

When a Small Typo Has Big Implications

William Schneider

Long before the Russians, other Europeans, and Americans arrived in Alaska, hunting, fishing, and gathering wild foods sustained Native people. Subsistence continues to be the economic, social, and cultural backbone of rural life in the state.¹ In 1867, under the Treaty of Cession with Russia, the United States government assumed trust responsibility for Alaska Natives and that included protection of their hunting and fishing rights.²

The federal trust responsibility to Alaska Natives has its roots in the history of federal rulings related to American Indians. The basic principle that guides the relationship of the federal government to Native Americans is one of “wardship” as defined by Chief Justice Marshall in 1831.³ It rests on the understanding that while Native Americans are to be treated as nations with sovereign rights, the federal government acts as a benevolent overlord with authority over but with responsibilities for the welfare of Natives.

Unlike the rest of the United States, in Alaska there are no treaties that spell out this relationship. However, the same principle guides the federal government’s relationship with Alaska Natives, and this is reflected in the language of the Treaty of Cession in 1867, when the U.S. government purchased Alaska and assumed responsibility for the “uncivilized” tribes, the vast number of Natives living outside the influence of the Russians. The federal responsibility was reaffirmed in the protections afforded to Alaska Natives for land they occupied in the 1884 Organic Act and in court cases such as the Berrigan Case. The evolution of the trust relationship took a step forward when the Indian Reorganization Act of 1934 was extended to Alaska two years later. Under the auspices of the Act, the Department of the Interior established village councils, a loan program, and expanded services to Native communities. In addition, reserves were established to delineate and protect land used by Alaska Natives.⁴ Although all but one of the reservations was extinguished under the Alaska Native Claims

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Settlement Act in 1971, the reservations represented recognition of federal responsibility for Native land rights.⁵ More recent expressions of the trust relationship can be seen in Title VIII of ANILCA that protects Native and non-Native hunting and fishing priority on federal land. In 1993 and 1994, Assistant Secretary of Indian Affairs Ada Deer formally recognized Alaska Native villages as tribes, a status which entitles them to powers over village services and affairs such as adjudication of child welfare cases. It also reaffirmed the federal government's responsibility to Alaska Natives.⁶

At the same time the federal government is bound by its trust responsibility to ensure protection of Alaska Native interests, the State of Alaska prohibits granting special treatment to any individual or group because of the Equal Access Provision and the Common Use Provision in the State Constitution. Further, in 1971, under provisions of the Alaska Native Claims Settlement Act (ANCSA), aboriginal title to the land and aboriginal hunting and fishing rights were extinguished. This set up an even more imminent conflict between the federal government with its trust obligation and the State of Alaska's constitution, which prohibits special treatment of Alaska Natives. Without Native control of their own land (without "Territorial Reach"), Alaska Natives are legally bound by two different legal management mandates, those of the State and the federal government. This paper explores the historic roots of this conflict.

My focus is on the history of issues and conditions that gave rise to the laws and legal actions that frame Native subsistence today. I examine the historic record not to argue legality but instead to demonstrate that this is a part of the past that should be understood from a historical perspective, that is, as a sequence of events that have led us to the present predicament over subsistence rights, sovereignty, and policies of natural resource management. It's a story of opportunities missed, actions taken that have compounded as opposed to solved the problems, and creative efforts to use the law to enhance Native management opportunities. I conclude that as important as the law is to our civil society, it tends to blind us to subsistence as a way of life integral to rural Alaskans and their identity.

This essay has its roots in the book, *The Tanana Chiefs: Native Rights and Western Law*, that I wrote in collaboration with other scholars and leaders. The book explores how the lives of Natives in Interior Alaska were influenced by the evolution of legal actions they faced under American law. The 1915 meeting of the Tanana Chiefs with Judge James Wickersham provided a window to the concerns of the Native leaders. With the publication of the book, I thought the story had largely been told, that is until Jim Magdanz,

a friend and colleague, pointed out a significant typo that led to the inquiry reported on here. Magdanz has many years of experience in the Subsistence Division of the State of Alaska Department of Fish and Game, and continues doing important subsistence research. He was the right person to recognize the significance of the mistake. The typo is on page 152, footnote 110 of the book. The word in question is “users” and occurs in the last sentence of the footnote. The actual language of the Act reads: “Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial *uses*” (emphasis added).⁷

The reference to “uses” as opposed to “users” means the Alaska state constitution does not permit favoring or granting special use provisions to any individual or group (users), and the Natural Resources article of the constitution is explicit about fish and game and how they should be managed for the “common use” of all.⁸ This wording reflects the difference between state and federal management of subsistence and when the typo was pointed out to me, I realized there was far more that had to be learned about how this distinction plays out in Alaska history.

The principle that the natural resources are to be made available to all citizens without preference, privilege, or other forms of exclusion has its roots deep in the American experience, is derived from English Common Law,⁹ and is embodied in the Public Trust Doctrine and the North American Model of Wildlife Conservation.¹⁰ These principles are common in all parts of the country. Vincent Ostram, consultant to the Natural Resources committee of the Alaska Constitutional Convention recalled many years afterwards the intent of the provision: “The expression ‘for common use’ implies that these resources are not to be subject to exclusive grants of special privilege as was so frequently the case in ancient royal tradition.”¹¹

The delegates to the Alaska Constitutional Convention and their advisor were committed to the basic principle of common use and there was little dispute within the predominantly non-Native delegates¹² until population pressure, depletion of fish and game, and competition for game created tension between sport hunters and subsistence hunters. In 1980 the Alaska National Interest Lands Conservation Act (ANILCA) became law and Title VIII of the act provides a special provision for rural subsistence users on federal land.¹³ This includes Alaska Natives and non-Natives who are living in rural Alaska and supporting themselves by a subsistence way of life. The implementation of ANILCA further set up the potential for conflict between the management

approaches of the state and federal governments. That is the short story, but to gain an understanding of how these two different approaches to managing subsistence developed, a more in-depth historical discussion is necessary.

The federal government's relationship with Alaska Natives begins with the purchase of Alaska in 1867.¹⁴ The United States government recognized both the tribal status of Alaska Natives and the responsibility to protect their interests in the land and the game, albeit not clearly defined at that time, but acknowledged in subsequent legislation. Shortly thereafter, in 1871, Congress ceased treaty making with Indian tribes. This is significant to Alaska Native history because it left open the question of how the federal government would ultimately address its responsibility to Alaska Natives. This was certainly on the minds of Alaska Native tribal leaders who fought for protection of their rights throughout this period.¹⁵ The 1884 Organic Act provided for the protection of Native lands and stated that Native subsistence activities were not to be disturbed.¹⁶ Native legal rights were tested in 1904, when John Minook, a man of mixed Russian and Native heritage applied for citizenship. He was granted citizenship by Judge Wickersham based on two criteria, his part-Russian heritage and the fact he was living a settled lifestyle consistent with White societal norms.¹⁷ This ruling stands in apparent contrast to a ruling one year later in a land dispute known as the Berrigan Case.¹⁸ A small group of Athabascans including Chief Jarvis had houses on the Little Delta River, an area where prospectors wanted to establish a supply post. They approached Chief Jarvis about purchasing the land. In this case, Wickersham ruled that Chief Jarvis could not sell the land because he was a member of the "uncivilized tribes," those Natives whose lands were held by the government until a future land settlement. Wickersham's ruling reflected the fact that they were "protected" from exploitation by virtue of the government's responsibility to them. The ruling was straightforward and based on provisions of the Treaty of Purchase. Judge Wickersham recognized the federal government's responsibility to protect the interests of Alaska Natives until their land claims were settled. The proceedings in both cases, however, followed the assimilationist policies of the day with evaluations of how qualified Chief Jarvis and the tribal members were to function in White society based on whether they were living a settled life and knew the ways of White settlers.¹⁹

Taken together, the two cases demonstrated that the federal government had responsibilities to protect Native interests both



Tanana Chiefs from villages in the Interior in conference with James Wickersham and other officials in Fairbanks in July 1915. Attendees include (back row, left to right) Julius Pilot of Nenana, Titus Alexander of Manley Hot Springs, Cramer (first name not listed), Thomas Riggs of the Alaska Engineering Commission, C. W. Richie, Chief Alexander William of Tanana; (middle row) Jacob Starr of Tanana, Chief William of Tanana, Chief Alexander of Tolovana, Chief Thomas of Nenana, Wickersham, Chief Evan of Cosjacket, Chief Charlie of Minto; (front row) Chief Joe of Salchaket, Chief John of Chena Village, Johnnie Folger of Tanana, Reverend Guy H. Madara, and Paul Williams of Tanana. (Frank and Frances Carpenter collection, LC-DIG-ppmsc-01565, Library of Congress)

through ensuring a path to citizenship and protecting their unsettled land rights. Unfortunately, there was little understanding of tribal ways, a fact that is evident in both cases and has continued to be the case.

The 1915 Tanana Chiefs meeting with Judge Wickersham gave a prominent public voice to the concerns of Natives in Interior Alaska about encroachment of non-Natives on their hunting areas, raised the issue of their rights under western law, and questioned their relationship with the federal government. Individual Native leaders had written letters and conferred with Wickersham, but this was an official meeting with representatives from up and down the Tanana River, and it was well publicized. At this meet-

ing, Wickersham appeared sympathetic, and he recognized that the government had a responsibility to the Natives but, unfortunately, he was unable to work outside of the legal framework in which he was trained to practice. On the issue of land he could only offer reservations or allotments, and the divide between what was possible with reservations and what the delegates and Wickersham could imagine happening was immense. The Native delegates knew their yearly cycle of hunting, fishing, and trapping depended on free movement over a large area, but Wickersham didn't understand this; it was too intangible. Perhaps if Wickersham had been able to listen longer and learn the scope of the chiefs' needs in terms of yearly cycles of activity, that might have helped. Chief Alexander, the man whom Wickersham had met earlier in Tolovana, stated, "I tell you that we are people that are always on the go, and I believe that if we were put in one place we would die off like rabbits."²⁰ Wickersham either didn't take such comments seriously or purposefully ignored them. The meeting brought to light the importance of firsthand experience as a basis to understand a different way of life, a theme that continues to resonate today. To Wickersham's credit, the following year (1916) he introduced in Congress a statehood bill for Alaska in which he specifically recognized Native land rights and the federal government's responsibility to administration of Native affairs.²¹ (In the context of this historic meeting in Interior Alaska, western legal scholars like Wickersham were sympathetic but ill prepared to understand the full range of Native concerns and they felt constrained by the law and legal precedents.²²)

Forty years later, in the winter of 1955–56, delegates to the Alaska Constitutional Convention gathered in Fairbanks to write the State's constitution. The issue of Native land claims was discussed and it was decided this was a federal concern that the new state did not need to spend much time considering; it was outside their jurisdiction. In the natural resources provisions of the Constitution, they called for equanimity in access and use of resources with no preferences allowed to user groups. On the surface, we can understand why the delegates would seek equanimity with respect to natural resources, uses, and allocations. As noted earlier, there is a strong historical tradition in the United States and Canada that recognizes that natural resources belong to the public and are to be managed by states or provinces for the common good of the resources and to provide for all the people who might want to use them.²³ We can get some indication of how the delegates felt from the fact that the first statehood bills failed to recognize Native claims at all and it was at the urging of the Secretary of the Interior, Julius Krug, that an amendment

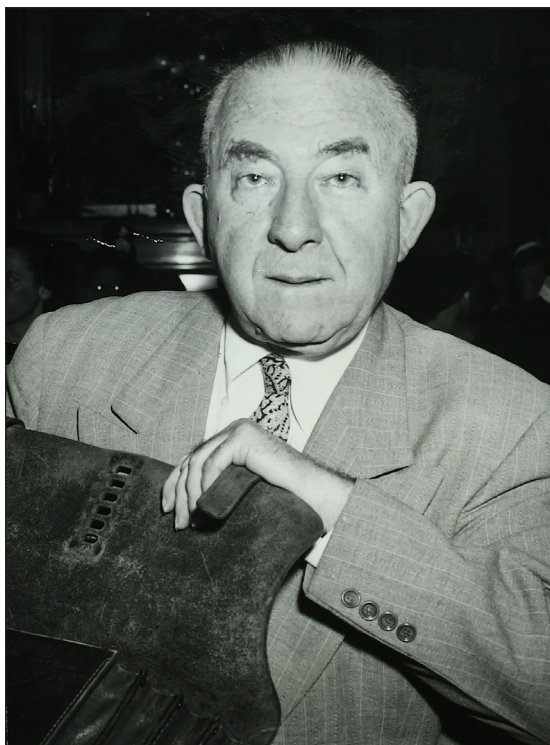
was added forcing the delegates to recognize Native land claims.²⁴ Krug's predecessor, Harold Ickes, also wanted to deal with Native land claims, stating they should be "affirmed, delimited, or extinguished with compensation."²⁵ At the national level there was fear that mention of Native land rights would hold up progress to statehood by suggesting rights where they didn't exist.²⁶ Mary Clay Berry, who chronicled the development of Native land claims, writes,

While most proponents of statehood were aware of the Native land claims, few seem to have understood them and most thought that any attempt to settle them at the time of statehood would merely postpone everything. So, almost to a man, they disclaimed any responsibility for them.²⁷

Convention delegate Vic Fischer recalled that the delegates considered Native land claims a federal problem.²⁸ Native leader Willie Hensley sees the failure to account for Natives at the time of the convention as a root of today's problems:

The issues that plague us today sort of have their roots in that document, the absence of concerns about land, about languages, about participation in our educational system, the importance of fish and game to our lives. And if there had just been a few phrases that would have given the jurists, you know, some direction on these issues that would have been great. There's no recognition of the tribal governments that existed at the time, none.²⁹

One measure of the attitude of Alaskans to Native land claims in the years leading up to statehood can be seen in the response by Alaska politicians to the extension of the Indian Reorganization Act to Alaska, the Alaska Reorganization Act of 1936 (ARA). This became a meaningful vehicle for Interior secretaries Ickes and Krug to support Native interests in village operations and in issues affecting the land and waters important to Native ways of life. A hallmark of the ARA strategy that emerged under the respective tenures of Ickes and Krug was establishment of reservations designed to empower Native control of resource use areas important to them. This policy created a backlash from territorial governor Ernest Gruening who believed that reservations would



Governor Ernest Gruening appearing before the U.S. Senate Interior and Insular Affairs Committee in 1950. (Personal collection of editor)

create “racial disharmony.”³⁰ He, like others, saw it as a form of “reverse discrimination” against the settler population.³¹ Gruening also claimed that it would actually impede Native development. Gruening had fought for Native civil rights in Alaska³² and he was not against settling Native land and possessory rights issues, but he saw citizenship and full participation in the American economy as the principle avenues to opportunity for Native people, and he believed that reservations would impede Native “assimilation, acculturation, and economic progress.”³³ In the push for statehood and the drafting of the bill, Gruening tried to convince members of Congress not to include a statement recognizing Native claims.³⁴ Yet, in his book, *The State of Alaska* (1954), he begins a chapter entitled “Native Claims: Equality versus Wardship” with a clear recognition of unsettled Native claims going back to the Treaty of Cession. He wrote, “Seventy years of future had passed by 1954 and the legislation by which the titles to Indians’ lands could be acquired had not yet been enacted by Congress.”³⁵ Years after statehood, he would publicly endorse the idea of a land claims bill to a statewide gathering of Native leaders. He supported having the U.S. Court of Appeals take jurisdiction in

settling the Native land claims. At that conference he noted that he had been supportive of land claims for a long time and referenced his 1954 book. When asked if he was in favor of a settlement that would provide a forty or fifty mile circumference around villages to support their subsistence, he deflected the question.³⁶ Earlier (April 29, 1966) Senator Gruening was more direct stating that he would rather see the Native communities get several thousand acres and a financial settlement, noting that the proposition of large land claims had paralyzed state land selection. In his words, "The mere granting of large areas of land is not the solution to the problems of Alaska Natives." Instead he stressed education and job training to integrate into the "mainstream of American life."³⁷ Perhaps his chapter title tells half the story; Gruening believed in equality of opportunity, and segregating large segments of land exclusively for Natives struck him as contrary to equal opportunity and therefore a poor solution to the problem of Native aboriginal claims. Driving this position was his conviction that the path to Native well-being was through economic integration into Western society. From a political standpoint at the time of statehood, advocating for a large segment of land designated for Natives presented a potential problem that could hinder the selection and development of state lands. So, at the time of statehood, it was convenient not to bring up Native interests. He could have it both ways but at different times in history.

Another Alaska politician active in the statehood movement was Bob Bartlett. He recognized that Native land rights existed but he wavered in his support of recognizing Native land claims in the statehood bill. As Stephen Haycox points out, Bartlett, Alaska's territorial delegate to Congress, was interested in advancing statehood and he did not want Native land claims to get in the way, yet he was not against the Native claims.³⁸ He wrestled with the fact that a disclaimer in the statehood bill recognizing Native land claims might be a serious impediment to the new state's ability to develop lands and build an economy. He sought a compromise position, no disclaimer but a promise that Congress would shortly address Native claims.³⁹ As we know, the final bill did have a disclaimer (Alaska Statehood Act, Sec 4, Compact with U.S.) but fulfilling the promise of a settlement for Native claims did not occur until 1971, and then largely due to the influence of the Udall land freeze and oil development. Bartlett gambled; Alaska finally got ANILCA with conflicting mandates from state land management, and we got the problems that has created.

If these two politicians are representative of public sentiment we are left with the realization that the enticement of statehood

outweighed consideration of Native interests and rights in the years leading up to statehood.

The delegates to the convention had no idea of how the federal government would end up managing subsistence on federal land. They had no idea how the urban population increase would create divisions between urban and rural Alaska as they competed for fish and game. And with few exceptions, they didn't know much about Alaska Natives and their way of life. All of this may be true through the eyes of our present knowledge of what happened but we are compelled to ask, why didn't the federal government tackle Native land claims before passing the Alaska Statehood Act? Shouldn't they have seen this as part of their trust responsibility and recognized the troubling issues that would emerge if Native land claims weren't addressed prior to statehood and State selections of land?

The Alaska Statehood Act became law in 1958, and Alaska officially became a state on January 3, 1959. While the federal government recognized there were Native rights that they were obligated to protect,⁴⁰ the language in the law was not much of a deterrent once developmental interests within and outside the state saw economic opportunities. Professor Kevin Illingworth points out that one year after Alaska became a state (1960) the federal government transferred all authority to manage fish and game to the State. This included regulation of Native hunting and fishing, a violation of Sec. 4 of the Alaska Statehood Act because aboriginal hunting and fishing rights had not been extinguished at that point in time.⁴¹ During this same period, the 1960s, Alaska Native leaders organized and responded to a wide range of proposed actions that would impact the land and their way of life.⁴² Finally, Secretary of the Interior Stewart Udall stepped in to declare a land freeze on state selections of land.⁴³

The 1971 Alaska Native Claims Settlement Act (ANCSA) was a landmark settlement for Alaska Natives conveying land and money to Native-owned corporations established under the law.⁴⁴ In return, the act extinguished aboriginal title as well as hunting and fishing rights.⁴⁵ There was Native input into provisions of the law and an Alaska Native Claims Task Force that was made up of Native leaders, state officials, and members from the Department of the Interior who made recommendations before Congress passed the bill. In 1968 they proposed the bill include "continued use of traditional lands for hunting, fishing, and gathering activities."⁴⁶ When Congress voted on the final language of the bill it did not include such provisions. In 2018 Willie Hensley gave a talk to the Stanford Woods Institute for the Environment and he was asked if there was anything about the land claims that he would

do differently. He responded by acknowledging that they weren't able to get subsistence rights into the act.⁴⁷

Ironically, the issues raised by Native leadership leading up to passage of ANCSA involved threats to their subsistence use areas, and so the loss of aboriginal title and aboriginal hunting and fishing rights was a major concession.⁴⁸ Professor Robert Anderson notes, "A major flaw in the settlement was the failure to provide statutory protections for the aboriginal hunting, fishing, and gathering rights extinguished by ANCSA."⁴⁹

Anderson further clarifies that under the 1867 Treaty of Cession, the United States acquired the "right of preemption," the right to acquire tribal land, but the tribes retained "aboriginal title," the right to use and occupy the land.⁵⁰ Extinguishment of the aboriginal title in ANCSA meant that in future legal dealings tribal powers would not extend freely to the land they depend upon for subsistence. However, in Congress's ANCSA Conference Committee report, it is clear that Native subsistence was to be protected. Case and Voluck quote from the report:

The Conference Committee after careful consideration believes that all native interests in subsistence resource land can and will be protected by the Secretary through the exercise of his existing withdrawal authority. The Secretary could for example, withdraw appropriate lands and classify them in a manner which would protect Native subsistence needs and requirements by closing appropriate lands to entry by nonresidents when subsistence resources for these lands are in short supply or otherwise threatened. The Conference Committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives.⁵¹

Despite the intent, Secretaries of the Interior have been reluctant to exert their authority on State land. One can only speculate what the fate of Native hunting and fishing rights might be if land claims had been settled by Congress years before⁵² and provision for a legal role in management of hunting and fishing. If there had been a clearer resolution of Native rights to land and resources before statehood, the conflicts between State and federal law might have been avoided.⁵³

When the Alaska National Interest Lands Conservation Act (ANILCA) was passed in 1980, Title VIII of the act was designed in

part to address the extinguishment of aboriginal subsistence rights by providing provisions for a rural subsistence priority on federal land.⁵⁴ In 1978, in anticipation of passage of ANILCA, the state passed a subsistence law (AS16.05.094) that legally recognized the priority of subsistence uses of fish and game, and this led to the establishment of the Division of Subsistence in the Department of Fish and Game. It is charged with conducting research necessary to document subsistence in the state. In order to conform to the requirements of Title VIII, Section 805(d) of ANILCA⁵⁵, the state made further changes in subsistence management to reflect not only recognition of subsistence as a priority but also to grant rural residents priority for subsistence in times of shortage. This cleared the way for the Secretary of the Interior to certify that the state was in compliance and could retain statewide management of subsistence on state and federal lands.⁵⁶ However, this proved to be a short lived solution.

In 1985 the state's right to uphold a rural subsistence preference was challenged in the Madison Case on grounds that the rural residence preference was in conflict with the state subsistence law, which did not give subsistence preference to rural residents.⁵⁷ In considering this case, part of the issue revolved around the way state management had established a criteria that designated certain communities be given subsistence priority in times of extreme resource shortage as opposed to any individuals who in all other respects (except residence in such a designated community) would meet the qualifications under the state definitions of subsistence. Designation of residence for preference was found illegal under state law because the Alaska subsistence statute does not limit subsistence uses to rural residents.⁵⁸ In response to the Madison ruling the State amended its subsistence law in 1986 to "limit the subsistence priority to residents of a rural area."⁵⁹

Frustrated by the loss of hunting opportunities, four Alaskans, including Anchorage resident Sam McDowell, filed a lawsuit in State court challenging the state's rural priority. The lawsuit, filed in 1983, was resolved six years later by the Alaska Supreme Court who ruled that the State could not use residency as a factor in determining rural priority because it violates the common use clause, the no exclusive right of fishery clause, and the uniform application clause of the state constitution.⁶⁰ Without a rural preference the State would no longer comply with Title VIII of ANILCA. The State addressed the McDowell decision by amending subsistence law to allow subsistence uses by all Alaskans in

State-managed hunts and fisheries, with no rural preferences.⁶¹ With the state out of compliance with ANILCA, the federal government in 1990 assumed management of subsistence uses on federal public lands.⁶² This created the dual system of subsistence management we have today—one on state land, one on federal land, the former prohibiting a rural preference, the latter mandated to provide a rural preference for subsistence. The McDowell ruling brought further legal clarity to the fact that residence could not be used as criteria for subsistence priority on State land, thereby highlighting the importance of the distinction between “uses” as in types of permissible activities and “users,” selective individuals or groups, as in those residing in a particular place or region.

With this distinct difference in the State and federal laws, the Secretary of Interior could have sought through Congress an



Sam McDowell of the Izaak Walton League (on right) with personnel from the Alaska Department of Fish and Game at the opening of the Izaak Walton recreational fishing area on the Kenai River in 1976. From left to right: Russell W. Cahill, Director of the Division of Parks; Russ Redick and Rupe Andrews of the Division of Sport Fisheries; McDowell. (Alaska Department of Fish and Game Historical Photographs, 1950–1991, ARLIS-ADFG-HPC-b7-f52-33, Alaska Resources Library and Information Services)

Alaska Native preference on all lands and waters in the state. Illingworth notes that the federal government could have exerted its authority over the state, by using the Supremacy Clause (Article VI) of the U.S. Constitution.⁶³ Instead, in this case, the federal government limited its reach of authority only to federal lands.⁶⁴

Occurring over roughly this same period, Katie John, Doris Charles, and the village of Mentasta initiated a request to the Alaska Board of Fisheries in 1984 to fish at Batzulnetas, a historic fishing site on the upper Copper River.⁶⁵ The site is located within the boundaries of Wrangell-St. Elias National Park and Preserve which was established under ANILCA in 1980, and therefore carries the protections afforded by Title VIII. Katie John sought the assistance of the Native American Rights Fund (NARF) at their newly opened office in Anchorage.⁶⁶ When the initial response of the State was deemed not satisfactory, Katie John, with the assistance of NARF, initiated in 1985 a lawsuit against the State in federal court.⁶⁷

The site of Batzulnetas had been closed to fishing in 1964 due to concern for the escapement of salmon that spawn in the upper river.⁶⁸ Ken Roberson, a retired Fish and Game biologist who has worked on the Copper River and other salmon issues, described the sensitivity of the Batzulnetas fishery this way:

There [are] over 100 stocks of sockeye in the Upper Copper River, only two of which pass Batzulnetas and . . . Copper Lake has a very small spawning population (typically less than 200 observed) and Tanada Lake can vary from less than 2,000 to over 10,000 based on actual weir counts and aerial surveys, thus the allowable harvest at Batzulnetas is not very large.⁶⁹

Roberson's comment illustrated the challenges of determining fish counts and adequate escapement.⁷⁰

Considering the initial closure and later the restricted harvest, Katie John argued that subsistence priority exists and therefore the subsistence fishery should have priority over commercial fishing occurring at the mouth of the Copper River.⁷¹ This fueled an extended legal battle over the exercise of a subsistence preference that evolved into an argument over whether the federal government has authority over activities on navigable waters through federal lands or whether this is a state jurisdiction. After many years, the federal argument shifted to become based on the Doctrine of Federal Reserved Water Rights, which holds that federal

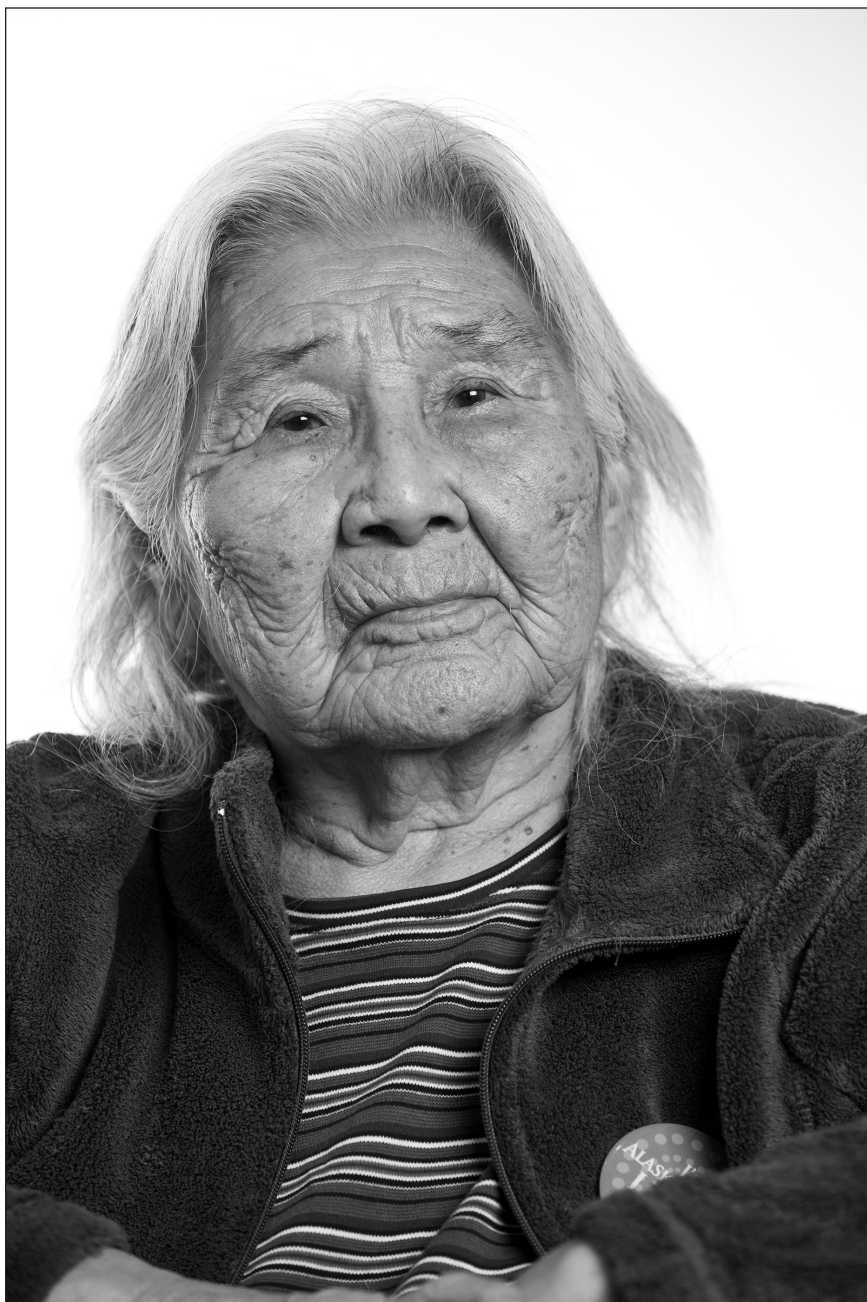
jurisdiction exists on navigable waters if the waters are integral to the reason for the federal land designation.⁷² This meant that the fishery at Batzulnetas was under federal management and therefore subsistence priority exists at this site. The ruling was upheld by the court but still could be challenged in the future.⁷³

The Katie John case is a high profile test case because of the many issues it raises. There is the long history of the site use by Ahtna people and the record of their efforts going back to the early years of the 20th century to defend rights to fish that were being taken by commercial users downstream. The Copper River supports multiple fisheries: commercial, sport, personal use, and subsistence, which creates the huge scientific and management challenge just described. The Ahtna source of fish at Batzulnetas consists of fish from just two fish stocks. They are few in number and are vulnerable to overharvest because they spawn upstream of Batzulnetas and are fished before they reach their spawning grounds. Ahtna cultural rights to use the site are based on traditional social customs that dictated how the fishing was to be done and where they could fish.⁷⁴

Ironically, by 1987 the State was making accommodations to allow a limited fishery at Batzulnetas.⁷⁵ In 1988 the State had accepted a proposal and management plan that would accommodate a limited fishery at Batzulnetas.⁷⁶ In March of that year, the Alaska Board of Fisheries produced a document entitled "Batzulnetas findings," a general description of the fishery, its management, and the Ahtna historic and present investment in the site and the fishery.⁷⁷ According to the report, "In general it appeared that the opportunity to fish at the old village site of Batzulnetas is more important to the proponents of [the] proposal . . . than the actual number of fish taken at this site."⁷⁸

While it would appear, at this point, that there was room for accommodation, the plaintiffs chose to fight on to secure federal management and establish the precedent of federal control of subsistence under Title VIII, which favored rural Alaskans. This appears to have been a case where the plaintiffs chose a long-term legal strategy over a reasonable but not necessarily long lasting State accommodation based on a growing awareness of the social and cultural importance of this limited fishery. Looking to Washington and Oregon, there was a record of legal accommodation of Native fishing rights that may very well have been part of the strategy of the plaintiffs.⁷⁹

In both the McDowell and the Katie John cases, the issue of state versus federal law was framed in terms of whether the rights of a group of people (rural subsistence users) should be selectively privileged over the rights of the entire population of the state. The



Katie John (Ahtna, Incorporated and Chris Arend)

intent of federal law is to protect Native and non-Native rural subsistence users. In the case of rural Native subsistence users the issue is tribal rights and the federal trust responsibility to protect their subsistence. In the case of non-Natives, the act recognizes their right to a rural subsistence life as well. The Katie John case marked the most dramatic battle between state and federal management of subsistence fisheries. It held the perfect mix of factors to legally challenge and further politicize the rift between state and federal management of subsistence, and it left more practical and less divisive solutions behind.

The divisiveness of earlier laws and rulings has led us to the confrontations of the present. If Native land claims had been settled before statehood, the land issues of the 1960s might have been avoided. Similarly, if subsistence had been addressed adequately in ANCSA (considering implications of the federal trust responsibility), we might have avoided the issues raised by the conflicts between Title VIII of ANILCA and the State constitution. In these ways the evolution of the Western legal system has created conditions that make it increasingly difficult to correct the law and incorporate different cultural perspectives.⁸⁰

Despite the barriers, Native groups have found ways to influence the regulatory structure. One way they have done this is through associations made up of communities of people who share a resource concern, such as whalers, walrus hunters, and salmon fishermen who want to ensure access to salmon fisheries on the Yukon and Kuskokwim rivers. In each case the three main issues are the health of the resource, access to hunt and fish, and a voice in regulation.

Federal law, unrestricted by the interpretation of the state's legal rulings that are based on the common use provisions, has in several cases accommodated Native co-management opportunities.⁸¹ In the cases of the Alaska Eskimo Whaling Commission and the Eskimo Walrus Commission the Native communities have had a voice but not regulatory authority.

In response to international regulations that threatened to eliminate Native bowhead whale hunting, whale hunters in 1977 formed the Alaska Eskimo Whaling Commission (AEWC) consisting of whale hunting communities in western, northwestern, and arctic Alaska.⁸² They also brought suit against the Secretary of the Interior for failing to object to the International Whaling Commission (IWC) proposed ban on Native subsistence whaling.⁸³ Under pressure, the IWC agreed to a reduced quota for Eskimo whale hunters. The AEWC successfully influenced the U.S. government

to listen to the collective voice of the whale hunters. Starting in 1982, the local municipality, the North Slope Borough, received support from the State of Alaska and the federal government to provide whale research data and census counts to the IWC to assist in their establishment of whale hunting quotas.⁸⁴ This research demonstrated that the previous whale counts were too low and did not adequately account for whales swimming under the sea ice, an observation based on Eskimo knowledge. The collaboration of scientific and Native traditional knowledge was made possible because of relationships and trust between key Native leaders who had worked with scientists before and their mutual respect. Thomas Albert notes, "The personal relationships formed a nucleus of trust that facilitated later discussions (1981 and onward) regarding whale migratory behavior that are relevant to the census of whales off Barrow."⁸⁵

Since its formation, the AEWK has developed a co-operative agreement with the National Oceanic and Atmospheric Administration (NOAA), initiated a program to self-regulate Eskimo whale hunting, and worked with industry to minimize their impact on whales and whale habitat.⁸⁶ In a program called Open Water Season Conflict Avoidance Agreement (CAA) whalers meet with industry officials to discuss and mitigate impacts of proposed industry actions.⁸⁷

The Eskimo Walrus Commission (EWC) was established in 1978 in response to Native hunters' dissatisfaction with State management of walrus.⁸⁸ The hunters formed an association of communities that grew to include villages from western and arctic Alaska. The group sought a way to demonstrate its members could self-regulate the taking of walrus and also provide for their subsistence needs.⁸⁹ Dissatisfaction with State regulations came to a head when the village of Togiak successfully brought suit against the federal government in 1979,⁹⁰ contending it had abrogated its trust responsibilities to protect their subsistence by allowing the State to impose regulations that restricted Native walrus hunting.⁹¹ However, under federal law Natives are exempt from regulation on sea mammal hunting.⁹² Because of the State Constitution, the State could not legally provide an exemption for Alaska Natives. The federal government was therefore forced to reassume management of walrus. Once again, what was at stake was the basic conflict between the Alaska Constitution that prohibits favoring any interest group under the "common use provision" and the federal government's trust responsibility to ensure protection of Alaska Native interests. Under federal management there is both a legal basis to support Native walrus hunting (the federal government's trust responsibility) plus lan-

guage in the Marine Mammal Protection Act excluding Alaska Natives from the prohibition on hunting marine mammals. There is also a provision in the act to support co-management efforts (section 119). The EWC has benefitted from all three provisions, which is reflected in federal funding to the EWC to collect data on walrus, initiate hunter education, develop management plans, and participate in policy discussions.⁹³ Like the AEWC, the EWC has a voice in management strengthened by their collective representation of villages sharing the same resource concern and speaking as one. However, they do not have legally recognized regulatory authority.

Low salmon runs on the Yukon and Kuskokwim Rivers prompted tribal groups along both river systems to begin discussions that would lead to the Yukon River Inter-Tribal Fish Commission (YRITFC) and the Kuskokwim River Inter-Tribal Fish Commission (KRITFC). The KRITFC was established in 2015.⁹⁴ The two commissions developed together, in part because the non-profit organizations supporting their work overlap in the lower Yukon and upper Kuskokwim. The Association of Village Council Presidents (AVCP) represents villages on both the lower Yukon and the Kuskokwim rivers, and the Tanana Chiefs Conference (TCC) represents villages on the lower, middle, and upper Yukon River as well as the upper Kuskokwim River. Both AVCP and TCC facilitate discussion with federal and state entities. They share a common goal to preserve salmon on both rivers and to seek consensus on direction and action from member tribes along the extent of each river. The YRITFC includes Canadian villages on the upper Yukon River even though their fishing rights under Canadian law differ from U.S. federal and Alaska state laws. The inter-tribal commissions are a testimony to the common resolve of all users to seek solidarity in management of salmon. They are also important because they provide an avenue for local subsistence values and approaches to be officially considered. Writing about the KRITFC, John "Sky" Starkey notes: "Providing the opportunity for the continuation of the Alaska Native hunting and fishing way of life is more likely to succeed if the people who live that way are fully engaged in determining how their uses of fish and wildlife should be managed to sustain that way of life."⁹⁵

In 2014 the groups' efforts gained the support of the Department of the Interior at the annual meeting of the Alaska Federation of Natives where the Interior spokesperson called for integration of tribes into salmon fish management in federal waters.⁹⁶ The authority for this comes from ANILCA, Title VIII, Section 809, where the Secretary of the Interior is granted license to enter into co-operative agreements with Native tribes.⁹⁷ This

provision is the basis for federal support of Native co-management on federal lands in Alaska.⁹⁸ It drives policy and provides funding to both commissions for their participation in management, although the extent and type of management input only applies to federal waters. KRITFC has a prominent role in the Yukon Delta National Wildlife Refuge fishery.⁹⁹ The YRITFC, lacking large areas of federal lands, has a more limited influence on management of fishing. Because of the federal authority, the KRITFC is more able to achieve a co-management approach in that it must, by law, be consulted, whereas the YRITFC works for a collaborative relationship with State managers.¹⁰⁰

Both fish commissions, like the AEW and the EWC, present united positions in representing constituent communities over vast regions of the state. They achieve consensus by working with diverse communities with different needs and concerns. Achieving consensus on positions takes time and lots of face-to-face discussion, but provides a powerful presence when negotiating for a position with governmental entities. Professor Carrie Stevens of the College of Rural and Community Development at the University of Alaska Fairbanks points out this process also has a positive impact on the consensus builders themselves: "[T]he overarching importance of the Commissions is that they are critical to operationalize indigenous protocols and stewardship for the health and wellbeing of the fishery and the people in relationship with that fishery—as proven time and again by inter-tribal fish commissions in other places—for the benefit of all 'user groups.'"¹⁰¹

The strategy depends on building relationships, particularly with the State fish managers and Board of Fisheries, who are not bound by the federal trust responsibilities. This means participants must travel to meetings of the Board of Fish (BOF) and Regional Advisory Councils (RAC), an expensive proposition but an important part of the strategy to build relationships with decision makers and facilitate understanding of tribal concerns through face-to-face discussion. These efforts are supported by grants from the federal government as part of their legally mandated trust responsibility to the tribes.

The most significant effect of the commissions and co-management efforts has been to provide ways for Native groups to pressure the federal government to meet its trust responsibilities to help tribes preserve elements of sovereignty (control) in their subsistence way of life. This is an area that had been severely neglected in the movement to statehood and stripped from tribal

groups under ANCSA. Unfortunately, as effective as the commissions may be, they do not fix the competing management mandates of the State and the federal governments, nor the impact this has on tribes. Professor Patricia Sekaquaptewa encapsulates the problem when she writes, "The story really does turn on whether one views Alaska Native 'users' as tribal governments/federal wards versus mere ethnic minorities."¹⁰² The discrepancy will continue to fester, even as managers and regulatory boards gain greater understanding and appreciation for diverse cultural approaches to the resources. The discrepancy between the State constitution and the federal government creates a barrier to a unified approach to management of fish and game and leaves some Native tribes benefitting from the more accommodating federal government with opportunities such as co-management voice and priority treatment on federal land. Other tribes are subject to State regulation with no special legal provision that ensures they can influence the regulatory process. The historic record tells us all of this could have been resolved before statehood and was not adequately dealt with in ANCSA, and that led us to the dual system of management that is Title VIII of ANILCA.

Magdanz offers a measured assessment of the situation:



Interior Secretary and former Alaska Governor Walter Hickel meeting with delegates from the Alaska Federation of Natives to discuss Native land claims, circa 1970. (Alaska Native Organizations Photo Collection, P33-05, Alaska State Library)

The basic conflict between the state and federal system, between uses and users, clarifies the limitations of the two approaches and casts the challenges facing Alaska Natives in maintaining subsistence into sharp relief. Ongoing adaptive management of common-pool resources cannot be neatly codified. Common-pool resource management requires continuing dialogues between users about uses, within nested legal frameworks that accommodate both.¹⁰³

A similar position is argued by Tom Morehouse and Marybeth Holleman who suggest that “mutual adjustment” by resource managers allows for accommodating dual management.¹⁰⁴ If we accept this conclusion we are left with the reality of the dual system, the efforts of professional managers to make it work, and the initiatives by Alaska Native groups to find ways to use collective organization to present and promote positions that influence management of subsistence.

The purpose of this paper is to recount the historic record of actions that has brought us to the present conflict between state and federal management of subsistence. Drawing on this record it would be negligent not to also mention a range of solutions. Three options are offered because they actually could fix the problem.

First, a rural subsistence priority in times of resource shortage could become law on State land with an amendment to the State Constitution, which would require a favorable vote by the electorate. In addition, it has been suggested that if there was a State Subsistence Board, this would allow rural residents a more direct way to have their concerns addressed.¹⁰⁵ If successful, this approach would have the support of the public and would include both Native and non-Native rural subsistence users. The drawback is the possibility of defeat by public vote.

The second option is for the Secretary of the Interior, acting under the trust authority to declare that in times of resource shortage, Native rural subsistence users have first priority on both federal and State land, mirroring Title VIII, sec 802 (2) of ANILCA. The advantage of this approach is that it is within the Secretary’s authority under his trust authority and it could happen quickly. The disadvantage is that it might leave out non-Native subsistence users in rural Alaska since they are not covered under the trust. However, mirroring the language of sec 802 (2) provides a powerful precedent for their inclusion and Congressional action could make this happen.

Third, with respect to Native subsistence rights, Professor Robert Anderson writes that Congress “could step in to expand federal subsistence fisheries jurisdiction or rework entirely the federal protections for the aboriginal hunting, fishing, and gathering rights extinguished by ANCSA.”¹⁰⁶

The point is that there are legal ways to address the disparity between State and federal management, but the problem often has been insufficient appreciation of Native subsistence rights vis-à-vis other State and federal interests. So, addressing Native subsistence has always been a patch on a problem that demands reconstruction.

NOTES

1. James Magdanz, *It is So Good To Be Back: Explorations of Subsistence in Alaska*, PhD. diss., University of Alaska Fairbanks, 2020.

2. The federal trust responsibility is defined as “a legal principle that the Supreme Court noted in *United States v. Mitchell* (1983) is ‘the undisputed existence of a general trust relationship between the United States and the Indian people.’” See “American Indians and Alaska Natives: The Trust Responsibility,” fact sheet, Administration for Native Americans, March 19, 2014, www.acf.hhs.gov/ana/resource/american-indians-and-alaska-natives-the-trust-responsibility [accessed October 5, 2020].

3. David S. Case and David A. Voluck, *Alaska Natives and American Laws*. (Fairbanks: University of Alaska Press, 2012), 1.

4. Case and Voluck, 28-29.

5. Case and Voluck, 29.

6. Public Law 103-454 103rd Congress, “Federally Recognized Indian Tribe Law Act of 1994”, section 103, Findings: 2, Trust Responsibility to recognize Indian Tribes.

7. Alaska State Constitution, Article 8, Sec. 4.

8. The natural resources article of the Alaska Constitution states: “Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use” (Section 3); “No exclusive right or privilege of fishery shall be created or authorized in the natural waters of the state” (Section 15); “Laws and regulations governing use or disposal of natural resources shall apply equally to all persons” (Section 17).

9. Richard Frank, “The Public Trust Doctrine: Assessing its Recent Past and charting its Future,” *University of California Davis Law Review* 45 (2012) 665-91.

10. John Organ et al., “Born in the Hands of Hunters: The North American Model of Wildlife Conservation,” *The Wildlife Professional* (Fall 2010), 1-6; Gordon Batcheller et al., “The Public Trust Doctrine: Implications for Wildlife Management and Conservation in the United States and Canada,” Technical Review 10-01, *The Wildlife Society* (2010), 1-28.

11. Vincent Ostrom, “Report on Clarifying the Meaning of Article VIII: Natural Resources as Adopted by the Alaska Constitutional Convention in 1956 with Addenda,” Workshop in Political Theory and Policy Analysis, Indiana University (1994), 1-248.

12. Frank Peratrovich was the only Native delegate to the Constitutional Convention.

13. Title VIII, Sec 1 of ANILCA states, "The Congress finds and declares that (1) the continuation of the opportunity for subsistence use by rural residents of Alaska, including both Natives and non-Natives on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional and social existence."

14. This is material that has been well trod by legal scholars. See Robert Anderson "Alaska Native Rights, Statehood and Unfinished Business," *Tulsa Law Review* 43, no. 1 (2013), 17-42; Robert Anderson, "Sovereignty and Subsistence: Native Self-Government and Rights to Hunt, Fish, and Gather after ANCSA," *Alaska Law Review* 33, no. 2 (2016), 187-227; Robert Anderson, "The Katie John Litigation: A Continuing Search for Alaska Native Fishing Rights after ANCSA," *Arizona State Law Journal* 51, Issue 3 (2019), 846-77; Ryan Peel, "Katie John v. United States: Balancing Alaskan State Sovereignty with a Native Grandmother's Right to Fish," *Brigham Young Journal of Public Law* 15, Issue 2 (2013), 263-76; Stephen Haycox, "Historical Aspects of the Federal Obligation to Alaska Natives," Appendix to Stephen Conn and Bart Kaloa Garber (editors) *Moment of Truth: The Special Relationship of the Federal Government to Alaska Natives and their Tribes, Update and Issue Analysis*, Rural Community Action Program (1981), 1-16; Stephen Haycox, "Contingency and Alaska History: How Congress's 1871 Cessation of Treaty-making Helped Create ANCSA a Hundred Years Later," in *The Big Wild Soul of Terrence Cole: An Eclectic Collection to Honor Alaska's Public Historian* (Fairbanks: University of Alaska Press, 2019), 169-80. The record outlined here demonstrates the history of conflicting management approaches of the State and federal governments and the efforts of Native tribes to find ways to be part of the management of fish and game resources they depend upon for their livelihood.

15. In the Interior of Alaska, there is a record of Native leaders voicing their concerns through letters to government officials, and in Southeast Alaska, Tlingit leaders as a group met with Governor Brady in 1898. See Ted Hinckley, "'The Canoe Rocks: We Do Not Know What Will Become of Us': The Complete Transcript of a Meeting between Governor John Green Brady of Alaska and a Group of Tlingit Chiefs, Juneau, December 14, 1898," *Western Historical Quarterly* 1, no. 3 (1970), 265-89.

16. "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." (May 17, 1884, Ch. 53, An Act Providing a Civil Government for Alaska).

17. William Schneider, *Tanana Chiefs: Native Rights and Western Law* (Fairbanks: University of Alaska Press, 2018), 3-4; James Wickersham "In Re: Naturalization of John Minook," *Alaska Reports*, May 16, 1904 (Fairbanks, Third Division, Vol. 2, West Publishing Company, 1906) 200-13.

18. Schneider, *Tanana Chiefs*, 4-6; U.S. vs. Berrigan et al., Case 270E, Alaska District Court, Third Division, Fairbanks, Box 30921, Alaska State Archives.

19. Schneider, *Tanana Chiefs*, 4-7.

20. Schneider, *Tanana Chiefs*, 45.

21. HR 13978, 64th Congress, 1st Session, March 30, 1916, Sec. 1 and Sec. 5.

22. In 1929 Wickersham and William Paul, Tlingit lawyer and prominent Alaska Native Brotherhood member, were able to work together to lay the groundwork for Native land settlements in Southeast Alaska. In that case, the claims fit more clearly the Western notions of ownership, and Paul had the Native background, support of the Alaska Native Brotherhood, and Western legal training. The two examples (Tanana Chiefs and the Tlingit-Haida Settlement) are an instructive study

in contrasts demonstrating the limitations of Western law when applied to Native concerns. See Schneider, *Tanana Chiefs*, 58-61.

23. This philosophy is embodied in the Public Trust Doctrine (see Batcheller et al., "The Public Trust Doctrine") and the North American Model (see Organ et al., "Born in the Hands of Hunters"; Organ et al., "The North American Model of Wildlife Conservation," Technical Review 12-04, *The Wildlife Society and the Boone and Crockett Club* (2012), 1-46). The roots of this approach extend back to the latter years of the 19th century and the early years of the 20th century. The development of scientific principles of wildlife management grew out of this movement and are the basis of current policies.

24. Robert Anderson, "Alaska Native Rights, Statehood and Unfinished Business," *Tulsa Law Review* 17 (2013), 17-42.

25. Robert Anderson, "The Katie John Litigation: A Continuing Search for Alaska Native Fishing Rights after ANCSA," *Arizona State Law Journal* 51, Issue 3 (Fall 2019), 853.

26. Richard Bloedel, *The Alaska Statehood Movement*, Ph.D. dissertation, University of Washington (1974), 374.

27. Mary Clay Berry, *The Alaska Pipeline: The Politics of Oil and Native Claims* (Bloomington: Indiana University Press, 1975), 25.

28. Victor Fischer, *Alaska's Constitutional Convention* (Fairbanks: University of Alaska Press, 1975), 137-39.

29. William Hensley, "Sixty Years Later, A Native Perspective of the Alaska Constitution," Alaska Law Review Symposium, University of Alaska Anchorage, October 12, 2018.

30. Kenneth Philp, "The New Deal and Alaska Natives," in Stephen Haycox and Mary Mangusso, eds., *An Alaska Anthology: Interpreting the Past* (Seattle: University of Washington Press, 1996), 278.

31. Jessica Arnett, "Unsettled Rights in Territorial Alaska: Native Land, Sovereignty, and Citizenship from the Indian Reorganization Act to Termination," *Western Historical Quarterly* 48, no. 3 (2017), 236.

32. Claus Naske, "Ernest Gruening and Alaska Native Claims," *Pacific Northwest Quarterly* 82, no. 4 (1991), 141.

33. Naske, "Ernest Gruening and Alaska Native Claims," 142.

34. Stephen Haycox, "The Uneasy Relationship of Biography and History in Alaska: Anthony Dimond, Ernest Gruening, and Bob Bartlett," *Alaska History* 34, no. 2 (2019), 57.

35. Ernest Gruening, *The State of Alaska: A Definitive History of America's Northernmost Frontier* (New York: Random House, 1954), 356.

36. *Tundra Times*, November 4, 1966, 1, 7.

37. Tom Snapp, "Gruening Clarifies position on Native Land Claims," *Tundra Times*, April 29, 1966, 1-2.

38. Haycox, "The Uneasy Relationship of Biography and History in Alaska," 56.

39. Haycox, "The Uneasy Relationship of Biography and History in Alaska," 57.

40. Section 4 of the Statehood Act states, "As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed

of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation." See, Public Law 85-508. Peter Metcalfe provides a detailed accounting of how, in the years before statehood, the Alaska Native Brotherhood worked diligently to preserve Alaska Native claims and title to land and waters. Its efforts led to the Tlingit-Haida judgment in 1959 and settlement of claims in 1968. Its efforts influenced the insertion of language protecting the unsettled Native claims referenced in the Statehood Act. See, Peter Metcalfe, *A Dangerous Idea: The Alaska Native Brotherhood and the Struggle for Indigenous Rights* (Fairbanks: University of Alaska Press, 2014), 8.

41. Kevin Illingworth, "A Brief Explanation of Aboriginal Hunting and Fishing Rights and Tribal Hunting and Fishing Rights," unpublished manuscript.

42. These include plans to build the Rampart Dam, a proposal to detonate atomic bombs to create a harbor in Northwest Alaska, and plans to create a state recreation area and road into the Minto Flats. See, Robert Arnold, *Alaska Native Land Claims* (Anchorage: Alaska Native Foundation, 1976), 102-03; Daniel O'Neill, *The Firecracker Boys: H-Bombs, Inupiat Eskimos, and the Roots of the Environmental Movement* (New York: Basic Books, 2007); Anderson, "Sovereignty and Subsistence," 201-02.

43. Cecil Roberts, *Economic, Administrative, and Environmental Consequences of the Alaska Land Freeze*, Masters Practicum, Natural Resources Administration (Ann Arbor: University of Michigan, 1970), 1, 9.

44. As Steve Colt points out, ANCSA was a land settlement based on a corporate model, generally disregarding federal oversight and tribes. See, Steve Colt, *Alaska Natives and the "New Harpoon": Economic Performance of the Alaska Native Claims Settlement Act Regional Corporations* (Anchorage: Institute of Social and Economic Research, University of Alaska Anchorage, 2001), 2.

45. Section 4b of ANCSA states, "All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished." However, as Illingworth points out, "While this language in ANCSA may have extinguished aboriginal hunting and fishing rights, it did not extinguish the ongoing federal responsibility to Alaska Native people to protect their hunting and fishing rights." See, Illingworth, "A Brief Explanation," 2.

46. Anderson, "Alaska Native Rights, Statehood and Unfinished Business," 33.

47. William Hensley, "A Conversation with William Hensley," Stanford Woods Institute for the Environment, October 30, 2018.

48. In search of evidence of response by the Native community to Section 4b of ANCSA, I did a preliminary search in three sources, the Joint Federal State Land Use Commission Hearings (1973), the Alaska Native Review Commission Hearings (ANRC) (1984) and *Tundra Times*. Subsistence is a major point of discussion in the JFSLUPC hearings but the predominant concern of the speakers was on the proposed regulations for the National Interest Lands legislation. These concerns overshadowed discussion of the impact incurred by the loss of aboriginal title and aboriginal hunting and fishing rights. The ANRC hearings did provide some discussion of Section 4b of ANCSA, most notably by Caleb Pungoweyi of Nome; Margaret Roberts, Sven Haakenson, and Gordon Pullar from Kodiak; Bonnie McCord of Tyonek; and Lonnie Strong Hotch of Klukwan. See, Thomas Berger, *Village Journey: The Report of the Alaska Native Review Commission* (New York: Hill and Wang, 1985), 60-65. Professional planner Walter Parker in his presentation to the commission provided damning testimony on the impact of ANCSA and ANILCA: "Both ANCSA and ANILCA were designed to remove the barriers raised by aboriginal rights to land to complete the transfer of land to the state, something

that has now been largely accomplished." See Walter Parker, Alaska Native Review Commission, Box 2, Series 1, Vol XIV, March 1-3, 1984. Harold Napoleon, writing in *Tundra Times*, addressed the issue of extinguishment head on: "To this day we have not yet felt the full sting of this 'extinguishment.' But in the future we will. When they begin arresting us for hunting and fishing from land we once owned." See Harold Napoleon, "Writer Voices Opposition to 1991 Legislation," *Tundra Times*, October 1987. There is a typo in the title; it should probably be 1971, not 1991.

49. Anderson, "Sovereignty and Subsistence," 187.

50. Anderson, "Sovereignty and Subsistence," 190.

51. Case and Voluck, 292.

52. Haycox, "Contingency and Alaska History," 177.

53. Case and Voluck, however, in their review of the IRA period in Alaska (1936-1971), point out the Secretary of the Interior made concerted efforts to define Alaska Native rights and to lay the groundwork for an eventual Native land claims settlement. See Case and Voluck, 29.

54. The rural preference applies to Natives and non-Natives living in rural Alaska but the provision was meant in part to insure the federal government meets its responsibility to address the needs of Alaska Natives who live in rural Alaska and who make their living off the land. This is implicit in Section 801, part 4 of Title VIII, the Subsistence provision of ANILCA, which states "in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs...and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents" (43 USC 1601). Under ANILCA, the U.S. government also recognizes rights of non-Natives living a subsistence life in rural Alaska. In testimony by John Shively before the Senate Energy and Natural Resources Committee (May 22, 1978) he referenced Governor Jay Hammond's concerns about the proposed language of ANILCA that would provide a Native preference. (This is based on an unpublished interview with Hammond by *Tundra Times*, February 9, 1978.) Shively claims Hammond was concerned the preference would be in conflict with the state constitution and that this led to the final language in the act that reflects Native and non-Native rural subsistence users. See, John Shively, "Testimony of John Shively Before the United States Senate Energy and Natural Resources Committee" (1978), 1229-42. As it turns out, even a rural preference proved to be against the State Constitution.

55. Under this section of the act, the State had the option to implement subsistence provisions in conformity with the federal regulations and thereby maintain control of fish and game management on federal land.

56. Peel, "Katie John v. United States," 268-69.

57. Peel, "Katie John v. United States," 269; Case and Voluck, 301.

58. Case and Voluck, 301-02; *Madison v. Alaska Department of Fish and Game*, Supreme Court of Alaska, February 22, 1985, 696P2d 168.

59. Case and Voluck, 302.

60. Case and Voluck, 302.

61. Alaska Department of Fish and Game, "Report on Implementation of the 1992 Subsistence Law," 1995.

62. Case and Voluck, 304.

63. Kevin Illingworth, email correspondence with author, June 25, 2019.

64. There are several cases where the federal government has used preemptive statute authority to override fish and game management in Alaska. The Marine Mammal Protection Act and the Endangered Species Act are examples. See Case and Voluck, 281-90.

65. The site of Batzulnetas was visited by Lt. Henry Allen on his 1885 exploration of the Copper and Tanana Rivers, and he reported that it was a fishing site associ-

ated with a chief named Batzulnetas. See, Henry Tureman Allen, *An Expedition to the Copper, Tanana, and Koyukuk Rivers in 1885* (Anchorage: Alaska Northwest Publishing Company, 1985), 59. The site also is reported on a Russian map in 1839. See, William Simeone and Erica Valentine with Siri Tuttle in collaboration with Mentasta Tribal Council, Cheech'Na Tribal Council, Gulkana Tribal Council, and Tazlina Tribal Council, *Ahtna Knowledge of Long-Term Changes in Salmon Runs in the Upper Copper River Drainage, Alaska*, Final report for study (14-552, USFWS Office of Subsistence Management, Fishery Information Services Division (2007), 43. The Ahtna have a long history of fighting for protection of the salmon they depended upon for subsistence. Their objections in the early 1900s to the establishment of canneries provide a record of concern. This was followed up in the years after statehood with letters by Ahtna leadership protesting against the restrictions on their subsistence fishing. See, Simeone et al., 72-79.

66. Robert Anderson, "Struggles in Federal Indian Law: Alaska Native Rights and the Katie John Litigation," 11th Annual William C. Canby Lecture, Arizona State University, January 25, 2018.

67. Peel, "Katie John v. United States," 270-71.

68. Peel, "Katie John v. United States," 270.

69. Ken Roberson, email correspondence with author, January 1, 2019.

70. Roberson is quoted here at length as he attempts to demonstrate to me the complexity of the biologist's job, both as he participated in the management and as he now recalls the issues: "Management of salmon harvests by the various user groups in the Copper River (especially sockeye salmon) begin in the commercial fishery at the river's mouth. Initial fishing periods are set based on forecasted returns and as sonar counts begin at Miles Lake, plus observed catch rates in the fishery, periods are adjusted accordingly to achieve desired levels of escapement at the sonar site. The sonar escapement goal includes anticipated catches in the personal use, subsistence and sport fisheries plus the desired spawning escapement which is a composite of the 100 plus sockeye salmon spawning stocks and returns to Gulkana Hatchery's three fry release site lakes on the Gulkana River. Spawner count goals are based upon historical average returns and presented as desired total escapement per day. Management of individual stocks is not possible. All of the in-river harvest levels have increased significantly since statehood requiring regular adjustments in the desired sonar escapement and have management plans which require adjustments in harvest levels when sonar counts are either above or below expectations. In addition, Gulkana Hatchery's return escapement has to be accounted for. Sonar use to enumerate escapement to the Upper Copper River began in 1978. Complicating management are the roughly 13 percent (recent 10-year average) of the sockeye salmon return that spawn on the Copper River Delta where escapement evaluation relies on aerial surveys as the fish near their spawning areas. Aerial surveys are also used in the Upper Copper River to evaluate success of spawning escapements to most of the significant spawning areas. These counts are too late to make any in-season adjustments in harvests due to timing but are used in part to make forecasts for the future returns." See Ken Roberson, email correspondence with author, February 5, 2019.

71. Peel, "Katie John v. United States," 270-71.

72. The Doctrine of Federal Reserved Water Rights derives from a 1908 court ruling (*Winters v. United States*) in which the water rights for an Indian reservation were under dispute and the court ruled that the water was essential to the purpose of the Indian reservation and therefore must be protected under federal law.

73. "Hovercraft Case Could Have Broad Impacts on Alaska Hunting, Fishing Rights," *Alaska Dispatch*, November 3, 2018. The hovercraft case on the Nation River in Yukon-Charley Rivers National Recreation Area was heard before the Supreme Court for a second time on March 26, 2019, and the Court ruled in favor

of John Sturgeon, finding the federal government's interest was limited to protecting the water from "depletion" or "diversion", neither of which they claim was applicable to operating the hovercraft. See, *Sturgeon v. Frost*, slip opinion No. 17-949, 2019, 2. For the moment, this opinion appears to leave the Katie John case ruling intact. See, Anderson, "The Katie John Litigation," 872.

74. Simeone et al., 13; Wilson Justin, email correspondence with author, February 2, 2019.

75. Title 5 Fish and Game Emergency Regulations 5AAC01.648 and 5AAC34.037, Part 1, Commercial and Subsistence Fishing and Private non Profit Salmon Hatcheries, Chapter 01 Subsistence Fin Fish Fishing Article 12, Prince William Sound, 5AAC 01.648, Batzulnetas, "Interim Subsistence Salmon Fishery Management Plan.

76. Proposal 399 was accepted with minor changes in the form of 399A. See, Board of Fisheries, Series 542, AS 23428 and AS 23429, Alaska State Archives.

77. Alaska Board of Fisheries #88-122-FB.

78. Report of Findings on Proposal 399, Board of Fisheries, Batzulnetas Findings, March 1988, 4.

79. In Washington State and Oregon, tribal groups subject to the Stevens Treaties of the 1850s are entitled to continued use of all fishing sites they were "accustomed" to use at the time of the treaties. In 1975 Judge Belloni ordered the tribes and the states to develop a comprehensive management plan for the fisheries. This led to the co-management now recognized in the Columbia River Inter-Tribal Fish Commission established in 1977. This is generally recognized as a model for tribal intergovernmental management. See, Michael Blumm and Cari Baermann, "The Belloni Decision and its Legacy: United States v. Oregon and its far-reaching Effects after a Half-Century" *Environmental Law* 49, no. 4 (2020), 7, 32, 37, 46.

80. Haycox, "Historical Aspects of the Federal Obligation to Alaska Natives," 12.

81. The Marine Mammal Protection Act establishes exclusive hunting rights for Natives and, under section 119, provides for federal agencies to enter into Co-operative Agreements with Native groups for co-operative management of certain marine mammals in Alaska (16 U.S.C. 1388 Sec. 119).

82. Thomas Albert, "The Influence of Harry Brower, Sr., An Inupiaq Eskimo Hunter, on the Bowhead Whale Research Program Conducted at the UIC NARL facility by the North Slope Borough," in *Fifty More Years Below Zero*, David Norton, ed. (Calgary: Arctic Institute of North America, 2000), 267.

83. *Adams v. Vance*, 570 F.2d 950.8nELR 20160; Nathaniel Rosenblatt, "The Federal Trust Responsibility and Eskimo Whaling," *Boston College Environmental Affairs Law Review* 7, Issue 3 (1979), 518-522.

84. Albert, "The Influence of Harry Brower, Sr.," 267.

85. Albert, "The Influence of Harry Brower, Sr.," 268.

86. Albert, "The Influence of Harry Brower, Sr.," 267.

87. Jessie Lefevre, "Pioneering Effort in the Design of Process and Law Supporting Integrated Arctic Ocean Management," *Environmental Law Institute* 43 ELR (2013), 10894.

88. Stephen Langdon, "Prospects for Co-Management under the Marine Mammal Protection Act," in *Co-Management of Fisheries*, L. Pinkerton, ed. (Vancouver: University of British Columbia, 1989), 162.

89. Langdon, "Prospects for Co-Management under the Marine Mammal Protection Act," 162.

90. *People of Togiak v. United States of America*, 470F Supp. 422 D.D.C.

91. Langdon, "Prospects for Co-Management under the Marine Mammal Protection Act," 158.

92. Under the Marine Mammal Protection Act (MMPA) of 1972, Native hunters are exempt from restrictions on sea mammal hunting (MMPA regulations 16USC

1371, Moratorium on taking and importing Marine Mammals and Marine Mammal Products).

93. Langdon, "Prospects for Co-Management under the Marine Mammal Protection Act," 162.

94. Chris McDevitt, *Equitable Co-Management on the Kuskokwim River*, MA thesis, Arctic and Northern Studies, University of Alaska Fairbanks (2018), 92.

95. John "Sky" Starkey, "Protection of Alaska Native Customary and Traditional Hunting and Fishing Rights Through Title VIII of ANILCA," *Alaska Law Review* 33, no. 2 (2016), 324.

96. Charles Enoch, "Historic Agreement Gives Kuskokwim Tribes Say in Fish Management," KYUK Bethel, Alaska Public Media, May 25, 2016.

97. "§809. The Secretary may enter into cooperative agreements or otherwise cooperate with other Federal agencies, the State, Native Corporations, other appropriate persons and organizations, and acting through the Secretary of State, other nations to effectuate the purposes and policies of this title."

98. McDevitt, *Equitable Co-Management on the Kuskokwim River*, 43.

99. McDevitt, *Equitable Co-Management on the Kuskokwim River*, 86, 94.

100. Reporting on a presentation by a Fish and Wildlife Service Native Affairs specialist, McDevitt reports that co-management carries "legal authority" (meaning legally spelled out conditions for the role of the tribes in management discussions and recommendations) whereas collaborative management does not. Co-management is possible on federal land where Memorandums of Understanding can extend legal authority to tribal entities for a consultative role in resource management. See McDevitt, *Equitable Co-Management on the Kuskokwim River*, 87-88. Collaborative management, on the other hand, is what is possible on State land where tribes can pursue input but there is no legal requirement of the State to treat them any differently than other members of the public. However, the collaboration can be an effective way to build understanding between tribes and state resource managers. This is the approach that the YRITFC follows as they work with the Department of Fish and Game and provide input at fish board meetings. See, Stephanie Quinn Davidson, YRITFC Director, email correspondence with author, April 29, 2019.

101. Carrie Stevens, email correspondence with author, May 21, 2019.

102. Patricia Sekaquaptewa, email correspondence with author, February 19, 2020.

103. James Magdanz, email correspondence with author, June 20, 2019.

104. Thomas Morehouse and Marybeth Holleman, "When Values Conflict: Accommodating Alaska Native Subsistence," Institute of Social and Economic Research, University of Alaska Anchorage, Occasional Paper No. 22 (1994), 1-55.

105. Walt Parker made a similar point about re-directing control of subsistence to rural subsistence users. He made the comments during the Alaska Native Review Commission hearings. He called for greater rural representation in decision making on fish and game and made the analogy to village health aides: "If we can trust para-professionals as the village health aides to provide services to people, surely we can trust para-professionals in wildlife management as a part of the process." See, Walter Parker, Alaska Native Review Commission Hearings, Box 2, Vol. XIV, Series 1, Hearing Transcripts, February 1984-March 1985, "A Commentary on Institutions and Legal Regimes Arising from the Alaska Native Claims Settlement Act," Overview Roundtable Discussions Alaska Native Review Commission, March 1-3, 1984, Transcript of Proceedings, Overview Papers, Anchorage, 1-5.

106. Anderson, "The Katie John Litigation," 877.

