied review of the Ninth Circuit decision upholding the regulations.<sup>181</sup>

In general, the subsistence priority for rural residents has not provided adequate protections for Native hunting and fishing rights.<sup>182</sup> As noted in the leading treatise on federal Indian law:

Since the state fell out of compliance with Title VIII of ANILCA in 1989, its statutory scheme maintains a subsistence priority in name, but not in substance, and is far removed from the federal standards. For example, the state has created vast non-subsistence areas, and treats its subsistence priority as applying only to use of fish or game after capture, and not as allowing for traditional means, methods, and timing of harvest. These provisions are inconsistent with federal law. Thus it appears unlikely that the state will be able to reassume management without making major changes to its constitution and statutes. In the meantime, dual state and federal management continue. Apart from issues regarding the geographic scope of the regulations, however, subsistence users have brought few legal challenges to the Subsistence Board's rules. There is widespread dissatisfaction among the Alaska Native community with the limited nature of the federal subsistence program.<sup>183</sup>

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Reg. 1276 (Jan. 8, 1999) (codified as amended at 50 C.F.R. § 100 (2016)).

181. *John v. United States*, 720 F.3d 1214, 1221 (9th Cir. 2013), *cert. denied sub nom.*; *Alaska v. Jewell*, 134 S. Ct. 1759 (2014). *See also* *John v. United States*, 247 F.3d 1032 (9th Cir. 2001) (*en banc*) (upholding federal assertion of jurisdiction over federal reserved waters as “public lands” under Title VIII and adopting the opinion in *Alaska v. United States*, 72 F.3d 698 (9th Cir. 1995)).

182. There had been a great deal of litigation with most of it involving state efforts to limit application of the subsistence priority. *See, e.g.*, *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312 (9th Cir. 1988) (holding state's statutory definition of “rural” unlawful, as it was inconsistent with the plain meaning of the term); *Bobby v. Alaska*, 718 F. Supp. 764 (D. Alaska 1989) (striking down state seasons and bag limits for moose and caribou as inconsistent with the customs and traditions of a Native Village, and affirming that ANILCA precludes restrictions on subsistence uses by rural residents unless all other non-subsistence uses are first eliminated); *John v. Alaska*, No. A85-698-CV, slip op. at 2 (D. Alaska Jan. 19, 1990) (Order on Cross Motions for Summary Judgment) (striking down state regulations that restricted subsistence fishing at a historic Native fish camp); *United States v. Alexander*, 938 F.2d 942 (9th Cir. 1991) (setting aside a federal Lacey Act prosecution on the ground that state law prohibiting cash sales from being considered subsistence uses was in conflict with ANILCA's protection of customary trade as a subsistence use); *Kwethluk IRA Council v. Alaska*, 740 F. Supp. 765 (D. Alaska 1990) (striking down state regulations governing subsistence hunting of caribou in western Alaska as inconsistent with the customary and traditional harvest patterns of Yupik Natives).

183. COHEN'S HANDBOOK, *supra* note 12, § 4.07[3][c][ii][C], at 348–52 (footnotes

In a number of congressional oversight hearings, Alaska Native tribes and organizations have expressed their frustration with the way the federal subsistence priority has been implemented. At the United States Senate Energy and Natural Resources Committee Hearing “[t]o examine wildlife management authority within the State of Alaska under [ANILCA] and [ANCSA],”<sup>184</sup> Rosita Worl described the current situation:

Forty-two years after ANCSA passed, and 33 years after ANILCA passed, neither the Department of the Interior nor the State of Alaska has lived up to Congress’s expectation that Alaska Native subsistence needs would be protected. Today, the Federal Government manages subsistence on federal lands in Alaska. The State of Alaska generally manages subsistence on state and private lands in Alaska, including private lands owned by Alaska Native Corporations formed pursuant to ANCSA. After more than 20 years of “dual” federal and state management, it has become clear that the State will not do what is required to regain management authority over subsistence uses on federal lands and waters. . . . We hope this Committee will recognize that ANCSA and ANILCA failed to provide the long-term protections for Native subsistence needs that Congress intended, and take the actions necessary to provide those protections.<sup>185</sup>

Subsistence fishing and hunting provide a large share of the food consumed in rural Alaska. The state’s rural residents harvest about 22,000 tons of wild foods each year—an average of 375 pounds per person.<sup>186</sup> Fish make up about 60 percent of this harvest.<sup>187</sup> Nowhere else in the United States is there such a heavy reliance upon fish and game.<sup>188</sup> The United States Senate Energy and Natural Resources Committee recently held a Full Committee Hearing “[t]o examine wildlife management authority within the State of Alaska under [ANILCA] and [ANCSA].” Senator Lisa Murkowski began the hearing by stating:

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omitted).

184. *Hearing to Examine Wildlife Management Authority Within the State of Alaska Under the Alaska National Interest Lands Act and the Alaska Native Claims Settlement Act: Hearing Before the S. Comm. on Energy and Nat. Res.*, 113th Cong. 1 (2013) [hereinafter *ANILCA Hearing*].

185. *Id.* at 50 (statement of Rosita Worl, Subsistence Committee Chair, Alaska Federation of Natives).

186. *Id.* at 17 (statement of Craig Fleener, Deputy Commissioner, Alaska Dep’t of Fish and Game).

187. *Id.*

188. *Id.* (“Alaska . . . is unique among all the states in that our fish and wildlife are essential to our quality of life . . .”).

[S]ubsistence is about a way of life . . . [for] our Native people around the State . . . [and] to identify your, not only your cultures, but, really, your spirituality with your food source, I think, is something that is important when we talk about subsistence because it is more than just putting food on the table.<sup>189</sup>

In testimony at the same hearing, AFN Co-Chair Ana Hoffman reported that in western Alaska, local residents harvest 490 pounds of wild fish and game per person per year.<sup>190</sup>

As outlined above, Alaska Natives have some measure of protection for subsistence uses in specialized subject matter areas including marine mammal protection, whaling, reindeer herding, and migratory birds. The Huna Tlingit Traditional Gull Egg Use Act of 2014<sup>191</sup> provides that the Secretary of the Interior “may allow the collection by members of the Hoonah Indian Association of the eggs of glaucous-winged gulls (*Laurus glaucescens*) within Glacier Bay National Park.”<sup>192</sup> In recognition of the importance of subsistence uses, an amendment to the Federal Duck Stamp Act exempts rural Alaska subsistence users from the requirement to purchase a Duck Stamp in order to hunt migratory waterfowl.<sup>193</sup>

Most subsistence activities, however, involve hunting for animals and fishing for anadromous and freshwater fish populations.<sup>194</sup> Most of that activity takes place on land and water within Alaska’s legal boundary, which was where ANILCA Title VIII and state law mirroring Title VIII should have provided protection.<sup>195</sup> As the United States interprets the “public lands” definition of ANILCA, about 60 percent of the water and land in the state is under federal jurisdiction for purposes of Title VIII.<sup>196</sup> This interpretation means that the 104 million acres of state-owned land and the 44 million acres owned by Alaska Native Corporations (ANCs) and tribes are not considered “public lands” under federal law.<sup>197</sup> Thus,

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189. *Id.* at 3 (statement of Lisa Murkowski, U.S. Senator from Alaska).

190. *Id.* at 34 (statement of Ana Hoffman, President/CEO, Bethel Native Corporation).

191. Pub. L. No. 113-142, 128 Stat. 1749 (2014).

192. *Id.* at 1749.

193. Pub. L. No. 113-264, § 4, 128 Stat. 2939 (2014) (codified as amended at 16 U.S.C. § 718a(a)(2)(D)).

194. ANILCA Hearing, *supra* note 184, at 54 (statement of Rosita Worl, Subsistence Committee Chair, Alaska Federation of Natives).

195. *See Amoco Prod. Co. v. Vill. Of Gambell*, 480 U.S. 531, 547 (1987) (holding that ANILCA applies within Alaska’s legal boundaries, i.e., out to three miles offshore).

196. *See ALASKA DEP’T NAT. RES., FACT SHEET: LAND OWNERSHIP IN ALASKA* (2000), [http://dnr.alaska.gov/mlw/factsht/land\\_fs/land\\_own.pdf](http://dnr.alaska.gov/mlw/factsht/land_fs/land_own.pdf).

197. Moreover, the Supreme Court noted that “[n]o lands conveyed to the State, to any Native Corporation, or to any private party shall be subject to the

no federal protection and only watered-down state protections for subsistence uses apply to these lands.<sup>198</sup>

It is more than ironic that Alaska Natives on their own lands have no federal subsistence protections—even though Congress directed that subsistence needs be taken into account in making selections.<sup>199</sup> No wonder, then, that there is a significant call for federal reforms to subsistence management in Alaska. The Native corporations as landowners have the right to exclude others from those activities on ANC lands, but the management regime is governed by state law. Accordingly, there have been informal discussions regarding the assertion of some measure of regulatory control over ANC lands by way of a cooperative arrangement between an ANC, local tribes, and the Secretary of the Interior. While this is a sound policy proposal, it will likely require a change in the “public lands” definition to make the subsistence priority of ANILCA Title VIII applicable.<sup>200</sup>

Congress’s broad authority to restore tribal powers over people and territory could be used to restore a measure of tribal territorial jurisdiction in Alaska.<sup>201</sup> This could include recognition of Native hunting and fishing rights on Native corporation land, federal land, and even state land. A more conservative approach would amend ANILCA to provide that Native corporation lands are “public lands,” but only for purposes of Title VIII, or simply that subsistence uses by rural residents are the priority use on ANC-owned lands. A number of such proposals have been presented to Congress over the years.<sup>202</sup> While there is clearly congressional power to accomplish any of the proposals, it will take increased political will to move forward. In the meantime, Native subsistence users will be required

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regulations applicable solely to public lands within such units.” *Sturgeon v. Frost*, 136 S. Ct. 1061, 1071 (2016) (internal quotation marks omitted). Several ANCs participated as amici in the case before the Supreme Court, arguing that the federal government had no authority over ANCSA lands within National Parks or National Wildlife Refuges. *See, e.g.*, Brief for Arctic Slope Regional Corporation, et al. as Amici Curiae Supporting Petitioner, *Sturgeon v. Frost*, 136 S. Ct. 1061 (2016) (No. 14-1209), 2015 WL 7625446, 2 (“ANILCA was *not* intended to regulate Native corporation (or State or private) property falling within the geographically-drawn boundaries of [conservation systems units]” (emphasis in original)).

198. The DOI recognizes a duty to consult with ANCs regarding matters affecting their lands and associated interests. *See* DEP’T OF THE INTERIOR, DEPARTMENT OF THE INTERIOR POLICY ON CONSULTATION WITH ALASKA NATIVE CLAIMS SETTLEMENT ACT (ANCSA) CORPORATIONS (2012), [https://www.fws.gov/alaska/external/native\\_american/doi\\_ancsa\\_policy.pdf](https://www.fws.gov/alaska/external/native_american/doi_ancsa_policy.pdf). 199. 43 U.S.C. § 1611(b) (2012).

200. *See* Alaska National Interest Lands Conservation Act, *supra* note 171.

201. *See infra* Part III. B., Section 1.

202. *See, e.g.*, *ANILCA Hearing*, *supra* note 184, at 3 (Statement of Lisa Murkowski, U.S. Senator from Alaska).

to muddle through existing federal and state administrative processes to secure the best regulatory conditions possible.

## B. Tribal Sovereignty and the Possibility of Trust Lands

### 1. *Alaska Native Tribes Are Federally Recognized and Have Governmental Powers*

ANCSA did not mention the governmental powers exercised by Native tribes in Alaska, so many assumed that those powers continued to exist, as would normally be the case under federal law. “Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government.”<sup>203</sup> The Supreme Court, however, did not follow this rule when it held in *Alaska v. Native Village of Venetie Tribal Government*<sup>204</sup> that land conveyed to Native corporations pursuant to ANCSA was not “Indian country,” and thus not territory subject to tribal jurisdiction under general principles of federal Indian law.<sup>205</sup> The Native Village of Venetie held fee title to 1.4 million acres of land set aside for them as the Chandalar Indian Reservation in 1943.<sup>206</sup> ANCSA revoked the reservation’s trust status and “[t]he United States conveyed fee simple title to the land constituting the former Venetie Reservation to the two corporations as tenants in common; thereafter, the corporations transferred title to the land to the Native Village of Venetie Tribal Government (Tribe).”<sup>207</sup>

Most federal restrictions on alienation were removed by the revocation of trust status, but Congress has – then and since – provided for selective protections for current and former ANCSA lands.<sup>208</sup> As a general rule, when Congress decides to extinguish tribal property rights or governmental power, it must do so expressly.<sup>209</sup> However, the Court found a clear intent to abrogate territorial jurisdiction over ANCSA lands.<sup>210</sup> While this seems contrary to prior law regarding limitations on tribal rights, it is now the law. The Court concluded with the observation

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203. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2032 (2014).

204. 522 U.S. 520 (1998).

205. *Id.* at 532–34. See also COHEN’S HANDBOOK, *supra* note 12, § 4.02.

206. *Native Vill. of Venetie*, 522 U.S. at 523.

207. *Id.* at 524.

208. See 43 U.S.C. § 1636(d) (2012).

209. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) (noting Congress’s broad power to limit tribal sovereignty, but refusing to imply limitations in the absence of clear expressions of intent); COHEN’S HANDBOOK, *supra* note 12, § 4.02[2] at 222–26 (“Tribal property rights and sovereignty are preserved unless Congress’s intent to the contrary is clear and unambiguous.”).

210. *Native Vill. of Venetie*, 522 U.S. at 534.

that “[w]hether the concept of Indian country should be modified is a question entirely for Congress.”<sup>211</sup> After *Venetie*, Alaska Native tribes continue to exist, but without a territorial base upon which government power over non-members might be exercised.<sup>212</sup>

The Alaska Supreme Court subsequently ruled, in *John v. Baker*, that Alaska tribes continue to have power over their members and others subject to their jurisdiction by virtue of a consensual relationship between the tribe and its members—an issue not addressed by the *Venetie* decision.<sup>213</sup> The issue emerged in an action involving the Northway tribal court’s jurisdiction to modify a prior custody order entered by that tribal court. The Alaska Supreme Court faced the question of whether Alaska Native villages have inherent, non-territorial jurisdiction allowing them to resolve domestic disputes between their own members.<sup>214</sup> Answering in the affirmative, the court first dealt with the question of whether Alaska Native tribes had sovereign status equivalent to that of federally recognized tribes in the lower forty-eight states.<sup>215</sup> After an extensive review of the law regarding federal recognition of tribes, and the history to the federal-tribal relationship in Alaska, the court agreed with the DOI that Alaska Native tribes had been federally recognized.<sup>216</sup> The court added that, “[t]hrough the 1993 tribal list and the 1994 Tribe List Act, the federal government has recognized the historical tribal status of Alaska Native villages like Northway.”<sup>217</sup> After concluding that the tribes on the 1993 list had federally recognized status, the court moved on to analyze the scope of tribal power outside of Indian country. It correctly noted that “Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”<sup>218</sup> It easily followed that a father who sought relief from his own tribal court in a domestic relations matter would be bound by that court’s

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211. *Id.*

212. Alaska did not challenge the federal district court’s ruling that the Native Village of Venetie constituted an Indian tribe under federal common law. *See* Native Vill. of Venetie I.R.A. Council v. Alaska, 1994 WL 730893 (D. Alaska 1994).

213. 982 P.2d 738 (Alaska 1999).

214. *Id.* at 744.

215. *Id.* at 749–50.

216. *Id.* While it has sometimes been argued that the 1993 list was a “new” recognition of tribes, the court affirmed, “the Department emphasized that the list included those Alaskan entities that the federal government historically had treated as tribes.” *Id.* at 749. In other words, the listed tribes had always been treated as federally recognized and this was not some unilateral federal action “invented” in 1993.

217. *Id.* at 750.

218. *Id.* at 751 (internal quotation marks omitted).

rulings.<sup>219</sup> The fact that the mother was not also a member of the Native Village of Northway had no bearing on the outcome.<sup>220</sup>

More recently, the Alaska Supreme Court, in *Simmonds v. Parks*, gave full faith and credit to a tribal court judgement terminating the parental rights of a non-member parent of a tribal member.<sup>221</sup> In that case, the Minto tribal court terminated the parental rights of a mother and father of a child who was a member of the Native Village of Minto.<sup>222</sup> The child was placed under the jurisdiction of the tribal court shortly after birth due to social workers' concerns about her safety.<sup>223</sup> After initial emergency hearings, the natural parents consented to continued third party custody of the child.<sup>224</sup> The father, Parks, made several attempts to regain custody of the child, and participated in tribal court proceedings where he objected to the tribal court's jurisdiction over him.<sup>225</sup> At that point, Parks hired an attorney, who wrote a letter to the court arguing that the Native Village of Minto was not a federally recognized tribe and thus had no jurisdiction over Parks.<sup>226</sup>

At the hearing terminating his parental rights, Parks was allowed to participate, but under Minto tribal court practices, his attorney was not allowed to speak. Instead of appealing the tribal court decision, Marks filed lawsuits in federal and state court challenging the tribal court's jurisdiction.<sup>227</sup> "The federal district court concluded that the Native Village of Minto is a federally recognized tribe and that the Native Village of Minto and the State of Alaska have concurrent jurisdiction as to child custody matters such as are raised in the tribal and state court proceedings."<sup>228</sup> After protracted state superior court proceedings and an initial appeal to the Alaska Supreme Court, the case returned for a second time for consideration of the issues of whether the tribal court had jurisdiction over the case, whether the court's refusal to allow the attorney

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219. *Id.* at 752 ("Because Northway Village's status as a federally recognized tribe is undisputed and its adjudication of child custody disputes over member children is necessary to protect tribal self-government or to control internal relations, its tribal courts require no express congressional delegation of the right to determine custody of tribal children.") (internal quotation marks omitted).

220. *Id.* at 760.

221. 329 P.3d 995 (Alaska 2014).

222. *Id.* at 998-1001.

223. *Id.*

224. *Id.*

225. *Id.*

226. The attorney threatened to file a civil action in the U.S. District Court against the Native Village of Minto seeking injunctive relief and monetary damages. *Id.* at 1001. The attorney also advised Parks that he could ignore the tribal court order and engage in self-help to regain custody of his daughter. *Id.* at 1002.

227. *Id.* at 1002.

228. *Id.* at 1004 (internal quotation marks omitted).

to speak constituted a denial of due process, whether the failure to exhaust tribal appeals affected his rights on the merits, and whether the tribal court decision was entitled to full faith and credit.<sup>229</sup>

In a thorough and well-reasoned opinion, the court concluded that “we will not allow a party to challenge a tribal court’s judgment in an Indian Child Welfare Act-defined child custody proceeding in Alaska state court without first exhausting available tribal court appellate remedies.”<sup>230</sup> The State of Alaska also participated in the case and argued that tribes should not be entitled to the same sort of full faith and credit as other states’ judgment. The court’s response was curt: “[t]he State’s argument also fails to afford tribal courts the respect to which they are entitled as the judicial institutions of sovereign entities. We have previously emphasized respect for tribal courts, and this respect must inform our analysis . . . .”<sup>231</sup>

In another domestic relations matter, the Alaska Supreme Court recently upheld tribal jurisdiction to determine non-member child support obligations.<sup>232</sup> The question arose when the Central Council of Tlingit & Haida Indian Tribes of Alaska (Tlingit & Haida) brought suit to force the Alaska Child Support Services Division (CSSD), the arm of the state government charged with enforcing child support orders, to enforce tribal court orders to the same extent it enforces the orders of other states. The Uniform Interstate Family Support Act (UIFSA) governs and authorizes funding for enforcement funds, but only if the state passes the UIFSA.<sup>233</sup> Alaska adopted the UIFSA and included tribes in the definition of “state,” which subjects tribal orders to state enforcement.<sup>234</sup> Similar to its losing position in *Simmonds v. Parks*, the state argued that tribal courts lacked inherent authority to adjudicate the rights of a non-member parent.<sup>235</sup> The argument was rejected, “because tribes’ inherent authority over child support stems from their power over family law matters

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229. *Id.* at 1006.

230. *Id.* at 1008. The court reasoned that “[b]ecause Parks failed to exhaust available tribal court remedies by appealing to the Minto Court of Appeals, and because none of the exceptions to the exhaustion doctrine apply, we conclude that he is not permitted to relitigate his minimum due process and jurisdictional claims in Alaska state court.” *Id.* The court adopted the exhaustion rule and exceptions provided under federal law. *Id.* at 1004–22. See also COHEN’S HANDBOOK, *supra* note 12, § 7.04[3], at 630–36 (“Where the Supreme Court has not yet clearly foreclosed tribal jurisdiction, however, the policies behind the exhaustion requirement itself dictate that tribal courts be permitted to first review the jurisdictional question.”).

231. *Parks*, 329 P.3d at 1010–11.

232. *State v. Cent. Council of Tlingit & Haida Indian Tribes*, 371 P.3d 255, 264–72 (Alaska 2016).

233. 42 U.S.C. § 666(f) (2012).

234. *Cent. Council of Tlingit & Haida Indian Tribes*, 371 P.3d at 258–60.

235. *Id.* at 268–69.

concerning the welfare of Indian children – an area of law that is integral to tribal self-governance – the basis and limits of that authority are tied to the child rather than the parent.”<sup>236</sup>

## 2. *Indian Country and Trust Lands*

While the books are rightfully closed on the questions of tribal status and non-territorial powers, it appears that the territorial jurisdiction of Alaska tribes is limited to Native allotments, defined as Indian country under 18 U.S.C. § 1151(c), and restricted Native townsite lots, the functional equivalent of allotments.<sup>237</sup> That could soon change, however, due to new DOI regulations regarding acquisition of trust lands, excluded Alaska lands until recently.<sup>238</sup> In *Akiachak Native Community v. Salazar*,<sup>239</sup> the district court struck down the exclusion, and the DOI agreed that the prohibition was unlawful.<sup>240</sup> The AFN, which had led the cause for a just settlement of aboriginal land claims, supported the proposed rule to allow land to be taken in trust in Alaska. In written testimony to the Assistant Secretary for Indian Affairs, the President of AFN supported the proposed trust lands rule, noting “ANCSA was a Congressional experiment to the settlement of aboriginal land claims of Alaska Natives, and has been amended over thirty times in both technical and conforming amendments to better meet the real needs of Alaska Native people.”<sup>241</sup> The Alaska tribes should not be subject to discriminatory treatment in the trust land context due to ANCSA.<sup>242</sup>

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236. *Id.* at 269. In the alternative, the court ruled that even under the exceptions to the presumptive rule against tribal jurisdiction over non-members when on non-Indian land, as under *Montana v. United States*, 450 U.S. 544 (1981), the Tlingit & Haida Tribes had jurisdiction in this case. *Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, 371 P.3d at 272.

237. COHEN’S HANDBOOK, *supra* note 12, § 4.07[3][d][ii], at 354–56.

238. Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76888 (Dec. 23, 2014) (to be codified at 25 C.F.R. pt. 151).

239. 935 F. Supp. 2d 195 (D.D.C. 2013).

240. *Id.* at 203–11. The court of appeals determined that the controversy between Akiachak and the DOI was moot and dismissed the State of Alaska’s attempt to appeal as the State had brought no independent claim for relief when it intervened in the case. *Akiachak Native Cmty. v. U.S. Dep’t of the Interior*, 827 F.3d 100, 102 (D.C. Cir. 2016).

241. Letter from Julie Kitka, President, Alaska Fed’n of Natives to Ass’t Sec. Kevin Washburn at 2 (June 26, 2014) (on file with author). The letter was submitted in the course of the rulemaking process.

242. *Id.* Amendments to the Violence Against Women Act, Pub. L. 113-4, § 910 (March 7, 2013), 127 Stat. 54, restored tribal criminal jurisdiction over non-Indians under some circumstances, but disclaimed any application to Alaska tribes aside from the Metlakatla Indian Reservation. In a hopeful signal, that discriminatory provision was repealed by Pub. L. No. 113-275 (Dec. 18, 2014), 128 Stat. 2988. *See* S. Rep. No. 113-269 (113th Cong. 2d Sess.), *see also*, 18 U.S.C. § 2265 note.

Consistent with the comments of AFN President Kitka and many others, the DOI adopted a final rule that removed the bar on taking land in trust for Alaska Native tribes.<sup>243</sup> Thus, it is now possible for Alaska Native tribes to petition the Secretary of the Interior to take land in trust.<sup>244</sup>

The process is not terribly complicated, but can be time-consuming due to administrative backlogs or when a party seeks judicial review. The regulation provides that land may be taken in trust when the tribe already owns an interest in the land, or when the Secretary determines the land is needed to further tribal self-determination, economic development, or Native housing.<sup>245</sup> Statutory authorization for trust land in Alaska is provided by the IRA.<sup>246</sup> Any application for trust status will result in a notice being sent to state and local governments for comment.<sup>247</sup> Final decisions by the Assistant Secretary are subject to judicial review under the Administrative Procedure Act (APA).<sup>248</sup> The BIA published a “Fee to Trust Handbook” that further explains the process and provides sample forms.<sup>249</sup>

The substantive criteria for acquisition in Alaska (aside from Metlakatla) are found in the “off reservation” section of the regulation, which provides for greater scrutiny of the need for trust status based on the distance of the land from the tribe’s reservation.<sup>250</sup> Because there are no reservations in Alaska aside from Metlakatla, it is not clear how this section would be implemented. But given the isolated character of most Native villages it would make sense to consider the proximity of the proposed trust lands to the village itself, allotments owned by tribe members, or Native townsite lots.

Substantively, the Obama Administration’s decision has great significance. The Final Rule’s preamble notes that two recent federal

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243. Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76888 (Dec. 23, 2014) (to be codified at 25 C.F.R. pt. 151) (altering the land-into-trust regulations and detailing the history of the adoption of the Alaska exception to the rule).

244. *Id.*

245. 25 C.F.R. § 151.3(a)(2)–(3) (2014).

246. 25 U.S.C. §§ 5108, 5119 (2012).

247. 25 C.F.R. § 151.11(d).

248. See *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210–12 (2012) (holding that a citizen alleging an injury due to the Secretary of the Interior’s decision to take land into trust for a tribe had standing to seek judicial review of the decision under the APA). If the decision is made by a lower level official, the regulations provide for administrative appeals before the action is considered final for purposes of judicial review. 25 C.F.R. § 151.12(d).

249. DEP’T. OF THE INTERIOR BUREAU OF INDIAN AFFAIRS, ACQUISITION OF TITLE TO LAND HELD IN FEE OR RESTRICTED FEE STATUS (FEE-TO-TRUST HANDBOOK) (2016), <http://www.bia.gov/cs/groups/xraca/documents/text/idc1-024504.pdf>.

250. 25 C.F.R. § 151.11.

commissions recommend the enhancement of tribal powers and the restoration of Native rights in Alaska – including renewal of the option to create trust lands.<sup>251</sup> It remains to be seen whether and how much land will be taken into trust in Alaska, and thus converted into Indian country. The decision is discretionary, and so much will depend on the policy on such actions in future administrations. In addition, the land in Alaska Native villages is primarily privately owned due to ANCSA requirements,<sup>252</sup> which provide for the conveyance of the surface estate title to individuals and non-profit organizations who were occupying the lands on the date that ANCSA became law. In addition, no less than 1280 acres was to be conveyed to state-chartered municipalities, or to the state in trust for a future municipality.<sup>253</sup> In some villages, the municipality may have been dissolved under state law, or there will likely never be a municipality because there is already a tribal government to carry out municipal government functions. Perhaps those municipal trust lands could be transferred to tribal ownership and then be converted to federal trust status if desired by the community.

Of course, other sources of land might be surface or subsurface estates transferred to a tribe from a Native corporation.<sup>254</sup> Essentially, the regulatory change opening the door to trust land status could result in the establishment of a significant amount of Indian country in Alaska. That territory will be subject to tribal authority and further advance the cause of Native self-government in Alaska. At the same time, however, the land taken into trust will likely be relatively small, and the time-consuming process may spark litigation as it has in the lower forty-eight states.<sup>255</sup> If tribal governments are to exercise broad authority in village Alaska, some

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251. Land Acquisitions in the State of Alaska, 79 Fed. Reg. at 76889. *See also* INDIAN LAW AND ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT AND CONGRESS OF THE UNITED STATES 33–62 (2013), [http://www.aisc.ucla.edu/iloc/report/files/A\\_Roadmap\\_For\\_Making\\_Native\\_America\\_Safer-Full.pdf](http://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf); DEP'T OF THE INTERIOR, REPORT OF THE COMM'N ON INDIAN TRUST ADMIN. AND REFORM 59–66 (2013), [https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/Report-of-the-Commission-on-Indian-Trust-Administration-and-Reform\\_FINAL\\_Approved-12-10-2013.pdf](https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/Report-of-the-Commission-on-Indian-Trust-Administration-and-Reform_FINAL_Approved-12-10-2013.pdf).

252. 43 U.S.C. § 1613(c)(1)–(2).

253. *Id.* § 1613(c)(3).

254. Any transfer of ANCSA corporation assets may have to comply with applicable provisions of the Alaska corporation code dealing with the “[d]isposition of assets not in the regular course of business.” ALASKA STAT. § 10.06.568 (2016). *See also* Jimerson v. Tetlin Native Corp., 144 P.3d 470, 472–74 (Alaska 2006) (ruling that an agreement to buy out shareholders as part of a settlement of litigation challenging a corporate land transfer was unenforceable due to ANCSA’s restrictions on sales of Native corporation stock).

255. *See* Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak, 132 S. Ct. 2199 (2012) (trust land decisions reviewable under APA).

federal designation of the territory subject to tribal jurisdiction that does not depend solely on trust land status will be necessary. This would be consistent with the situation in the lower forty-eight states where non-trust lands are defined as Indian country if within a reservation's exterior boundaries.<sup>256</sup>

### CONCLUSION

Alaska's non-indigenous settlement and movement toward statehood was typical of colonial expansion in the United States. The aboriginal occupants of Alaska had their rights to property and sovereignty diminished by the newcomers through the exercise of congressional power—without Native consent. The amount of land and compensation received by Alaska Natives in ANCSA has been viewed favorably. However, the failure to affirmatively recognize Native governmental authority over land, or to protect Native hunting, fishing, and gathering rights under federal law are glaring deficiencies in the settlement. There is reason for hope, however.

First, the basic structure of tribal governance is firmly established as a matter of federal law. The door is now open to the administrative establishment of expanded tribal territorial jurisdiction because the Obama Administration revised land-into-trust rules that previously discriminated against Alaska tribes. Even so, the well-documented difficulties in providing adequate law enforcement call out for congressional action to provide increased tribal criminal and civil jurisdiction over all present in Alaska Native villages.

Second, because Alaska Natives remain vitally connected to the land and its resources, there is a compelling case for meaningful protection for Native hunting, fishing, and gathering rights. The federal subsistence regime put in place by ANILCA has largely failed due to the State of Alaska's refusal to cooperate in the regime it previously supported. The Alaska Native community has pressed both the Administration and Congress to provide greater protections for subsistence uses and there have been some, albeit limited, positive responses. Even more than in the case of tribal self-governance, the subsistence questions will require fresh legal and policy thinking, along with continued advocacy.

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256. 18 U.S.C. § 1151(a).

But at the end of the day, it is most likely that the Alaska Native community will continue its efforts to advance hunting, fishing, and gathering rights, as well as tribal self-government. These efforts will aim to correct the deficiencies in ANCSA and ANILCA. Tribal self-government and protection for subsistence uses should be protected by Congress in ways that accord with Native desires, values, and in recognition of inherent rights.