ALASKA NATIVE SUBSISTENCE AND SOVEREIGNTY: AN UNFINISHED WORK

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ABSTRACT

Alaska Native cultures are based on subsistence fishing, hunting and gathering, which also remain important sources of food supply. The 1971 Alaska Native Claims Settlement Act (ANCSA) extinguished all aboriginal rights to territory, hunting and fishing, creating Native corporations to own Native land in fee simple, instead of reservations with land in trust with the U.S. government (Indian country). ANCSA led to the Alaska National Interest Lands Conservation Act (ANILCA), which protects subsistence activities on federal land. Alaska followed ANILCA's subsistence guidelines on state land, until the preference was found unconstitutional in 1989. Subsistence and sovereignty today are linked to a network of interacting institutions such as tribal governments, Native corporations, ANCSA, ANILCA and court decisions. The thesis examines these and argues that institutional changes must occur for Alaska Natives to be sovereign and protect subsistence resources and culture. Suggestions include restoring Indian country to Alaska, resource co-management, and amending ANILCA.

ALASKA NATIVE SUBSISTENCE AND SOVEREIGNTY: AN UNFINISHED WORK

INTRODUCTION

A subsistence hunter shoots a bear not far from his village, on a lake beach below mean water line. He is pleased. His freezer will be full for a while. The meat will feed his family. He will take a haunch over to his in-laws, who are elderly and don't hunt any more. Some meat will go to his sister, who is raising three children after her husband died in an accident. Everyone in the village will share the meat.

The lake where the bear was shot is a boundary between state land and national park land. Both the state and the park have specific hunting seasons for various game species, but these do not always coincide with each other or with the best times to subsistence hunt. The park service tried to fine the hunter, although under the regulations he was following, land below mean water line is state land, and his hunt was legal there. The issue had to be resolved by a trooper, but the hunter was so demoralized by the territorial ambiguity that after years of hunting for a living, he rarely hunts anymore.

This tale, based on an actual incident reported by an anthropologist working for the Alaska Department of Fish and Game (ADF&G) (Holen 2003b) illustrates only one aspect of a complex system of managing land and wildlife and subsistence hunting in Alaska. "Dual management" has been in effect in Alaska since 1990 for hunting, and since 1999 for fishing. No one asked for it. No one really likes it. Someone going hunting or fishing practically needs to carry a thick book of maps and regulations, to make sure which jurisdiction he or she is

in and what the rules are for that place at that time. How did such an absurdly complex situation come to pass?

The answer is not simple. It involves history, federal Indian law and policy, and culture; politics, economics and ecology. It requires examining these in relation to past and current institutions, Native and non-Native, and the ways in which they articulate with each other in contemporary Alaska. This thesis will attempt an explication, but because the topic is so large and diverse, the lens through which I will tell the story is that of Alaska Native subsistence and sovereignty.

Alaska Natives are at the nexus of the many institutions operating in Alaska, but they are far from a passive audience. They have written and are re-writing scenes, along with other authors—the federal government, the state, the world economy, public opinion. Their own traditional and modern institutions have major roles in the drama. Their plot thread is the struggle for identity and self-determination. Other actors would speak from a different point of view, but it is the story as it affects the indigenous peoples of Alaska that I choose to tell here.

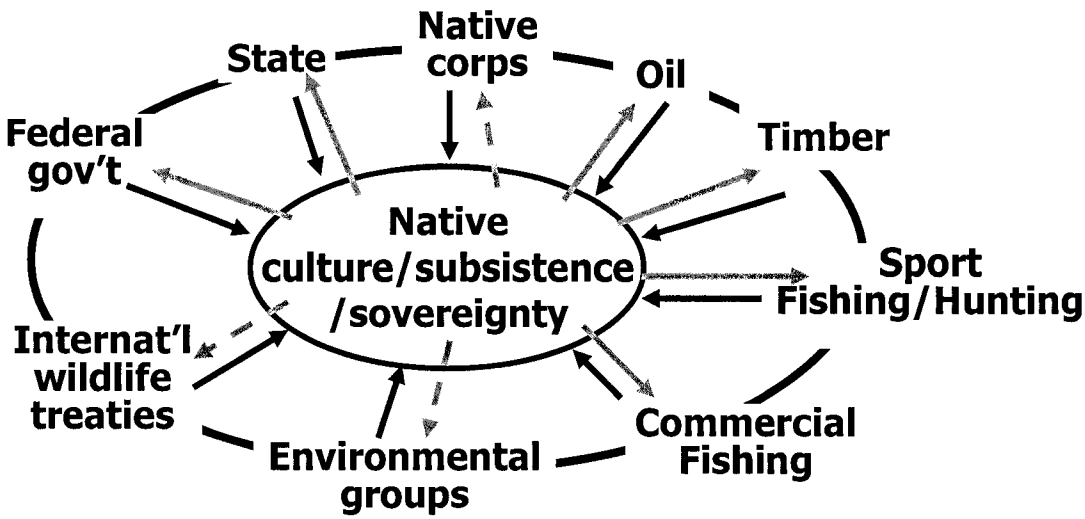
The play, of course, is not finished. The ending must involve a transformation, and no one yet knows what changes must occur to effect one,

how many scenes must be played out before the final act. Having first set the stage in Part 1, the plot will thicken through Part 2, and Part 3 will explore some options for change, and potential outcomes.

The Players (or, A Model)

- Alaska Natives (5 ethnic groups, 228 recognized tribes, different languages; the aboriginal inhabitants of the 365 million-acre "Great Land")
    - Regional corporations
    - Village corporations
    - Tribal governments
- The United States (which purchased Alaska from the Russians, who didn't own it, in 1872) and the U.S. Congress
    - Federal Indian law and policy
    - Land management agencies: BLM, NPS, USFS, USFWS
    - Bureau of Indian Affairs
- The State of Alaska (since 1959)
    - Citizens of Alaska
- Environmentalists
- Natural resource extraction industries
    - Oil and mining companies
    - Commercial fishing industry
    - Sport hunting and fishing industries and participants

Figure 1. Model of institutional interactions



The model and its articulations

Alaska Natives, as individuals, tribes, and corporations, articulate with each entity on the outer ring. None of the interactions is unidirectional, nor absolutely positive or negative in its impact. Federal and state government policies have an impact on Alaska Natives' ability to be self-governing, and to conduct subsistence activities as their families have done for generations. Some federal policies support self-determination and subsistence; state policies tend to obstruct tribal sovereignty, but some are beginning to come to terms with supporting subsistence activities. Natives make government hear them at the voting booth, in the courts, in elected and non-elected government positions, and in public discourse. Alaska Natives participate in and do business with extractive

industries, as well as resist the impacts of those activities on their fishing and hunting grounds. These strong two-way interactions are represented by solid arrows.

More tenuous interaction is represented by the broken arrows. Until recently, Alaska Natives had little input to international wildlife treaties that prohibit hunting certain species at certain times, or at all. Treaty restrictions can have a strong negative impact on subsistence, if a migratory animal has left tribal territory by the time it is legal to hunt or catch it. Natives have responded with grassroots resistance and formal organizations that use insights from traditional knowledge in sophisticated research to support their claims to international scientific bodies. Nevertheless, many such international agreements were made by federal governments without input from Alaska tribes or any other.

Environmental groups have supported Alaska Natives when it coincided with their own agenda, such as during the land claims process and in opposition to oil development on the coastal plain of the Arctic National Wildlife Refuge (ANWR). But Native feeling about drilling in ANWR is not uniform; the Native corporation on the North Slope holds subsurface rights to that land, stands to profit from development, and resents interference by out-of-state environmental groups in what they consider private business matters. Those groups side with

the Gwich'in Athabascan Indians, fearing for the fate of the caribou herds and other wildlife that use the coastal plain, and on which the Gwich'in depend for livelihood. A knowledgeable Alaskan has commented, in essence, that there is no love lost between Alaska Natives and environmentalists (personal communication, former Land Dept. Director, 3/1/03). Thus the broken arrow signifies that Alaska Natives have little input into the agendas of environmental organizations.

Most ironically, a broken arrow flies from Native culture and subsistence, most vital at the village level, to the Native for-profit corporations that own their land (hence the solid arrow). Although as corporate shareholders, villagers have a vote on who runs the corporations, and certain other issues brought to a vote at annual meetings, the regional for-profit corporations appear not to be especially responsive to village concerns. It is unclear what other mechanisms exist for villagers to influence corporate behavior. The weak relationship here in part reflects corporations' and shareholders' conflicting views of the role of the corporation.

The institutions on the outer ring also articulate with one another, and these interactions may also have either direct or indirect impacts on Alaska Native culture, subsistence, and sovereignty.

Prologue

Because the issues are so complex and interrelated, I will begin by laying out the scenario in brief. It must first be understood that Alaska Natives are a diverse group ethnically, linguistically, culturally, socially and economically. Practically nothing can be said for which exception cannot be found, but I am here taking a bird's-eye view of three things: Alaska Native culture as it is defined by subsistence; Native sovereignty as a tool for supporting a subsistence lifestyle for those who choose to have one; and the effects of various Native and non-Native institutions on the ability of Alaska Natives to be sovereign and conduct subsistence activities. The issue of subsistence cannot be separated from other issues of tribal governance, so some of these other aspects will arise, such as limits on criminal and civil jurisdiction by tribes. That said, the most important things to understand follow.

1. Land tenure. No treaties were ever signed with Alaska Natives. Their legal title to land was not established until a land claims agreement was made. In a dramatic break with the past, the Alaska Native Claims Settlement Act (ANCSA) of 1971 created regional and village level Native corporations to own native land in fee simple, rather than reservations with land held in trust by the

U.S. government, as in the rest of the United States. Nevertheless, there are more than 220 federally recognized tribes in Alaska. Of these, a few have land owned in fee simple by their tribal government. One has a reservation. The history of the land claim will be discussed in Part 1, where I will also place the situation of Alaska Natives in the context of U.S. dealings with Native nations in general.

2. Sovereignty. Tribal governments in the lower 48 have a limited sovereignty over people and land within their territory. The lands occupied by these tribes are considered "Indian country." Indian country as defined in federal statute is associated with conventional Indian land tenure in reservations and other types of property held in trust for tribes by the U.S. government, and Indian-owned fee-lands within reservations. Because Alaska Native land is not held in trust, the question of whether it is Indian country came to be addressed by the Supreme Court. Part 1 will provide a history of federal Indian policy, the trust doctrine, the evolution of Indian country, and the meaning of sovereignty. Part 2 will describe the legal case that led to the Supreme Court decision, and examine the implications of having or not having Indian country in Alaska.

3. Subsistence. Alaska Native culture and rural economy are tied to subsistence, the access to and use of land and wild resources for economic and cultural/spiritual purposes. Yet subsistence use and control of land and resources

are externally controlled and contested—primarily by the state and federal governments. History and the politics of resource extraction, state sovereignty, federal Indian law and policy and environmentalism have brought Alaska Natives into articulation with a variety of national and international institutions with varying levels of input and control over resources that Natives formerly utilized undisturbed. Further, the new set of Native institutions established in the land claim added yet another institutional layer with which to interact. ANCSA extinguished any Alaska Native aboriginal hunting and fishing rights as well as rights to territory. An attempt to legally protect these activities was contained in later legislation, Title VIII of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA). ANILCA's federal protection of subsistence activities on federal lands in Alaska also led to a federal court case. The history and terms of ANCSA and ANILCA, how they are related, and their impacts on Alaska Native subsistence and sovereignty, are addressed in Part 2.

4. Native institutions. The traditional unit of governance in Native Alaska was the village. The corporate structure of land ownership was a new institution for Alaska Natives. A structure of regional and village corporate land ownership was superimposed on existing traditional and modern institutions such as communal stewardship of land and resources, a culture of sharing, tribal

governments and state-chartered government entities. Part 3 will examine several Native or quasi-Native institutions as to which might be most effectively used to support subsistence and sovereignty, and how each might be affected by other institutional changes, such as amending the Indian country statute.

5. The argument. The premise of this thesis is that institutional change must occur in order for Alaska Natives to fulfill the goals of ANCSA and the Native community itself to be self-determining and economically self-sufficient, while preserving Native cultures, for which the foundation is subsistence. Thus policy that supports subsistence supports Alaska Native empowerment to achieve their own goals in their own fashion. Part 3 will discuss opportunities and obstacles presented by the various institutions introduced in previous sections. Opportunities include amending the Indian country statute to include the nature of land tenure in Alaska, co-management agreements, amendments to ANILCA, using an existing state institution, and using ANILCA's land bank arrangement.

6. In summary:

- Subsistence is a crucial aspect of cultural identity for Alaska Natives
- Tribal sovereignty over land is important to support subsistence activities.
- Tribal sovereignty is important to Alaska Native self-determination and in Alaska tribal sovereignty is in doubt
- One possible solution is to re-instate Indian country in Alaska, by changing the federal definition to suit current land tenure in Alaska

  - Law is not frozen in time; it changes as society changes, which is one reason why laws get amended. So,
  - Indian country does not have to be land in trust.
- Other solutions to increase sovereignty, or native control of resources, are possible (co-management, Alaska Land Bank, amendments to ANILCA and ANCSA, home rule borough government)
- There will be no one solution; solutions will involve collaboration, flexibility, incremental change
- The state will almost certainly continue to be an obstacle to Alaska Native sovereignty
- Alaska tribes have all the potential for self-determination, but an obstacle is lack of territorial jurisdiction, which affects subsistence and therefore culture and identity.

PART 1. BACKGROUND

The right of American Indians and Alaska Natives today to access to resources important in their traditional cultures, economies and spiritual traditions is fundamentally connected to the exercise of their sovereignty as nations. U.S. government policy since the 1970s has been to encourage and facilitate Indian self-determination, and significant legislation has been passed to promote that ideal. Alaska Natives are usually explicitly included in those laws that apply to American Indians, whether or not they are specifically Indian legislation (i.e., environmental legislation). However, because the conventional tribal-federal relationship links sovereignty to land, and the Alaska Native Claims Settlement Act (ANCSA) has been found to sever sovereignty from land (Case and Voluck 2002), Alaska Natives are left in an ambiguous state concerning their ability to be truly self-determining. I shall therefore begin with a discussion of the importance of the land to Alaska Native cultures.

1.1 Native relationship to the land

While all nations are not alike, it seems safe to say that there are core concepts that are common to most Native American[1] cultures, including those in Alaska. One American Indian scholar puts it thus:

> The native people of North America speak of their relationship to the Earth in terms of family. The Earth is not something to be bought and sold, something to be used and mistreated. It is, quite simply, the source of our lives—our Mother. And the rest of Creation, all around us, shares in that family relationship. The Okanagan people of the Pacific Northwest speak of the Earth as Mother, the Sun as Father and the animals as our brothers and sisters. This view of the world was held by the Navajo and the Abenaki, the Sioux and the Anishinabe and most of the aboriginal people of this continent. –Joseph Bruchac (Sozap) (Bruchac 1991)

In addition, the cultures of peoples who have spent generations in a place tend to become entwined with the features and attributes of that place. The very names of places may evoke history, life lessons, and ancestors (Basso 1996), tying individuals, families, clans, and tribes to that place. Landscape thus becomes a cultural resource (Stoffle, Zedeño, et al. 2001) as important as origin stories, language, or ceremonies.

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[1] A note concerning terminology: I use the term "American Indian" to refer to the aboriginal Native nations of the lower 48 United States, in part because American Indian scholars and other Indian people use the term themselves. "Alaska Natives" is a group identity for Alaska's aboriginal peoples, who are Eskimo and Aleut as well as Indian. Therefore, I use the term "Native American" to refer collectively to Alaskan and other U.S. Native peoples.

Access to fish, game and plant resources has been important to Native American peoples' subsistence and culture since time immemorial and remains so today. In only a relatively few treaties, however, did tribes explicitly reserve their rights to these resources outside of their reservations. This occurred in treaties with tribes in the Pacific Northwest and Great Lakes areas, where tribes reserved fishing rights on ceded land, and a few reserved hunting rights off reservation (Getches, Wilkinson, et al. 1998:871). Indian tribes that today insist on their treaty rights to hunt, fish and gather off-reservation are asserting their sovereignty as signatories to those treaties.

While the use of wild game and fish may not be strictly necessary to most Indians' personal survival in the present, it remains an important component of Indian cultures; in Alaska, wild resources may well be critical to personal survival, and their acquisition remains fundamental to Alaska Native cultures. Just as an immigrant may treasure a food or spice from her native country as a precious link to home and culture, wild resources are similarly important to American Indian cultural continuity, revitalization, and identity. Furthermore, access to and control of natural resources are crucial to Indian nations' efforts at

economic self-sufficiency and self-determination. These goals are simultaneously a function of and necessary to the exercise of sovereignty[2].

This is particularly true in the state of Alaska, where many Natives live as their families have for generations, in small bush communities with few opportunities for wage work. Alaska Natives never had treaties with the U.S. that could serve to protect their interests in wild resources. Rather, they have had to assert their rights under the doctrine of aboriginal title, a shakier legal foundation. In 1971, a year that brought massive change to the Alaska Natives with the passage of ANCSA—a unique land claims settlement—many Natives still relied wholly on subsistence resources; a number still spoke their native language exclusively. Even for those who had been "outside," or who participated in the cash economy, the subsistence way of life was inseparable from life itself. Yet the land claims legislation extinguished all aboriginal title to land and rights to hunt and fish, with vague background promises that the state and federal governments would protect subsistence livelihoods. In fact, the "machinery of settlement" (Young 1981) was designed to make capitalists out of hunter-gatherers and bring them swiftly into the U.S. economic mainstream

[2] Sovereignty is here broadly defined as the inherent right of a group of people to organize themselves in ways that meet their needs, "to make their own laws and be ruled by them." The concept of sovereignty will be discussed in greater detail in the following pages.

(Berger 1985). In order to understand the significance of ANCSA, and the position of Alaska Natives vis à vis other Indian nations, a look at federal Indian policy is necessary.

1.2 Federal Indian policy, Native sovereignty, and natural resources

1.2.1 U.S. Indian policy

Indian law and policy in the U.S. is based on two fundamentally contradictory concepts: that of the inherent sovereignty of self-governing Indian nations as they existed when Europeans arrived, and that of "domestic dependent nations" within the higher sovereignty of the United States. The former concept derives from the Law of Nations, an unwritten code of European nations in the age of exploration. The Law of Nations states, among other things, that the weaker power does not surrender its independence and right to self-governance when it accepts the protection of a stronger nation (Getches, et al. 1998:120), providing the rationale for allowing the American Indian nations present in the future United States to continue to exist and be recognized as governments.

The concept of "domestic dependent nations" derives from 19th century U.S. Supreme Court rulings, primarily *Cherokee v Georgia* (1831) by Chief Justice John

Marshall. In that decision, Marshall acknowledged the Cherokee nation as "a distinct political society separated from others, capable of managing its own affairs and governing itself" but not to the extent of being treated as a "foreign state." Rather, he characterized the relationship of the tribe to the U.S. as "resembling that of a ward to his guardian" (Canby Jr. 1998:15). These Supreme Court decisions also interpret the law of nations and the doctrine of discovery to deprive the Indian nations of property rights (as Europeans understood these), entitling aboriginal inhabitants only to undisturbed "use and occupancy" of ceded lands (*Johnson v. McIntosh* [1823]) (Getches, Wilkinson, et al. 1998). The Marshall cases also, however, established the principle that tribes have a direct government to government relationship with the United States that precludes state jurisdiction over tribes.

The trope of ward and guardian was subsequently cited in legislation, policy and court rulings that effectively deprived Indian nations of their ability to govern themselves, or to make decisions concerning their own land, economic activities and well-being. The status of "wards" was based on a presumed inherent racial and cultural inferiority to European and Euro-American standards of proper conduct of religion, ways of making a living, and law. Indian nations that had for centuries ruled themselves and flourished in a wide variety

of environments across the Americas were reduced in the Euro-American mind to incompetent savages in need of protection and education by the superior Europeans and later Americans. This took the form of Indian policy devoted to separating nomadic hunting peoples from their traditional wide-ranging subsistence practices, which were perceived as "savage," relocation to avoid white settlers, and the attempt to tie them to small plots of land as farmers (Sheridan 1995).

1.2.2 The trust doctrine

As wards, the lands and property rights remaining to the tribes were placed in trust with the U.S. government, lest the people squander or lose their assets to unscrupulous outsiders—of which, admittedly, there were plenty. Unfortunately, they frequently included the Indian agencies and individuals to whom the management of tribal resources and benefits were entrusted. Nevertheless, the trust doctrine means the government has obliged itself to meet the highest fiduciary standards on behalf of its Indian "wards." From 19th century agents that stole and sold tribal rations (Sheridan 1995) to twentieth century land and mineral leases made by the BIA without tribal consultation or consent (Esber 1992), and the "disappearance" of a hundred years worth and billions of dollars of individual Indian allotment monies held in trust (*Cobell v.*

Norton, 240 F.3d 1081, 1098 [D.C. Circuit 2001]), the U.S. as trustee has frequently failed miserably in its self-assigned fiduciary duty.

The trust doctrine, or the "special relationship between Indian tribes and the U.S. government," reflects racist attitudes that have outlived their context of a bygone time. Yet these attitudes are encoded in law and precedent that were until the latter part of the twentieth century used to justify decisions made when expanded knowledge, experience and common sense make evident the fallacies of these precedents. Despite these origins, the trust doctrine is an important moral and ethical tool to ensure that promises made, whether in treaties or statutes, will be promises kept. While the courts cannot enforce the trust responsibility on Congress (which, because it has plenary power, can do as it pleases), they can ensure that federal agencies behave in an exacting fiduciary manner in accordance with the best interests of the tribes, and tribes frequently go to court for this purpose (Pevar 2002). It is important to note that the trust relationship extends to all Indians, not just those with treaties and land in trust; New Mexico's Pueblos and Alaska Natives have trust relationships even though they do not have treaties, and own their land in fee simple (Getches, Wilkinson, et al. 1998:163; Pevar 2002:302). Still, Indian tribes today must frequently fight the federal government for proper execution of its trust responsibilities. States, with

which is there is no trust or government-to-government relationship, can be overtly adversarial to Native American interests, which they perceive to compete or conflict with state interests.

1.3 Indian sovereignty

> It must always be remembered that the various Indian Tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government. --*McClanahan v. Arizona. State Tax Commission,* 411 U.S. 164 (1973)

It has been noted that sovereignty is a European concept of "the supreme, absolute power of a state" that is external to the "stateless societies" of the Indian nations to which it is applied (Kickingbird, Kickingbird, et al. 1996; Medcalf 1978). Nevertheless, through usage and convention, it has acquired significance and acceptance by both American tribes and the U.S. legal system. At its most fundamental, sovereignty is the ability of a group of people to make their own laws and be ruled by them (Canby Jr. 1998; Getches, Wilkinson, et al. 1998; Wilkinson 1987). Kickingbird, et al (1996) note that sovereignty is inherent, coming "from within a people or culture. It *cannot be given* from one group to another." Legal scholar Felix Cohen, a noted authority on Indian law, using language from *U.S. v. Wheeler* (435 U.S. 313, 322-323 [1978]), has described sovereignty as "the most basic principle of Indian law":

> Those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather "inherent powers of a limited sovereignty which has never been extinguished" (Case and Voluck 2002:373, n.21).

Mike Myers, a Seneca consultant to the Institute for the Development of Indian Law, provided this definition of sovereignty:

> Ideally, sovereignty is the unrestricted right of groups of people to organize themselves in political, social and cultural patterns that meet their needs. It is the right of a people to freely define ways in which to use land, resources and manpower for their common good. Above all, sovereignty is the right of people to exist without external exploitation or interference. (Kickingbird, Kickingbird, et al. 1996:2)

American Indian lawyer and scholar Vine Deloria, Jr. makes a connection between culture and sovereignty today when he notes that "although sovereignty originated as a means of locating the seat of political power in European nations, it has assumed the aspect of continuing cultural and communal integrity when transferred to the North American setting" (Deloria 1996:122). As will be shown, this is a particularly trenchant comment in terms of the situation in Native Alaska.

The U.S. recognized Indian sovereignty by entering into 371 treaties with tribes between 1778 and 1871; other agreements with comparable force of law continued to be made after treaty-making ended in 1871. Shortly after declaring

independence, making treaties with Indian nations was a way for the fledgling United States to establish its own status as a nation in the eyes of elder European powers, which had previously recognized Indian nations as "legitimate sovereignties" through their own treaty-making (Robbins 1992:89). It was also a practical recognition of the tribes' superior military power at the time (Churchill 1992). Later, treaty-making was a way to keep peace as settlers encroached on Indian territories, then to constrain tribes to reservations and secure Indian land for settlement as the Euro-American population expanded inexorably westward.

A series of Supreme Court decisions in the early 19th century, known as the Marshall Trilogy, articulated the boundaries of Indian sovereignty in the United States. In the first, *Johnson v. McIntosh* (21 U.S. 98 Wheat. 543 [1823]), Chief Justice John Marshall described how the European "Doctrine of Discovery" gave exclusive rights to negotiate with the native inhabitants of a discovered land to the (European) nation that discovered it. The Doctrine recognized the aboriginal inhabitants as sovereign owners of the "discovered" territory, with the power to cede their lands through purchase or treaty to another, equal, sovereign (Churchill and Morris 1992). The decision in *Johnson v. McIntosh* served to consolidate in the United States the power to negotiate with tribes, and withhold it from states or individuals. It is also used, however, to argue for the sovereignty

of Indian tribes because of its interpretation of the Doctrine of Discovery as recognizing Indian nations as sovereigns equal to European nations.

Marshall further delimited the sovereign powers of American Indian nations in *Cherokee v. Georgia* (1831) and *Worcester v. Georgia* (1832). These "Cherokee cases" further solidified exclusive federal power over tribes, finding that state laws did not apply on the Cherokee reservation lands in Georgia. In *Worcester v. Georgia*, the chief justice wrote:

> The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights ... with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed. ... The settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government—by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government and ceasing to be a state.

Marshall thus introduced the term "domestic dependent nations" and assigned them "quasi-sovereign" status, under the ultimate (plenary) control of the United States Congress. He characterized Indian peoples as in a "ward and guardian" relationship to the United States, which owed them protection (Churchill and Morris 1992; Skinner 1997).

Churchill (1992:18) notes ironically that these decisions found tribes "sovereign enough to engage in treaty-making with the United States (for purposes of conveying legal title to their lands), but not sovereign enough to manage their other affairs as fully independent political entities." Further, Skinner (1997:18) points out that "the issue in *Worcester v. Georgia* was the preservation of exclusive federal authority over tribes and not tribal sovereignty." Nevertheless, the language of these cases is still being evoked by advocates to defend the inherent sovereignty of tribes (Kickingbird, Kickingbird, et al. 1996:30). Several cases at the beginning of the twentieth century recognized and supported inherent tribal sovereignty. *Talton v. Mayes* (163 U.S. 376) a 1904 Supreme Court decision, noted that "local powers" of tribes (in this case, the Cherokee Nation) were not "federal powers arising from and created by the constitution of the United States" but "existed prior to the constitution" (and were thus not subject to the Fifth Amendment that limits the powers of the federal government) (Canby Jr. 1998; Deloria 1996:121). Another decision, *U.S. v. Winans* (198 U.S. 371) in 1905 observed that the treaties were grants of rights *from* the Indians *to* the United States, and therefore that rights not explicitly ceded in treaties or agreements were reserved to the tribes. This doctrine is still regularly cited today in court decisions that support tribal sovereignty. Today, the courts

recognize a "limited tribal sovereignty" that exists alongside the sovereignties of the state and United States governments (Skinner 1997). It is "limited" by the Indian commerce clause, the treaty clause, and the supremacy clause of the U.S. Constitution.

More recent courts have interpreted earlier decisions and statutes to undermine tribal sovereignty. For instance, *Oliphant v. Suquamish Tribe* (435 U.S. 191 [1978]) had the effect of depriving tribes of criminal jurisdiction over non-Indians on the reservation (Canby 1998; Churchill 1992:19). Additional cases have established that the tribes cannot regulate hunting and fishing by non-Indians on non-Indian fee land within the reservation, unless they have a consensual business relationship or their activities interfere with tribal self-government or threaten the health and welfare of the tribe or tribal members (*Montana v. U.S.*, 450 U.S. 544 [1981]); and *Strate v. A1 Contractors* (117 S.Ct 1404 [1997]) used the Montana rule to exclude tribal jurisdiction in the civil case of an automobile accident involving non-Indians on a state highway with a right-of-way through the reservation (Canby 1998). These cases introduced land ownership as a criterion for where tribal civil jurisdiction pertains within Indian country. In contrast, in *Nevada v. Hicks* (121 S.Ct. 2304 [2001]) the Court, again referring to *Montana*, held that a tribe did not have authority to regulate state

game wardens serving process to a tribal member, at his home on tribal land, for an alleged off-reservation violation of state law. In this case, it was noted that tribal jurisdiction is based on membership status, not land ownership. In sum, such cases challenge inherent sovereignty that is presumed to exist unless Congress has explicitly limited or withdrawn it, replacing it with the presumption that "power is absent unless Congress has said otherwise" (Canby 1998:76).

1.3.1 Features of Indian sovereignty

What are the components of a "limited" Indian sovereignty? Most important is the power of the people to determine their own form of government. Other sovereign powers are to determine who may be a member of the tribe; to make laws and administer justice; to regulate domestic relations, property use and inheritance; to exclude persons from tribal property, and regulate and adjudicate the civil behavior of certain non-Indians; and the power to tax (Alaska Natives Commission 1994b; Kickingbird, Kickingbird, et al. 1996; Pevar 2002). Lawyers who work for tribes perceive the key attributes of sovereignty to be jurisdiction and the ability to tax and zone. In other words, sovereignty is the power to control people, land and resources (Medcalf 1978). What are "the limits" to tribal sovereignty? One commentator notes that Chief

Justice Marshall in 1832 described the tribes as "distinct, independent, political communities" that retained their original sovereignty, a principle that remains intact today. "It is merely the reach of that sovereignty, that is, the jurisdiction over which tribes may assert themselves, that has been limited" (Johnson 2001:12). Further, the ability to set limits to tribal jurisdiction is restricted to Congress, although states persist in trying to do so.

In the treaties, Indian nations gave up some of their rights and property to the United States while retaining others. Land and rights not expressly ceded to the United States in treaties were, in theory, retained by the tribes. "...The treaties were not a granting of rights to them [the Indians] but a grant of rights from them [and] a reservation of those not granted" in the language of *U.S. v. Winans,* (1905) (Jaimes 1992:217). Under the U.S. Constitution, treaties stand as law, today as then. Although the making of treaties officially ended in 1871, equivalent binding agreements continued to be made between tribes and the U.S. through Congressionally ratified executive orders and acts of Congress (statutes). Although their validity has been challenged, these agreements have been found to carry the same weight of law as treaties. The United States has not always upheld their obligations under these laws, however.

In theory, sovereignty is retained unless it has been explicitly limited by treaty or an act of Congress (Medcalf 1978:62, n3). In reality, federal and state law, policy and regulations have continually infringed on sovereign powers of Indian nations. A few examples suffice:

- The Trade and Intercourse Acts (1790-1834) limited and set conditions on those who would trade or conduct business with native nations.
- The Indian Removal Act (1830) facilitated and legitimated the "mass, forced relocations" (Churchill and Morris 1992:14) of the Eastern tribes to west of the Mississippi.
- The Major Crimes Act (18 U.S.C.A. Sec. 1153 [1885]) unilaterally gave jurisdiction to the United States over fourteen crimes (such as homicide) when committed by Indians in Indian country. (It is likely that the tribe has the jurisdiction to punish a federal crime that also violates its own laws. The Supreme Court has not addressed that question but the legislative history of the act suggests concurrent tribal jurisdiction was intended) (Canby Jr. 1998).
- The General Allotment (Dawes) Act (1887) forced tribal members to apply for 160-acre tracts of their own land and opened the "surplus" to homesteaders.
- The Indian Reorganization Act (IRA, 1934) encouraged tribes to form centralized governments modeled on that of the United States (and ignored the various historic styles of traditional tribal governments).
- Termination policy began in 1953, enacted in numerous statutes that unilaterally and summarily terminated the government's trust relationship with 109 tribes, leading to loss of tribal lands, destruction of tribal economies, and dislocation of tribal members. It eviscerated tribal sovereignty by imposing state jurisdiction across the board. (It became inactive in the 1960s, and the policy was officially repudiated in the 1970s. The government's trust relationship with some terminated tribes has been restored.)

- Public Law 280 (1953) extended mandatory state criminal and civil jurisdiction to Indian country in five states, (plus Alaska, added in 1958) and permitted any other state to assume jurisdiction by passing legislation or a constitutional amendment (although few did, and a later amendment to the act required permission from the tribes to do so). Tribal courts are permitted concurrent civil jurisdiction if they choose to exercise it and have a functional justice system, and taxation and regulation are left exclusively to the tribes (Canby 1998). PL 280 with respect to Alaska will be discussed more fully below.
- The State of Washington attempted to impose zoning on the Yakima Indian Reservation (*Brendale v. Confederated Tribes and Bands of Yakima,* 492 U.S. 408 [1989]). In an unusual split decision, the court found the state could zone the "open" lands within the reservation that were primarily non-Indian owned, while the tribe held zoning power only on the less-developed ("closed") part of the reservation that retained its "tribal" character (Canby 1998:276).
- Arizona attempted to impose state income taxes on the wages of a tribal member earned on tribal land from a tribal enterprise. (The Supreme Court found they could not do so in *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164 [1973]).
- In *Montana v. U.S.* (450 U.S. 759 [1981]), the Supreme Court found that the Crow tribe is not permitted to regulate fishing by non-Indians in a river that flows through non-Indian fee lands within the reservation. The tribe may regulate only if non-Indians' activities threaten or have an impact on "the political integrity, economic security, health or welfare of the tribe," or if there were a consensual business relationship, such as a contract, between the non-member and the tribe or tribal members.

Infringement on tribal sovereignty is particularly evident in the arena of control of natural resources, as exemplified, for instance, by *Montana v. U.S.,* noted above (Canby Jr. 1998; Case 1998; Churchill 1992; Freeman 2000; Gallagher 1988; Hunn 1990; Institute for Natural Progress 1992; NARF 2001a). Yet the

control of land and resources is necessary to achieve economic self-sufficiency. In the state of Washington, the right to continue fishing was retained in 19th century treaties that guaranteed access to fishing in "all usual and accustomed places"—albeit "in common with other citizens of the Territory." (*U.S. v. Winans*, 198 U.S. 371 [1905]). That right was continually denied to Indian fishers by those "other citizens" and the tribe brought suit to enforce the terms of their treaty. Their right to fish was affirmed and protected by a federal district court in what has famously come to be known as the Boldt decision (*U.S. v. Washington*, 384 F.Supp.312, et. seq.) (Getches, Wilkinson, et al. 1998), and the U.S. Supreme Court upheld Judge Boldt's decision in 1979, affirming Northwest tribal fishing rights as federal law. The quantification of annual harvests was left to state regulation, however, and is a continuing matter of controversy (Hunn 1990:285). The Boldt decision recognized the cultural importance of Indian fishing when it allotted the amounts tribes could take for commercial purposes as over and above the take for cultural/ceremonial needs (Medcalf 1978:64, n34). Restoring the Northwest tribes' ability to fish has engendered cultural revitalization as well as economic progress (Institute for Natural Progress 1992).

The case of the Northwest tribes and the ramifications of the Boldt decision serve as an example that subsistence is sufficiently important to tribes, politically,

economically and culturally, to energize resistance to state policies that interfere with federally acknowledged rights. Aboriginal rights to hunt and fish in Alaska, however, were never reserved in treaties. Without that legal protection, federal and state legislation and regulation affect the ability of Alaska Natives to practice their traditional culture and economy as sovereign entities.

With a few exceptions, neither was land "set aside" for the exclusive use and occupancy of Alaska's native peoples, as in the lower 48. Reservations and Indian allotments, and certain other kinds of Indian communities, constitute geographically bounded spaces that are known as "Indian country" in federal law. Indian country is a geographic expression of jurisdiction, and Indian sovereignty is associated with territorial jurisdiction within Indian country. The question arises, does Indian country always equal sovereignty, or does sovereignty always require Indian country? For instance, tribes without a land base still can be recognized tribal entities with sovereignty. As such, a discussion of Indian country is required.

1.3.2 Indian country

"Indian country" is most simply defined as "lands held in trust" (Sutton 1991:3) but the concept is more complex. For instance, the lands of the Pueblos of

New Mexico are considered Indian country under U.S.C.A. Sec 1151(b) (see below), although they are not held in trust (Getches, Wilkinson, et al. 1998).

The concept of Indian country as a geographically bounded area originated in a 1763 proclamation by King George in which he gave to the Indians land where they would be protected from white encroachment (Wilkinson 1987:89). The terminology persisted in the United States into the era when Indians were assigned or removed to lands in an effort to keep them in territory separate from European-Americans (Getches, Wilkinson, et al. 1998). There was no legal definition of the geography of Indian country until the Trade and Intercourse Act of 1834, which declared Indian country to be "(1) all lands west of the Mississippi River, outside of the states of Louisiana and Missouri and the Territory of Arkansas, and (2) any lands east of the Mississippi, not within any state, the Indian title to which had not been extinguished" (Wilkinson 1987:90). The revised statutes of 1874 repealed this definition by omission, for by then it had become obsolete (Getches et al 1998); settlers were well intruded into the named lands. Since no language replaced it, however, the courts continued to use the definition by adapting it to "changing conditions." Changing conditions included the creation of new categories of Indian property, such as allotments and non-treaty reservations (because treaty-making in its original form ended in

1871); and the creation of states in the former Indian Territory (Wilkinson 1987). Two Supreme Court cases in 1913 added to the categories of land in Indian country by deciding that Pueblo Indian lands, owned communally in fee simple and not in reservations, were Indian country because they were "occupied by 'distinctly Indian communities' which were 'dependent tribes' recognized and protected by the federal government. ... The simple ownership of land by a federally recognized, dependent Indian tribe is sufficient to bring the lands so held within the ambit of the phrase 'Indian country'" (Clinton 1976).

In 1948 Congress codified the 1913 cases in the general criminal laws at 18 U.S.C. 1151; this, however, was for purposes of law enforcement on Indian land, and not to define a geography of tribal sovereignty:

> "Indian country"... means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through same.

A footnote in the 1975 decision *De Coteau v. District County Court* (420 U.S. 425 [1975]) applied the definition to "questions of civil jurisdiction as well" (Wilkinson 1987:91). Wilkinson (1987:92) observes that "it is typically the

territorial concepts embodied in the definition of Indian country that trigger the special principles of Indian law." This would seem to make Indian country a desirable, if not necessary, component of Indian sovereignty.

Tribes "see their ability to make and enforce laws in a particular territory as an essential force necessary to preserve a geographic and cultural core" (Getches, Wilkinson, et al. 1998:438). This is consistent with Sutton's (1991:24) interpretation of Indian country as a place that gives a people a spatial identity and cultural cohesion—where "locational or territorial identity serves as a way to sustain group solidarity."

Indian country is a place where federal and tribal jurisdiction rule, to the exclusion of the state. While there is a recognized government-to-government relationship between tribes and the federal government, no such relationship necessarily exists between tribes and states. Indeed, states can tend to be hostile towards tribal interests, especially where taxation or regulation of economically important resources are involved (Canby Jr. 1998; Getches, Wilkinson, et al. 1998).

This may be nowhere more apparent than in Alaska, where tribes' status as governments is arguably ambiguous (according to the state's, not the tribes', point of view) (Alaska Natives Commission 1994b) and no clearly drawn

geographic boundaries define the scope of tribal jurisdiction. Getches et al. (1998:439) point out, "the central issue in Indian law has changed not a whit [since Worcester v. Georgia over 150 years ago]: who governs the land, the resources, and the people in Indian country?" If jurisdiction is linked to ownership (Sutton 1991:21), then the concept of Indian country becomes seminal to self-governance and sovereignty. The nature of Native land ownership in Alaska challenges the foundations upon which Indian country rests, and from this challenge arise the jurisdictional conflicts that plague the state.

The definition of Indian country is also germane to a discussion of sovereignty in Alaska in the context of Public Law 83-280. Passed in 1953 at the outset of the termination era, this law gave six states, including Alaska (added in 1958), criminal jurisdiction and civil adjudicatory authority over "Indian country" within their states. The definition of Indian country therefore becomes crucial to determining the scope of state or tribal jurisdiction in Alaska Native communities.

1.3.3 PL 280

At the request of states with communities near reservations to address "lawlessness" on the reservations, PL 280 gave certain "willing" states (California, Nebraska, Minnesota, Oregon, Wisconsin and in 1958 Alaska)

criminal and civil jurisdiction over tribes in their states (with a few individual exceptions)[3]. These are the "mandatory states." Other states were given the option to take jurisdiction at any time in the future, by passing legislation or amending their constitution to repeal a disclaimer that frequently appeared in statehood acts. (The disclaimer usually takes the form of declaring that the state leaves "absolute jurisdiction and control" of Indian lands "the title to which has not been extinguished" to the Congress of the United States, until the people of the state in question and the U.S. consent otherwise) (Goldberg-Ambrose 1997:70). Although some states sought permission from the tribes to take jurisdiction, tribal consent was not legally required until 1968 amendments. None have consented to a state take-over since that time.

The law did not terminate the federal government's responsibility to provide services other than law enforcement, but the BIA took it as an opportunity to save money in the participating states and withdrew many services it had been providing in areas such as health and education (Goldberg-Ambrose 1997). Mandatory or voluntary, state jurisdiction was not accompanied by federal funding to the states to compensate them for the additional costs of law enforcement on the reservations, leading in many cases to poor or no

[3] See Appendix A for relevant text of the legislation.

services at all. For instance, the reserve of the Metlakatla Indians, the only reservation now remaining in Alaska, was made exempt from the criminal jurisdiction provisions of the Act in 1970, because the state could not provide law enforcement and justice services (Case and Voluck 2002). The unfunded nature of the mandate apparently discouraged more states from taking jurisdiction (Getches, Wilkinson, et al. 1998:488).

PL 280 did not terminate the trust relationship over Indian land, nor treaty hunting and fishing rights. It did not extinguish the authority of tribal courts where they exist, but many reservations lacked legal infrastructure or the resources to develop it (Goldberg-Ambrose 1997). It has since been determined that tribal jurisdiction is concurrent with state jurisdiction (Case and Voluck 2002; Getches, Wilkinson, et al. 1998; Goldberg-Ambrose 1997). Tribal courts also retain "civil jurisdiction over activities within Indian country" and "criminal jurisdiction over Indians" (Goldberg-Ambrose 1997:246). Tribes in PL 280 states still have authority over the disposition of tribal or individual member-owned property, licensing, gambling, and—significantly—hunting and fishing regulations.

Case (2002) argues that if Alaska Native villages are not Indian country, then PL 280 is rendered substantially irrelevant. Without Indian country, the

state has the same jurisdiction in Native villages and over Natives as it does in the rest of the state. An illustration of this is the case of *Organized Village of Kake v. Egan* (369 U.S. 60 [1961]), in which the question was whether the Indian village of Kake was exempt from state fishing regulations under the provision of PL 280 that protects treaty hunting and fishing rights. The Court found that the state did not need PL 280 to assert its regulations, because "the territory had never been reserved for the Indians by Congress" (Goldberg-Ambrose 1997:72). In other words, there was no Indian country, and PL 280 only has force in Indian country; therefore the state always had regulatory authority in Kake.

If there is Indian country, however, the state has jurisdiction over criminal activities and civil court proceedings, but no taxing, zoning or regulatory authority on Native land. While it might seem therefore that a PL 280 state like Alaska has the same power over tribes with or without Indian country, the presence of Indian country protects other tribal powers that are important to self-determination, economic development, and control of subsistence resources. Specifically, these are the powers to make and enforce fish and game and land use regulations. This is the link between sovereignty, subsistence, Indian country and PL 280. The next section will further explore this link by placing Alaska

Native groups in the broader context of U.S. Indian policy and Native sovereignty.

1.4 Alaska Natives and the U.S. Government

The United States bought Alaska from the Russians for $7,200,000 in 1867, a deal derided at the time as "Seward's Folly" and "Seward's Icebox." Russia had never made treaties with or secured title from the Natives, and neither did the United States. Most Natives had no knowledge of the transaction (Worl 2001:73). The single acknowledgment of their presence was one sentence in the Treaty of Cession: "The 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 in that country." As Chance concludes, "From that moment on, the future of Alaska Natives was linked politically to that of other Native Americans living far to the south" (Chance 1990:32). This linkage would have important consequences, both negative and positive, for Alaska Natives.

The Organic Act of 1884 acknowledged and protected Native subsistence rights but postponed resolving Native land claims to an unspecified time in the future. Section 8 of the Organic Act provides:

> 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. (Sec. 8, 23 Stat. 24) (Case and Voluck 2002:7; Ford 1997:321).

Conflict over land began shortly after the U.S. purchase of Alaska. The Tlingit Indians of the Southeast coast, who were in contact with the Russians and knew of the transaction, contested the sale, claiming ownership of the lands they occupied and which they felt the Russians had no right to sell. The issue of aboriginal ownership and rights of use and occupancy arose again nearly 100 years later, in the case of *Tee-Hit-Ton Indians v. U.S.* (75 S.Ct. 313 [1955]). The Tee-Hit-Ton is a clan of Tlingit Indians who, in response to a Forest Service timber sale contract in Tongass National Forest, claimed "compensation for a taking by the United States of certain timber from Alaskan lands allegedly belonging to the group" (Getches, Wilkinson, et al. 1998:268). The resolution permitting the timber sale included the proviso that "Nothing in this resolution shall be construed as recognizing or denying the validity of any claims of possessory rights to lands or timber within the exterior boundaries of the Tongass National Forest" (Getches, Wilkinson, et al. 1998:269). The Supreme Court found that Congress had in no way recognized any legal property interests of the Tee-Hit-Tons, regardless of their right to "use and occupancy." It further found that "original Indian title or permission from the whites to occupy" means possession but not ownership, and therefore no compensation for a taking was justified (Getches, Wilkinson, et al.

1998). In other words, the Tee-Hit-Tons had no rights of ownership because the United States never officially recognized their Indian (aboriginal) title to the land they used and occupied.

This case stimulated the movement for Alaska Natives to secure legal title to their land. Their goal was not realized, however, until the 1968 discovery of vast petroleum reserves on the North Slope, in the territory of the Iñupiat Eskimo. Further, the route over which oil would be shipped south to the port of Valdez passed through other tribal territory, and the Natives claiming it would not agree to permit construction until land claims were resolved. This eventually brought the initially resistant oil companies to support accomplishing the land claim, and resulted in the passage of ANCSA on December 18, 1971. The land claims act is discussed in more detail below at page 64.

The ANCSA does not definitively recognize aboriginal rights; it extinguished any "aboriginal rights that *may* exist" (emphasis added) in land and fishing and hunting, without explicitly affirming or extinguishing Alaska Native sovereignty or the existing trust responsibility of the U.S. government (Case and Voluck 2002). This ambiguity has kept the door open to Alaska Native claims to benefits of the trust relationship, such as continuing participation in BIA and

other government programs for Indian tribes. How ANCSA affected Alaska Native sovereignty is a point of contention between the states and the tribes.

1.5 Sovereignty in Alaska

> Sovereignty is within ourselves... We don't have to look anyplace else. We have it within us, around us, by us, with us. All we have to do is look for it, find it, use it. – Dorothy Kameroff, Emmonak, Alaska (Alaska Natives 1994)

What of sovereignty in Alaska, where there were no treaties that can be invoked or interpreted to preserve aboriginal rights and land tenure? Alaska Natives are now subject to the same federal laws and policies that apply to American Indians in the lower 48 states (Johnson 2001), but this relationship evolved gradually through numerous judicial, administrative, and statutory actions (Case and Voluck 2002:8). Native land tenure in Alaska differs radically from that of other U.S. tribes. Only one reservation considered to be "Indian country" exists in Alaska. Yet 224[4] Alaskan groups are recognized as tribal governments by the BIA (Case and Voluck 2002; Johnson 2001; Mitchell 2001; (Federal Register 2000), and these are considered to retain their tribal sovereignty and their government to government relationship with the United States (Alaska

[4] Of these, two governments serve two villages each, making 228 tribal entities total, according to the list of tribes issued by the BIA on March 3, 2000 (Federal Register 2000).

Natives Commission 1994b), despite PL 280, according to a BIA official (Daisy West, BIA, personal communication, 3/26/03).

While sovereignty may be defined in general as jurisdiction over members and territory, Worl adds that for Native peoples, sovereignty must also include cultural and spiritual aspects. Fundamental to Alaska Native culture and spirituality is the land. Thus protecting their land base has always been the prime objective of Alaska's indigenous peoples, before, during and since negotiations for ANCSA (LitSite Alaska 2001; Worl 2001). Because subsistence fishing and hunting remain vital components of Alaska Native cultures, government intercession in these activities is tantamount to an infringement of Native sovereignty.

The eloquent testimony of Gilbert Charles Fred, an elder from Angoon (southeast Alaska), to the Alaska Natives Commission, makes clear these relationships:

> It needs to be reiterated that when our people speak of sovereignty, sovereignty is something that we have. Sovereignty is like our muscles. It's there. It's something that we shouldn't ask for. I believe that sovereignty is something that is useless unless we exercise it. ... I feel that every time we Indians dance, every time that we teach our children their culture and the way that our society is set up in a matrilineal society, how we learn from our mother's people, how we take our mothers' crests, every time we carry potlatches every time we go out there to provide the customary foods for our potlatches, these

> are ... exercises of sovereignty. I feel that every time that our people are arrested for going out and getting these foods to provide for potlatches this is an infringement and a denial of our sovereign rights...

Academic researchers agree; Cornell and Kalt of the Harvard Project on American Indian Economic Development have written:

> It is still federal policy that Indian nations should determine their own futures, and determined Indian nations can still do so. But shaping those futures will require not simply the assertion of sovereignty, a claim to rights and powers. It will require the effective exercise of that sovereignty. (Cornell and Kalt 1998)

The land and its wild resources are the foundation of Alaska Native cultures and spiritual life. The ability to continue subsistence practices, and pass on cultural learning in the process, are equally crucial to the survival of traditional Alaska Native cultures. Institutions that obstruct the process by interfering with Native control and access to resource areas therefore interfere with Alaska Native sovereignty, understood as the right to control people, land and resources, and to protect and preserve culture and spiritual life. Federal Indian policy, while recognizing sovereignty on paper, has constructed myriad rules and institutions that create such obstructions, or enable states to do so. The following sections will describe some of these institutional obstacles, address the

Alaska Native worldview, subsistence, and introduce some of the legislation and legal cases that influence Alaska Native subsistence and sovereignty.

PART 2. CULTURE AND SUBSISTENCE

2.1 The Alaska Native worldview

"Alaska Natives" is a collective term for the diverse indigenous peoples of Alaska. Anthropology lumps them into three groups—Eskimos, Indians, and Aleuts—but the Alaska Federation of Natives (AFN) today recognizes five, using more specific ethnic identities: Aleuts, Iñupiat, Yuit[5], Athabaskans and Southeast Coastal Indians (Tlingit, Haida, Eyak and Tsimshian) (Alaska Natives Heritage Center 2000). These labels in turn subsume 228 individual villages that that are recognized as tribes by the Bureau of Indian Affairs (Federal Register 2000).

While they differ in their cultures, languages, social organization, and dominant subsistence preferences, the five ethnic groups have in common a number of core cultural values (AFN 2001), all of which can be linked to land and the subsistence lifestyle. Family is an important value that grew out of the mutual support necessary for all to survive in a harsh environment. The subsistence way of life required everyone to participate and to share—with elders in particular, and with others who were less successful hunters or

[5] Yuit is a term for the peoples of Southwest Alaska who are more usually called Yup'ik or Yupiaq, (plural Yupiit); Yup'ik and Cup'ik are dialects of the same language.

otherwise unable to provide adequately for themselves. Family values extended beyond blood and fictive kin, to members of one's complex social network—hunting partners, those in distant villages related by marriage, adoption, or other kinds of connective mechanisms (AFN 2001). The sense of kinship extends to the land itself, and all its living and non-living inhabitants: The land "gave rise to all their social and political institutions. Land, above all, was to be protected to ensure the survival of the Real People" (Worl 2001:73).

Sharing and respect for elders are additional values that grow out of the central concept of family. As of 1989, Anders (1989) found that kinship still remained an important component of social organization. The 1994 report of the Alaska Native Commission reaffirms the continuing central role of family and community when it decries the damage done to them by "the assault of diseases and the invasion of Western life. ... Wounded and in some cases nearly destroyed, were the family and kinship systems that governed everyday life. These systems included clear delineations of relationships, responsibilities, and rights of all the members of a family and village... " (Alaska Natives 1994).

Yup'ik educator Oscar Kawagley (1995:8) identifies other aspects of a common Alaska Native worldview: sharing, cooperation among extended family, and giving thanks to the creative force. Living in harmony with the world

around them is a value also linked to the subsistence way of life, which generates "specific cultural mandates regarding the ways in which the human being is to relate to other human relatives and the natural and spiritual worlds." This entailed "a highly developed social consciousness and sense of responsibility." Attitude was as important as actions; thoughts were powerful, and people learned to be careful to avoid injury or offense to one another or to animal spirits (Kawagley 1995:8-10). Rituals and ceremonies traditionally guided daily life and balanced "the human, natural and spiritual realms." Thus humans are a part of nature and must reciprocate the gifts of the environment on which they depend with proper behavior and respect, in order to continue the cycle of life (Kawagley 1995:9).

2.2 What is subsistence for Alaska Natives?

> The ability of Alaska Natives to maintain subsistence as way of life is a measure of their ability to achieve self-determination (Case 1998).
>
> Alaska native cultural existence is so intimately bound to subsistence that, if Alaska Natives are to continue as distinct cultures within American society, their subsistence uses will have to be accorded continued legal protection (Case and Voluck 2002:259).
>
> Alaska Native people are united on this point. We know that subsistence is our means of self-determination, cultural existence, and survival (Phillips 1998).

It is common to read in the literature on subsistence in Alaska that to most of us, the word "subsistence" suggests barely eking out a marginal living, but that it has an entirely different meaning in Alaska (for instance, Case 1989, 1998, 2002; Berger 1985). "Subsistence" to an economist means "living off local resources of the land and sea as a way of life. Gathering of subsistence or 'country' foods is just a part of subsistence living. The subsistence economy is an entire economic system based on household production and sharing of locally produced goods, with closely integrated social, cultural and spiritual dimensions" (Berman 1998:2, n1). From a legal perspective, "subsistence has come to stand for a class of hunting and fishing rights that, under complementary[6] federal and state laws, enjoy a legal preference over competing sports, commercial, and personal use rights" (Case 1989:1009).

More important to understanding subsistence in Alaska are the words of Alaska Natives themselves (Berger 1985):

> Subsistence to us is ... our spiritual way of life, our culture. ... (Gladys Derendoff, Huslia)

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[6] Case must have written this in 1989 prior to the Alaska Supreme Court's decision that year in *McDowell v. State of Alaska*, that found Alaska's subsistence priority for rural residents to be in violation of the Alaska constitution's guarantee of equal access to resources, precipitating a vivid and as-yet unresolved conflict with the federal government over the management of subsistence resources in the state. This situation is discussed later in this paper.

> Our culture comes from that land. That is how we define ourselves as people. That's where we derive our identity. (Antoinette Helmer, Craig)
>
> Subsistence, our tradition, is very significant to our life-style. Our people have been taught from generation to generation to respect the land for the future generation. Knowing it's essential, the ways have been taught from father to son. (Leah Atakitliq, Togiak)
>
> Profit to non-Natives means money. Profit to Natives means a good life derived from the land and sea, ... Living off the land and sea is not only traditional, but owing to the scarcity of cash income, it is required for our families to survive. ... Good old Mother Earth with all her bounty and rich culture we have developed from her treasures is our wealth. Without our homelands, we become true paupers. (Antoinette Helmer, Craig)
>
> Us Natives, we should have the right to live out our culture, something that cannot die... to take away our culture would be to take away our lives, everything we knew, everything our parents knew, everything our children should know. ... What is that billion dollars? I'd rather have my fishing and hunting rights. (Franklin James, Jr., Ketchikan)
>
> The land means everything to us, it brings us food, it provides for our clothing, it provides for our lodging, it brings us water; it means everything to us. (Suzy Erlich, Kotzebue)

Alaska Native subsistence involves the interplay of natural capital and social capital. Lansing (1998) defines natural capital as ecosystem functions necessary to a society's operation. Social capital, which in Alaska Native societies is traditionally acquired through hunting, fishing, gathering and sharing,

requires natural capital (Lansing, Lansing, et al. 1998)[7]. Access to natural capital is essential to such a society's functioning. It does not take any special anthropological insight to recognize this. The AFN report states:

> Subsistence is more than economics. In addition to supplying food and other necessities, it provides people with productive labor, personal self-esteem, strong family and community relationships, and a cultural foundation that can never be replaced or duplicated by any other arrangement.

The AFN authors perceive subsistence policy as "social policy, the allocation of limited resources among competing user groups," as Native leader Julie Kitka put it in 1992. This takes place not only at the state level, but in national and international arenas as well. Obstacles to Alaska Native subsistence occur in a broad institutional context.

2.3 Sovereignty and natural resources

The struggle for sovereignty often takes the form of legal contests with states over which government has the right to use or regulate land or wildlife resources on Indian property. State competition with Indian tribes to regulate reservation resources is commonplace throughout the U.S. (Goldberg-Ambrose

[7] As an aside, monetary capital is no less necessary to the subsistence food quest these days. Bush Alaska functions for the most part on a mixed cash-subsistence economy. Substantial sums are necessary for weapons, ammunition, snowmachines, boats, motors and fuel, as well as store foods that supplement wild resources or substitute for them when necessary.

1997). One of the most intense controversies over the control of natural resources occurs in Alaska, among federal and state governments and the Alaskan tribes (Pevar 2002). This is in part a result of the discovery of oil in Prudhoe Bay, which led to Alaska Native Claims Settlement Act (ANCSA) of 1971. ANCSA in turn included a provision that led to the Alaska National Interest Lands Conservation Act (ANILCA) of 1980, the largest piece of federal conservation legislation ever enacted. Both of these Acts had profound consequences for Alaska Natives and their subsistence way of life. I will describe the terms and effects of ANCSA and ANILCA after describing a sample of some of the other institutional structures that affect Alaska Natives' ability to hunt and fish.

2.4 Laws and institutional structures that affect Alaska Native subsistence

Alaska Native tribes did not have the benefits of treaties with the United States that might protect their hunting and fishing rights. Further, the United States has entered into a number of international wildlife conservation treaties that affect Alaska Natives' ability to utilize those resources. Case (2002:263) lists those that include specific exemptions for Alaska Native subsistence harvesting, although he notes that the exemptions do not always effectively protect subsistence. As the list shows, laws that interfered with Alaska Native

subsistence activities did not begin with ANCSA and ANILCA, nor even with statehood in 1959.

- Migratory Bird Treaty with Great Britain (1916)
- Migratory Bird Treaty with Mexico (1937)
- Migratory Bird Treaty with Japan (1974)
- Migratory Bird Treaty with the Soviet Union (Russia) (1976)
- The Migratory Bird Treaty Acts are implemented by the Migratory Bird Treaty Act of 1918 (40 Stat 755, 16 U.S.C.A. Sections 703 et seq.).
- Fur Seal Convention (1957), expired in 1984 (implemented by the Fur Seal Act of 1966)
- International Whaling Convention (1946) (implemented by the Whaling Convention Act of 1950)
- Polar Bear Convention (1976) (implemented by the Marine Mammal Protection Act of 1972).

Such international treaties put Alaska Native subsistence activities (and those of other circumpolar Arctic peoples) at the mercy of international as well as national environmental agendas. The attempted restrictions have galvanized Alaska Native hunters to organize and intervene in a number of these conventions in order to protect their subsistence rights.

Forms of resistance have ranged from grassroots to global. The 1916 Migratory Bird Treaty banned hunting eider ducks and other migratory water birds between March and September. The convention's ban was not enforced in Alaska, however, until 1961 when, in response to poaching in the southern part

of the state, the Secretary of Interior ordered game wardens in the Bureau of Sport Fisheries and Wildlife to begin enforcement. Eider ducks are an important subsistence resource in the Iñupiat villages of the North Slope, and are only present in the Arctic during the months when hunting them is banned. John Nusunginya, an Iñupiat state legislator and resident of Barrow, and several other hunters found themselves arrested by a federal warden for hunting eider ducks on a Saturday in May 1961. The following Monday, the village requested the warden to attend a town meeting. The warden arrived to be met by 300 Iñupiat, of whom 138 displayed eider ducks. Each hunter submitted a written statement that he had taken the duck out of season, and the villagers all signed and presented the warden with a petition demanding that President Kennedy permit the "hunting of migratory waterfowl for subsistence food at any time." The petition explained that by the time the season legally opened, the eider ducks leave for warmer regions, and if the Iñupiat were to be forbidden to use them for food when they were available, the government should know that "hunger knows no law." Later that year, all charges against the 139 hunters were dropped. While the treaty has never been changed as requested, it also had not been further enforced as of 1990 (Chance 1990:146-147). The event has become infamously known as "the Duck-In."

Another notable example of Native initiative, this one to intervene at the international level, is that of the Alaska Eskimo Whaling Commission (AEWC), formed in response to the International Whaling Convention's 1977 ban on hunting bowhead whales. The bowhead is the major subsistence resource utilized by the Iñupiat, and as such is important both for food and cultural reasons. Whaling captains from the North Slope organized to contest the conclusions of scientists that bowhead whale numbers were low enough to merit a complete moratorium on hunting them. Through their own research, the AEWC demonstrated that whale numbers were far greater than Western scientists had calculated (Hensel and Morrow 1998). The AEWC succeeded in acquiring a quota for a Native take of whales, and raising it incrementally in succeeding years. In 1982 the IWC established separate standards governing aboriginal whaling. A subsistence advisory committee to the IWC, including aboriginal members, was created with standing equal to that of the scientific advisory committee. The AEWC now has official representatives on the American delegation to the IWC, giving them a voice at the table where annual quotas and international whaling policy are developed. The AEWC also participates effectively in co-management of the bowhead whale with the U.S. Department of Commerce (Case and Voluck 2002:269-270). It conducts research,

develops and enforces whaling regulations, and allocates and enforces the quota among the whaling villages. The quotas are set by the International Whaling Commission, with "substantial influence" by the AEWC via its representation on the U.S. delegation to the Commission (Case and Voluck 2002:314).

The "duck-in" and the AEWC illustrate that co-management is a necessary and practical strategy that allows Alaska Natives a voice in wildlife management. Other co-management institutions have followed AEWC, such as the Alaska Beluga Whale Committee, Alaska Sea Otter Commission, the Association of Village Council Presidents, Bristol Bay Native Association, Eskimo Walrus Commission, Inuit Circumpolar Conference, North Slope Borough Department of Wildlife, Pribilof Aleut Fur Seal Commission, Southeast Native Subsistence Commission, Alaska Harbor Seal Commission, and the Sitka Marine Mammal Commission (Case and Voluck 1002:364-5). A thorough discussion of co-management theory and benefits is beyond the scope of this paper. Clearly, however, consultation, participation, and collaboration in resource management are desirable for Native groups and have proven effective for better research, wildlife management, and at least partially meeting Native needs (Cornell, Taylor, et al. 1999).

There are several mandates for such consultation. President Clinton issued executive orders in 1999 and 2000 that re-articulate the trust obligation of federal agencies to consult with tribes on matters that affect them, and these executive orders have not been rescinded by the current administration (yet). Tribes can enforce their right to meaningful consultation under these orders. The Alaska National Interest Lands Conservation Act (ANILCA, discussed below) also mandated local participation in regulating and managing subsistence resources on public lands (Section 805). Section 812 of ANILCA

> requires the Fish and Wildlife Service and the National Park Service to work in close cooperation with each other and with the State of Alaska and other appropriate Federal agencies in conducting ... research on fish and wildlife populations used for subsistence purposes on the public lands, and on the subsistence use of such populations. The section requires both agencies to utilize the special knowledge of local conditions and requirements of local residents engaged in subsistence uses in their area" (U.S. Code and Administrative News 1980:5219-20).

Alaska Natives are demanding, and receiving, a more active role in managing important resources, and both scientific and users' management goals would be better met if institutional arrangements accommodated them. It is a matter of both sovereignty and survival.

By far the most profound effects of legislation on Alaska Native life have been results of the Alaska Native Claims Settlement Act of 1971 (ANCSA, PL 92-

203), Indian land claims legislation unique in the history of U.S.-Indian relations, and the Alaska National Interest Lands Conservation Act of 1980 (ANILCA, PL 96-487), conservation law which grew out of a provision in ANCSA. These laws also affected the laws and policies of the state of Alaska concerning wildlife and land use regulations for Alaska Natives and other rural subsistence resource users, and competing commercial and sportsmen's interests.

2.4.1 ANCSA

The 1968 discovery of major oil reserves on the North Slope of Alaska stimulated the resolution of Native land claims in Alaska. Land claims had assumed some urgency for the Natives with the Alaska Statehood Act of 1958 that allotted 103.5 million of Alaska's 365 million acres to the state. The state undertook the land selection process with alacrity, and without regard for the territories of the state's aboriginal people, who naturally were never consulted about statehood, the sale of their land to the United States by Russia, nor the Russians' claim of possession and right to sell. Well aware that Alaskan lands contained valuable minerals, oil and gas, the state proceeded to select the most valuable areas, disregarding a clause in the statehood act requiring it to "disclaim any interest in Native lands" (Summit 1997:612). Because there were no treaties with Alaska Natives, and aboriginal rights had not yet been

extinguished, it can be argued that Alaska Natives held aboriginal title to virtually all 365 million acres (Berger 1985:21). Yet the act specified that the new state could select from public lands those "which are vacant, unappropriated, and unreserved" and the state interpreted Native lands used for subsistence purposes and not visibly occupied "to fall within the public domain" (Berger 1985:22).

After statehood, new layers of government regulation of hunting and fishing and interference with subsistence activities emerged, and by the 1960s Alaska Natives statewide had come together to establish the Alaska Federation of Natives (AFN) to protect their land. Its first policy act was to demand a freeze on all land selection until Native claims were settled, and Secretary of Interior Stuart Udall complied in 1966 (Berger 1985:88), lending legitimacy to the idea that the Natives indeed had claims to pursue. With the discovery of oil in 1968, development pressure from state and oil companies mounted and the Natives found themselves holding the cards; they would not allow pipeline construction to proceed until land claims were settled. A Juneau Empire article relates this bit of history:

> "Robert Willard, a Juneau leader in the claims battle, ... was at the table when the AFN board met with oil company executives

developing the trans-Alaska pipeline. He recalled how Joe Upicksoun, an Arctic Slope Native, made clear the Native position:

'Not one drop of oil, not one inch of pipe will come from the Arctic Slope until the Native claims settlement act is settled.'

Oil executives responded that nothing would stop the pipeline. They would take Alaska Natives to court if they had to, but of course that would probably take a hundred years.

'We - can - wait,' Upicksoun said.

Willard's eyes lit up and a thin smile crossed his heavily creased face as he recalled that moment. Then he said quickly, 'Well, Big Oil couldn't wait 100 years.'" (Juneau Empire 2001)

The Alaska Native Claims Settlement Act (ANCSA) was devised and became Public Law 92-203 on December 18, 1971.

PL 92-203

The key features of ANCSA were as follows:

- All aboriginal titles to territory and resources based on use and occupancy, and hunting and fishing rights, were extinguished (Sec. 4[b]).
- In exchange, the Alaska Natives were to receive $962.5 million dollars and 44 million acres of land (11.7% of Alaska's land area). An initial $462.5 million, distributed over 11 years, was to come from the U.S. Treasury (Sec. 6[a][1]); the remaining $500 million would come over time from revenues paid to the state and federal governments from oil and mineral leases (Sec. 9 [a-h]). The cash was to be deposited in the Alaska Native Fund and disbursed annually by the U.S. Treasury.
- There would be no reservations as exist in the lower 48 states. Rather, ownership in the 44 million acres would be vested in

  - 12 regional corporations (established more or less according to the composition of existing Native associations) (Sec. 7[a]); a thirteenth corporation comprised of Alaska Natives 18 years of age or more and not residing in the state, that would receive cash but no land; and
  - 226 village corporations (Sec. 8), with "village" defined as a community having 25 or more Natives in residence as of the 1970 census, but fewer than 2500 residents, and where Natives are a majority of the residents; and providing the village is NOT "of a modern and urban character" (Sec. 11[2-3]).
- Regional corporations were to be for-profit operations organized under state law.
- Village corporations, also organized under state law, could choose to incorporate as for-profit or non-profit entities (all chose profit-making status).
- Village corporations received only surface rights; subsurface rights were vested in their regional corporation.
- Regional corporations received both surface and subsurface rights in their lands, plus rights to the subsurface estate of village corporation lands in their region.
- Regional corporations (with one exception) had to share 70% of revenues earned from timber and subsurface resources with the other regional corporations. This was meant to even out the benefits of unevenly-distributed natural resources.
- Alaska Natives became the exclusive shareholders, each given 100 shares of stock in the regional and village corporations where they were enrolled.
- Only Alaska Natives alive and enrolled as of the date of passage, December 18, 1971, were eligible to receive shares.
- Shareholders could vote for and serve on the board of directors of the regional corporation; receive dividends and distributions, and hold all other rights of any shareholder in an Alaskan corporation, EXCEPT that they were not permitted to sell or otherwise alienate their shares or any "inchoate rights thereto" (i.e., subject them to lien)

for 20 years after the bill's passage, that is, until after December 18, 1991.

- Native corporation (regional and village) lands that remained undeveloped would not be taxable by any government entity until after 1991.

Like the old trust relationship, the 20-year restrictions on stock alienation and exemptions from taxation were to protect the Natives from the immediate loss of land to outsiders such as multinational corporations offering quick cash, losses due to their lack of business experience, or inability to pay property taxes. It also gave them a 20-year learning curve during which to learn and adapt to this new Native institution.

Both the level of collaboration among the diverse Alaska Native groups, and the level of their participation in the drafting of the settlement were unprecedented. Nevertheless, although Alaska Natives helped design the settlement, its implications were far from clear to most villagers. Corporate ownership and stock and shares were new concepts to most villagers. It took some time to realize that they did not really own their land, and that it could be lost through sale, tax delinquency (after 1991), or corporate business deals gone bad. Most threatening was the law's 1991 expiration of the restriction on sale of Native corporation stock; at that time, the corporations or individuals could reap

one-time monetary gains from stock sales that would most likely be to non-Natives, placing control of Native birthright in the hands of outsiders (Berger 1985; Worl 2001; Skinner 1997). Other unsatisfactory terms of ANCSA involved who could inherit stock, whether or not non-Native shareholders had a corporate vote, and the "afterborns," the sad name for Natives born after December 18, 1971 who were not entitled to own stock unless they inherited it.

The worst fears concerning the expiration of restrictions in 1991 were eventually addressed in various amendments to ANCSA. Significant ones, passed in 1988 but often referred to as "the 1991 amendments," addressed some of the issues of greatest concern. These allow restrictions on stock alienation to continue indefinitely, unless a corporation's shareholders vote to terminate them. The amendments extend the tax exemption on undeveloped and unleased corporate-owned land. They also address the "afterborns" issue, allowing corporations with shareholder approval to issue new stock to those born after the Act, who are now more happily termed "New Natives." Although their shares would extinguish automatically upon their death, these younger shareholders would have a voice through voting rights in their corporations. Each of these provisions, and others, were intended to secure Native land in Native control, and promote the self-determination envisioned by the original drafters of the bill

but obstructed by the original language of the law (Skinner 1997). The ongoing work of molding ANCSA to better address Alaska Natives' social, economic, and political goals (Worl 2001) has led several Native leaders to term it "a work in progress" (LitSite Alaska 2001), and demonstrates Alaska Natives' determination to assert their sovereignty by effectively articulating with the institutions that dominate their lives.

2.4.2 How ANCSA begat ANILCA

Significant to the issue of subsistence, because hunting and fishing rights were extinguished in ANCSA, was Section 17(d)(2) of ANCSA that instructed the Secretary of Interior to withdraw as much as 80 million acres of unreserved public land to be considered for inclusion in the national conservation system (parks, refuges, forests, wild and scenic rivers). This clause was a function of pressure from environmental groups justifiably concerned about the potential loss of unique wilderness to business development interests. Even prior to the Prudhoe Bay discovery and ANCSA negotiations, Native leaders expressed concern that if the state were allowed to continue its land selection, Natives might be deprived of choice of land that would benefit them into the future[8]. A

[8] This was not an idle concern, as the state had already selected, and the U.S. had patented, lands used and occupied by Alaska Natives that were explicitly excluded from selection in the statehood legislation. The Alaska Statehood Act (72 Stat. 339) "required the state to disclaim any rights or jurisdiction in lands 'the

"public interest provision", Section 17(d)(1) authorized the withdrawal of an additional 45 million acres to be studied for future management classification, to avoid a land rush that would interfere with the Native selection process. Between the two provisions, nearly all public land in Alaska was withdrawn, and came to be known as "the d2 lands." The designation of national conservation units was established in the Alaska National Interest Lands Conservation Act (ANILCA) of 1980, after years of negotiation, legislative bickering and political maneuvering by environmental groups, Alaska Natives, the state's Congressional delegation, recreational and commercial fishers, sportsmen's associations and a wide variety of other Alaskan and national stakeholders.

2.4.3 ANILCA (PL 96-487)

ANILCA's purpose was given in the Act as "to preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archaeological, geological, scientific, wilderness, cultural, recreational,

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right or title to which may be held by any Indians, Eskimos or Aleuts'". Yet all the land in the state was subject to aboriginal title because there had been no resolution of Native title with the United States. Alaska Natives unified to file protective claims and protest the state land patents. A federal freeze in 1968 halted state land selections but oil and gas leasing on the state-selected lands continued, including in Prudhoe Bay (Getches et al 1998:906-907).

and wildlife values. ... " (Section 101[a]); "to provide for the maintenance of sound populations of, and habitat for, wildlife species of inestimable value to the citizens of Alaska and the Nation, ..." and "*the opportunity for rural residents engaged in a subsistence way of life to continue to do so*" (Section 101[c]); emphasis added). While language in ANCSA's legislative history suggested that Natives' ability to continue subsistence activities would be protected, neither the state nor federal government had fulfilled that obligation. Title VIII of ANILCA spelled out Congress' intent "to protect and provide the opportunity for continued subsistence uses on the public land by Native and non-Native rural residents..." (Section 801[4]). The legislative history makes clear, however, that the primary intent of this section was to protect Native subsistence; "rural" was substituted at the insistence of the state to avoid discriminating on the basis of ethnicity, which would have violated the Alaska constitution.

Protecting their right to continue to hunt and gather resources on 100 million acres of what became public lands was particularly important to the Natives in light of the fact that the land granted to the Native corporations amounted to vastly less than what they had traditionally used for subsistence (44 million acres out of Alaska's 365 million). And it was mainly village corporation

lands, half of the settlement total, that tended to be selected with subsistence use in mind.

> I believe the amount of land we received is only a small portion of what we actually used for subsistence purposes. ... we definitely don't have our prime subsistence grounds within our village land selections. ... there are limitations and restrictions put on by whoever owns the land, either be it state of federal government. It can get to a point where we can no longer hunt, fish, or gather, if these different land managing agencies feel that we are depleting the game resource or damaging the land that they manage. I definitely feel that we did not get enough ground to protect our interests for self-preservation. -- Henry Ahgupuk, Shishmaref (Berger 1985:91-92)

ANILCA specified that the state would be permitted to regulate fish and game on federal lands if it also adopted a subsistence preference in management of state and private lands comparable to that in Title VIII. The state did so in 1978, anticipating ANILCA's passage, but the Alaska Supreme Court decision in *McDowell v. Alaska* in 1989 (785 P.2d 1 [Alaska]) found that the rural preference violated the state's constitutional guarantee of equal access to resources. Adhering to its own constitution brought the state out of compliance with ANILCA. The state refused to amend its constitution to include the subsistence preference and comply with the federal law, and subsistence resource management on federal land, about 60% of Alaska's land area, was slated to revert to the federal government. The feds assumed management of hunting on

federal land in 1990, and federal management of fishing finally resumed in 1999 after a series of implementation delays engineered by Alaska's Senator Ted Stevens (Anchorage Daily News Staff 2002; Case 1998). All Alaskans are now subject to a dual management regime, one for state and private land, the other for federal land and waters, with all the ensuing confusion and complexities.

2.4.5 Impacts of ANCSA and ANILCA on Alaska Native subsistence and sovereignty

ANCSA and ANILCA are good illustrations that we do not live in the ideal world where "sovereignty is the unrestricted right of groups of people to organize themselves in political, social and cultural patterns that meet their needs. ... the right of a people to freely define ways in which to use land, resources and manpower for their common good. ... the right of people to exist without external exploitation or interference" (Kickingbird, Kickingbird, et al. 1996:2). ANCSA and ANILCA, aided by the state of Alaska and wider national politics, operate to constrain Alaska Native peoples from fully exercising any of those rights.

> Government restrictions and other outside influences have limited our ability and obligation to pass on cultural ways to the next generation. Subsistence activities are critical to the survival and recognition of Alaska Native groups.... I believe Alaska Native cultures cannot survive without subsistence rights, because subsistence is an active, fundamental part of our lives. (Phillips 1998).

> Many valleys and rivers are lost to us. You can see our markers still. We fished there, we hunted there—but it's not ours anymore. -- Weaver Ivanoff, President, Unalakleet tribal government (Berger 1985:91).

While ANCSA gives as its stated purpose the creation of a land claims settlement that was "in conformity with the real economic and social needs of Natives," (PL 92-203, Sec. 2[b]), it imposed upon them the manner in which they would organize themselves (into corporations) and directly and indirectly constrained the ways in which they could use "land, resources and manpower for their common good." Take, for instance, ANCSA Section 7(i), which stipulates that the Native corporations have to distribute 70% of their revenues earned from timber and subsurface resources among the other corporations. On one hand, this has resulted in the distribution of millions of dollars, a great asset to struggling regional and village corporations[9] in resource-poor areas. On the other hand, the inability of the better-endowed regional corporations to retain such a large part of their income (coupled with the immunity of Native corporation lands from environmental regulations) forced some of them into unsustainable practices that damaged the habitat needed to sustain wild subsistence resources (Dombrowski 2001; Durbin 1999).

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[9] Regional corporations are required to redistribute 50% of funds received under 7(i) to village corporations and at-large shareholders (those who are not village corporation shareholders) (Case and Voluck 2002).

From another perspective, however, the revenue-sharing provision can discourage investment in natural resources extraction because the costs of resource development would be borne by one corporation, but the majority of the benefits would be shared, with the potential that the 30% of revenue retained would not cover costs and allow profit. This stymied the legislation's intent for the corporations to make investments that would generate profits that would trickle down to support their communities.

For there was indeed an assumption on the part of ANCSA's drafters that the Native corporations would be engines of job creation in their region's communities, employ their shareholders, end villagers' dependency on government support programs, and gradually reduce or eliminate the subsistence lifestyle (Berger 1985). This was certainly not "in conformity with the real conditions of life" in rural Alaska, where business opportunities are scarce and hunting and fishing are vital to sustaining culture as well as crucial components of the economy (Active 1998; Berman 1998; Fall 1998; Kitka 1998). Neither is it in conformity with the usual motives of corporations; the Native corporations themselves have demurred from the expectation that the corporate model can fulfill Alaska Natives' social needs (McClanahan 2001:2). On the occasion of ANCSA's thirtieth anniversary in 2001, Native leaders reported

mixed success by corporations in meeting social and employment goals. Some corporations have created jobs in their shareholders' communities; most have college scholarship programs for their young people. Some fund separate non-profit arms or support village non-profits that provide social services or support cultural revitalization activities (LitSite Alaska 2001). But most of the corporations have struggled to be profitable, and one analysis found that only three corporations succeeded in combining local job creation with profits; most lost money whether or not they prioritized social goals such as shareholder employment (Colt 2001). Business opportunities in rural Alaska are hard to come by, and corporations that invest in money-losing ventures risk shareholder suits for breaching their fiduciary duty (Case and Voluck 2002; Cornell, Taylor, et al. 1999). Shareholders in some corporations have exerted pressure to distribute dividends rather than investing assets or retaining them in an operating account (Mitchell 2001). Such situations place the regional corporations in a difficult position; shareholders discourage corporate strategies that could deliver benefits in the long term, in favor of short term cash that benefits individuals (and, admittedly, the local economy) but threatens corporate success.

Another factor that constrained Native land selection and use (as well as that of the state of Alaska) was the issue of the "d2 lands," the temporary land

freeze on most Alaska public (federal) land until selections could be made to be added to the national conservation system. The extremely political process of selecting conservation lands took 9 years, until the Alaska National Interest Lands Conservation Act passed in 1980. ANILCA placed its own constraints on Native livelihood by restricting the types of activities that are permitted (to anyone) on the different classes of federal land. ANILCA's Title VIII was designed, however, with good intentions to support the continuation of the subsistence lifestyle for Natives and other rural residents who were dependent on wild resources taken from public lands. Title VIII engendered an ongoing conflict between the state and federal governments concerning which holds the power to regulate resources on federal land (see the discussion concerning the *McDowell* case and dual management, above). The dispute is a direct result of Title VIII's "subsistence preference" language.

"Subsistence uses" are defined in ANILCA Section 803 as:

> the customary and traditional uses by rural Alaskans of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of non-edible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal family consumption; and for customary trade.

In particular, the definitions of "rural" and of "customary trade" have been points of contention, addressed by both state and federal governments.

Section 804 enunciates the "subsistence preference":

> Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for non-wasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes. Whenever it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in order to protect the continued viability of such populations, or to continue such uses, such priority shall be implemented through appropriate limitations based on the application of the following criteria:
>
> 1. customary and direct dependence upon the populations as the mainstay of livelihood;
> 2. local residency;
> 3. the availability of alternative resources

The subsistence preference has provoked antagonisms throughout the state, pitting commercial and sportsmen against subsistence users, and rural against urban resource users. Natives cross-cut every category. The most notorious challenge to state management that denied the subsistence preference guaranteed in federal law was a 17-year legal dispute known as "Katie John."

***Alaska v. Babbitt*, aka *"Katie John"* (U.S. Court of Appeals, 9th Circuit, 72 F.3d 698 [1995]; 9th Circuit en banc [2001])**

The state-federal conflict wrought by ANILCA was dramatically played out in this case. Katie John is an Ahtna Athabascan elder who, along with elder Doris

Charles, demanded that the state, then federal, government protect their right to fish in a traditional fishery. The state had closed the fishery, located at Batzulnetas in what later became Wrangell-St. Elias National Park, for management purposes in 1964, when Katie John was 46 years old (NARF 2001b). The site was on one of several tributaries to the Copper River that were closed to subsistence (fishwheel) fishing at the time, ostensibly to allow salmon stocks to recover, although they remained open to hook-and-line sport fishing (Simeone 1998). By 1984, the resource apparently was sufficiently recovered that Alaska Fish and Game was permitting a sport and commercial fishery downstream from the traditional site. Despite this fact, the subsistence fishery remained closed to use. In 1984, Katie John and Doris Charles demanded their right to fish under the terms of ANILCA's subsistence provisions.

The state Board of Fisheries eventually opened a limited subsistence fishery, but the Federal District Court determined that the regulation was still too restrictive, and ordered the Board to revise their regulations. At about the same time, the *McDowell* decision led to federal resumption of wildlife management on federal lands, and the federal agency issued a limited subsistence fishing regulation in 1992. Katie John challenged the federal regulation as too limited. The state challenged the federal government's authority to manage, and the

District Court combined both Katie John's and the state's actions into *Alaska v. Babbitt* (*Katie John I*). As the case proceeded through the federal courts, the issue became centered on what waters were included in the definition of public lands over which the federal government could assume Title VIII control. Arguments called upon federal reserved water rights doctrine, the Submerged Lands Act (gives states sovereignty over riverbeds and the waters above them upon statehood), the Commerce Clause (federal authority over issues involving interstate commerce), the Property Clause (federal plenary power over anything it owns), and various other non-Indian cases concerning water rights and jurisdiction (*Alaska v. Babbitt* 1995; *Alaska v. Babbitt* 2001). In May 2001, after a re-hearing by the full bench, the 9th Circuit Court of Appeals affirmed the Court's 1995 3-judge opinion—that certain waters were indeed public lands under the reserved water rights doctrine, and that the federal government could regulate them. This permitted federal control over about 60% of Alaska's navigable waters, and represented a victory for Alaska Native subsistence users. After visiting Katie John at her fish camp, then-governor Tony Knowles declined to appeal the decision to the Supreme Court, allowing the triumph for Alaska Natives' subsistence rights to stand.

The politics of the state-federal conflict is beyond the scope of this thesis, but the case illustrates several salient points:

- The difficulty of enforcing ANILCA's attempt to protect Native access to subsistence resources;
- the resistance of the state to implementing a subsistence preference for Native resource users, interfering with their ability to continue traditional cultural practices that are tied to their Native identity;
- and the lengths to which Alaska Natives must go to protect their Native culture and their rights to use subsistence resources, by demanding enforcement of federal law.

"In 1971," wrote Thomas Berger (1985:60), "Alaska Natives believed that, if they owned their own land, they could protect the traditional economy and a village way of life. Subsistence is at the core of village life, and land is at the core of subsistence. You cannot protect the one unless you protect the other. The law has protected neither." In August of 2001, however, it could finally be said that ANILCA protected subsistence fishing.

Governor Knowles convened a Subsistence Leadership Summit in August 2001, an attempt to harmonize stakeholders and come to a statewide consensus on subsistence, but although many proposals were raised, resolution was not attained. This despite the fact that a statewide poll by the AFN prior to the Summit found that more than 60% of voters supported protecting the Native

way of life by law, and more than 70% thought that solving the subsistence debate would reunify the state (AFN Press Release 2001). State legislators refuse to pass a law or constitutional amendment that would protect subsistence, and refuse as well to allow the issue on the ballot for a referendum vote. There seems little hope for any cooperation from the state, in terms of amending their constitution to comply with ANILCA, and now the best hope for protecting subsistence interests is probably in Alaska Natives' government-to-government standing with the U.S. (Alaska Federation of Natives 2001). While some progress was made under Governor Knowles' administration, it remains to be seen whether the impasse will be resolved under the new governor, former Senator Frank Murkowski, who took office in 2003.

Alaska v. Native Village of Venetie Tribal Government (522 U.S. 520, 1998)

Laws relating to subsistence are not the only challenges to Alaska Native sovereignty. Interestingly, another legal case with historic implications for Alaska Native sovereignty did not concern harvesting of resources, but the ability of an Alaska Native tribal government to tax an outside business. If we accept that the power to tax is an attribute of sovereignty, then the denial of that power undermines the sovereignty of this tribe and by implication, that of all Alaska Natives.

In ANCSA, those tribes with reservation lands were the given the option to take their land in fee simple and forfeit the cash payment and additional land transfers that were part of the standard settlement. This was the course chosen by the people of the Neets'aii Gwich'in Athabascan villages of Venetie and Arctic Village. Once the land was patented to their corporations, they transferred the assets to the Native Village of Venetie Tribal government (NARF 1998; 118 S. Ct. 948; Getches et al 1998). This protected the land from being lost through mismanagement, taxation or sale, all risks of corporate land ownership, without the approval of the tribal government.

This case hinged on whether or not the Venetie tribal lands could be considered "Indian country" under the current federal definition, given in 18 U.S.C. § 1151, and thus have the powers of nations in Indian country. The relevant part of the statute reads:

> The term 'Indian country' ... means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government ..., (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through same." (18 U.S.C. 1151) (Getches, Wilkinson et al. 1998:942).

Indian country status confers some control of reservation land (limited by its trust status) and activities of members and, under certain conditions, non-members on tribal land. Tribally-owned fee land in Indian country cannot be alienated without consent of the tribal government. Indian country governments also have the authority to tax non-tribal businesses in Indian country and to zone their land (although this is frequently challenged by states and local governments).

Venetie concerned whether the tribal government had the jurisdiction to impose and enforce a tax on an outside company that was contracted by the state to build a school in the Native Village of Venetie. The state, which under the contract was responsible for the $161,000 tax, refused to pay it. The Tribe attempted to collect the tax from the state, the school district and the contractor in Tribal court. The state sued in Federal District Court to enjoin collection of the tax. The District Court found that the Tribe did not have the power to tax because its lands did not fit the definition of Indian country in 18 U.S.C. §1151(b) ("dependent Indian community"), and because ANCSA had extinguished Indian country in Alaska. The tribe appealed and the 9th Circuit Court of Appeals reversed the district court's decision, affirming the Tribe's power to tax nonmembers doing business on tribal land. (It also rejected the District Court's

assertion that ANCSA had extinguished Indian country, citing the principle that statutes affecting Indians be construed broadly and ambiguities resolved in favor of the Indians. Accordingly, they found ANCSA made no clear statement extinguishing the trust responsibility [NARF 1997].) The appeals court decision was seen as a victory for native sovereignty in Alaska, based on the powers of tribes in Indian country (NARF 1997). In 1998, however, the U.S. Supreme Court unanimously reversed the 9th Circuit decision, again finding that Venetie is not Indian country.

Venetie clearly was not a reservation under the jurisdiction of the U.S. government, nor was it an Indian allotment. The court then focused on the question of whether it was a "dependent Indian community." The test for "dependent Indian community", as established by the 9th Circuit in 1996 (*State of Alaska v. Native Village of Venetie [Venetie V]*, 101 F.3d 1286) (Case and Voluck 2002), is to examine:

1. the nature of the area
2. the relationship of the area inhabitants to Indian Tribes and the federal government
3. the established practice of government agencies toward that area
4. the degree of federal ownership of and control over the area
5. the degree of cohesiveness of the area inhabitants
6. the extent to which the area was "set aside" for the use, occupancy, and protection of dependent peoples (NARF 1997).

But rather than give equal weight to all six considerations, the court focused on only numbers 2, 4, and 6 of the 1996 test. According to Justice Thomas' opinion, "dependent Indian communities" are lands that are neither reservations nor allotments, and that (1) have been set aside by the federal government as Indian lands for the use of Indians, and (2) must be under federal superintendence. The justices reasoned that there is no reservation (land set aside by the federal government for the tribe), nor federal superintendence (trust responsibility) with tribal dependency on the federal government, because ANCSA lands were "set aside for privately held state corporations" (Kendall-Miller 1999), and Venetie's fee-simple ownership permits them to be used for non-Native purposes or disposed of without restriction. Therefore Venetie is not Indian country (522 U.S. 520 [1998]). The Venetie tribal government therefore has no jurisdiction to act like a sovereign and impose or collect the tax.

Heather Kendall-Miller, the Native American Rights Fund attorney who argued the case for Venetie, wrote a summary and scathing criticism of the decision for the Alaska Federation of Natives (Kendall-Miller 1999). In it, she points out that the justices:

- ignored precedent, established in a long line of cases beginning with *U.S. v. Sandoval* (231 U.S. 28 [1913]), that federal superintendence is over Indians and not over the land they occupy;

- made no reference to the canons of construction that favor Indians when language is ambiguous;
- and interpreted ANCSA as termination legislation despite the requirement that extinguishment or termination of a tribal right must be made by Congress with clear and express language as to its intent.

Nevertheless, it is a decision that Alaska Natives now have to live with.

Kendall-Miller concludes, however, that

> For most communities in rural Alaska, there will be very little change in day to day life. Tribal governments will continue to do what they have always done—govern their communities. Where we will continue to encounter conflict will be in those situations, like Venetie's where the State of Alaska specifically seeks to enjoin or stop a tribe from regulating an activity within its community (Kendall-Miller 1999:D4).

The contradiction of ANCSA by the *Venetie* decision

> ANCSA was intended to be a departure from traditional Indian policy... . "It attempted to preserve Indian tribes but simultaneously attempted to sever them from the land; it attempted to leave them as sovereign entities for service purposes, but as sovereigns without territorial reach. – *Alaska v. Venetie*, 522 U.S. 520, 1998 (Case and Voluck 2002).

ANCSA was supposed to give control of resources to Natives and avoid federal supervision by not placing property in trust, and having the land owned by the Native corporations in fee simple. ANCSA's objective was to create greater opportunities for self-determination and self-sufficiency in Alaska than those available to tribes in the lower 48, by giving them control over land and

resources. Yet the *Venetie* decision takes away tribal control of its land (in the form of its sovereign right to tax the outside construction company), in effect punishing the tribe for not being dominated by the federal government. This is a bitter irony in face of the fact that the government devised ANCSA with the goal of ending federal superintendence.

The decision "undermines the ability of Alaska tribes to be self-governing. Without Indian country, tribes lack important regulatory powers such as the power to tax and raise revenue from companies conducting business on tribal land," an attribute of lower 48 tribes with reservations that are Indian country (NARF 1998:10), and also an attribute of sovereignty as discussed in previous sections.

Corporations, tribes and sovereignty

Placing Native land in corporations with fee simple ownership raised the specter that the corporations could lose or freely dispose of the land or, after 1991, sell corporation stock, which could also remove land from Native control. Individuals also would be able to sell their shares after 1991, further diminishing the scope of local Native control. These risks had become clear and of deep concern in the villages by the time of Justice Thomas Berger's investigation of the effects of ANCSA in the early 1980s (Berger 1985).

To protect their land from the risks of corporate ownership, some villages, such as Arctic Village and Venetie (discussed above), dissolved their ANCSA corporations and vested the land in the tribal government. Alaska Native groups have used other mechanisms as well to adapt ANCSA to their own ends (Worl 2001). But putting land in the ownership of tribal government, since *Venetie,* does not restore to tribal government the control or protection that would come with Indian country. With the *Venetie* decision, "tribal sovereignty" and "Indian country" were effectively separated in Alaska[10]. Nevertheless, tribal sovereignty survives in truncated form. Although there have been claims to the contrary, it is argued that Native sovereignty in Alaska was not extinguished in ANCSA for a number of reasons. First is because it is not mentioned in ANCSA. Congress must make a clear and explicit statement of its intention to terminate tribal status (Pevar 2002), and no such statement is made in ANCSA. Second, one of the canons of construction in Indian law requires any ambiguity in treaties or statutes to be interpreted liberally in favor of the Indians, and ANCSA can be considered ambiguous on the question of tribal status and sovereignty:

> ...without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system

[10] It should be noted that some Indian country still exists in Alaska, in the more than 8,000 allotments, the Metlakatla Indian reservation, and scattered parcels of trust land (Kendall-Miller 1999). This is however a relatively small amount of land compared to total Native landholdings.

> or lengthy wardship or trusteeship, and *without adding* to the categories of property and institutions enjoying special tax privileges... (ANCSA, Sec 2[b], emphasis added).

"Without adding to" does not extinguish existing categories of properties and institutions. As Kendall-Miller (1999) points out, however, the *Venetie* court justices ignored the canons.

Third, Alaska Native villages are considered to be "tribes" for purposes of post-ANCSA Indian law such as 1975 Indian Self Determination and Educational Assistance Act (PL 93-638, hereafter "638"), the Indian Child Welfare Act, the Indian Tribal Justice Act, and other federal grant, service and loan programs. They are also included in the provisions of the Clean Water Act that allow tribes to be treated as states for the purposes of water resources management and setting water pollution standards.

Fourth, the sovereign immunity of Alaska Native governments has been established in a number of different court cases (Case and Voluck 2002:388, n. 123). Thus there is ample evidence that Alaska Native tribes retain their inherent powers of self-government. That these powers may be limited in scope by the exclusion of jurisdiction over territory does not eliminate sovereignty over members and internal affairs of the tribe.

The state of Alaska has contested the very existence of tribes in Alaska, however, denying that tribal sovereignty exists (*Stevens Village v. Alaska Management and Planning*, 757 P.2d 32 [Alaska 1988]) (Alaska Natives Commission 1994b). The next issue, then, is to establish that the entities involved in ANCSA are indeed recognized as tribes. The case of Tee-Hit-Ton Indians v. US (75 S.Ct. 313 [1955]), described in more detail above, made apparent the necessity to for Alaska Natives to gain recognition as tribes in order to validate their claims to aboriginal title and make a case for a land claims settlement. The state courts of Alaska in particular remained entrenched against recognizing tribal sovereignty. Despite the canons of construction, and the inclusion of Alaska Natives with lower-48 tribes in federal laws, the status of Alaska Native villages as sovereign tribes remained uncertain until 1993. In that year, the Solicitor of the Department of Interior issued an opinion that confirmed the status of Alaska Native villages as tribes with "the same sovereign status as tribes in the lower forty-eight states" (Case and Voluck 2002:413). The opinion did not, however, specify which villages qualified. In prefatory remarks to a list of federally recognized tribes published later in 1993, and which excluded ANCSA

corporations[11], the Interior Department resolved the uncertainty about which villages were recognized as tribes, and stated its intention

> to eliminate any doubt as to the Department's intention by expressly and unequivocally acknowledging that the Department has determined that the villages and regional tribes listed below *are distinctly Native communities and have the same status as tribes in the contiguous 48 states.* Such acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes. This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather, *they have the same governmental status as other federally acknowledged Indian tribes with a government-to-government relationship with the United States; are entitled to the same protection, immunities, privileges as other tribes; have the right, subject to general principles of Federal Indian laws, to exercise the same inherent and delegated authorities available to other tribes; and are subject to the same limitations imposed by law on other tribes."* (Case and Voluck 2002:413-414; emphasis added).

The list was later ratified by Congress and held by the Alaska Federal District Court to resolve the issue of tribal status. A tribal list published in the Federal Register in 2000 names 228 federally recognized tribes in Alaska. The existence and sovereignty of Alaska Native tribal governments is therefore well and firmly established. What remains to be resolved is the reach of their jurisdiction, and this is where the matter of "Indian country" comes in.

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[11] The reason for this, according to a BIA official, is because ANCSA says they are not tribes, (Daisy West, BIA, personal communication 3/26/03). ANCSA corporations were created for narrow business purposes

Justice Clarence Thomas closed the unanimous opinion in the *Venetie* decision with these words:

> **Whether the concept of Indian country should be modified is a question entirely for Congress.**

In the next section, I will discuss whether Congress should reconsider the criteria for Indian country to address the unique situation of tribal land tenure in Alaska. This will require a look at existing Native and non-Native institutions of governance and land management, and what the effects of Indian country might be on each. It first requires, however, additional discussion of Native jurisdiction in Alaska.

2.4.6 Alaska Native jurisdiction

As discussed above, Indian country generally refers to geographically bounded territory in which only tribes and the federal government have jurisdiction, to the exclusion of the state. The 1993 Solicitor's opinion concluded that while Alaska Native tribes have sovereignty, their jurisdiction does not reach to land or non-members (Case and Voluck 2002:414). This was in part the basis of the Supreme Court's decision in *Venetie*. Without meeting the existing criteria for Indian country, as interpreted by that court, the Native Village of

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and do not have the powers of governments, although they may be considered "tribal entities" for certain

Venetie could have no jurisdiction over land. The 1999 Alaska Supreme Court case of *John v. Baker* (982 P.2d 738 [Alaska 1999]), however, acknowledged the authority of Alaska Native governments over their members, even absent jurisdiction over land as decided in *Venetie. John v. Baker* was a custody dispute, and the court found that the tribe had jurisdiction over such disputes brought by tribal members in tribal courts (with concurrent state jurisdiction). After carefully examining previous cases, statutes, canons of Indian law and the 1993 Tribal List, the Court found that sovereignty over territory (the existence of Indian country) was not necessary for the tribe to retain jurisdiction over its own members in internal community affairs. Rather, the "the inherent power over internal matters essential to self-governance and self-determination is not limited to the existence of Indian country, but is independently founded on membership alone" (Case and Voluck 2002:428). Absent "Indian country," however, the court found no bar to concurrent state jurisdiction (Johnson 2001). Johnson characterizes this decision as introducing a two-tiered approach to sovereignty in Alaska: sovereignty over members and sovereignty over territory.

John v. Baker may have historic consequences in terms of opening the door to greater degrees of Native village control over local law enforcement, substance

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purposes, such as access to BIA programs (Case and Voluck 2002).

abuse, and domestic relations, if the state gives comity[12] to tribal court decisions. As a practical matter, tribal governments may be the only source of law enforcement or dispute resolution in remote areas where the state has neither resources nor incentive to administer justice.

The administration of justice leads logically to PL 280, also discussed earlier. PL 280 gives Alaska criminal jurisdiction and the right to adjudicate civil issues in Indian country; without Indian country, PL 280 has no force (Case and Voluck 2002), and Native villages and people are subject to the same state jurisdiction as other citizens of the state. However, state acknowledgment and comity with tribal justice systems in bush communities would fill a crucial role for the same reasons noted above. PL 280 does not preclude concurrent tribal jurisdiction. Instead of taking the adversarial position that the state has in the past, one can envision cooperative agreements and compacts between the state and tribes that would locate responsibility for local law enforcement (including hunting and fishing regulations) to the tribes, provide training and technical assistance as needed, and allow them to call on state authorities when a situation is beyond

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[12] "Comity" is the principle under which one government jurisdiction voluntarily recognizes the law and judicial decisions of another jurisdiction, "out of deference and mutual respect." It is, however, not mandatory as would be a constitutional requirement to give "full faith and credit" to the other court's jurisdiction (Case and Voluck 2002:429 n.397). "Full faith and credit" would be a more substantive recognition of tribal sovereignty.

local capacity to manage. These ideas, in fact, appear in the report of the Alaska Native Commission in the section on Alaska Native Tribal Government (Alaska Natives Commission 1994b). The same report cites a study by the Alaska State Judicial Council attesting to "the continuing importance to the state of tribal judicial activity by special courts and village councils in matters of village social control throughout Alaska, this despite the state's longstanding position that it had been delegated exclusive criminal law authority under PL 280." Bill Cotton, Executive Director of Alaska Judicial Council, testified, "Basically, the state does not have the resources, especially at the present time, to provide comprehensive justice services in rural Alaska."

Recall that PL 280 specifically excludes the state from regulation and land use functions in Indian country. Ironically, then, PL 280 would preserve tribal jurisdiction over land even where it usurps other kinds of tribal authority, if there were Indian country in Alaska. This raises several questions:

Which kind of Native land would best be designated Indian country? That requires looking at the various types of Native land owning and governing institutions, and how each would be affected by a finding of Indian country.

- What would a new definition of Indian country look like?
- What are the limits to unifying native governance of land and people *without* Indian country?

- Finally, what other possible solutions are there to enhance Native control or management of subsistence resources and habitat?

The following discussion will take up each of these questions in turn.

PART 3. DISCUSSION

A number of different Native institutions own Native land or govern Native people in Alaska. These are[13]:

- Tribal or traditional councils
- IRA governments
- Municipal and borough governments
- Village corporations
- Regional corporations

With this network of overlapping institutions, with differing authority over land and people, and articulating with the state and federal governments, what is the hope for unifying governance and land management? One possible solution is to designate certain Alaska Native lands as Indian country. This would require changing the definition of Indian country as codified. Because subsistence practices are integral to the perpetuation of Alaska Native cultures, access to and management of the habitats of subsistence resources are crucial to community well-being as well as cultural identity. Such control is an aspect of tribal sovereignty, and Indian country confers a wider range of sovereign powers than Alaska Natives are now permitted, after *Venetie*. Can a modified definition

[13] The regional and village non-profit corporations are not considered here because they do not own large amounts of land and do not have governing authority, although they often provide government-like services.

of Indian country facilitate the goal of Alaska Natives to assert greater control over subsistence resources?

The next section will consider the effect of redefining Indian country to apply to different types of Alaska Native land and what the costs and benefits might be to each type of Native institution.

3.1 Native institutions and Indian country

3.1.1 Traditional governments

Tribal or traditional governing councils and IRA governments are federally recognized governments that are exclusively Native, by definition. In this category, Case (Case and Voluck 2002) also distinguishes the Tlingit and Haida Central Council as a separate type of federally recognized Native government.

Traditional governing councils do not have a federally approved IRA constitution, nor are they organized under state charter (as a municipal government). These councils are a product of custom and tradition of their Native constituents. Of the 227 Alaska tribes listed by the BIA as federally recognized in 1993, 151 had traditional governments (Case and Voluck 2002:319). These governments have the same inherent sovereign powers as any other tribal government, limited only by what Congress has explicitly denied them. Thus,

based on Felix Cohen's[14] criteria for inherent sovereignty (Case and Voluck 2002:321), they can define conditions of tribal membership, regulate domestic relations of members, prescribe rules of inheritance, levy taxes, regulate property within its jurisdiction, control member conduct by municipal legislation, and administer justice. If recognized as a tribal organization under the Indian Self-Determination Act, they also have the ability to administer programs under 638 contracting. With Public Law 280 and the cases described above, Alaska tribal governments do not in fact have all of the powers described. Despite the interference of state jurisdiction in some arenas, the tribes retain their sovereign immunity and are eligible for all federal services, benefits, programs, and privileges of recognized Indian tribes. Most significant, however, because the Native corporations are the landowners, few tribal governments own land, i.e., "property within its jurisdiction."

How would Indian country affect traditional governments?

If Indian country were extended to lands owned in fee simple by traditional councils, they would regain some of the type of jurisdiction held by reservation governments in the lower 48. If the land held by the tribal government were

[14] Felix Cohen is the author of the authoritative reference book on federal Indian law, frequently cited by the most knowledgeable

Indian country, a tribal council government would be able to tax and zone it, and establish and enforce hunting and fishing regulations. This would once again make logical the "retribalization" movement that had started prior to the final *Venetie* decision, of transferring corporate land to tribal government in order to protect it from the risks of corporate ownership.

3.1.2 IRA Governments

IRA governments were authorized when the 1934 Indian Reorganization Act was extended to Alaska in 1936. Because there were few reservations, the criteria for forming an IRA government were amended to permit organization based on "a common bond of occupation, or association, or residence" (25 U.S.C.A. §473a) (Case and Voluck 2002:322). IRA governments have all the same inherent sovereign powers as traditional governments, plus some additional rights and powers. Perhaps the most important difference between traditional and IRA governments is the power of IRA governments to "prohibit alienation of Indian lands without tribal permission." Even the Alaska Supreme Court, never one to interpret liberally in favor of the Natives, has recognized this power (Cornell, Taylor, et al. 1999:18). IRA councils tend to be the primary form of government in unincorporated villages. As of ANCSA's passage, many of the

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lawyers, judges, and scholars.

IRA governments were not functioning due to lack of funds and ambiguity as to their status. By 2002, however, 75 villages had organized IRA governments (Case and Voluck 2002:320). Village IRA governments revived in the 1970s when they became the preferred "tribal organizations" for federal government contracting under the Indian Self-Determination and Education Assistance Act of 1975. These governments also could sanction non-profit corporations to contract with the federal government to administer programs and deliver services to their villages under 638.

Like traditional councils, IRA governments for the most part have no land base—their ANCSA regional and village corporations own their land, except in the few cases where land has been transferred to the tribal government (such as in Venetie). Territory within reservation boundaries is the typical location of Indian country, and defines tribal jurisdiction. A dependent Indian community can also be Indian country, but again, this implies a bounded location. What then, would constitute Indian country within which tribal governments could exercise jurisdiction?

How would Indian country affect IRA governments?

Lands acquired by or transferred to an IRA government would be protected from the risks of corporate ownership, as they would be if owned by a traditional

council-style tribal government. Native Alaskan IRA governments should have the same powers and jurisdiction as IRA governments on conventional reservations that are Indian country. In Alaska, these would be somewhat restricted, by PL 280 and the same caveats discussed under "Traditional Councils," above. The same advantages noted above, of having the power to regulate land use, hunting and fishing in Indian country, also apply to IRA governments.

Outside Alaska, some IRA governments are also the tribe's business corporations, causing some politicizing of business activities and vice versa. Cornell and Kalt (1992) have recommended that in the name of economic efficiency tribal governments should not make "day to day business decisions" (Cornell and Kalt 1992). Following that advice would meant that Indian country powers in Alaska should be clearly delimited into groups with separate responsibilities for governance and for business. Tribal governments would set strategies for land use, regulation, and economic development. Day-to-day business operations would be left to businesspeople (preferably local Alaska Natives) hired for their business expertise. The village profit-oriented corporations can fulfill this role; village governments would have to work closely

with them in such a scenario, and with regional profit corporations that own the subsurface rights to village corporation land.

With Indian country, village corporation land slated for development, which would open it to state and municipal taxation, could be transferred to tribal ownership, giving it Indian country protection from taxation and regulation by entities other than tribal government. Such a tax-evasive transfer, however, would undoubtedly aggravate the state and local governments, making it necessary for tribal governments to collaborate closely with those institutions to minimize social or economic backlash. For further discussion, see "Native Regional Profit Corporations" and "Native Village Profit Corporations" in this section.

3.1.3 Tlingit and Haida Central Council

The roots of the Tlingit and Haida Central Council are in an organization formed by the Alaska Native Brotherhood and Sisterhood of southeast Alaska to press land claims in the 1930s. The Central Council is a recognized tribe, but is an umbrella for the other 21 recognized Tlingit and Haida communities in Southeast Alaska. The legislation that recognized the Central Council specifies that "other federally recognized tribes in southeast Alaska have 'precedence over the Central Council ... in the award of federal compacts, contracts, or grants to the extent

that their service population overlaps'" (Case and Voluck 2002:328). The Central Council must receive the approval of its member communities to take on government contracts under the Self-Determination Act (638 contracting).The Central Council has a constitution that defines its powers. They are substantially the same as those of IRA governments, but unlike IRA governments, none of the Council's powers are subject to approval by the Secretary of the Interior (Case and Voluck 2002:328).

What would Indian country mean to the Tlingit and Haida Central Council?

The Tlingit and Haida Central Council could remain in the same relationship to its member governments as now. The 21 member communities would have the Indian country powers over land under their control, and the Central Council would exercise jurisdiction over land, if any, under its exclusive control. A more adequate answer to this would require additional information about the land base and operation of the Central Council, and its relations to member communities, a task beyond the scope of this document.

3.1.4 Municipal Governments

Municipal governments are not Native governments, except by default in predominantly Native communities where Natives hold elected office. They

must represent all residents of the municipality, not just Natives (Case and Voluck 2002). A number of villages with IRA governments are also organized as state-incorporated municipalities. Cornell et al (1999:15) count 49 organized cities that operate concurrently with IRA governments. Municipal governments may compete with IRA councils for certain types of state or federal funding. On the other hand, IRA councils in even large municipalities have taken on responsibility for significant social and community service programs that serve Natives and non-Natives alike (See Appendix C for an example). The cost/benefit balance of municipal organization is ambiguous; some municipalities have disbanded and left governance (as well as assets and debt) to an IRA council; in other cases, IRA and municipal governments have collaborated successfully (Case and Voluck 2002; Cornell, Taylor, et al. 1999).

What would Indian country mean to municipal governments?

ANCSA Section 14(c)(3) gave to municipal corporations in Native villages that were to have village corporations (or to the state in trust for future municipal corporations) title to "the surface estate of the improved land on which the Native village is located." That suggests that by definition municipalities are not Native landowners. Indian country would therefore apply to Native land located within or surrounding a municipality. Section 14 (c)(1)

and (2) also conveyed title to individuals, businesses, and non-profit corporations to the land they occupied within a village, making for checkerboard ownership. See discussion and Figure 3 under "Native Village Profit Corporations." Indian country if applied to Native owned land within municipalities would potentially deprive the municipality of taxes. This might not be a great loss if there is no business tax base, but the loss of property taxes from individual landowners might have an impact on municipal budgets. Costs and benefits of Indian country to a municipality would depend on the proportion of Native landowners, how much business property exists, how much of it is Native-owned, whether it was a Native village originally, how much land is owned by the Native village corporation (if any—some villages do not have corporations), and what type of Native government exists concurrently. As noted under "IRA governments," there is the potential for mutually beneficial collaborations between tribal and municipal governments.

3.1.5 Borough government

The borough is an intermediate level of government between municipal and state governments, established in the state's constitution and defined in legislation (Cornell, Taylor, et al. 1999). It is sometimes compared to a county, but that is not considered an exact analogy (Case and Voluck 2002). The powers

of boroughs have geographic dimension; they are areawide, nonareawide (not applicable in organized municipalities within the borough), and service area ("an area of more intense or different service delivery that may include a city if the city's council or voters approve" (Cornell, Taylor, et al. 1999:21). The "unorganized borough" is Alaska's term for areas where no regional, municipal government exists (Case and Voluck 2002).

Boroughs are Home Rule or Second Class, with somewhat different scopes of power. Home rule boroughs write their own charter; second class boroughs follow Alaska state statutes. Both must provide education areawide; conduct planning and zoning areawide (although cities in second class boroughs may make their own regulations); both may tax property, with limitations. Whether a home rule borough collects sales tax depends on its charter; a second class borough may have a sales tax, if approved by voters (Cornell, Taylor, et al. 1999). Clearly a benefit of borough organization is the ability to collect taxes, where there is adequate economic activity to generate meaningful revenues. Thus the oil-rich North Slope, mineral-rich Northwest Arctic, and timber-rich Yakutat regions have organized into boroughs. The formation of the North Slope borough in 1972 gave the Arctic Slope Natives leverage over oil companies through taxation and zoning, and permitted them to issue billions of dollars in

bonds for capital improvements. Bonds are repaid with funds from oil field taxes. The borough structure has allowed them to profit "more from the Prudhoe Bay oil field than have any other Alaska Natives," earning them more than $3.8 billion since 1972 (Mitchell 2001:528). Like municipal governments, borough governments must represent all residents regardless of ethnicity, so boroughs will only benefit Native interests where Natives are the majority population. Nevertheless, "the power to regulate certain lands outside of towns and corporation lands, the ability to tax, and the ability to administer state services with minimal difficulty are advantages the borough form has over tribal and ANCSA institutions" (Cornell et al 1999).

How would Indian country affect boroughs?

The same considerations as for municipalities would apply—especially the fact that the borough, as a state-chartered entity, is not Native land. In addition, boroughs encompass huge land areas which may include many villages, leading to the possibility of checkerboard jurisdiction, conflict with non-Native municipalities (if any) within the borough, and potential conflicts of interest with the Regional Native corporation. The quality of relations with the regional corporation would depend on whether regional corporation lands have Indian country status, and whether a Native-dominated the borough government

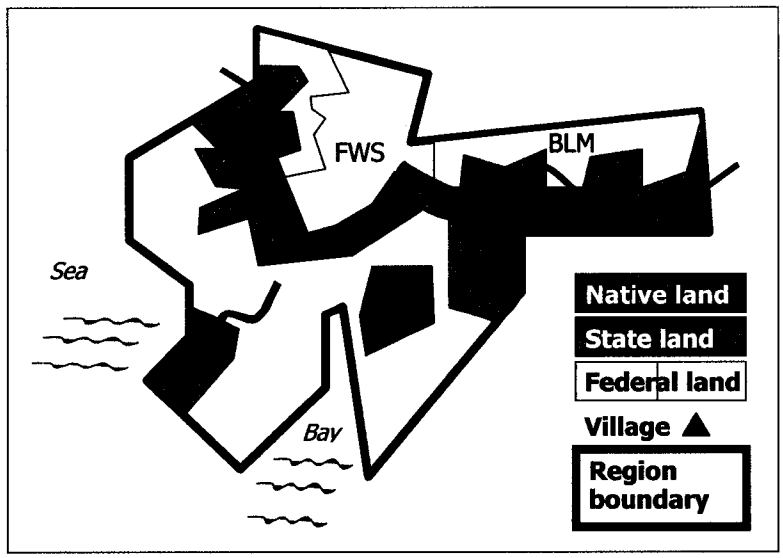
extends them any special treatments, such as tax abatements, in return for corporation support of, for instance, social or cultural services or infrastructure.

3.1.6 Native Regional Profit Corporations

The twelve Regional Native corporations formed pursuant to ANCSA among them own approximately 22 million acres of land[15] in fee simple, to which they have rights to both the surface and sub-surface estate. They also own the rights to the subsurface estate of the Village corporation lands, but "the right to explore, develop, or remove minerals from the subsurface estate in the land within the boundaries of any Native village shall be subject to the consent of the Village Corporation" (ANCSA Sec. 14(f)). They also received title to existing cemetery and historic sites within their regions.

[15] The thirteenth regional corporation for non-residents received cash but no land under ANCSA.

Figure 2. Schematic of land tenure in regions



Their exclusive shareholders are the Native villagers enrolled in their region at the time of ANCSA's passage, and those issued stock under subsequent amendments; their boards of directors are by law to be comprised of stockholders over the age of eighteen, in other words, Natives. The regional corporations have the power to require villages in their region to help finance projects undertaken by the regional corporation that would benefit the region as a whole (ANCSA Sec. 7[L]).

An argument could be made to treat ANCSA regional corporation lands as Indian country because although ANCSA corporations are chartered under state law, they are unique in most other respects:

- Restrictions on shareholders: only Alaska Natives who are members (not necessarily current residents) of villages within the region can be voting shareholders. Non-Native shareholders cannot vote. These restrictions, originally set to expire in 1991, are now retained indefinitely unless a corporations shareholders vote to terminate them.
- Requirement for Native boards of directors
- Undeveloped or unleased Native corporation lands are indefinitely exempt from state and local taxation
- Regional corporations (except in the Southeast) are required to share 70% of revenues from timber or subsurface resources with the other regional corporations
- ANCSA corporations have access to Native business development programs in addition to public and private sources of funding available to non-Native corporations (Case and Voluck 2002:336)
- Whereas regular corporations are required by law to make equal distributions of dividends to each shareholder, amendments to ANCSA enable Native corporations whose shareholders vote to do so to favor certain shareholders, such as elders. by establishing "settlement trusts." These trusts must be used for the purpose of promoting "the health, education and welfare" of beneficiaries, or to "preserve the heritage and culture of Natives" (Case and Voluck 2002:184).
- ANCSA corporations are exempt from federal securities law (Case and Voluck 2002:182)
- ANCSA corporations were formed with the expectation that they would prioritize economic development that would provide jobs and fund social services in shareholder villages. Yet the regional corporations were required to incorporate as profit making entities, and operating profitably is not easily compatible with the provision of community and social services in remote villages with few economic opportunities. The corporations thus face a contradictory, dual mission which few have been able or willing to fulfill.

Such characteristics distinguish ANCSA regional corporations from ordinary business corporations, making them a unique class of Native landholder whose lands should perhaps be eligible for Indian country status. Skinner (1997) suggests that amending the Indian country statutes to include lands owned by the Alaska Native corporations as Indian country would strengthen tribal powers, and promote real justice for Alaska Natives in the modern era. Making corporation land Indian country would mean "the state and Native corporations could no longer ignore tribal governments or their powers. Native corporations and tribal governments would be forced to work together to promote the 'best interests' of Alaska's Native peoples." Her conception of corporate Indian country casts the corporations as "trustees" for communal land, which is the birthright of all Alaska Natives, whether or not they are shareholders. (Skinner 1997:121-2).

On the other hand, ANCSA corporations are excluded from the list of recognized tribes, and do not have governmental powers. For instance, they cannot pass laws, assess taxes, or establish courts in which to adjudicate member disputes (Skinner 1997). Further, the regional corporations are for the most part not accountable to the villages or tribes for their actions (Cornell, Taylor, et al. 1999), and anecdotal evidence suggests there exists resentment in villages at their

disconnectedness from village concerns, making them inappropriate to become units of government. What then would be the governing entity if Native corporation lands were to be Indian country?

How would Indian country affect Regional Native profit corporations?

Native regional corporation land is already free from federal, state or local taxes until it is leased or developed. As Indian country it would remain tax exempt even under development. This would be advantageous for the corporations, but not for the state, borough, or locality in which the corporate lands are located. But there may be ways around this problem. As with reservation gambling revenues in the lower 48, a requirement for tribes to compact with the state and/or localities for some level of revenue sharing might assuage the loss of property tax income.

Assuming that corporations are not given the status or powers of government, their land as Indian country would have to be administered by one or more tribal/village governments; these may disallow the type of development proposed by the regional corporation, or levy fees or taxes themselves to support the villages. Giving villages this degree of control might complicate regional corporation development plans. As it is, village corporations must consent to regional corporation exploration, development, or removal of minerals from its

subsurface estate, which is owned by the regional corporation (ANCSA Sec 14[f]). Regional corporate land as Indian country under the governance of one or more village governments would expand the area requiring external consent for development.

With the potential for such restrictions, regional corporations may choose to forego Indian country protection, pay local taxes on development, and retain the liberty to develop the land as they wish. Because they are not government entities, Indian country status could well create more problems than benefits for regional corporations.

Byron Mallott, a former Native corporation CEO and current CEO of the First Alaskans Foundation, commented with regard to corporation lands,

> Economic institutions, like corporations, really don't have use of non-economic assets, so if you can't use land productively in your business it ought to be somewhere else, because it's not efficient for the corporation. ... those assets, like land that can't be employed vigorously to advance economic interests of the corporation, ought to be placed elsewhere.
>
> In terms of our governance, our tribal jurisdictions need some kind of land base in which to exercise their jurisdictions. Over time we'll see a process of ANCSA corporations turning land over to governance institutions that are outside the corporations and the corporations will retain just those lands they can employ very aggressively in the business. ... I see tribal government growing (LitSite Alaska 2001).

Mallott's comments suggest that a sort of free-market effect will contribute to the redistribution of ANCSA lands to those entities that will make the most effective use of them. Regional corporate lands that do not produce cash income can be transferred to a village government that will protect them for subsistence use. In such a scenario, however, village government must have the jurisdiction to regulate use and activities on their land, a jurisdiction that would come automatically if village (tribal)-owned lands were Indian country. Such an economically efficient redistribution of land would also minimize the problem of villages as Indian country (with land use restrictions) within regional corporation lands; presumably the regional corporation would have given or sold to the village land it did not want anyway, removing the potential for conflict between regional and village priorities.

3.1.7 Native Village Profit Corporations

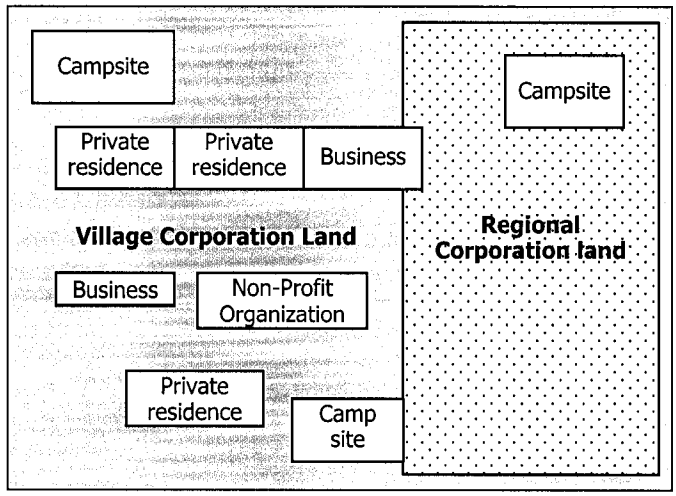
Like the regional corporations, ANCSA village corporations were formed under ANCSA to share in its benefits at the local level. In contrast to the regions, however, the villages had the option to incorporate as either for-profit or non-profit. None took the non-profit option. Also like the regional corporations, village corporations are limited by ANCSA from selling their stock to non-members (ANCSA Sec. 8[c]). The regional corporations originally oversaw the

distribution of ANCSA cash to each village, contingent upon the region's approving the village's plans for using the distribution (ANCSA Sec. 7[j-l]). The appropriate regional corporation also had to approve the villages' articles of incorporation (ANCSA Sec. 8[b]).

Under Section 14(c)(1-4) of ANCSA, once a village had selected its land, it was to convey title to the surface estate of primary residences, businesses or campsites to the occupants (Native or non-Native); title to the surface estate occupied by a non-profit corporation to the non-profit for fair-market value or less; and title to the "surface estate of the improved land on which the Native village is located and as much additional land as is necessary for community expansion, all rights-of-way for public use, and other foreseeable community needs..." (Sec. 14[(c][3]) to the municipal corporation of the village, or to the state in trust for a future municipal corporation, in no case to be less than 1,280 acres. The federal government was to receive title to airports, airport beacons, other navigation aids and acreage necessary for easements and operations (Sec. 14[c][4]).

These stipulations make a checkerboard of land ownership in villages. A village core area might then look something like Figure 3.

Figure 3. Schematic of land tenure in a village



Because the regional corporations were established to earn profits to benefit their shareholders, they selected lands based on their economic potential, rather than for their subsistence values. The villages, on the other hand, struggled to select lands with important hunting grounds, campsites, fishing grounds, burial sites, and other cultural resources (Chance 1990) from the much larger areas they had traditionally used. Village lands are therefore more likely to hold important subsistence resources. Yet, like regional corporation lands, these lands belong to the corporation, not village tribal governments, raising the same question: what would be the governing entity if village corporation lands were to be ascribed the status of Indian country?

How would Indian country affect village corporations?

Giving village corporation lands Indian country status would create some of the same objections as with regional corporation lands. The village corporations are not governments either, and the loss of tax revenues would similarly offend the state. But the village corporations may stand a better chance of having land use priorities consistent with those of villagers, and of working collaboratively with village governments to protect habitat and subsistence resources on village corporation lands. These lands seem to be the most appropriate candidates for Indian country because they are carved out of traditional use areas surrounding the village core, and have the most relevance to subsistence.

The village is the traditional unit of Alaska Native governance, and remains so whether in the form of traditional councils, IRA governments, or other Native governing institutions. Most Alaska village governments are federally recognized tribes, eligible for the same benefits and with all the powers of other sovereign Indian nations, except with respect to PL 280 and to governance of territory. It would make sense, therefore, for village lands to come under the scope of Indian country, and be under the control of tribal government. It is at the village level that subsistence concerns are most vital. Tribal government is local, and village subsistence users are those most knowledgeable about the

status of local wild resources, making them better-equipped to monitor local environmental conditions and social needs than city governments or the corporations (Flanders 1998). Tribal enterprises such as wildlife monitoring, land management and guiding non-member sportsmen could provide local employment and tribal income. Such ventures could be in collaboration with state or federal agencies and existing guide companies that wished to maintain access to Native areas for their clients.

Giving village lands (both fee land and village corporation land) Indian country status would enable village government to establish local wildlife and land use regulations, charge fees to non-members for access or guide services, and generally to control use of their resources and profit from them appropriately.

The next section presents a rationale for amending the Indian country statute, and suggests what changes to the language of the Indian country statute would need to occur if Indian country status were to be applied to village corporation, or other Native-owned lands in Alaska.

3.2 Re-defining Indian country

The Indian country statute was developed in 1948, years before the ANCSA settlement in the form of corporate land holdings was conceived. It fit the

conditions of reservation tribes in the lower 48 states. Earlier changes to the definition of Indian country had occurred in response to changes in reality on the ground. Clearly the dominant society's conception of Indian nations and their abilities and rights to govern themselves has changed since the early 20th century. The current federal policy of self-determination is at odds with a requirement that tribes be dominated by federal governance to justify their claims to Indian country. Alaska's unique land tenure arrangement, outside the scope of previous Indian reservation and allotment practices, cries out for adapting the definition of Indian country to fit Alaska's conditions. Such change holds the potential to bring Alaska Native tribal sovereignty into alignment with that of other U.S. Indian nations.

When the criteria for Indian country were established in 1948, they *described* the status of tribal land at the time they were defined; the criteria did not *prescribe* what Indian country should be in the future. The new type of land tenure created by ANCSA was neither imagined nor anticipated by those who wrote the definition of Indian country nearly thirty years before ANCSA and the policy of self-determination. The time has come to recognize Alaska Native land as Indian country and amend the Indian country statute to do so.

Changing an Indian law to make it applicable to Alaska Natives has precedent. For example, language of the 1934 Indian Reorganization Act was amended in 1936 to include Alaska Natives, whose villages may consist of members of different Native groups:

> Groups of Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond of occupation or association, or residence within a well-defined neighborhood, community or rural district, may organize to adopt constitutions and by-laws and to receive charters of incorporation and Federal loans ... under the Act of June 18, 1934 (the IRA) (Case and Voluck 2002:83).

Another revised section allowed lands in the use or occupancy of "Indian or Eskimos," and land previously reserved to federal jurisdiction but in actual use or occupancy by Indians or Eskimos within the Territory of Alaska, to be set aside as reservations (Case and Voluck 2002:83).

That the definition of Indian country might change also was not previously unimagined. An important Supreme Court case, *Ex Parte Crow Dog* (109 U.S. 556) in 1883, included the comment that the concept of Indian country was "flexible," and "may be considered in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes" (Case and Voluck 2002:400).

Changes have indeed "taken place in our situation." With the passage of ANCSA, the federal superintendence prong of the Indian country test has outlived its general applicability as surely as have the racist attitudes that generated Indian policy from the earliest times. The requirement of federal superintendence to establish sovereign powers for Alaskan tribes is an oxymoron that is in direct conflict with the mandate for Alaska Native self-determination introduced in ANCSA, and the federal policy of Indian self-determination in general. While tribal sovereignty has been somewhat undermined in recent years by Supreme Court decisions that favor state over tribal control[16], self-determination is still the official stated Indian policy of the U.S. government (Cornell and Kalt 1992) and a lifeline for all tribes. The ability to act as sovereigns, to control Native property and to have access to subsistence resources on both Native and public land, as provided for in federal law, is a key component of Alaska Native self-determination and cultural survival. Establishing a unique standard for Indian country in Alaska will contribute to Native empowerment to attain those goals.

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[16] Such as Nevada v. Hicks (121 S.Ct. 2304 [2001]), which found that a tribe did not have authority to regulate state game wardens serving process to a tribal member at his home on tribal land, for an alleged off-reservation violation of state law.

3.2.1 A new definition of Indian country

> Please ask Congress to make ANILCA consistent with the findings that Congress has already made, and extend the priority or protection for subsistence management to Native-owned lands which were primarily selected in reliance on the idea they would be protected." -- Testimony of Paul Tony, at ANC hearings in Fairbanks, early 1990s (Alaska Natives Commission 1994b).

The 1991 Amendments to ANCSA included a disclaimer that they "should not be construed to validate or invalidate 'any assertion that Indian country (as defined by 18 USC 1151 or any other authority) exists or does not exist' in Alaska" (Skinner 1997:117). Thus it would seem that ANCSA does not preclude the existence of Indian country in Alaska. As Justice Thomas noted in concluding the *Venetie* opinion, Congress has the power to decide whether Alaska Native land should be Indian country, by amending the Indian country statute.

The current language of 18 USC §1151 says:

> Indian country"... means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through same.

What this means at its most basic is "land in trust." Because Alaska Native lands are not held in trust by the federal government, and the terms and history of ANCSA show clearly that neither Natives nor Congress wanted them to be, an amended definition would need primarily to address that distinction. Thus a section "d" added to the statute might say:

> "In Alaska only, Indian country means: Land owned in fee simple by Alaska Native village for-profit corporations; or land owned in fee simple by Alaska Native IRA or tribal governments that are recognized under the Tribal List Act of 1994 (as amended 2000). In order to be considered 'Indian country,' village corporation land must be subject to the authority of the IRA or tribal government, or other recognized tribal governing entity, for purposes of managing surface resources and wild fish and game."

Taking language from the Tribal List Act of 1994, it should say in addition that

> "Recognized Alaska Native IRA or tribal governments have the same governmental status as other federally acknowledged Indian tribes with a government-to-government relationship with the United States; are entitled to the same protection, immunities, privileges as other tribes; have the right, subject to general principles of Federal Indian laws, to exercise the same inherent and delegated authorities available to other tribes; and are subject to the same limitations imposed by law on other tribes."

To protect existing property owners, the amendment will undoubtedly have to include disclaimers to the effect that the application of Indian country to these lands will not affect any land previously patented to any individual, Native

Regional or other private corporation, or the state. And, most crucial, the amendment would have to specify that it does not affect the status of any tribes outside of Alaska, regardless of land ownership.

Realistically, such an amendment is not likely to be promulgated any time soon. Members of the Alaska Congressional delegation hold powerful committee positions in Congress, and are not afraid to throw their weight around[17] (Firestone 2003). Other powerful interests, such as the oil and timber industries, would likely balk at having to deal with the restrictions Indian country might impose. Not least, it is probable that at least some regional Native corporations would object to having land areas within their holdings under a different jurisdiction that might restrict their development options or interfere with business, such as private timber contracting in the Southeast (Dombrowski 2001). Although "Alaska Natives" is a convenient "collective identity," it must be remembered that it glosses a diverse group of people and interests which cross-cut every stakeholder category: rural and urban, subsistence and commercial, "traditional" and "modern," marginalized and powerful. ANCSA created social and economic divisions that are not readily resolvable (Dombrowski 2001). It is

[17] On March 19, 2003 the Senate voted to remove a provision to open the Alaska National Wildlife Refuge to drilling from a budget resolution. Alaska's Senator Ted Stevens, chair of the powerful Appropriations committee, was quoted in the New York Times as saying, "People who vote against this today are voting against me. I will not forget it."

necessary therefore to consider alternative solutions to the problem of Alaska Native control or management of fish and game for subsistence and culture, if Indian country were *not* to be restored to Alaska.

3.2.2 What are the limits to Native governance without Indian country?

> While Alaska tribes are federally recognized tribes and continue to retain important aspects of sovereignty, without the Indian country designation tribes will be limited in their ability to regulate their land.
> ...
> We must begin to consider our other options, whether they be in the legislative arena, international arena, or other avenues. ... (Kendall-Miller 1999)

Not all sovereign powers are linked to Indian country. As previously noted, Alaska tribes already have substantial sovereign powers as a function of their federal recognition as tribes, and of their inclusion in various statutes affecting Native Americans. They have the same access to contracting and compacting to deliver services under the Self-Determination and Administration Act. Even the state of Alaska has recognized tribal sovereignty over members, domestic relations, and other internal affairs. It is governance of territory that is the salient condition for control of subsistence resources, however, and it is this condition that Alaska tribes lack. One way of gaining territorial jurisdiction is through

Indian country, as discussed above. There are other solutions to consider, many of which come from Alaska Natives themselves.

3.3 Options for Native control of subsistence resources

The Alaska Natives Commission Report (1994) developed three "overarching principles" that frame its discussion and analysis of issues facing Alaska Natives:

> 1. Self-Reliance: While using the rights they have resulting from the special relationship of Native Americans with the federal government and rights they have as citizens of the United States and Alaska generally, self-reliance—which includes acceptance of responsibility for individual and community actions—is the key to Alaska Natives' future well-being in social, cultural, economic, education, and physical and mental health areas.
>
> 2. Self-Determination: To be effective, policies and programs affective Alaska Natives must, to the largest extent possible, be conceived, developed, and carried out by Alaska Natives.
>
> 3. Integrity of Native Cultures: Policies and programs affecting Alaska Natives—chief among them being policies dealing with rights to subsistence hunting and fishing—must recognize, take advantage of, and maintain and enhance the traditional values of Alaska Native cultures.

Each of these speaks to an aspect of sovereignty, and Native control over Native futures without abandoning the wisdom of Natives' past. The federal trust relationship, ANCSA, and any other non-Native institutions that Alaska Natives would utilize are all only tools to re-acquire the self-reliance and

community self-esteem that were characteristic prior to U.S. intervention in their homeland. As the policy statements above illustrate, Alaska Native people do not separate their sovereignty from their traditional and contemporary subsistence culture. One comment is representative of many:

> Native people and their communities seek control over the most fundamental parts of their lives—the parts that define what it means to be a Native community—protection of Native lands and resources; promotion of the health, safety and welfare of Native people and their culture through education, Native service delivery, and protection of cultural artifacts and practices, preservation of Native land and resource uses also called subsistence; and self-government, the prerogative to make their own rules and live by them. To these matters, government and others attach the tag sovereignty. ... – Shirley Lee, testimony to the AFN, Fairbanks 1992 (Alaska Natives Commission 1994b).

ANCSA regional and village corporations each control about 22 million acres of Alaska's land. Those 44 million acres total about 12% of the state's land area. The state only holds about 28%, and private lands other than Native corporations amount to a fraction of 1%. The remaining two-thirds is in federal hands. The federal government regulates and enforces fishing and hunting regulation on federal land in Alaska, as a result of the *Katie John* decision and Alaska's refusal to comply with ANILCA. The state regulates everywhere else, on state and private (including Native-owned) land. Native landowners do not have the regulatory powers that they have in the lower 48. The corporations can

post their lands against trespassing, and institute policies concerning shareholder use for subsistence purposes. At least some have permit systems for members, non-members, or both, who wish access to corporate land for hunting, fishing, camping or other purposes. What other mechanisms can serve to enhance Native control of subsistence resources?

3.3.1 Cooperative management or co-management

The food replacement value of the subsistence harvest has been estimated at more than $200 million per year (Haynes 2003b; Wolfe 2000). The fish and game populations on which subsistence users in Alaska rely are mobile and seasonal. Official regulations that limit harvests during the only time when a species is available, or during the best time to hunt it, are likely to be defied (Holen 2003a). Self-regulation, on the other hand, is based on the needs of the community for food and cultural/ceremonial use. In the Southeast, for instance, the traditional system of fishery management conserved fish through rules for escapement, personal use areas, and monitoring based on historic knowledge of the resource abundance and community usage (Smith 2003). In the past, clan leaders acted as resource managers who determined who could fish where, when and with what weapons, and how much each could take (Ramos and Mason 2003). Thus there is

a large body of long-term local and traditional knowledge embodied in both Native and non-Native subsistence users.

The Alaska Natives Commission report (1994) calls for implementing cooperative local management and contracting under ANILCA's Section 809. Since October 1999, when the federal government assumed management of fisheries in federal waters in Alaska, the Fish and Wildlife Service (FWS) has begun establishing various co-management arrangements, through its Office of Subsistence Management. The FWS Subsistence Fisheries Resource Monitoring Program implements Section 812 of ANILCA, which calls for using local knowledge in conducting research to fill information gaps. FWS interprets this mission as a call to build capacity in rural organizations that will enable them to participate meaningfully in fisheries management (Wheeler 2003). This dovetails nicely with the ANC's comment that

> ...the effort to make local residents an integral part of the system provides knowledge that only they possess, as well as a cultural authority at the village level that no amount of training or money can produce in bureaucrats. Moreover, it encourages local responsibility for the arrangements in place and reduces the adversarial nature of relationships between agency personnel and subsistence users (Alaska Natives Commission 1994a).

Section 805 of ANILCA mandates establishing regional advisory councils composed of subsistence users, who provide responses and recommendations on proposed regulations to the Federal Subsistence Board. The Federal Subsistence Board consists of the Alaska regional directors of the National Park Service, the Forest Service, Bureau of Land Management, U.S. Fish and Wildlife, and the Bureau of Indian Affairs (Case and Voluck 2002). Fish and Wildlife is the lead agency. The chair is appointed by the Secretary of Interior and in 2003 was an Alaska Native (Victor Fisher, ISER, personal communication 3/1/03). Representatives from each of the five agencies and the FWS's Office of Subsistence Management staff the board, along with "six specially designated regional council coordinators." The Board can accept the subsistence management recommendations of the regional councils as long as they are supported by substantial evidence, are consistent with "recognized principles of wildlife conservation," and are not "detrimental to the satisfaction of subsistence needs." The state is expected to assist the regional councils in their functions, but local advisory committees may be created to do so if ADF&G does not fulfill this responsibility (Case and Voluck 2002).

The state of Alaska established local advisory committees for fish and wildlife management as early as 1959, and later worked with regional fish and

game advisory councils in developing subsistence management plans and regulations, but the collaborative process was not nurtured and never fully developed (Haynes 2003b). Local advisory boards were stocked with commercial and sports interests, and Native and other subsistence users had little voice at that table (Simeone 1998). More recently, anthropologists within the Alaska Department of Fish and Game (ADF&G) Subsistence Division and the Division of Wildlife Conservation have been able to help department biologists understand the importance of stakeholder participation and the value of their long-term knowledge of local resources (Fall 2003; Haynes 2003a; Holen 2003b). The state now appears to be making a good faith effort to involve stakeholders in fisheries and wildlife management. A statewide working group was organized by ADF&G and the Alaska Inter-Tribal Council (AI-TC), consisting of 2 biologists and 1 anthropologist from the state, 3 federal and 5 tribal representatives. In a series of meetings in 2000, they reviewed existing harvest assessment programs and developed recommendations for a "unified" (not necessarily uniform) subsistence harvest assessment program. (It is "unified" in the sense that it adheres to certain principles, but not "uniform" in that it must be flexible to account for diverse harvest situations.) Among its program evaluation criteria are questions such as whether data is really representative of all users, and the

level of local involvement in data collection. Ironically, local subsistence users are frequently wary of providing harvest data to researchers, suspecting that it might be used to establish more restrictive or inappropriate harvesting regulations (Fall 2003).

Both state and federal co-management programs have initially focused on fisheries management because fish species, predominantly salmon, represent 60% of the total subsistence harvest. I have already mentioned some species-specific co-management programs, such as the Alaska Eskimo Whaling Commission and others, that appear to successfully engage resource users in management decision-making. Participating in these collaborative resource monitoring and management projects builds community capacity that can lead to transferring more responsibilities to Native institutions, including regulation and enforcement. This would help to address all three of the goals stated in the Alaska Native Commission Reports' statement of "overarching principles," quoted at the beginning of this section (p. 129). Co-management is a solution that is practicable, acceptable to diverse stakeholders including the regulatory agencies, and already in practice. Its potential is proven, and it remains only to expand its scope to include more species, more communities and greater land areas. The Alaska Federation of Natives published an implementation study of

its 1994 report (Alaska Federation of Natives 2001), and its recommendations include amending ANILCA to promote exactly that process.

3.3.2 Amend ANILCA

The state's unwillingness to comply with ANILCA put subsistence resource management on federal lands back in the hands of the federal agencies, and enforces the protection of subsistence hunting and fishing on the 60% of the state that is owned by the federal government. The AFN has called for amendments to ANILCA that would further strengthen the protection of subsistence practices, and increase the degree of co-management by Native communities. Their recommendations (Alaska Federation of Natives 2001) include:

- Requiring that any time the state is out of compliance with ANILCA, "federal jurisdiction shall include all federal public lands and reserved navigable waters, all selected but unconveyed lands under the Statehood Act and the Alaska Native Claims Settlement Act, Native lands considered Indian country, any conveyed ANCSA lands agreed to by the Native corporations owning them, and federal 'extraterritorial' authority over subsistence on state or other private lands and waters in order to provide for subsistence on federal lands and waters" ...
- "Congress should add 'cultural and religious' uses to the list of protected subsistence uses in Title VIII" ...
- "Congress should require that federal agencies and the state contract to Native institutions, particularly to tribes and tribal consortia, as many subsistence management functions as are feasible and proper—and that such delegated functions of co-management include effective roles in the regulatory process itself and in

> enforcement on the ground, not just counting fish runs, gathering soil samples and monitoring harvests"

Naturally, amendments such as the first bullet item would be politically inflammatory within the state. The expansion of federal jurisdiction is exactly what the state does not want to happen. These recommendations are, however, responses to the ANC Report's (1994) findings that

> Subsistence is a Native issue—a critical part of the larger historical question about the status, rights and future survival of Alaska's aboriginal peoples. ... Hunting, fishing and gathering ... provide Native people with productive labor, personal self-esteem and family relationships. More than an economic system, it is the social foundation of life. ... In the foreseeable future, Alaska Natives will remain a permanent minority in a state dominated by the political and economic power of a non-Native, urban majority. Demographic pressures and political competition for natural resources will continue and increase. ... the fight over subsistence ... never goes away—because competing human user groups are a permanent fact of life in Alaska. ... The State of Alaska will not provide adequate protections of subsistence against the demands of sport, commercial and other uses of fish and game ... . The result [of not resolving the federal state impasse] is dual management. Part of the blame for this gridlock can be fixed on individual officeholders and their parties, but the larger fact is that the interests and attitudes of non-subsistence user groups pervade the executive branch, the Legislature, the state courts and the Boards of Fisheries and Game. The only bulwark protecting Alaska Natives from the power of an adversarial state government is federal law.

ANILCA has not been amended in ways requested by the AFN, or by the state, whose recommendations for amendments were intended to make ANILCA

consistent with state policies, and would have created greater restrictions on subsistence once the state regained management authority. Needless to say, the "subsistence impasse" has not been resolved. The Alaska Federation of Natives see the federal government as a powerful ally to protect Native subsistence and sovereignty. They have become skilled at using the tools of Indian law and political activism to promote and protect Native interests.

Amending ANILCA is a way to strengthen tribes' positions against a presumed adversarial state. Another tactic is to negotiate with the state, in an effort to improve relationships. This is the next option to discuss.

3.3.3 Negotiate with the state

A group of tribes organized and drafted the "Millennium Agreement between the Federally Recognized Sovereign Tribes of Alaska and the State of Alaska" in an effort to establish a government-to-government relationship of respect and comity comparable to that of tribes with the federal government. It was signed in April 2001, during the last year of Governor Tony Knowles' administration, by a number of tribes and the State of Alaska. The parties agreed to guiding principles that included

- Recognizing the tribes' right to self-governance and self-determination;

- Predicating a government-to-government relationship between the parties on "equal dignity, mutual respect, and free and informed consent"'
- Agreement that, as a matter of courtesy, each party would inform the other "of matters or proposed actions that may significantly affect the other";
- "The parties have the right to determine their own relationships in a spirit of peaceful co-existence, mutual respect, and understanding";
- The parties will respect fundamental human rights and freedoms in the exercise of their respective political authority.

The purpose of the agreement is to promote more constructive dialogue, enhance communication, facilitate mutually favorable resolutions to issues, and "work toward greater public recognition, respect, and support for Tribal self-governance and self-determination." The document continues with more specifics, but in sum is an effort to procure the state's public respect and support of tribal sovereignty and self-determination, and a commitment to act on such a policy. It formally acknowledges the need for an educational process within each set of governmental organizations and for the public, to "promote understanding of the government-to-government relationship." It includes action items such as the tasks required for accountability, education and consultation, and those designated to perform them. It establishes a State-Tribal Forum to facilitate dialogue "at the highest level" between the tribes and the state, which at its first

meeting was charged with forming working groups that would facilitate dialogue and coordination among multiple state agencies and tribal representatives, "on issues that are relevant to more than one State department or agency." The State-Tribal Forum is also envisioned as a dispute resolution mechanism.

While veiled in positive terms, the Millennium Agreement is a blunt critique of the ways in which the state has failed or antagonized the tribes. It is an attempt to turn an adversary into a respectful opponent, if not an ally. Governor Knowles took it seriously enough to include implementation activities as components of his FY 2003 budget, published in December 2001. In 2003, however, Governor Knowles is no longer in office and the Millennium Agreement is no longer on the state website (I was only able to access it in a search-engine archive). This suggests that Governor Murkowski's administration will not make its implementation a priority by any means. If true, that will reinforce for Alaska Natives their reliance on federal law and policy to defend both their sovereignty and their subsistence.

3.3.4 A non-tribal alternative

Cornell, Taylor, et al (1999:C1) highlight the use of "home rule" as a Native self-governance option. They point out that maximizing local self-government is

a goal of both the Alaska state constitution and Native communities. Home rule has not been extensively tried in Native communities, and would require some changes in the statutory requirements, but the authors are convinced that it would serve the advantage of both Native communities and the state's objective of promoting local self-governance.

Home rule gives communities more flexibility to adapt and be more appropriate for rural Alaska than second-class city status, as which many Native villages are organized. The state constitution gives home rule boroughs or cities "all legislative powers not prohibited by law or charter" (Cornell, Taylor, et al. 1999). Essentially, this means a home rule community can "design its own government," subject only to the state constitution, state laws, and its own charter (Cornell, Taylor, et al. 1999). The North Slope borough, established in the Arctic Slope Region to maximize local benefits from Prudhoe Bay oil development, is a stellar example of the ways in which home rule governance can be adapted to effectively meet a community's needs.

The powers that home rule government offers to localities are substantially similar to those of Indian country: "tools for the effective exercise of law enforcement and other police powers, management of land and resources, protection of subsistence habitat and environmental quality, and for carrying out

other public responsibilities." The ability of home rule governments to impose taxes provides funding to exercise those powers. Yet as a state-sanctioned institution, home rule would not stimulate the antagonism that Indian country would. The state would need to cooperate by reducing the minimum population size for a home rule community from its current 400, and by removing "existing statutory barriers to effective local control and adaptation to local ways of self-governing." And it would need to observe its own constitutional directive that "a liberal construction shall be given to the powers of local government units" (Cornell, Taylor, et al. 1999). This directive is ironically reminiscent of the canon of construction in Indian law that directs the courts to interpret treaties and statutes liberally in favor of the Indians.

Perhaps using the state's own terminology—"local" self-governance—would be less objectionable than "Native" self-governance, and engender less resistance to what would lead to effectively the same outcomes where the population is predominantly Native. Whether Native communities would be willing to resort to this subterfuge would depend on how committed they are to forcing the state to recognize and respect Native sovereignty for what it is.

3.3.5 Automatic Land Bank

ANILCA included a provision (Section 907) under which Native corporations could place undeveloped lands into a "Land Bank." Lands in the land bank could not be developed, alienated, transferred, assigned, mortgaged, or pledged (Mintz, Kalen, et al. 1999). In return for these restrictions (or protections, depending on one's perspective), the lands "would be immune from (1) adverse possession; (2) real property taxes; and (3) judgment in any action at law or equity to recover sums owed or penalties incurred by the Native Corporation" (i.e., creditors) (Mintz, Kalen, et al. 1999). Although the program was little used and costly to administer, in 1988 amendments to ANILCA the Land Bank program was extended to include "land, and all interests therein," owned by Alaska Natives, Native Corporations, and State-Chartered Settlement Trusts. Such lands would be entitled *automatically* and indefinitely to the protections the Land Bank affords, as long as they were not developed, leased or sold to third parties. While in the Land Bank, land would also be immune from repossession claims due to insolvency, or from "involuntary distributions or conveyances related to the involuntary dissolution of Native Corporations as, for example, might occur if State filing requirements were not met" (Mintz, Kalen, et al. 1999). The main criteria for placing land in the Land Bank are that it is

corporate owned, and not developed. Both conditions must be met. "Corporate owned" refers to Regional, Village, Urban, or Group corporations as defined in ANCSA.

The definition of "undeveloped" allows the land to be used for "subsistence or other Native customary of traditional uses," and does not exclude structures built for such purposes. Owners may also receive fees for permitting guided services such as hunting or fishing on their land, without threatening its "undeveloped" status. Other activities permitted on "undeveloped" land are surveying and construction of utilities such as power lines or sewers, as long as these do not result in a "state that effectuates a condition of gainful and productive present use without further substantial modification." (This probably means that nothing is built that uses the utilities.) Land may also be developed for exploration "to determine the existence of subsurface nonrenewable resources" without losing its undeveloped status. Land on which timber harvesting takes place will be considered developed only during the time when timber is being harvested. After harvesting ceases, it reverts to "undeveloped" status. Finally, the filing of subdivision plats automatically makes the land "developed" and ineligible for the Land Bank. Land Bank protections that are

lost when land is leased or developed, can resume when leases expire or development ends (Mintz, Kalen, et al. 1999).

Because Land Bank protection is limited to corporate-owned lands, land owned by tribal governments would not be eligible for inclusion. Tribal owned lands would therefore be susceptible to adverse possession, property taxes, bankruptcy proceedings or claims of other creditors. If there were Indian country in Alaska, tribal-owned lands would have protections similar to those of the Land Bank. The *Venetie* decision, however, undermined that option, removing what would have been the advantage of transferring corporate land to Native village governments. Mintz, et al, however, perceive several benefits of tribal government ownership despite the risks involved. One is that tribally owned lands are less likely than corporate owned lands to fall into the possession of non-members, as through sale of stock. Another is that tribal governments may be more willing or better able to restrict access to their land or impose conditions for land use than corporate owners. And tribes are not constrained in their land use decisions by the obligation to earn profits, as are the corporations (Mintz, Kalen, et al. 1999).

The advantages of the Land Bank to corporations are obvious. It shields them from a number of risks, while allowing them the flexibility to develop or

lease the land for profit at such time as the opportunity arises, and to return the land to protected status if leases or development end. At the same time, the Land Bank does not preclude subsistence uses, allowing village members to continue harvesting or even to earn income from guiding on undeveloped village or regional corporation land. Developed land that reverts to the Land Bank might be damaged for subsistence use, however. The Land Bank also does not benefit Tribal governments or promote tribal sovereignty. Nevertheless, it can provide Indian-country-like protections to corporate land that is not Indian country under current statutes.

PART 4. CONCLUSION

Alaska Natives have expressed their conviction that many of their social and economic problems can be solved if they have a greater degree of tribal self-determination. This involves local control over a host of functions, from health and social services and education, to subsistence management. Alaska tribes have the potential for the self-determination they seek—with federal recognition, a government-to-government relationship, access to government Indian-program funding, 638 contracting, and state and federal funding open to corporations in general. They also face serious constraints, in the form of lack of funds for local governance and capacity building, and lack of jurisdiction over territory (Alaska Federation of Natives 2001; Alaska Natives Commission 1994a; Alaska Natives Commission 1994b; Cornell, Taylor, et al. 1999).

I have focused here on jurisdiction over territory as a major characteristic that is missing from Alaska Native sovereignty, because Alaska Native identity is so intertwined with subsistence, which is a territory-based concept. The territorial jurisdiction available to lower-48 tribes with land in trust is not available to Alaska Natives whose land is owned in fee simple by tribal governments, since the *Venetie* decision found that such lands do not qualify as Indian country. Neither are the lands owned by Native corporations Indian

country under the current definition. I have therefore proposed as one possible path to recapturing sovereignty over territory a radical redefinition of Indian country that would apply to Alaska: that in addition to such trust and reservation land as exists there, land owned by village corporations and tribal governments should also be given Indian country status, with no requirement for placing the land in federal trust or under substantial federal superintendence. Even in a PL 280 state like Alaska, Indian country would assure tribal jurisdiction over land use and fish and wildlife regulation.

While such a move would be politically controversial, the ability to amend laws reflects the fact that law is not a static institution. Law can change as society changes, as the changing statutes and policies in Indian law through the years demonstrate. Alaska Natives have demonstrated their cognizance of this fact with their campaigns to amend ANCSA and promulgate amendments to ANILCA and state laws.

But Indian country will not solve all the problems of Alaska Native subsistence. Nearly two-thirds of the state is in federal ownership. Federal law (ANILCA) protects Native and other rural subsistence users' rights to harvest subsistence resources on that land. Co-management is a promising tool for increasing Native participation in policy and decision-making for those

resources. It has the potential to build local capacity that might someday allow substantial devolution of resource management to the village level, a goal called for in the policy recommendations of the Alaska Federation of Natives. Co-management programs are giving Native resource users a voice in state fish and wildlife harvest assessment, and may eventually lead to more effective participation in management at the policy level.

Other aspects of federal law can help protect Native land, such as ANILCA's Land Bank, and general principles of Indian sovereignty. The state, however, has remained resistant to acknowledging tribal sovereignty, and stands to remain as an obstacle to the fulfillment of ANILCA's promise to protect subsistence harvesting throughout the state. Its refusal to extend a subsistence harvesting preference to "rural" residents opens subsistence resources to competition from all state residents (and non-residents). This has affected the abundance and availability of some subsistence species in communities that most rely on them for both personal and cultural sustenance. It deprives Native subsistence users who happen to reside in areas that are not rural by definition or that have outgrown the definition, of foods and activities that are important to them. Further, Alaska's intransigence in complying with ANILCA has subjected the entire state to a complex and confusing dual management regime, making

violations of fish and game regulations even more likely to occur. The subsistence issue in Alaska has been at an impasse since 1989. Subsistence law is indeed, "in its distribution of limited resources among competing user groups, ... social policy on a grand scale" (Alaska Natives Commission 1994a). There is no indication that the state will cease to be an obstacle to Alaska Native sovereignty, especially in terms of subsistence resources.

Home rule government has been proffered as an option that would enhance Native village sovereignty with a state-sanctioned institution. The only problem is that it does not acknowledge Native sovereignty per se; it is a structure of local self-governance, which would give Natives power only where they are in a majority able to gain elected office and make policy that addresses Native goals. Nevertheless, I agree with Cornell et al (1999) that it holds out great promise for de-facto Native control of land use and other government functions and services, similar to those of Indian country.

Alaska Natives are at a nexus of their own and external institutions. The complexity of their position creates many challenges, but being in a web of institutions may also provide the greatest opportunities. There will be no single solution to enhancing Alaska Native sovereignty, in terms of subsistence or any other Native issue. Solutions will involve collaboration, flexibility, and most

likely incremental change. Articulating with many different institutions opens many different possibilities for Alaska Natives to combine resources to their greatest advantage. Alaska Native subsistence and sovereignty is a work in progress, but Alaska Natives have the tools to be the authors of their own destinies.

APPENDIX A. PUBLIC LAW 83-280

Civil Jurisdiction: 28 USCS § 1360 (2003)

§ 1360. State civil jurisdiction in actions to which Indians are parties

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	Indian country affected
Alaska	All Indian country within the State
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full

force and effect in the determination of civil causes of action pursuant to this section.

***

Criminal jurisdiction: 18 USCS § 1162 (2003)

§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	**Indian country affected**
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the

United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

Note: 18 USC 1852 applies federal or tribal law exclusively to Indian country. 18 USC 1153 is the Major Crimes Act.

APPENDIX B. *ALASKA V. BABBITT/KATIE JOHN I AND II*

Katie John and Doris Charles are Ahtna Athabascan elders. Batzulnetas was an important traditional and historic fishing site and cultural resource area on the Copper River in the northern part of what is now Wrangell-St. Elias National Park. In 1964 the state closed the subsistence fishery along with many others along the upper Copper R.

1984: Katie John and Doris Charles request Alaska State Board of Fisheries to re-open Batzulnetas to subsistence fishing. The Board refused, while permitting sport and commercial salmon fishing downstream.

NARF filed suit on behalf of Katie John, to re-open the fishery under Title VIII of ANILCA. Eventually the state Board of Fisheries provided for a limited fishery.

1990: District Court determined regulation was "too restrictive" and remanded to Board of Fisheries for proceedings consistent with state and federal law.

1990: Federal government begins fish and wildlife management on federal land.

1992: Federal agency issues subsistence fishing regulations that apply only to non-navigable waters on public lands.

Katie John contests exclusion of navigable waters (in which subsistence fishing takes place) from public lands

State files separate suit challenging federal authority to regulate

District Court consolidates both actions into *Katie John I*

Agency reverses earlier stand, agrees with Katie John that all navigable waters subject to federally reserved water rights are public lands

The subsistence use priority in ANILCA is clear and not at issue.

Issue: Are navigable waters public lands?

Arguments:
- Katie John: Yes, under federal navigational servitude
- Agencies: Public lands include navigable waters in which the U.S. has an interest under reserved water rights doctrine.

1994: District Court validates federal authority to manage subsistence on federal lands under ANILCA; including navigable waters encompassed by navigational servitude (i.e., all waters).

Decision stayed for interlocutory appeal as to whether public lands include navigable waters. State and federal agencies appeal to 9th Circuit.

April 20, 1995: U.S. Court of Appeals, 9th Circuit, 72 F.3d 698.
- Public lands include some navigable waters
- Reserved water rights doctrine is a permissible construction of the statute (ANILCA) by the federal agencies
- Administrating agencies must determine which navigable waters are public lands
- Reversed decision based on navigational servitude and remanded to District Court for further proceedings

Meanwhile in state court...
1995: AK Supreme Court in *Totemoff v. State* finds that:
- federal subsistence law does not pre-empt state laws that do not conflict with it;
- ANILCA does not protect customary and traditional means and methods;
- disagrees with 9th Circuit's finding in Katie John I that public lands include navigable waters

As a result of *Totemoff*,
1995: State files petition for Supreme Court review of Appeals Court decision
1996: Supreme Court denies review
2000: Final District Court judgment affirms that ANILCA reaches to navigable waters

Meanwhile...

1997-1999: Governor Knowles convenes a subsistence task force, more recommendations, amendments and legislation are introduced but no actions are taken to change Alaska constitution or make laws that would bring state into compliance with ANILCA and restore its right to manage hunting and fishing throughout the state.

Katie John II

- State appeals for, and 9th Circuit Court of Appeals holds, an en banc re-hearing Dec. 2000

Issue: May the U.S. enforce the ANILCA rural subsistence priority at the Batzulnetas fishing site?

May 7, 2001: YES. En banc court majority AFFIRMS the 1995 panel's judgment in *Alaska v. Babbitt* (Katie John I) and the Federal District Court.

Katie John II - Concurrence
Justices Tallman, Tashima, Fletcher:

- Affirm 1995 9th Circuit judgment for Katie John, but disagree with the reasoning
- The reserved water rights doctrine is inadequate to achieve Congress' express purpose of protecting subsistence fishing.
- The judges believe Congress intended to protect traditional subsistence fishing on all navigable waters within Alaska, not just those in which the U.S. has a reserved water right.

Reasoning:

- Commerce Clause applies because subsistence fishing affects interstate commerce in commercial fishing
- Submerged Lands Act gives state concurrent authority, does not relinquish federal plenary power over fish in navigable water
- Property clause alone grants U.S. plenary power to regulate federal lands.
- The agency changed its interpretation of the statute, first arguing that the subsistence priority did not apply to navigable waters, then later arguing that it did under reserved water rights doctrine. Such change entitles its opinion to "considerably less deference" than if it had been consistent.
- Statutory interpretation is a job for the courts and not agencies.

- The statute must be read as a whole to determine Congress' intention.
- The U.S. has "title" (exclusive possession and control) to two interests in navigable waters in Alaska: navigational servitude and reserved water rights. The statute does not require an interest of a specific type, just an interest.
- The hair-splitting over the nature of federal interest in waters in Katie John I was therefore superfluous.

The opinion goes on to dispute the dissent's arguments

- emphasizing interpretation in context of whole statute;
- dismissing a claim of ambiguity based on the agency's switching interpretations;
- and discussing the misapplication of the "super-strong clear statement rule" that Congress may waive state sovereign immunity or interfere with state self-governance only by making a "super-strong clear statement" of its intent to do so

Concluding that
"ANILCA clearly includes navigable waters because they are essential for achieving the federal objective of preserving traditional and customary subsistence fishing in the State of Alaska"

IN SUM:

- Public lands include those navigable waters to which the U.S. has an interest under reserved water rights doctrine.
- Federal agencies therefore have authority to manage and implement ANILCA's rural subsistence priority
- The intent of ANILCA to protect subsistence fishing on public lands is fulfilled

APPENDIX C. IRA GOVERNMENT IN AKIACHAK

As an example of an IRA government that displaced a municipal one, Cornell et al (1999) highlight the case of Akiachak, a Yupik village on the lower Kuskokwim River in southwest Alaska. Akiachak had a second class city government, established in 1974, that overlapped an IRA government, the Akiachak Native Community, established in 1948. In 1983, the village dissolved the city government and delegated its responsibilities to the IRA government. The move was to first gain greater local autonomy over schools, and the IRA government "invited two neighboring villages to create an independent 'Yupiit School District,'" which was accomplished in 1986 (Cornell, Taylor, et al. 1999). Although the village lost state municipal assistance funds by dissolving the state-chartered municipal government, it later compensated by acquiring "substantial federal and state capital and operating funds." With the financial impact mitigated, Native IRA governance enhanced Native identity and local control over education and other services, such as water and sewer, police and fire protection, and roads. The IRA government also directly administers services under 638 federal contracting, unlike some villages that designate non-profits as 638 contractors. They have asserted their rights under federal Indian law by establishing a tribal court that addresses minor offenses and infractions of an

alcohol ban ordinance. While the state does not sanction the tribal court, it "cooperates or looks the other way," since it cannot provide equivalent judicial or police services to the remote village (Cornell, Taylor, et al. 1999).

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